Estimated Total Recordkeeping/ Reporting Burden: 2,361,569 hours.

Clearance Officer: Garrick Shear, (202) 535–4297, Internal Revenue Service, Room 5571, 1111 Constitution Avenue, NW., Washington, DC 20224.

OMB Reviewer: Milo Sunderhauf, (202) 395–6880, Office of Management and Budget, Room 3001, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports Management Officer.

[FR Doc. 91–2869 Filed 2–6–91; 8:45 am]

BILLING CODE 4830–01–M

Public Information Collection Requirements Submitted to OMB for Review

February 1, 1991.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Public Law 96–511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, room 3171 Treasury Annex, 1500 Pennsylvania Avenue, NW., Washington, DC 20220.

Internal Revenue Service

OMB Number: 1545–0295.

Form Number: Form 5064 and Notice 210.

Type of Review: Extension.

Title: Media Label (Form 5064); Preparation Instructions for Media Label (Notice 210).

Description: 26 U.S.C. 6041 and 6042 require that all persons engaged in a trade or business and making payments of taxable income must file reports of this income with IRS. Payers wishing to file these returns on magnetic media must complete Form 5064 to label their media with pertinent information essential to the processing of their data. Notice 210 provides instructions to the filers for filling out the label.

Respondents: State or local governments, farms, businesses or other for-profit, Federal agencies or employees, non-profit institutions, small businesses or organizations.

Estimated Number of Respondents: 30,000.

Estimated Burden Hours Per Response: 5 minutes.

Frequency of Response: On occasion.

Estimated Total Reporting Burden: 5,106 hours.

OMB Number: 1545–0939.

Form Number: 8404.

Type of Review: Extension.

Title: Computation of Interest Charge on DISC-Related Deferred Tax Liability.

Description: Shareholders of Interest Charge Domestic International Sales Corporations (IC–DISCs) use Form 8404 to figure and report an interest charge on their DISC related deferred tax liability. The interest charge is required by Internal Revenue Code section 995(f). IRS uses Form 8404 to determine whether the shareholders has correctly figured and paid the interest charge on a timely basis.

Respondents: Individuals or households, businesses or other for-profit.

Estimated Number of Respondents: 2,000.

Estimated Burden Hours Per Response/Recordkeeping:

Recordkeeping—4 hours, 4 minutes

Learning about the law or the form—2 hours, 23 minutes

Preparing, and sending the form to IRS—2 hours, 34 minutes

Frequency of Response: Annually.

Estimated Total Recordkeeping/ Reporting Burden: 18,020 hours.

Clearance Officer: Garrick Shear (202) 535–4297, Internal Revenue Service, room 5571, 1111 Constitution Avenue, NW., Washington, DC 20224.

OMB Reviewer: Milo Sunderhauf (202) 395–6880, Office of Management and Budget, room 3001, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports, Management Officer.

[FR Doc. 91–2959 Filed 2–6–91; 8:45 am]

BILLING CODE 4830–01–M

Sunshine Act Meetings

Federal Register
Vol. 56, No. 26
Thursday, February 7, 1991

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

FEDERAL ELECTION COMMISSION

DATE AND TIME: Tuesday, February 12, 1991, 10:00 a.m.

PLACE: 999 E Street, NW., Washington, DC.

STATUS: This meeting will be closed to the public.

ITEMS TO BE DISCUSSED:

Compliance matters pursuant to 2 U.S.C. § 437g.
Audits conducted pursuant to 2 U.S.C. § 437g, § 438(b).
Matters concerning participation in civil actions or proceedings or arbitration.
Internal personnel rules and procedures or matters affecting a particular employee.

* * * * *

DATE AND TIME: Thursday, February 14, 1991, 10:00 a.m.

PALCE: 999 E Street, NW., Washington, DC (ninth floor).

STATUS: This meeting will be open to the public.

MATTERS TO BE CONSIDERED:

Correction and Approval of Minutes
Draft Advisory Opinion 1990–29–Timothy W. Jenkins on behalf of Joseph E. Seagram & Sons, Inc.
Administrative Matters.

* * * * *

PERSON TO CONTACT FOR INFORMATION: Mr. Fred Eiland, Press Officer, Telephone (202) 376–3155.

Hilda Arnold,

Administrative Assistant, Officer of the Secretariat.

[FR Doc. 91–3098 Filed 2–5–91; 2:34 pm]

BILLING CODE 6715–01–M

Corrections

Federal Register
Vol. 56, No. 26
Thursday, February 7, 1991

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF COMMERCE

International Trade Administration

Short-Supply Determination: Certain Continuous Cast Steel Slabs

Correction

In notice document 91-1312 beginning on page 1981, in the issue of Friday, January 18, 1991, make the following correction:

On page 1982, in the second column, in the eighth line from the bottom, "and 36,000", should read "and 36,300".

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Office of Hearings and Appeals

43 CFR Part 4

RIN 1094-AA37

Special Rules Applicable to Surface Coal Mining Hearings and Appeals

Correction

In rule document 91-1336 beginning on page 2139 in the issue of Tuesday, January 22, 1991, make the following corrections:

1. On page 2140, in the first column, in the first paragraph, in the ninth line from bottom of the paragraph, "52 FR 29528" should read "52 FR 39528".

2. On the same page, in the same column, in the last complete paragraph, in the fourth line "request" should read, "requests".

3. On the same page, in the second column, in the last paragraph, in the sixth line, "1264", should read "30 U.S.C. 1264(a)".

§ 4.1109 [Corrected]

4. On page 2142, in the third column, in § 4.1109(a), in the first line, "part" should read "party. In the same paragraph in the ninth line"of" should read "at". In the same paragraph in the last line, "filed" should read "field".

5. On page 2143, in the second column, in the table of contents, in the third line "Burden" should read "Burdens".

§ 4.1360 [Corrected]

6. On the same page in the same column, in § 4.1360(a), in the sixth line, "or" should read "on". In the same column, in § 4.1360(b), in the third line "right" should read "rights".

§ 4.1363 [Corrected]

7. On the same page in the third column, § 4.1363(e), in the fourth line, "was" should read "as".

§ § 4.1370-4.1379 [Corrected]

8. On page 2145, in the first column," § § 4.1370-4.1739 [Amended]" should read "§ § 4.1370-4.1379 [Removed]".

BILLING CODE 1505-01-D

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1926

[Docket No. S-207]

RIN 1218-AA57

Safety Standards for Stairways and Ladders Used in the Construction Industry

Correction

In the issue of January 23, 1991, on page 2585, in the correction of FR Doc. 90-26520, a portion of the text that appeared is inaccurate and is corrected as follows:

§1926.1052 [Corrected]

On page 2585, in the third column, under amendatory instruction 2., in the second line, "§ 1926.1051(c)(5)," should read "§ 1926.1052(c)(5), ".

BILLING CODE 1505-01-D

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 701

Organization and Operation of Federal Credit Unions

Correction

In proposed rule document 91-1660 beginning on page 2723, in the issue of Thursday, January 24, 1991, make the following correction:

§ 701.21 [Corrected]

On page 2728, in the first column, in § 701.21(2)(iii)(D), in the second line, "6 months" should read "60 months".

BILLING CODE 1505-01-D

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. 89-25; Notice 02]

RIN 2127-AC69

Glazing Materials; Head Up Display Systems

Correction

In proposed rule document 91-2021 beginning on page 3235, in the issue of Tuesday, January 29, 1991, make the following corrections:

1. On page 3235, in the second column, under **SUMMARY:**, in the ninth line, "NAPRM," should read "ANPRM,".

2. On the same page, in the same column, in the 16th line, "MHTSA" should read "NHTSA".

BILLING CODE 1505-01-D

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[T.D. 8329]

RIN 1545-AN91

Methods of Accounting—Limitation on the Use of Cash Receipts and Disbursements Method of Accounting

Correction

In rule document 91-46 beginning on page 484, in the issue of Monday, January 7, 1991, make the following correction:

§ 1.448-1T [Corrected]

On page 486, in the second column, in § 1.448-1T(g)(3)(ii), the last line should read " * * * * * ".

BILLING CODE 1505-01-D

federal register

Thursday
February 7, 1991

Part II

Department of Energy

48 CFR Parts 915, 950 and 970
Acquisition Regulation; Interim Final Rule

DEPARTMENT OF ENERGY

48 CFR Parts 915, 950 and 970

Acquisition Regulation

AGENCY: Department of Energy.

ACTION: Interim final rule.

SUMMARY: The Department of Energy (DOE) today publishes an Interim Final Rule which will amend the Department of Energy Acquisition Regulation (DEAR) regarding its contracting practices and fee arrangements with its profit making and fee bearing (hereinafter referred to as "profit making") management and operating (M&O) contractors. These amendments are being made in order to clarify the responsibilities in the performance of these contracts while providing additional incentives to enhance the accountability of M&O contractors to DOE.

DATES: Effective date: The interim final rule shall be effective March 11, 1991.

COMMENT DATE: DOE will accept post publication comments until April 8, 1991.

The rule will become final May 8, 1991, if the agency takes no further action in response to comments.

ADDRESSES: Comments should be sent to: Stephen D. Mournighan, Office of Policy, PR–12, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT:
Stephen D. Mournighan, Office of Policy, PR–12, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–8182
Lawrence R. Oliver, Assistant General Counsel for Procurement and Finance (GC–34), 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–2440.

SUPPLEMENTARY INFORMATION:

I. Background
II. Discussion of Comments Received
III. Section-by-Section Analysis of the Interim Final Rule
IV. Procedural Requirements
A. Review Under Executive Order 12291
B. Review Under the Regulatory Flexibility Act
C. Review Under the Paperwork Reduction Act
D. Review Under the National Environmental Policy Act
E. Review Under Executive Order 12612
V. Additional Opportunity for Public Comment.

I. Background

Today's Interim Final Rule is the culmination of four separate actions by DOE covering a period of almost one year. These four actions are set forth below.

A. Publication of the Proposed Rule on Accountability.

The first action taken by DOE was the issuance of the Notice of Proposed Rulemaking regarding accountability of profit making M&O contractors (Accountability NOPR) on January 26, 1990 (55 FR 2796). The Accountability NOPR specified conditions under which the profit making M&O contractors would assume the risk of non-reimbursement for certain avoidable costs. The impact of this Accountability NOPR was discussed in detail in the January 26 notice and was summarized again in the Revised Proposed Rule (RPR), which was issued on August 10, 1990 (55 FR 32874).

B. Publication of the Proposed Rule on the New Award Fee Structure.

The next action taken by DOE was the publication of the Notice of Proposed Rulemaking regarding the new award fee structure (Award Fee NOPR) on May 24, 1990 (55 FR 24104). The Award Fee NOPR specified certain changes in the award fee structure, created new categories of facilities operated by profit making M&O contractors and updated the award fee schedule to recognize the effects of inflation from 1983 to 1989. The fee schedule in the Award Fee NOPR was designed to provide DOE with another management tool under which M&O contractors would be encouraged, through financial incentives, to achieve a higher level of performance. The impact of this NOPR was discussed in detail in the May 24 notice and was summarized again in the RPR.

C. Publication of the Revised Proposed Rule.

The RPR, which was issued on August 10, 1990 (55 FR 32874) by DOE, consolidated the Accountability NOPR and the Award Fee NOPR into a single proposed rule and modified the prior proposals in response to comments received. DOE recognized when it began the rulemaking process that exposing an M&O contractor to greater risk would require an examination of whether M&O contractors should ge given an opportunity to earn commensurately greater benefits. Since M&O contractors will assume greater risks while being offered an enhanced award fee structure, the RPR combined both aspects of the new procedures, as does this Interim Final Rule. The RPR did contain certain revisions to both prior rulemaking actions which were incorporated and published in that notice. The RPR also responded to comments which had been provided by the public in response to the publication of the two prior NOPRs. These comments, as well as the impact of the proposed rule, as revised, were discussed in detail. Finally, the RPR also contained a notice of a public hearing on August 28, 1990 and requested that written comments be filed by October 9, 1990.

D. The Public Hearing

On August 28, 1990, a public hearing on the issues raised by the RPR was held by DOE in the auditorium of the Forrestal Building, 1000 Independence Avenue, SW., Washington, DC. The hearing was chaired by DOE's General Counsel, Stephen A. Wakefield, and the Director of the Office of Procurement, Assistance and Program Management, Silas B. Fisher. Representatives of seven organizations spoke at the hearing and raised issues which are considered in this Interim Final Rule, as well as those issues which were raised in the written comments on the RPR.

II. Discussion of Comments Received

Comments on the RPR were provided orally at the public hearing and in writing during the 60-day period permitted in the August 10 notice. Issues that were raised during the public hearing were generally treated with further detail in the subsequently filed written comments. There were no issues raised orally at the public hearing which were not also addressed in the written comments. Therefore, by explicitly addressing the issues raised in the written comments received, issues covered at the hearing will also be encompassed. In promulgating this Interim Final Rule, DOE has reviewed and analyzed the comments that were received both in response to the RPR and to the NOPRs that formed the basis for the RPR. Throughout the year-long process of this rulemaking, all interested parties were given several opportunities to raise their concerns to DOE.

DOE appreciates and finds helpful both the written comments received from the public in response to its RPR and the oral testimony of witnesses at the public hearing. In its internal review process, DOE has weighed the suggestions, underlying rationale and recommended changes of the commenters against the policy reasons which induced the proposed modification. DOE has revised certain provisions contained in the RPR, in whole or in part, where the reasons provided by commenters were found to be compelling or where ambiguities may have existed. DOE did not modify the RPR in those areas which were the

foundation for the achievement of greater contractor accountability or where DOE concluded that its goal of providing additional management tools to promote excellence in performance would be compromised.

DOE's specific responses to issues raised by the commenters to the RPR are addressed to the extent that such comments differ from those provided in response to the Accountability and Award Fee NOPRs or the extent that different arguments have been advanced or facts provided in support of additional changes to the provisions contained in the RPR. However, many of the comments to the RPR substantially replicate comments which have previously been addressed in the issuance of the RPR. For convenience, substantially similar prior comments and the response given by DOE in its issuance of the RPR are repeated in this Interim Final Rule.

This Interim Final Rule will not be imposed upon contracts previously executed, but will only apply to contracts entered into after 30 days from the date of publication of this rule unless the parties have already agreed or subsequently agree to incorporate, or negotiate in good faith, these amendments into their existing contract.

1. Fines and Penalties

The comments on the fines and penalties provision in the RPR primarily reiterated positions previously taken or responded to DOE's answers to earlier comments. However, the following additional comments were received:

Comment: Several commenters were concerned that too much discretion would reside with the Contracting Officer in determining whether fines and penalties are to be allowable costs or are to be non-reimbursable avoidable costs.

The Contract Disputes Act of 1978, Public Law 95–563, 41 U.S.C. 601(a) *et seq.*, places the initial decision-making authority for all claims relating to costs incurred under a contract with the Contracting Officer for a decision. The Interim Final Rule is consistent with this statutorily mandated structure. A contractor who disagrees with the ruling of the Contracting Officer has statutory rights of review. However, creation of another determining official would be time-consuming and, since presumably that official would have less familiarity with the conditions at the site and problems facing the contractor, would not necessarily provide a more objective forum to decide these technical issues.

In the proposed regulations set forth at the conclusion of the RPR, several factors were specified that a Contracting Officer "may" consider when determining whether any claim for payment by an M&O contractor for a fine or penalty should be an allowable cost. DOE agrees with those comments which express concern that these proposed regulations may provide the Contracting Officer with too much discretion. The Interim Final Rule mandates that the Contracting Officer must consider all of the specified factors prior to making an Avoidable Costs decision. Rather than leaving the issue of whether to consider each specified factor within the discretion of the Contracting Officer, the Interim Final Rule mandates that the Contracting Officer "shall" consider each of the enumerated factors in assessing the claim for payment.

Comment: Eight commenters questioned whether the rule implied that the Contracting Officer could authorize unlawful activities.

In the RPR, DOE did not mean to imply that Contracting Officers have the authority to direct contractors to violate the law. They do not have such authority, and any direct order to do so would violate both public policy and explicit contractual requirements that the contractor operate in compliance with the law. It is conceivable, however, that a Contracting Officer could issue a directive, the execution of which could result in an unintended violation of a law or regulation. It was this circumstance which the RPR was intended to address.

There is little difference between this approach and that expressed in the Federal Acquisition Regulation, which also permits reimbursement for fines and penalties incurred as a "result of compliance with specific terms and conditions of the contract or written instructions from the Contracting Officer." FAR 31.205–15, 41 CFR 31.205–15. The rule recognizes the complexity, as well as ambiguity and arguably conflicting directives, of the wide spectrum of environmental laws and regulations which the Contracting Officer is required to interpret.

For the convenience of the reader, earlier comments and DOE responses are repeated below:

Fines and Penalties

DOE proposed that fines, penalties, judgments, settlements and related litigation costs (including attorneys fee) should be unallowable if the fine or penalty resulted from contractor or subcontractor negligence provided that such negligence or misconduct did not occur as the result of complying with formal DOE direction or guidance. Moreover, the breach of the contractor's legal duty giving rise to the liability must involve an area of responsibility clearly placed on the M&O contractor. If a third party, other than DOE, contributed to the negligence or misconduct, the contractor will not be reimbursed by DOE.

Comments: Twelve commenters questioned whether ordinary negligence was an appropriate standard for disallowing the costs incurred by M&O contractors for fines and penalties. It was suggested that DOE should determine that costs are unallowable only when they result from fines and penalties that have been incurred as the result of a knowing violation of the law. Some commenters urged that only those fines and penalties associated with environmental, safety or health violations should be unallowable costs.

DOE intended to take a broader approach to the issue of fines and penalties by not limiting unallowability based upon categories or criminal standards such as a "knowing" violation. In order to encourage a higher standard of accountability with respect to laws and regulations on the part of our M&O contractors, DOE determined that it was most appropriate for contractors to assume direct responsibility for the consequences of their actions in almost all cases. Today's RPR proposes far more specific guidelines for determining whether a fine or penalty is an unallowable cost, while at the same time allowing for an independent determination to be made by the Contracting Officer in each case. For instance, the Contracting Officer can, among other things, take into consideration whether: (i) The contractor voluntarily informed the Contracting Officer in a timely and good faith manner of the condition or activities which later resulted in the fine or penalty; (ii) the contractor was new to the site; (iii) the assessment of the fine or penalty was due solely to the contractor's negligence or wrongdoing, not from a strict liability standard imposed by law; (iv) whether DOE contributed to the contractor's actions or inactions; (v) the act or failure to act resulted from written direction by the Contracting Officer; or (vi) the act or failure to act resulted from the negligence of the contractor or subcontractor, or other third parties. This more flexible approach was also expanded to the determination of all avoidable costs by the addition of new proposed DEAR section 970.3102–22, Determination of Avoidable Costs.

Although this flexibility introduces a certain lack of specificity into the process of cost allowability determination, it permits more flexibility and added fairness for unusual or unforeseeable circumstances. For example, some fines and penalties may have been incurred for reasons that reflect decisions regarding national security. The Contracting Officer can take these and other relevant facts into consideration before making a final decision. However, no situations are anticipated where the Contracting Officer would determine that a criminal fine or penalty is allowable under the new proposed guidelines.

Comments: Seven commenters urged DOE to consider and respond to the situation where DOE orders a contractor to continue to operate after a potential violation is reported by the contractor or alleged by a governmental entity, such as a state

regulatory agency or the United States Environmental Protection Agency.

M&O contractors for DOE facilities occupy an unusual position in the realm of government contractors in that they operate government-owned facilities and have broad responsibility in assisting DOE in performing its mission. Because of this, they lack control over funding, authorizations, and even to some extent the hiring and control of their own employees. Furthermore, they operate in a heavily regulated environment in which statutes, regulations, and contract provisions often mandate the manner in which they can perform their work. DOE, however, has concluded that contractors can and must operate these facilities in full compliance with all laws. DOE never intended to place its contractors in a "no win" situation in which actions that are mandated by the agency or by the contract result in unavoidable fines and penalties that are unallowable costs under the contract. The RPR clearly provides exceptions for extraordinary situations where DOE must require a contractor to perform a specific task with the result that possible violations of law may occur, in order to fulfill the agency's national defense mission. Although a contractor may not be permitted to stop work under extreme circumstances involving national security, the Contracting Officer will, under the RPR, retain the discretion, after evaluation of all of the facts and circumstances, to reimburse the contractor. Moreover, the Interim Final Rule does not make unallowable those fines and penalties which were truly unavoidable by the contractor, such as those resulting from DOE's actions or failure to act. Needless to say, the Contracting Officer has no legal or contractual basis for authorizing contractors to violate public laws and regulations.

Comments: Seven commenters expressed concern over the consequences of a contractor voluntarily informing DOE of a noncompliant situation.

The Accountability NOPR did not adequately address the issue of contractor notification of noncompliance. The RPR guidelines under which the Contracting Officer will consider cost allowability place considerable emphasis on whether a contractor has informed DOE of noncompliance in a timely, good faith manner. Good faith disclosure and self evaluation are key factors to be considered in determining the consequences of the disclosure.

Comments: Three commenters wanted to know how DOE would deal with fines or penalties incurred by a new contractor which recently entered into a contract to operate a facility and presumably needs more time to assess deficiencies and compliance problems.

DOE recognizes the risks and uncertainties inherent in assuming operation of aging facilities at which environmental considerations were not always given their present priority. Start up periods for new contractors will be a major factor to be considered by the Contracting Officers in their evaluation of whether fines or penalties should be allowable costs. A phase-in period, not to exceed one year, may be negotiated into agreements with new contractors at a site. The Contracting Officer may take into account extended periods for conditions which preexisted the contractor's presence and of which the contractor could not reasonably be expected to be aware.

Comments: Two commenters wanted to know specifically whether fines and penalties incurred by subcontractors who are hired by profit making M&O contractors may be considered allowable costs if reimbursed by the prime M&O contractor.

Fines and penalties incurred by M&O subcontractors which would be unallowable if incurred by the prime contractor are not allowable costs under the rule proposed today unless the subcontractor is a nonprofit contractor or a small or small disadvantaged business. Reimbursement of fines and penalties incurred by a subcontractor and which otherwise are unallowable costs is strictly a contractual issue between the prime and its subcontractors.

Comments: Seven commenters expressed concern over the reimbursement of fines and penalties imposed upon a contractor who had previously notified DOE of an instance of noncompliance which was not rectified prior to the imposition of a fine or penalty because of the failure to provide adequate funding.

The Accountability NOPR did not specifically address the situation described by the commenters. While the RPR does not provide for blanket cost allowability in situations where the contractor timely notified appropriate persons of compliance problems, it does allow the Contracting Officer to use discretion in determining that the cost is allowable. This would almost certainly be the case when the noncompliance could have been rectified had adequate funding been available for that purpose. The Contracting Officer may consider all relevant factors in arriving at a decision with respect to cost allowability.

2. Insurance

Under this Interim Final Rule, DOE will be modifying its historical practice under which the government was a total self-insurer of its property to a regime in which the government partially insures its property but requires its contractors to be responsible, under certain circumstances, for damage they cause to that property, subject to limitations. DOE has determined that these changes in the Government property provisions of the DEAR require a modification of DEAR section 970.5204–32, "Required bonds and insurance-exclusive of Government property (cost-type contracts)," in its application to profit making M&O contractors. The existing regulations prohibit a cost-type contractor from procuring or maintaining for its own protection any insurance covering loss or destruction of or damage to government-owned property. Since contractors may now be held responsible for causing certain damages, DEAR 970.5204–32 is modified by the Interim Final Rule to allow profit making M&O contractors to purchase insurance, at their own expense and not as an allowable cost, for protection against loss of or damage to Government property. The current DEAR provision remains unchanged for nonprofit M&O contractors since the Government will continue to self insure against loss or damage which may result regarding property within control of those contractors.

The comments on the insurance provisions contained in the RPR primarily reasserted comments previously urged in the Accountability NOPR or responded to DOE's answers to earlier comments. However, the following additional issues were raised:

Comments: Four commenters asserted that DOE was declining to provide reimbursement for insurance costs on the apparent theory that the existence of insurance creates an incentive for contractor negligence. According to these commenters, this anti-insurance idea is an archaic concept that has been discredited by experience and therefore should not form a basis for holding insurance costs unallowable.

These commenters incorrectly assume that DOE's primary rationale for making insurance costs unallowable was the notion that insurance encourages poor performance or lower standards of care. To the contrary, DOE has no objection to its contractors obtaining insurance if they wish to do so. However, it would be inconsistent for DOE to disallow a cost incurred in performing work under the contract and then reimburse the contractor for the cost of insuring against that disallowed cost. To allow recovery of these costs would have the effect of neutralizing the very incentive for accountability DOE is attempting to foster in its M&O contractors. It would mislead the public to say that a contractor is being held accountable for its actions when, in fact, the taxpayers are paying for the insurance costs to protect the contractor from the same risk. In fact, the additional expense of insurance premiums would likely be greater than if the government remained a self-insurer and continued to indemnify M&O contractors against their avoidable costs.

Although DOE rejects the view that its contracting practices may not deviate from the Federal Acquisition Regulation (FAR), this provision is consistent with the FAR, which disallows reimbursement for insurance premiums on policies covering unallowable costs. (See, *e.g.* FAR 31.205–19(a)(2)(iv).)

Comments: Two commenters stated that DOE's assumption that insurance costs should be offset against profit is fallacious and represents a

misunderstanding of the commercial world. In their view, in the commercial arena insurance premiums are a cost factor used to establish the price to be charged the customer and are not an offset against profit.

While DOE agrees that insurance is a cost factor reflected in the price of goods and services, the ultimate determinant of the price charged is the market place, not an accountant's calculation of costs incurred. The market may or may not permit full recovery of every cost incurred in a commercial venture. The extent to which cost recovery is permitted will have a direct bearing upon a firm's profit. The commercial world neither guarantees profits nor full cost recovery. In DOE contracts, however, recovery of most costs is assured. To the extent they are not allowable, costs must be an offset to fees, or profits, otherwise available. The increase in the Basic Fee and the Award Fee available is intended to provide compensation for the additional risks incurred by profit making contractors, including the cost of insurance, in undertaking a contract which does not provide for allowability of all costs. The spreading of risk through insurance is a well understood and accepted business practice which is embraced by DOE. DOE, however, will not both pay a higher price (or fee) for a perceived greater risk involved in the providing of services by profit making M&O contractors and also reimburse those contractors for the cost of insurance premiums to protect against the risk which the increased fees are designed to compensate. This would create an unacceptable double payment by the taxpayers.

Comments: Six commenters believed that DOE should not deviate from the FAR on payment for insurance costs. These commenters claimed that this practice would cause a lack of uniformity from facility to facility because the Contracting Officer has too much discretion in determining whether or not to treat particular costs as allowable.

Contrary to these commenters' contentions, the FAR insurance provision does not require the Government to reimburse a contractor's insurance costs, but instead leaves it to the Contracting Officer's discretion. (See FAR 28.301(a)(2) which indicates that "the Government reserves the right to disapprove the purchase of any insurance coverage not in the Government's interest.") Therefore, this provision is at variance with the FAR only to the extent that it creates a presumption against the allowance of costs for certain types of insurance coverage. This presumption can only be overcome by a specific written direction of the Contracting Officer requiring such coverage, while the FAR would require action to disapprove the purchase.

Comments: One commenter wanted the Government to permit insurance costs to be applied against the liability ceiling.

For the reasons explained in response to the first set of comments under "Insurance," to allow the insurance costs to be applied against the liability ceiling would defeat DOE's purpose. Ceilings on exposure to unallowable costs are designed to limit potential losses in areas where the risks may be difficult, if not impossible, to quantify. Insurance premiums, however, are quantifiable and their incurrence is within the control of the contractor, who may elect not to purchase insurance. Furthermore, if avoidable costs are insured at the expense of the contractor, it would seem appropriate that any benefits resulting from the policy would accrue to the benefit of the contractor.

Comments: One commenter requested clarification on whether or not Worker's Compensation Insurance is an allowable cost.

This type of insurance does not provide coverage for costs which otherwise would be unallowable. Legally required contributions to Worker's Compensation plans and other similar types of required insurance remain an allowable cost under DEAR 970.5204–13(d)(8)(ii). The types of insurance which are unallowable are those which would insure the contractor against liabilities incurred under the provisions of the DEAR promulgated in this rulemaking.

Comments: One commenter felt that professional liability insurance should be an allowable cost.

Because professional liability insurance is intended to protect against damages arising out of negligent acts, which may be avoidable costs under the Interim Final Rule, the insurance to protect against such loss is also unallowable, for the reasons stated in response to the first set of comments under "Insurance."

For the convenience of the reader, earlier comments and responses on the insurance issue are repeated below:

Insurance

The Accountability NOPR provided that the cost of insurance which would protect or reimburse the contractor against an unallowable cost, is also an unallowable cost.

Comments: Three commenters wanted to know why DOE is unwilling to pay the costs of insurance for protection against costs and liabilities which are now being made unallowable, particularly in light of the fact that the Government has in the past been self-insured. These commenters argued that the government's practice of self insurance results in lower costs to the taxpayers.

It would be inconsistent for DOE to disallow a cost and then reimburse the contractor for the cost of insuring against that disallowed cost. To provide otherwise would have the effect of neutralizing the very incentive for accountability DOE is attempting to foster in its M&O contractors. It would greatly mislead the public to say that a contractor is being made accountable for its actions when in fact the taxpayers are picking up the tab for the insurance costs to protect the contractor from the same risk. In fact, the additional expense of insurance premiums would likely be greater than if the government remained a self-insurer and continued to indemnify M&O contractors against their avoidable costs. The RPR places certain risks on the contractor when the contractor is in a better position to evaluate the risk and take the necessary actions to avoid, minimize or eliminate those risks. DOE simply cannot reimburse the contractor for the costs of insurance against the very risks we are asking the contractor to assume. DOE is determined to depart from the policy of self-insurance because the goal of this rulemaking is greater accountability on the part of M&O contractors, particularly in the areas of environment, safety and health. In any event, the outside limits of the contractors' liability is known and fixed by the liability cap. In the event the contractor elects to insure against nonreimbursable costs, the premiums for such insurance are properly a portion of the contractor's overhead, to be offset against his profits in the same manner as most commercial manufacturers are required to do.

Comments: Eleven commenters asked whether increased award fees will cover increased costs due to additional risks placed on M&O contractors and whether DOE will be paying an appropriate price for greater contractor accountability.

DOE appreciates the increased exposure potentially imposed upon profit making M&O contractors by the Accountability NOPR. These greater risks require that the contractor have the opportunity to earn enhanced award fees. It is DOE's belief that the higher fees proposed in the Award Fee NOPR provide the fair profit expectation for these contractors in return for their increased risks and insurance costs. DOE has determined that the potentially increased costs to the Government under the Award Fee NOPR are adequately balanced if the resulting increase in contractor accountability also provides substantial benefits to society, particularly with respect to environment, safety and health.

Comments: Two commenters pointed out that under the Accountability NOPR, contractors would not be reimbursed for the cost of payment and performance bonds, which may be necessary in order to obtain other insurance.

The Accountability NOPR did not specifically address this issue. Under the RPR, it is proposed that Contracting Officers would have the authority to reimburse a contractor or subcontractor for obtaining payment or performance bonds and insurance, in special situations, when obtained at the Contracting Officer's specific written direction after a determination that the costs are necessary and in the best interest of the Government.

Comments: Six commenters stated that in some situations insurance may be commercially unavailable. In such cases contractors might be unwilling to do business with DOE without indemnification.

DOE recognizes that in some cases insurance may be commercially unobtainable. For example, certain environmental statutes place significant regulatory requirements on contractors. However, the contractors are not being asked to incur unlimited exposure; there is a ceiling on contractor liability, as discussed below. In effect, the profit making M&O contractor is being asked to incur the deductible portion of an insurance policy while the government remains the self-insurer for the unlimited remaining portion of any exposure.

3. Liability Cap

The comments on the liability cap in the RPR primarily responded to DOE's answers to earlier comments. However, the following additional comments were received:

Comments: Generally, commenters clearly understood that the liability ceiling proposed in the RPR at section 970.5204–55, "Ceiling on Certain Liabilities for Profitmaking Contractors," would not apply to criminal fines and penalties and related costs of litigation or to the contractors' risk under the Major Fraud Act of 1988, 41 U.S.C. 256 (Major Fraud Act) or the civil and criminal penalties provisions of the Price-Anderson Amendments Act of 1988, 42 U.S.C. 2273, 2282 (Price-Anderson Amendments Act). One commenter, however, urged that if contractors are to have a cap that is more than illusory, that cap must cover all costs incurred under the Price-Anderson Amendments Act of 1988, the Major Fraud Act and other statutory exclusions, as well as the additional costs contractors are being asked to assume under any new rule which is finally promulgated. That commenter proposed that those costs which are made unallowable by statute should be included first for purposes of accumulating unallowable costs. Thereafter, the costs made unallowable by these and other DOE regulations should be added in calculating whether the cap has been met. Alternatively, in the view of that commenter, any increase in fee should also contain an incrementally adjusted upward amount to account for costs which are not within the cap.

Statutorily mandated non-reimbursable costs cannot be limited by an administratively established ceiling. To permit any costs which are otherwise unallowable to be included in the calculation of a liability ceiling, the purpose of which was to limit exposure resulting from this rule, would subvert that policy. Only those unallowable Avoidable Costs created by this Interim Final Rule will be included in and subject to the liability cap. All other unallowable costs, whether mandated by statute, such as the Major Fraud Act of 1988 or the Price-Anderson Amendments Act of 1988, or regulations not resulting from this Interim Final Rule, will not be included in determining when the liability ceiling has been reached.

DOE, moreover, disagrees with the comment that the liability ceiling is illusory if it does not cover all costs incurred under the Price-Anderson Amendments Act of 1988, the Major Fraud Act of 1988 and other statutory exclusions. The Interim Final Rule creates a new class of unallowable costs, which are defined as Avoidable Costs. By its provisions the Interim Final Rule compensates the M&O contractor for the risk of incurring these new costs. The liability ceiling was a major consideration in determining the fee structure. It would be inconsistent for DOE to now change its balance of risk and reward by encompassing the entire universe of Federal, state and local statutory and regulatory exposure faced by an M&O contractor within a ceiling designed to define the limits of risk being assumed by that contractor.

Comments: One commenter complained that the RPR was unclear regarding which unallowable costs will be subject to the ceiling. The commenter was particularly concerned that litigation and claims costs be subject to the cap.

Section 970.5204–55 identifies those costs which are subject to the ceiling, including the costs of defending third party claims. To avoid any possible confusion, however, section 970.5204–31, "Litigation and Claims," has been added to the list of unallowable Avoidable Cost provisions to which the ceiling applies.

Comments: Nine commenters suggested that a liability cap should be applied to subcontractor costs. They proposed that the cap should be the subcontractor's fee.

DOE agrees with these commenters and, accordingly, has added a paragraph to section 907.5204–55 which establishes a ceiling on subcontractor liability. The rationale for this decision is set forth below in the "Subcontractors" section of the preamble.

For the convenience of the reader, earlier comments and DOE responses are repeated below:

Liability Cap

The Accountability NOPR placed a ceiling on the liability of M&O contractors for unallowable avoidable costs incurred equal to the maximum potentially available award fee for the applicable six month evaluation period. The contractor was required to provide a guarantee that it could satisfy any current liability or potential future liability discovered after the award fee period or after the contract terminated or expired.

Comments: Five commenters argued that the liability cap should be lower, and suggested a cap consisting of the award fee actually earned in the applicable period. On the other hand, two commenters argued that liability should be without limit, especially in the case of criminal fines or penalties.

Under the RPR, there is no limitation on the amount of criminal fines and penalties which may be disallowed. As for other unallowable costs and expenses resulting from the application of this RPR, the liability cap has been set in the RPR at the amount of the actual award fee earned plus the actual basic fee earned during the six-month award fee period in question. DOE has determined that a limitation on disallowance of the entire award fee available is no longer appropriate since the restructuring of fees under the Award Fee NOPR. The RPR, therefore, limits the contractor's risk to the fee or profit earned. The costs imposed or incurred under the Price-Anderson Amendments Act and the Major Fraud Act of 1988, section 8, 41 U.S.C. 256 (Major Fraud Act), will not be limited except as provided in regulations implementing those provisions.

Comments: Four commenters wanted to know what type of financial guarantee would have to be provided by the M&O contractors, and in what amount.

DOE has left the amount and nature of the financial guarantee to the discretion of the Contracting Officer after consultation with the contractor. In addition, under this proposed rule the contractor will have the option of authorizing DOE to retain a percentage of its fee to satisfy the financial responsibility requirements. M&O contractors operate under a wide variety of conditions with regard to risk. The contractors often have widely disparate financial structures. Some contractors are new, while many have operated their respective facilities for long periods of time. This may affect their perception of the risk being undertaken. The appropriateness of a financial guarantee is a business decision to be made on a case-by-case basis. For example, a contractor may decide a retainage of a percentage of the fee is appropriate (or invoicing for less than the full fee earned). In addition, other types of arrangements a contractor may wish to consider include (i) Letters of credit, (ii) corporate guarantees from financially responsible parent corporations, (iii)

performance bonds, or (iv) other similar financial arrangements. The financial responsibility obligation will remain for up to one year after the expiration or termination of a contract.

Comments: Three commenters argued that because the liability cap is tied to the award fee, the contractors will be driven to negotiate for larger basic fees relative to the award fees, reducing the incentive effect of the award fee.

Under today's RPR, as indicated above, it is proposed that the contractor's risk be limited to the award fee and basic fee actually earned. Therefore, the incentive for seeking a reduced award fee in exchange for a larger basic fee is eliminated. The Award Fee NOPR, in any event, did not allow the contractor the flexibility to negotiate award fee-basic fee percentages. Today's RPR retains that concept.

Comments: Eleven commenters raised questions as to exactly how the liability cap for a particular period will correspond to costs or liabilities due to events that are not discrete and severable, and the length of time that such liability will continue into the future.

The Accountability NOPR anticipated this issue and provided as follows:

In the case of continuing activities of the contractor which occur over a number of evaluation periods and result in costs or liabilities described above, the potential financial risk of the contractor shall be limited to the amount of the award fee which was available in the single evaluation period when the incident or event giving rise to the contractor's disallowed costs or expense took place. If it is not possible to relate or reasonably allocate particular activities to individual evaluation periods, the financial risk of the contractor shall be limited to the amount of the award fee which was available in the evaluation period when the amount of nonreimbursable costs or liabilities were finally determined. If such determination is made following the expiration of a contract, or the contractor is otherwise replaced, the available award fee for the last evaluation period that the contract was in effect shall be utilized, after deducting such disallowed costs as were previously charged to that period.

Today's RPR retains and refines this concept, but references to "available" award fee will be changed to "actual" fee earned.

DOE has determined that a period of up to one year after contract expiration or termination is an appropriate period of time for the contractor to continue its financial responsibility obligation to assure payment to DOE of avoidable costs, such as damage to government property. However, the authority of DOE to refuse to reimburse a contractor for otherwise disallowed costs, such as fines and penalties or third party liability, shall continue indefinitely.

Comments: Two commenters argued that since the extent of a contractor's liability is going to be tied to the available award fee, the award fee determination should be subject to the disputes clause.

Under today's RPR, the limitation of liability has been tied to the amount of fee actually earned for an award fee period, thereby significantly reducing the risk to the contractor. It is important to distinguish between the mechanism used to determine the limitation of liability (which happens to be the amount of fee actually earned) from the disallowance of certain avoidable costs and the obligation to pay such costs. The latter cost disallowance is clearly subject to the Contract Disputes Act of 1978, Pub. L. No. 95–563, 41 U.S.C. 601, *et seq.* (Contract Disputes Act). The award fee determination, on the other hand, is governed by a different set of rules, including the Department's discretion, and is made independent of any cost determinations which are subject to the disputes clause.

Comments: Eight commenters noted that since costs and liabilities naturally flow down from M&O contractors to their subcontractors, DOE should establish a rule with respect to a liability cap for subcontractors who will not otherwise be able to continue to do business with DOE M&O contractors.

Disallowed costs caused or incurred by profit making subcontractors are within the M&O contractor's limitation of liability. Subcontractors are free to negotiate their contractual relationship with prime contractors in order to delineate the party who bears the ultimate financial exposure for disallowed costs. If fewer subcontractors are willing to enter into arrangements with primes, primes will have to offer more favorable conditions. In any case, the fee received by subcontractors from the prime is an allowable cost under the prime contract. The relationship between a prime and its subcontractors (whether cost-plus or fixed-price) should not be controlled by DOE, except to the extent that Small and Small Disadvantaged Businesses are excluded from the cost disallowance provisions.

4. Litigation Costs and Control

The comments on litigation costs and control of litigation in the RPR primarily responded to DOE's answers to earlier comments. However, the following additional comments were received:

Comments: Several commenters requested that DOE further define what it meant by "costs of litigation." That phrase is used when referring to the costs for which the Government may assume responsibility should the Contracting Officer choose to direct or approve the litigation.

In response to this concern DOE has added a definition of "costs of litigation" to be included at § 970.5204–31(c). The new language is very similar to language currently used in part 31 of the Federal Acquisition Regulation implementing the Major Fraud Act.

Comment: One commenter felt that further discussion was needed on what the RPR meant by "control."

The word "control" does not appear in the proposed regulations on "Litigation and Claims." However, the concept of DOE assuming or retaining control of litigation is referred to in the preamble of the RPR. The text of the proposed regulation refers to the Contracting Officer directing or approving the litigation. For purposes of clarification, it is contemplated here that the Contracting Officer's direction of the litigation may not involve control of the day-to-day minutiae of the litigation process, which generally would be inconsistent with the general scope of work contained in most M&O contracts, but could consist of overall policy guidance in the defense of litigation. However, this does not mean that the Contracting Officer would be precluded from exercising control over any or all aspects of the litigation should such involvement appear to be in the best interest of the Government. As is usual with M&O contracts, the Contracting Officer must exercise his or her judgment as to the level of involvement necessary in the administration of an activity under a contract. Because the phrase "not choose to direct," in the RPR's Litigation and Claims provision, DEAR 970.5204–31, is confused with the word "control," DOE has revised that phrase in subsection (b)(3) to clarify that it encompasses both approval and direction of the defense. It does not mean to suggest that the government will decline responsibility for costs of litigation in all situations in which DOE simply does not have the resources or desire to direct every specific aspect of the litigation.

It is expected that Contracting Officers will give wide discretion to M&O contractors to "manage" litigation which arises in the course of normal business operations within the scope of the contract. It would be inconsistent with the overall philosophy of M&O contracts for the Contracting Officer to either micro-manage contracting litigation arising under the contract or refuse to initiate litigation which, in the normal course of business, would be in the best interest of the Government to undertake. It is not possible to contemplate every factual circumstance which might arise under all DOE M&O contracts. It is sufficient to note that some discretion must be left to the Contracting Officers to administer their contracts.

Comments: Another commenter noted that the rule might tend to prompt early settlements to limit costs when it might be in the best interest of the Government to continue the litigation.

Contractors might in some instances determine it is in their best interests to settle cases in order to limit costs which might not be reimbursed by the Government. However, a contractor who settles litigation without the prior

approval of the Contracting Officer will jeopardize his ability to recover those settlement costs. If the Contracting Officer approves the settlement, the regulations provide that the contractor shall also reach agreement with the Contracting officer as to the appropriate share of costs to be borne by each party. In every instance there are economic benefits to be weighed by the contractors as well as by the Government. The Contracting Officer is not compelled by the rule to accept the contractors determination regarding conduct of litigation, including the appropriateness of any settlements. All litigation must be reported to the Contracting Officer. It is the responsibility of the Contracting Officer and the DOE legal adviser assisting the Contracting Officer to determine the appropriate course of action for the Government.

Comment: Eight commenters were concerned that the language of the rule "offers a wide-open exemption to the limitation on reimbursement. A Contracting Officer can make the Government liable for almost any claims or damages, regardless of the contractor's culpability, and regardless of whether such amounts would otherwise be reimbursable, simply by electing to assume the direction of the defense of a case."

It would create an irreconcilable conflict of interest for the Government to assume defense of a lawsuit brought against its contractor and then, when faced with an unfortunate result, to deny responsibility to reimburse its contractor. A Contracting Officer must be able to consider all aspects of a case when deciding whether to assume the direction of the litigation. The discretion of the Contracting Officer in this area is considered important to the interests of the Government. Presumably, this discretion will be exercised only when direction of the defense is considered to be in the Government's interest and after consultation with appropriate DOE legal counsel. Although this comment raises concerns that this discretion may be exercised too frequently in favor of the contractor, many other commenters, as noted previously, are concerned that it will be exercised too sparingly. As in all Government contracts, the law places the responsibility on the Contracting Officer to make decisions for all kinds of legally binding actions, and provides such official wide discretion. This Interim Final Rule comports with that concept.

Comment: Eight commenters indicated that they were concerned about the prospect of DOE electing to take over a contractor's defense in any action, including one brought by another agency of the Federal Government.

DOE agrees that one governmental agency should not litigate against another under the Unitary Executive theory. We note further that because the conduct of litigation in which the Government is interested is reserved to the Department of Justice (28 U.S.C. 516), the situation posited by the comment should not arise. Finally, DEAR subsection 970.5204–31(b) specifically provides that DOE may not be assigned or subrogated to the rights or claims of a contractor where such rights or claims are against the Government.

For the convenience of the reader, earlier comments and DOE's responses are repeated below:

Litigation Costs and Control

In the Accountability NOPR DOE did not provide draft language concerning litigation costs and control of litigation. DOE, however, did solicit comments from the public on the issue of litigation control and costs. DOE specifically asked whether a contractor's refusal to allow DOE to control specific litigation should result in a waiver of claims for reimbursement, even in those cases where the ceiling on disallowance has not been reached.

Comments: Ten commenters felt that in those situations in which DOE retains control of the litigation, DOE should assume financial liability.

The Department is in agreement with the commenters on this issue. If DOE assumes control of litigation, it is appropriate that the agency should also assume liability for litigation costs and potential damages notwithstanding the ceiling or potential deductible. This new approach is reflected in today's RPR. It would be inappropriate for DOE to control a contractor's litigation, including its strategy, its expert witnesses, its defenses and even its selection of private counsel and then disallow the costs. Consequently, costs, including judgment or settlement amounts, incurred in cases where DOE controls or directs the litigation will be reimbursable in their entirety and not subject to the deductible based upon the amount of fee earned. If litigation is settled with DOE approval, the apportionment of costs and the settlement amount will be a matter of negotiation between the contractor and the Contracting Officer. This aspect of the RPR is subject, of course, to the prohibitions contained in the non-reimbursement costs provisions of the Major Fraud Act.

Comments: Three commenters wanted to know who would bear the expense of litigation while negligence remains to be determined.

Under the Accountability NOPR, the contractor would have to pay for all costs associated with the litigation and seek to recoup those costs from the Government afterward. The RPR retains this system of reimbursement where the Contracting Officer initially determines that these are avoidable costs and thus unallowable. The contractor, however, may request that DOE approve a settlement at any time during the litigation process. If DOE approves the settlement, the contractor and DOE will agree on the appropriate allocation of financial responsibility.

Comments: Five commenters argued that contractors should not be deemed to have waived their rights to reimbursement of litigation costs when they retain control of the litigation.

Under today's RPR, it is proposed that a contractor's retention of control of litigation does not automatically result in loss of rights to reimbursement of litigation costs or judgment amounts which are below the liability cap. Possible loss of rights to reimbursement of litigation costs and judgments based upon findings of the contractor's negligence or wrongdoing will be determined by the Contracting Officer, with assistance from DOE's legal staff, independent of any administrative or judicial finding of negligence or other wrongdoing. Under today's RPR, the contractor is eligible, but not assured, of reimbursement for the costs of litigation when the outcome of the litigation is favorable. Reimbursement, however, is still subject to the nonreimbursement provisions of the Major Fraud Act.

Comments: Three commenters asked questions relating to the handling of litigation costs involving subcontractors under the new rules.

Under today's RPR the cost of litigation incurred by subcontractors will be reimbursed to the same extent that prime contractors would be reimbursed.

Comments: Three commenters argued that new contractors should not be liable for costs of litigation due to legal actions resulting from pre-existing site conditions where the contractor inherited problems that resulted in the litigation.

DOE agress, subject to a reasonable transition period. Under today's RPR, if the contractor is not in any way responsible for the environmental damage that is the basis for the legal action, the contractor will either not be named a party to the action or not be held liable. In the latter case, the contractor would be able to recoup the costs of litigation from DOE. In those cases in which a statute imposes strict liability, the law has been designed to place legal responsibility on any party that had an opportunty to avoid the damage or loss, so fault is not an issue in such cases and under the RPR the Contracting Officer will determine whether reimbursement by DOE is appropriate. Finally, the RPR includes a phase-in time period before full contractor responsibility for the new site (not to exceed one year).

5. Government Property

DOE has determined that the originally proposed changes contained in the RPR to the Government property provisions of the DEAR, and retained in this Interim Final Rule, require a modification of DEAR section 970.5204–32, "Required bonds and insurance-exclusive of Government property (cost-

type contracts)," in its application to profit making M&O contractors. DEAR 970.5204–32 is modified by the final rule to allow profit making M&O contractors to purchase insurance, on a nonreimbursement basis, to protect the contractor from loss or destruction of, or damages to, government property, to the extent the contractor may incur unallowable or non-reimbursable costs. The current DEAR provision remains unchanged for nonprofit M&O contractors.

With one exception, the comments on the Government property provisions in the RPR were substantially the same as the comments received in response to the Accountability NOPR.

Comment: One commenter indicated that the provisions of the RPR were not stringent enough in addressing property damage since non-reimbursement required a finding that costs resulted from circumstances clearly within the contractor's sole and exclusive control.

DOE designed the Government property provision to encourage contractors to achieve higher standards to efficiency. This required a balance between the old rule in which the Government absorbed all losses for damage or theft of Government property and a rule which would hold the contractor more responsible for its own acts or omissions. DOE does not agree with the concept that nothing is within the contractor's exclusive control "since DOE ultimately governs all of their activities." However, appropriations and necessary authorizations may be required from DOE. To the extent these have been requested by the contractor but are not forthcoming, DOE does not believe it would be appropriate to place responsibility upon the contractor. DOE believes that the new property provision will effectively and efficiently improve contractor performance by balancing these two compelling issues.

For the convenience of the reader, the earlier comments to the Accountability NOPR and DOE's responses in the RPR are repeated below:

Government Property

The Accountability NOPR provided that direct costs and expenses resulting from damage to Government property as a direct result of contractor or subcontractor ordinary negligence should not be reimbursed.

Comments: Ten commenters objected to the proposal because it deviates from standard government practice.

DOE recognizes that standard government contracts generally do not make contractors liable for damage to government property. However, DOE M&O contracting has historically been a unique area of government contracting, one with a discrete set of rules and regulations compared to those applied in more traditional government contracts. If the agency is to achieve its goal of inducing its contractors to greater excellence in performance, it will be necessary to shift certain risks to the contractor that have traditionally been borne by the Government. Consequently it will be necessary to be different from the FAR to the extent that those regulations do not contemplate such a shift in responsibility.

Comments: Five commenters argued that damage to, and loss of property are ordinary costs of doing business in the everyday world. These commenters felt that such costs are likely to be less in the long run than the costs necessary to implement measures designed to avoid them.

DOE firmly disagrees with these comments. The fact is that while such damages and losses may be deemed the cost of doing business, they are borne by the party responsible in the ordinary business world. A commercial manufacturer would expect to add such expenses to its overhead, which in turn would tend to reduce its profits. In conducting DOE's business in a manner more like that of the private sector, DOE anticipates achieving results that demonstrate higher standards of efficiency and better performance. By shifting these losses to the contractor, DOE also expects a benefit in the form of protection against even greater losses over the long term. DOE does not anticipate approving impractical measures proposed to assure that government property is not damaged or lost.

Comments: Five commenters maintained that M&O contractors cannot adequately protect against losses to government property because they do not control use, maintenance, repair and replacement of the property.

In fact, DOE contemplates holding contractors responsible only for losses to government property due to negligence or theft in those instances where such acts, and the property, are totally under contractor control. Losses and expenses resulting from ordinary wear and tear would continue to be reimbursable or not charged to the contractor's account.

Comments: Four commenters asked for clarification on how the property in question would be valued. They pointed out that, in many instances, the conditions and value of the property over which they assume control are not known.

Although the final decision will be left to the Contracting Officer's discretion in determining the amount of damage of government property, DOE believes that the depreciated value (or book value, as appropriate), as opposed to replacement cost, should be determinative. The general objective will be to place the damaged property in the same working condition that existed prior to the damage being incurred, but not to place it in a new or improved condition.

6. Subcontractors and Environmental Restoration Contractors

Subcontractors

In the Interim Final Rule, DOE modifies the limitations on the responsibility of M&O contractors for Avoidable Costs resulting from the fault of their subcontractors. Under this Interim Final Rule M&O contractors are responsible for Avoidable Costs incurred by their subcontractors only if the M&O contractor was responsible, in whole or in part, for the actions or inactions of the subcontractor which resulted in the Avoidable Costs. The small business and small disadvantaged business concern who is a subcontractor was exempted from the RPR's Avoidable Cost and insurance provisions. That exemption is retained in the Interim Final Rule.

Comments: Eleven commenters argued that the allocation of risk between prime contractors and subcontractors needed further clarification since otherwise a subcontractor could be required to indemnify the M&O contractor for Avoidable Costs limited by the liability cap of the M&O contractor, without regard to the relative contract size of the subcontractor.

DOE agrees with these commenters. Both M&O contractors and subcontractors felt that DOE should provide some additional protection to subcontractors and take a role in defining the relative risks to be borne between subcontractors and M&O contractors. As a result of the extensive comments on this issue, DOE has made changes to DEAR section 970.5204–55 and has provided a liability cap for subcontractors equal to the subcontractor's profit during the M&O contractor's relevant six-month evaluation period. In addition, DOE will reimburse the M&O contractor for Avoidable Costs incurred by the subcontractor which exceed the subcontractor's liability cap, unless the M&O contractor contributed, in whole or in part, to the incurrence of the Avoidable Cost by the subcontractor. If the M&O contractor contributed, in whole or in part, to the incurrence of Avoidable Costs by its subcontractor, the M&O contractor remains responsible to DOE for the Avoidable Costs incurred, up to its own liability cap, but is limited in seeking reimbursement by the level of its subcontractor's liability cap.

To insure that the subcontractor is only obligated to pay Avoidable Costs up to the level of its profit, when a subcontractor's Avoidable Costs in amounts above its liability cap are reimbursed by DOE to the M&O contractor, the subcontractor shall receive a parallel reimbursement from the M&O contractor or, the M&O contractor shall be required to pay such

costs directly, as the situation may require.

Comments: Nine commenters stated that subcontractors should be provided a liability cap that should be set at the fee the subcontractor earns.

DOE agrees with these comments. Commenters argued that subcontractors cannot continue to participate in DOE contracting without a reasonable liability cap. In the RPR, DOE had limited exposure for each award fee period to the total fees earned by the M&O contractor without providing any limitation for liability, other than that overall ceiling, for any individual subcontractor. Since the M&O contractor is made responsible for Avoidable Costs which are the fault of its subcontractors, it would be reasonable to assume that M&O contracts would seek indemnity from their subcontractors for Avoidable Costs. If the limitation on this indemnification is the total liability cap of the M&O contractor, which bears no relation to the size of the subcontractor's profits, many subcontractors may be unable or unwilling to participate.

As a result of the extensive comments received, DOE has amended DEAR section 970.5204–55 as published in the RPR to provide a cap for subcontractors equal to the subcontractor's earned fee, or 15% of the total dollar amount of the subcontract price in those instances, such as fixed price contracts, where the Contracting Officer cannot reasonably determine what the actual profit was.

Comments: Six commenters felt that DOE should establish a direct relationship between itself and the subcontractors of its M&O contractors.

It would not be appropriate for DOE to alter the contractual relationship between the M&O contractors and their subcontractors. Such a change would alter the traditional responsibilities of the M&O contractor who has privity of contract with its subcontractor. Furthermore, DOE wishes to limit its interference with the effect of market forces on these relationships beyond the role of approving any subcontracts prior to execution by the M&O contractor.

Comments: Five commenters argued that a prime contractor should not be held responsible for the acts of a subcontractor unless those acts arose solely as a result of the M&O contractor's negligence in carrying out its obligations under the contract.

DOE partly agrees with these comments. The M&O contractor is in the best position to monitor its employees and subcontractual arrangements and to make any changes which are necessary to assure excellent performance under its contract with DOE. The purpose of this rulemaking is to make contractors more accountable for the actions of their employees and subcontractors. Therefore, the commenters' suggestion that an M&O contractor should only be responsible for its subcontractors if the M&O contractor is solely at fault in contrary to the fundamental purpose of this rulemaking. In addition to the limitation set forth above on the subcontractor's liability, however, M&O contractors will be responsible for the Avoidable Costs caused by its subcontractors only in those instances where the M&O contractor contributed, in whole or in part, to the negligence of its subcontractor.

Comments: Five commenters stated that M&O contractors did not have the control over subcontractors, especially sole source suppliers, that the RPR implied.

As discussed in the DOE response to the preceding comment, the M&O contractor is the party to the best position to monitor its subcontracts and implement changes as needed. Part of the overall management responsibility of an M&O contractor is to elicit an excellent performance from its subcontractors.

Comments: Five commenters argued that the current cost principles, including insurance provisions, should continue to be used for subcontractors.

Since much of the work to be performed under the M&O contract is subcontracted by the M&O contractor, it would defeat the purpose of this rule to make M&O subcontractors exempt from today's rulemaking. If such an exemption were provided, a significantly larger portion of the work under the M&O contract would be subcontracted as a way of avoiding the responsibilities imposed under this rule. Today's Interim Final Rule, however, does limit the liability of subcontractors as indicated above, although the M&O contractor will continue to be liable to the extent its acts or omissions contribute to the subcontractor's incurrence of Avoidable Costs.

Environmental Restoration Contractors

Several comments were directed to DOE's response to comments on environmental restoration contractors contained in the RPR. DOE's response in the RPR indicated that the issue of "indemnification" for environmental restoration contractors was being considered by a separate task force within DOE and that the RPR was not attempting to address coverage of clean up contractors under this rulemaking. The following additional comments were received:

Comments: Five commenters stated that clean up contractors need non-nuclear indemnification.

The volume of comments on this issue during the stages of this rulemaking has heightened DOE's awareness of contractors' concerns on this issue. DOE currently has a task force examining this issue and is analyzing a number of options available. A policy decision on this issue has not been made and the exact form or extent of protection to be provided clean up contractors cannot be addressed at this time.

To the extent, however, that environmental restoration subcontractors (or contractors) are not M&O contractors and are not subcontrators to M&O contractors they are not covered by this Interim Final Rule.

Comments: Three commenters felt that customized contracting policies should be developed for clean up contractors.

DOE has a task force that has been examining this issue and, pursuant to a **Federal Register** notice published October 31, 1990, at page 45844, a public meeting was held November 15, 1990, in Orlando, Florida to receive public comments on DOE clean up contracting.

Comments: Three commenters stated that environmental restoration contractors should not be covered by the rule.

As indicated above, this rulemaking covers M&O contractors and does not effect DOE's procurements using other contractual vehicles. To the extent that environmental restoration services are procured directly by DOE non-M&O contractors, the rules promulgated today will not effect those environmental restoration contracts.

Comments: Three commenters felt that DOE should take a role in establishing the relationship between the M&O or other prime contractor and the environmental restoration subcontractor.

As discussed in the response section under "Subcontracts," it is generally not DOE's policy to create a direct relationship with subcontractors to M&O contractors with which it has no privity of contract. This is also the case for subcontractors to non-M&O type prime contractors.

The issue of environmental restoration contractors was not specifically raised or addressed in the Accountability NOPR.

For the convenience of the reader, the earlier comments and DOE's response regarding subcontractors and environmental restoration contractors, are repeated below:

Subcontractors

In the five major categories of M&O contractor liabilities for avoidable costs, the Accountability NOPR made M&O contractors responsible for the acts of its subcontractors.

Comments: Sixteen commenters pointed out that under the Accountability NOPR, small and small disadvantaged businesses would often be unable to subcontract with M&O contractors because the added liabilities would flow down to subcontractors and the subcontractors would often be unable to obtain insurance or effectively self-insure due to their size.

DOE recognizes that small subcontractors would face limitations in obtaining insurance commercially and in self-insuring. Today's RPR offers an exemption for M&O subcontractors that are small and small disadvantaged contractors (as these terms are defined in the FAR § 19.001) to minimize the adverse impact of the rule on small and small disadvantaged businesses. These contractors, for instance, will be reimbursed for the cost of insurance or obtaining appropriate bonding.

Comments: Nine of the commenters argued that there will be fewer M&O subcontractors and that the contracts between M&Os and their subcontractors will cost more because liability under the NOPR will flow down to the subcontractors, while the enhanced award fees and the liability cap will not.

So long as the prime contractors award subcontracts, the increased fees to the subcontractors are costs to DOE. The increased fees will allow subcontractors to obtain insurance or to self-insure, and allow subcontractors to remain in the M&O arena and compete for enhanced fees and greater profitability. If higher costs are incurred in contracts between M&Os and their subcontractors, DOE is satisfied that the contractor accountability on all levels will result in overall cost savings.

Comments: Four commenters requested that special indemnification be allowed for Response Action Contractors (RACs) (which clean up toxic and hazardous waste) as it is often difficult, if not impossible, for them to obtain insurance.

Today's RPR does not attempt to propose solutions regarding the issue of possible indemnification of subcontractors performing clean-up activities at DOE sites. This is the case whether the subcontractors are operating as RAC's or clean-up subcontractors under the authority of the Atomic Energy Act of 1954, 42 U.S.C. 2201 (Atomic Energy Act). There is currently an internal DOE Environmental Clean-up Task Group ("Task Group") reviewing alternative contracting methods for DOE's clean-up activities. DOE will make its determination whether or not to include RAC's in the new rules for M&O contractors after the Task Group has completed its work.

7. Liability for Ordinary Negligence and Third Party Liability

In the RPR, DOE proposed that common law negligence be a criteria used by Contracting Officers in making their determination of allowability of Avoidable Costs, but that the standard of care to be imposed was that care which a reasonably prudent man would exercise in a technically complex high risk environment. In this Interim Final Rule, references to "common law" negligence are being dropped to avoid confusion between the standards created under this rule and the various standards created under case law.

Comments: Six commenters felt that the proposed standard of care was unworkable and that decisions would not be made uniformly. They also felt that the Contracting Officers were not trained to make these determinations.

Contracting Officers are trained to make business judgments and are continually called on to do so. Where appropriate, they also seek legal and technical advice to assist them in making their determinations. Contracting Officers are already called on under existing contracts to make determinations of gross negligence or willful misconduct, and with the assistance of legal counsel, will be able to make determinations of negligence as defined in this rule. Such determinations can not be made "uniformly" since each determination will be largely fact dependent and vary from incident to incident. However, the same standard of care will apply to all M&O contractors.

Further, the Interim Final Rule revises the definition of negligence to that of a "reasonable and prudent person under the same or similar circumstances in an identical or similar environment." This is a more commonly understood standard of care than the definition contained in the RPR which was that of a reasonably prudent person in a "technically complex, high risk environment."

Comments: Some commenters agreed that it was unfair to hold M&O contractors liable for the actions of third parties over which they had no control.

Under the Interim Final Rule, M&O contractors may be responsible for Avoidable Costs resulting from negligence of their personnel or the personnel of their subcontractors, over whom they are presumed to have at least indirect control. The relative responsibilities and limitations on the liability of subcontractors are discussed above. As to the liability for actions of other third parties (other than DOE) over whom the M&O contractor indeed has no control, the M&O contractor will not be held responsible unless negligence can also be shown on the part of the personnel of the M&O contractor or its subcontractors. If joint negligence with third parties is present, the allocation of financial responsibility should be determined by the parties involved.

For the convenience of the reader, earlier comments and DOE responses are repeated below:

Liability for Ordinary Negligence and Third Party Liability

The Accountability NOPR defined unallowable avoidable costs to include (i) Losses resulting from the ordinary negligence of the contractor or subcontractor when carrying out well-understood non-experimental work under a contract, including costs necessary to correct the error and accomplish the assigned task; and (ii) costs resulting from contractor or subcontractor negligence or misconduct giving rise to simple tort liability to third parties.

Comments: Fourteen commenters raised issues surrounding the lack of clarity for the negligence standard and the fact that negligence standards differ in different jurisdictions, and wanted to know what the mechanism for final determinations of negligence would be. The commenters indicated that disputes would be more likely under the proposed rule.

DOE recognizes that the Accountability NOPR was not entirely clear with respect to either the standard or the mechanism for determining negligence. Today's RPR defines the standard as "common law negligence" and places authority for the final determination with the Contracting Officer. The standard of care imposed will be that which a reasonably prudent man would exercise in a technically complex, high risk environment. Since the determination involves a claim against the Government, a final decision must be made by the Contracting Officer under the Contract Disputes Act. The standard is specified by contract, even though it is one conceptually borrowed from tort law.

Comments: Four commenters commented that in the commercial world, the price of goods and services includes the costs of rework and employee negligence.

In the commercial sector, costs of rework and negligence are reflected in the profit which the business obtains after the deduction of these overhead expenses. The price would only reflect such additional costs if the market or competition places no limits on the ability to impose price increases. The proposed rule involves cost reimbursement contracting. These potentially increased costs, should they be incurred, will be reflected in the enhanced award fees resulting from better contractor performance. Under either commercial arrangement or these new proposed rules, the ability of the business to control avoidable costs will result in greater profits.

Comments: Nine commenters argued that M&O contractors lack the control over employees, subcontractors, other prime contractors, and third parties necessary to avoid incurring costs due to employee negligence, rework, and third party liability.

With respect to new contractors taking over a site, DOE has recognized a problem of control for the contractor. Today's RPR, as indicated above, contains a provision to allow for a grace period for new contractors

before placing responsibility on the contractors for the employees already at the site. With respect to all other contractors, the problems of control at this level are no different than those faced in the private sector. The contractor is in the best position to avoid these kinds of costs, and this is precisely the kind of responsibility it is being paid to assume.

8. Level of Employee Responsibility

There were no new significant facts provided or arguments presented on the issue of level of employee responsibility. For the convenience of the reader, the earlier comments and DOE responses on this issue are repeated below:

Level of Employee Responsibility

The Accountability NOPR holds the contractor responsible for the actions or inactions of contractor and subcontractor personnel that result in unallowable avoidable costs.

Comments: Sixteen commenters pointed out that placing responsibility for negligent loss and theft of government property, ordinary negligence, and third party liability down to the lowest level employee represents a deviation from contracting principles in the FAR.

DOE recognizes that the FAR maintains a standard for liability in these cost categories for high level employees such as officers, directors, and plant managers. M&O contracting has from its inception been an area of government contracting filled with exceptions and special rules due to the unusual nature of its mission. The agency, in this RPR, is attempting to shift responsibility and risk to the contractors in order to encourage greater accountability and improved performance. The RPR makes the M&O environment more like that of the private sector in which an employer is responsible for the actions of his employees. The contractor is in the best position to ensure quality employee performance at intermediate and lower levels through adequate programs of hiring, training and supervision.

Comments: Seven commenters argued that contractors lack adequate control over employee hiring, management and work standards to allow for these companies to be able to practice risk management at the individual employee level.

In those instances where a new contractor has taken over a facility, DOE recognizes the difficulties a contractor faces in assessing the situation and taking appropriate action to avoid incurring unnecessary costs. Today's RPR provides a grace period for new contractors, within the discretion of the Contracting Officer, but not to exceed one year.

9. Direction From The Contracting Officer

There were no new significant facts provided or issues raised on the issue of direction from the Contracting Officer. For the convenience of the reader, the earlier comments and DOE responses on this issue are repeated below:

Under the Accountability NOPR, specific directions from the Contracting Officer will relieve the M&O contractor from having to absorb otherwise unallowable avoidable costs.

Comments: One commenter stated that in the M&O environment, directions from DOE do not usually come from the Contracting Officer and, in fact, specific written direction from the Contracting Officer is likely only in very rare cases.

DOE does not believe that this is a correct description of the day-to-day workings in an M&O environment. First, the DOE operations office manager is usually the Contracting Officer for M&O contracts. Second, the M&O contractor works under a very broad "statement of work." The M&O contractor carries out a substantial portion of its work without direct or specific DOE supervision. Third, if a situation arises where the M&O contractor receives directions from a DOE employee it will be in those important areas or at critical times where it is necessary for DOE to provide direction in order to ensure the performance desired by DOE. Those DOE employees giving such directions should be acting within the scope of their authority as delegated by the Contracting Officer (the manager of the operations office). The contractor in these instances, is aware, or ought to be aware, of whether the DOE employee is acting within his or her delegated authority. Most M&O contractors are experienced government contractors and should know the rules regarding the delegation and exercise of Contracting Officer authority.

10. Profit Making Subcontractors of Nonprofit M&O Contractors

There were no new significant facts provided or issues raised in regards to subcontractors of nonprofit M&O contractors. For the convenience of the reader the earlier comments and DOE responses are repeated below:

The Accountability NOPR does not specifically address the question of the extent of which profit making subcontractors of nonprofit prime contractors are subject to the unallowable avoidable cost provisions of that NOPR.

Comments: One commenter stated that the Accountability NOPR did not address profit making subcontractors working for nonprofit M&O contractors.

Profit making subcontractors of nonprofit M&O contractors are exempt from today's RPR to the same extent as the nonprofit prime contractors.

11. Special Exemptions From the RPR

Comments: In response to the Accountability NOPR the M&O contractors for (1) Sandia National Laboratories, (2) Bettis Atomic Power Laboratory (Bettis), and (3) Knolls Atomic Power Laboratory (KAPL), requested that they be treated as nonprofits and thus exempt from the applicability of the rule. DOE, in the RPR, asked for public comments on the requests for exemptions.

There were no significant objections (in fact only one commenter raised an objection to these specific designations), or new facts provided or issues raised in regard to these exemptions. DOE, therefore, has concluded that the M&O contractors currently at Sandia National Laboratories, Bettis, and KAPL are nonprofit entities for the purpose of being exempt from the application of this Interim Final Rule.

In addition, the following contractors at the specified sites are also determined to be nonprofit organizations under the Interim Final Rule:

Nonprofits Educational

Iowa State University
Ames Laboratory
Princeton University
Princeton Plasma Physics Laboratory
Stanford University
Stanford Linear Accelerator
University of Georgia Research Foundation
Savannah River Ecology Laboratory
University of California
Lawrence Berkeley Laboratory
University of California
Lawrence Livermore National Laboratory
University of California
Los Alamos National Scientific Laboratory
University of California
SF–Lab of Radiobiology and Environmental Health
University of Chicago
Argonne National Laboratory

Other Nonprofits

Associated Universities Inc.
Brookhaven Laboratory
Battelle Memorial Institute
Pacific Northwest Laboratory
Hanford Environmental Health Foundation
Hanford Occupational and Medical Environmental Health Services Organization
Lovelace Biomedical and Environmental Inhalation Toxicology Research Institute
Oak Ridge Associated Universities
Oak Ridge Operations Support
Southeastern Universities Research Association
Continuous Electron Beam Accelerator Facility
Universities Research Association, Inc.
Superconducting Super Collider
Universities Research Association, Inc.
Fermi National Accelerator

Comments: Several commenters indicated that DOE's definition of nonprofit was inappropriate in that it excluded corporations which received small fees to cover their overhead, but were not, in fact, established with a profit motive. Several of these commenters suggested that the definition of nonprofit provided at 35 U.S.C. 201(i) was more appropriate:

The term nonprofit organization means universities and other institutions of higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)) and

exempt from taxation under section 501(a) of the Internal Revenue Code (26 U.S.C. 501(a) or any nonprofit scientific or educational organization qualified under a State nonprofit organization statute.

While DOE does not agree that the definition contained at 35 U.S.C. 201(i) is appropriate as the controlling definition of nonprofit for this Interim Final Rule, the Interim Final Rule provides that when the Contracting Officer is considering for treatment as a nonprofit a contractor whose particular corporate organization and circumstances warrants such consideration, the Contracting Officer need not require that the absence of a fee be a prerequisite to designation as a nonprofit for purpose of the applicability of the Interim Final Rule. This is an exception to the definition of nonprofit contractor contained in the Interim Final Rule. The definition of 35 U.S.C. 201(i) is used as a qualification requirement prior to a determination being made by the Contracting Officer to grant an exception to the basic definition.

Comments: One commenter felt that specific contractors should not be listed as exempted or nonprofit in this rulemaking, and that these determinations should be made on an individual basis.

These determinations have not been included in the rule itself and will not become part of the DEAR. A discussion of the proposed status for certain contractors was contained in the preamble to the RPR because DOE specifically wanted to solicit comments with respect to these particular determinations. Because DOE thought it important for the public to be informed of its initial determinations as to which M&O contractors are nonprofits, they are listed above, but not in the body of the Interim Final Rule.

For the convenience of the reader, earlier comments and DOE's responses are repeated below:

Special Exemptions From the RPR

As indicated above, the Accountability NOPR provides that a nonprofit management and operating contractor is one which receives no fee and is considered nonprofit under the laws of the jurisdiction where it is incorporated, and if it is a subsidiary, it is a subsidiary of a company which is considered nonprofit under the laws of the jurisdiction where it is incorporated. A Contracting Officer may also treat as nonprofit a contractor which receives no fee and whose particular corporate organization or circumstances, in the judgment of the Contracting Officer, warrants such consideration. All other management and operating contractors are considered profit making.

Comments: Several M&O contractors have asked that they be exempt from the provisions of the Accountability NOPR because of special circumstances, including a historical exemption form procurement laws and regulations. Some contractors also argue that they are really nonprofits although they do not neatly fit within the definiton contained in the Accountability NOPR.

DOE is very reluctant to exempt M&O contractors from the provision of today's RPR except in the most unusual and compelling circumstances and where it is clearly in the best interest of the Government. First, DOE has concluded that the Sandia National Laboratories (SNL), operated by [Sandia Corporation, a wholly-owned subsidiary of AT&T], may be an appropriate candidate for such an exemption and the exemption is reflected in today's RPR. AT&T has indicated that its motivation for operating the SNL continues to be national service. AT&T operated SNL at no fee or profit. AT&T agreed to manage SNL in 1949 at the request of President Truman. For over forty years AT&T has made a significant contribution to DOE's mission at SNL.

DOE invites comments from the public as to whether AT&T at SNL should be treated as a nonprofit for the purpose of exemption from the Interim Final Rule.

Second, it was specifically requested that the Bettis Atomic Power Laboratory (Bettis) and the Knolls Atomic Power Laboratory (KAPL), both of which are part of the Naval Nuclear Propulsion (NNP) Program, be exempt from today's RPR. DOE has concluded that the contractors for Bettis and KAPL may be appropriate candidates for such an exemption and the exemption is reflected in today's RPR. These laboratories are operated by Westinghouse Electric Corporation (Westinghouse), and the General Electric Company (GE), respectively. GE and Westinghouse each have more than forty years involvement in the Naval Reactors Program. Additionally, both laboratories are single-purpose laboratories dedicated exclusively to the NNP Program, wholly dedicated as a support facility for that program.

DOE reviewed, among other things, Executive Order No. 12344 entitled "Naval Nuclear Propulsion Program." This Executive Order was signed by President Reagan on February 1, 1982 and was subsequently ratified by Congress in Public Law No. 98–525, 42 U.S.C. 7158 note. The Order provides, in part, as follows:

By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States of America, with recognition of the crucial importance to national security of the Naval Nuclear Propulsion Program, and for the purpose of preserving the basic structure, policies, and practices developed for this Program in the past and assuring that the Program will continue to function with excellence, it is hereby ordered as follows:

* * * * *

Sec. 5. Within the Department of Energy, the Secretary of Energy shall assign to the director the responsibility of performing the functions of the Division of Naval Reactors transferred to the Department of Energy by section 309(a) of the Department of Energy Organization Act (42 U.S.C. 7158), including assigned civilian power reactor programs, and any naval nuclear propulsion functions of the Department of Energy including:

(a) Direct supervision over the Bettis and Knolls Atomic Power Laboratories, the Expended Core Facility and naval reactor proto-type plants;

* * * * *

(e) Administration of the Naval Nuclear Propulsion Program, including oversight of program support in areas such as security, nuclear safeguards and transportation, public information, procurement, logistics, and fiscal management.

DOE invites comments from the public as to whether the M&O contractors for Bettis and KAPL, GE and Westinghouse, respectively, should be treated as nonprofit for the purpose of exemption from the final rule. (Brackets added.)

12. Fee Schedules and Converison Table

The fee schedules published in the RPR did not change from those originally published in the Award Fee NOPR. The conversion table did, however, change from a straight line conversion scale where each performance point was worth 5% of the available pool, to a conversion scale which provided increased fees for scores of 88 and above.

Comments: Many of the commenters stated that the proposed fee structure still will not compensate contractors for the additional risks. The commenters' perception is that DOE's grading system has become more stringent, and therefore, the higher scores are unattainable. The commenters also stated that the fee increases were "illusory" and that a large portion of the additional fee dollars would be the result of inflationary adjustments. Two commenters believed that the ten year review cycle for inflationary adjustments to the fee schedules was too long and recommended that the DOE commit to a more frequent review cycle.

Changes have been made to make available increased fees for contractors who perform at levels which are more than merely satisfactory. Two effects of these changes are that the evaluation process has been tightened-up to provide a more consistent approach at all DOE facilities. It is not the intent of the DOE to grade lower so that higher fees are unattainable. The increased fees are the result of both the inflationary adjustments to the schedules and the new award fee structure and, therefore, DOE believes that adequate compensation for associated risks has been provided. DOE is not persuaded that contractors' claims for additional increases can be justified.

In the RPR, DOE stated it will continue to review methods of

compensating for the effects of inflation. DOE has considered the public comments requesting a shorter review cycle for adjusting the fee schedules and has determined that the fee schedules will be adjusted for the impact of inflation at least every five years.

For the convenience of the reader, the earlier comments and DOE responses on the compensation for inflation issues are repeated below:

Compensation for Inflation

In the Award Fee NOPR DOE adjusted the fee schedules to reflect the impact of inflation from 1982 through 1989 using the GNP Price Deflator Index.

Comments: Three commenters expressed concern that the proposed rule did not fully compensate for inflation since 1982. Some commenters applied various indices to the existing fee schedules to indicate variances from DOE's proposal. Three commenters suggested that DOE should review the fee schedules on an annual basis or implement new schedules taking inflation into consideration each year.

For purposes of the RPR, DOE intends to retain the use of the GNP Price Deflator Index for the years 1982 through 1989. The GNP Price Deflator Index has been used for compensating for inflation in the fee schedules in the past. This Index expresses prices of various years as a percentage of price of a selected base year. At the time of the last adjustment of the fee schedules, the Index and formulae for adjustment were developed following an extensive study of DOE's fee policies. Essentially, the technique involves deflating each interval of estimated cost back to the base year (in this case, 1982) dollars. Next, a fee is calculated based upon existing fee schedules, which were developed on 1982. Finally, the fee amounts are adjusted to 1989 dollars by applying the Index. This has the effect of increasing the fee amounts by a greater percentage at the upper ends of the fee schedules. That is, the fees for higher estimated cost levels are increased by a larger percentage than fees for lower cost levels. This is appropriate because of the nature of DOE's declining fee curve policy, where the fees for larger value M&O contracts are a lower percentage of estimated cost than for lower value contracts.

The fee study issued in 1982 recommended that fee schedules be adjusted every ten years. DOE's current position is that any cost index will go through periodic fluctuations which will be "dampened" over a multi-year cycle.

However DOE will continue to review methods of compensating for the effects of inflation while the RPR is out for comment, and also will reconsider what review cycle is appropriate.

13. Double Penalty and Appealability of Award Fee

These topics were treated as a single subject in the comments to the RPR and comments were generally the same as those raised in response to the Accountability and Award Fee NOPRs. Commenters again argued that award fee determinations should be reviewable and appealable and that these determinations were appealable under the Contract Disputes Act.

Comment: Five commenters argued that award fee determinations are directly linked to Avoidable Cost determinations and both determinations should be appealable. An appeal of a Contracting Officer's negligence determination may not be resolved until after an award fee determination is made, and that award fee determination will take into account the Contracting Officer's earlier negligence determination.

There is enough flexibility already in the award fee process to account for this type of situation without the need to create a separate appeal process. Contracting Officers and fee determination officials have enough discretion to address this problem. As an example, even though a contractor may be found liable to a third party in a court case, DOE may make a separate decision in its award fee decision or allowable cost determination that the contractor has followed all applicable DOE guidelines.

For the convenience of the reader, the earlier comments and DOE responses regarding the double penalty issue are repeated below:

Double "Penalty"

The Accountability NOPR establishes contractor responsibility for certain unallowable avoidable costs. A contractor's performance will be reflected in the award fee and the "at risk" portions of the new Basic Fee.

As stated in the Accountability NOPR, DOE will seek to minimize the contractor's duplicative exposure to reduced award fees arising from the same facts or conditions which created the unallowable avoidable cost. When an M&O contractor timely advises DOE of incidents of weaknesses it has discovered, and voluntarily agrees that it will bear those costs, it is DOE's intention that such critical self-evaluation will be favorably considered with regard to performance for award fee purposes.

Comments: Two commenters are concerned that, in situations other than self-evaluation discussed above, the proposed Award Fee NOPR will "penalize" contractors twice, in disallowance of the unallowable avoidable costs, and in a lower fee determination.

Disallowance of cost items (e.g., fines, penalties, acts of negligence) on the one hand, and a fee determination on the other hand, are two independent concepts and events. It is unavoidable that poor performance which results in unallowable avoidable costs will impact the award fee determination. However, as already indicated above, critical self-evaluation will be considered favorably in the award fee determination process. The proposed fee structure reflects the greater risks and potential for unallowable avoidable cost.

There were no new significant facts provided or issues raised in regard to the appealability of the award fee. For the convenience of the reader, the earlier comments and DOE responses on this issue are repeated below:

Appealability of Award Fee

The Award Fee NOPR follows Federal Acquisition Regulation (FAR) 16.404–2, which provides that in cost-plus-award-fee contracts "[t]he amount of the award fee to be paid is determined by the Government's judgmental evaluation of the criteria stated in the contract. This determination is made unilaterally by the Government and is not subject to the Disputes clause."

Comments: Several commenters argued that award fee determinations should be appealable. Some of the commenters argued that such determinations should be appealable under the "Disputes" clause of the contract, while one commenter argued that the right provided under the Contract Disputes Act cannot be contracted away. The commenters' statements give the appearance that the non-appealability of the award fee determinations is unique to DOE. However, DOE has adopted the policy of the Federal Acquisition Regulation (FAR) in this regard. Once the cost-plus-award-fee contract type is chosen, it is government-wide policy that these award fee determinations are not appealable. DOE has no legal or policy basis for deviating from this policy.

It is DOE's position that the award fee portion of the total fee is not appealable. DOE believes that this approach is within the letter and the spirit of the FAR and applicable laws.

14. Performance Adjectives

Under the RPR, narrative descriptions of the performance adjectives were provided for performance levels of Outstanding, Good, Satisfactory, Marginal and Unsatisfactory. The descriptions and adjectives in the RPR were not changed from the Award Fee NOPR.

Comments: Two commenters expressed concern that the performance adjectives were not sufficiently defined and would be difficult to apply.

DOE does not believe that changes need to be made to the performance adjectives. The performance adjectives and narrative descriptions listed in the RPR are similar in form and content to the ones which DOE has been using in the past; they have only been standardized for DOE-wide use. The very nature of the award fee system results in a large amount of subjectivity during the determination process. Furthermore, performance evaluation criteria will most likely be both subjective and objective. For the

convenience of the reader, the earlier comments and DOE responses on performance adjectives are repeated below:

Performance Objectives

To implement the objective of greater financial incentives to compensate for greater risks for M&O contractors, the Award Fee NOPR contained proposed Performance Scores/Standards Adjectives/Fee Conversion Factors.

Comments: Many of the commenters argued that the increases in the available award fee were not obtainable because of the changes made in the scoring system. A number of these commenters stated that the amount of fees which could realistically be earned under the proposed system would not balance the greater degree of risk imposed by DOE under the Accountability NOPR. On the other hand, one commenter believed that DOE was in error in offering additional fees simply because M&O contractors would be held more accountable for their actions.

DOE has evaluated these comments and is today proposing a revision to the Performance Scores/Standard Adjectives/Fee Conversion Factors. This proposed new fee schedule is included as Attachment 1 to this section II. DOE believes that these proposed new fee conversion factors address the criticisms of the commenters, in that the conversion factors now increase the amount of award fee available for scores of 88 and above, thus providing further incentive to enhance contractors performance. For example, if the amount of award fee available was $10 million, under the Award Fee NOPR, a score of 90 would have resulted in an award fee of $5 million. Under today's RPR, a score of 90 will earn an award fee of $6 million. Similarly, a score of 95 under the Award Fee NOPR would have resulted in an award fee of $7.5 million. Under today's RPR, a score of 95 will result in an award fee of $9.4 million. DOE solicits comments regarding this revised fee schedule.

15. Classification of Facilities

The comments on Classification of Facilities in the RPR primarily responded to DOE's answers to earlier comments. However, the following additional comment was received.

Comment: One commenter believed that the Procurement Executive should not make unilateral designations and the categories should be published in the Federal Register for public comment.

The determination to assign each facility to a designated category involves myriad considerations and is not performed in a vacuum by one individual. These determinations will remain within the Department on a case-by-case basis and not subject to publication for public comment. Additionally, the process should be flexible enough to provide for timely redesignations when circumstances surrounding an assessment have changed, without the need for publication, comment and resolution of public comments.

For the convenience of the reader, the earlier comments and DOE responses on classification of facilities are repeated below:

Classification Categories

The Award Fee NOPR proposed the use of categories (Defense Facility-A, Defense Facility-B, Enrichment Plant, and Miscellaneous) for classification of each of the M&O facilities.

Comments: Eight of the commenters disagreed with the concept of categorizing facilities and assessing different amounts in award fee pools based upon the category. Some commenters believed that there was an inadequate number of categories or that certain categories were undervalued.

Other commenters expressed concern that the factors used to determine category assignment were inappropriate. A few commenters felt that the categories should be reviewed on a regular basis. Finally, several commenters believed that one or more of the facilities were placed into the wrong category.

DOE has considered these comments but has not been convinced that any major changes are necessary to the concept of categories and classification of facilities. Several facilities may be reassigned to a different category based upon the public comments. DOE's Procurement Executive will reassign individual facilities as appropriate on a case-by-case basis.

16. Retain Percentage of Award Fee as Financial Guarantee

The RPR required that contractors provide a financial guarantee to assure that sufficient resources are available to satisfy all costs and liabilities up to the amount of the actual award fee earned and the actual basic fee earned for a period based upon the highest amount of fee received over the last four evaluation periods. At the election of the contractor, the Contracting Officer may retain a percentage of the award fee as determined to be sufficient by the Contracting Officer to protect the interest of the Government.

Comments: Two commenters questioned the policy of withholding a percentage of award fee earned to protect the Government's interests. One of the commenters stated that more guidance to Contracting Officers was needed and the other commenter believed that the concept is inappropriate. One recommendation was made to limit the withhold feature to the final six months of a contract which is expiring.

The policy of retaining a percentage of the total fee, not just award fee, is "at the election of the contractor" and can be used in lieu of providing some other form of financial guarantee. Retainage of a percentage of the total fee is a change from the RPR which allowed the contractor to retain part of the award fee only. This concept is consistent with the change in the liability ceiling from "award fee available" to "award fee and basic fee earned" in a six-month evaluation period. DOE, moreover, has simply provided an alternative for consideration by the contractor. In any event, the Government must be protected, as it is in most Government contracts, and be able to administratively recover reimbursed costs to which the contractor is not entitled. The recommendation to limit the withholding feature to the final six months of an expiring contract is not adequate to protect the Government's interests during the life of an M&O contract which may involve a period of performance of many years.

17. Basic Fee Concept

Prior to the Accountability NOPR and the RPR, the base fee was a flexible amount which was established at a level up to 50% of the fixed fee. Under the RPR, the "basic fee" would be equivalent to the amount of the fixed fee under a CPFF arrangement, 50% of which would be "at risk" (refundable) if the contractor's performance falls below the "Satisfactory" level.

Comment: One commenter stated that the creation of the "basic fee" concept is unnecessary and that the basic fee is simply an extension of the award fee itself.

DOE does not agree with the commenter. The basic fee is an amount that is considered reasonable compensation for "acceptable" performance in managing and organizing contractor resources in general, whereas the award fee pool represents additional fee available to reward excellence in performance in specific areas designated by the Government for evaluation, such as environmental, health and safety issues.

III. Section-By-Section Analysis of the Interim Final Rule

Today's Interim Final Rule amends the DEAR. DEAR section 970.3102–21, Fines and Penalties, is revised to reflect that, for profit making M&O contractors, fines, penalties and related costs incurred in the performance of the contract are generally nonreimbursable when they result from contractor negligence or misconduct. Any claim for reimbursement of fines and penalties assessed against the contractor for which the contractor seeks reimbursement must be presented to the Contracting Officer under the terms of the contract. In determining whether

reimbursement is appropriate under the facts and circumstances presented, the Contracting Officer will take into consideration such factors as whether the losses resulted from acts directed or authorized by the Contracting Officer or resulting from the failure of DOE to provide necessary funds to avoid a noncompliant situation. A profit making contractor which is not otherwise exempt by law or regulation will not be reimbursed for fines or penalties imposed by DOE under the Price-Anderson Amendments.

All of the above nonreimbursable costs are unallowable costs under DEAR section 970.5204–13(e)(12) as well as section 970.5204–14(e)(10).

A new DEAR section 970.3102–22, Avoidable Costs, has been added to provide the Contracting Officer with the factors he or she must consider in determining whether a cost is an Avoidable Cost, and thus unallowable, or an allowable cost. As part of the decision making process, the Contracting Officer will consider the completeness, efficiency and effectiveness of the contractor's internal control system and procedures, whether proper training and instructions were provided to employees, whether overall reasonable precautions were taken and whether adequate corrective actions were taken to preclude future occurrences.

Also DEAR sections 970.5204–13(e)(17)(iv) and 970.5204–14(e)(15)(iv), losses, are revised to disallow any costs that could have been avoided by the contractor or its subcontractors, and were incurred solely and exclusively as the result of negligence or willful misconduct on the part of any contractor or subcontractor employee at any level or third parties other than DOE. This is intended to include situations where the contractor or subcontractor has not performed with the skill and expertise for which DOE has bargained under the contract. Third party claims for damages alleging negligence on the part of the contractor or subcontractor and litigation expenses are also unallowable under this section.

DEAR sections 970.5204–13(e)(36)(i) and 970.5204–14(e)(34)(i) are revised to make clear that the costs of bonds and insurance are unallowable when they are incurred to insure against losses resulting from Avoidable Costs that are otherwise unallowable under the contract. The purpose of the revision is to preclude the contractor from being indirectly reimbursed for unallowable costs thare are not directly reimbursable. An exception is made for insurance or bond costs which are authorized by specific written direction of the Contracting Officer. DEAR 950.7011(c) is also amended to reflect that policy.

DEAR sections 970.5204–13(e)(36)(ii) and 970.5204–14(e)(34)(ii) are added to exempt Small Businesses and Small Disadvantaged Businesses from today's Interim Final Rule in order to ensure participation of Small Business and Small Disadvantaged Businesses in the M&O contracting and subcontracting system.

DEAR section 970.5204–16 has been revised to provide that the new proposed paragraph (a) will be used instead of the current paragraph (a) when the award fee provisions are used. This new subsection provides that 50% of the new "Basic Fee" may be refunded to DOE for performance scores of 75 or below.

DEAR section 970.5204–18 provides a definition of nonprofit and profitmaking management and operating contractors. This is a new section intended to provide greater flexibility for the Contracting Officer when determining whether an M&O contractor should be treated as nonprofit.

The Interim Final Rule holds the contractor liable for loss or destruction of or damage to Government property resulting solely and exclusively from any negligent act or omission or willful misconduct, including theft, of any kind on the part of any contractor or subcontractor employee at any level. New DEAR section 970.5204–21(j) holds the contractor liable for any such losses resulting from failure to exercise reasonable care to avoid the loss or damage. However, scrap, waste and other routine costs which are reasonably anticipated are allowable costs under this clause.

The Interim Final Rule amends DEAR 970.5204–31 to indicate that if DOE does not approve litigation between the contractor and a third party, DOE will not be responsible for the costs of litigation, unless the Contracting Officer, following the specified guidelines, determines the cost to be reimbursable. The contractor would be eligible to make a claim for the costs of litigation and related costs, once a final judgment has been rendered, and subject to the limitations imposed by the nonreimbursement provisions of the Major Fraud Act and the Price-Anderson Amendments. DOE will continue to reimburse all costs involved with litigation which are approved, controlled or directed by DOE. DEAR 970.5024–13(e)(17)(iv) and 970.5204–14(e)(15)(iv) are amended to reflect these changes.

A revised DEAR section 970.5204–32, "Required bonds and insurance-exclusive Government property (costs-type contracts)," is included in the Interim Final Rule and would permit profitmaking contractors to insure against loss or destruction of or damage to Government property.

New DEAR section 970.5204–55 provides a limitation on the exposure of the contractor for non-criminal fines, penalties, and the related costs of litigation which are no longer allowable costs under the Interim Final Rule. This ceiling on liability is equal to the sum of the actual award fee earned and the actual basic fee earned for the six-month evaluation period when the event(s) which caused the Avoidable Costs occurred but does not apply to any costs or liabilities incurred under other provisions of the contract. (In cost-plus-fixed-fee contracts, the liability ceiling is equal to the amount of 6 months of fixed fee for the period during which such costs are attributed or otherwise incurred.)

A new subsection 970.5204–55(b) has been added to limit the liability of subcontractors to the amount of fee earned during a particular M&O contractor's six-month evaluation period. If the Avoidable Costs exceed the subcontractor's profit DOE will reimburse for such cost, unless the M&O contractor caused, in whole or in part, the incurrence of the Avoidable Costs. In such case the M&O contractor will be responsible for the payment of the Avoidable Costs to the extent of its ceiling.

Since fees awarded during subsequent periods may be insufficient to assure DOE recovery for costs which are the contractor's responsibility, the Contracting Officer has the option of withholding a percentage of the award fee earned at the end of each evaluation period to protect DOE from a potential default on the part of the contractor for its Avoidable Costs obligation. Alternatively, the contractor may satisfy its financial responsibility obligation by obtaining letters of credit, corporate guarantees, bonds, or make other similar financial arrangements. Liability for fines, penalties, unallowable Avoidable Costs and loss to Government property incurred over multiple evaluation periods would be allocated to the evaluation period in which the incident or event giving rise to the cost occurred. If it is not reasonably possible to allocate these activities to a specific evaluation period, or if the incidents or events giving rise to the Avoidable Costs occurred over multiple evaluation periods, the contractor's financial risk is limited to the sum of the actual award fee earned and the actual basic fee

earned in the evaluation period when the amount of nonreimbursable costs or losses were determined. If such determination is made following the expiration of a contract, or the contractor is otherwise replaced, the sum of the actual award fee earned and the actual basic fee earned for the last six-month period that the contract was in effect shall be utilized, after deducting such disallowed costs as were previously charged to that period.

Today's Interim Final Rule adds new DEAR section 970.5204–56, Deteriming Avoidable Costs, which provides for a phase-in period for a new contractor inheriting employees as holdovers from the previous contractor. The new contractor would not be responsible for Avoidable Costs resulting from negligence of the holdover employees for a period to be negotiated with the Contracting Officer prior to entering into a contract. This phase-in period, however, may not exceed one year. The purpose of the phase-in period is to provide adequate time for employee evaluation, orientation and training. The contractor will have a reasonable period of time, which may be more or less than one year, to discern other problems and report them to the Contracting Officer. This section also defines what Avoidable Costs are.

In addition, DEAR section 970.5204–56 provides that the Contracting Officer, in determining whether a cost is an "Avoidable Cost," must, among other factors, consider three specified factors. This is designed to provide the Contracting Officer flexibility when unusual and unforeseen circumstances result in the incurrence of an Avoidable Cost that would otherwise be nonreimbursable.

It is contemplated that DOE and its M&O contractors will make every effort to resolve as soon as possible on an informal basis any disagreements which arise concerning particular costs which may be unallowable under these regulations. DOE recognizes that it will be in the best interest of cooperative contract administration and performance to encourage mutually satisfactory agreements with its contractors regarding cost allowability in a timely and informal manner.

The Construction Contracts Schedule, Construction Management Contract Schedule, and Special Equipment Purchases/Subcontract Work Schedule are revised to reflect fee amounts, related fee percentages and incremental percentages which have been increased to accommodate the economic inflation since these schedules were last updated. DEAR 915.971–5 (d), (f) and (h).

Language is added to DEAR 915.972(a) making it clear that all M&O contracts awarded on an award fee basis will use the techniques set forth in 970.1509–8 to convert from a CPFF to an award fee negotiation objective.

DEAR 950.7011(c) was amended to reflect the policy that insurance for non-nuclear risks is limited to losses in excess of the liability cap of DEAR 970.5204–55. This clause was also revised to reflect the policy that insurance premiums for otherwise unallowable costs may not be reimbursed.

The Production Efforts Schedule and Research and Development Efforts Schedule amend DEAR 970.1509–5(b) to incorporate fee amounts, related fee percentages and incremental percentages which have been increased to accommodate economic inflation since these schedules were last updated.

DEAR 970.1509–8 is amended to provide the details of the technique which will be used to convert a CPFF negotiation objective to an award fee negotiation objective. In essence, the table under subparagraph (d) is deleted in favor of a new approach which provides mandatory basic fees plus award fees which vary in size based upon the type of facility being managed and operated. Under this approach, contractors responsible for activities with greater risk, particularly the kinds of risks detailed in the Accountability NOPR, will be eligible for higher award fees.

In addition, this section includes a new listing of adjectival ratings which will be used in performance evaluations under M&O award fee contracts. Each adjective is defined in narrative fashion, in terms of performance scores, and in terms of the percentage of available award fee earned. This list of standard, mandatory adjectives will ensure that contractors rated at the same level of performance will receive identical adjectival ratings. Furthermore, a mandatory fee conversion table is incorporated, which will ensure that a specific performance rating will result in the award of a particular percentage of the available award fee for the evaluation period involved. These revisions are intended to provide a more uniform approach to award fee contracting throughout the DOE.

IV. Procedural Requirements

A. Review Under Executive Order 12291

Executive Order 12291 requires that a regulatory impact analysis be prepared prior to promulgation of a "major rule," and subject to certain exceptions, provides for submission of rules to the Office of Management and Budget (OMB) for formal regulatory review. The term "major rule" is defined by Executive Order 12291 to include "any regulation that is likely to result in: (1) An annual effect on the economy of $100 million or more; (2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) Significant adverse effects on competition, employment, investment, productivity, innovations, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets."

1. Type of Rule

In the preamble to the RPR, DOE concluded that this rulemaking does not involve a "major rule," and further that the rule does not have to be submitted to OMB for formal regulatory review because it is part of a class of procurement regulations which are exempt from such review. DOE received comments criticizing its determinations under Executive Order 12291 and its decision not to submit the RPR to OMB for formal regulatory review. Some of the comments also sought to make a case for voluntary submission to OMB.

The comments regarding whether the rule is a "major rule" argued largely that the rule will result in an annual effect on the economy of $100 million or more, or result in a major increase in costs or prices for contractors and DOE. In support of these arguments, the comments cited the multi-billion dollar size of the FY 1991 budget requests including M&O contractor activities, the potential for significant fines and penalties, exposure to third party liability, cost increases due to decreased competition for M&O contract and subcontract awards, cost increases due to increased recordkeeping to identify and track property and justify allowability of costs, and reduced expenditures for research and development.

Determining whether a rule is a "major rule" within the meaning of Executive Order 12291 requires an assessment of the incremental and likely economic impact of the rule. The rule is not likely to affect all of the appropriations Congress makes available for M&O contractor activities. However, all of the M&O contractors and DOE are certain to be affected economically by the inflation adjustment. That adjustment, estimated to be $25 million dollars, based on available fees for FY 1988, is likely to have a significant cash flow effect on

the economy and the costs of M&O contractors and DOE only in the first year because it is a multi-year adjustment from 1981 to 1989. It will add money to the economy, offset increased M&O contractor costs, and add to DOE costs.

The financial exposure of M&O contractors resulting from the rule, as distinguished from the independent effect of any other provision of law such as the Major Fraud Act, is largely the exposure to loss of the award and basic fees. It is likely that some M&O contractors will suffer some loss of these fees during any year; it is possible, but *not* likely, that all such fees will be lost. To the extent that there is some loss of fees, DOE will experience lower costs.

It is true that M&O contractors will have to modify existing acounting and recordkeeping systems, but given the lack of specifics from commenters, who are in the best position to provide details, DOE is not persuaded by the conclusory assertions in some of the comments to the effect that wholly new and extremely expensive accounting systems will be necessary. Moreover, the effect of increased costs of compliance on the economy will be offset by a factor largely ignored by critics of DOE's determinations under Executive Order 12291, namely, improved avoidance of costs which are unallowable and non-reimbursable as a result of the rule. In the absence of specifics from the commenters on increased accounting costs, and given the predictable incentive effect of the rule toward improved cost avoidance, DOE believes it likely that the latter will exceed or largely offset the former.

Finally, it is possible that some potential contractors will refrain from competing for M&O contractor and subcontractor awards, but given the changes DOE has written into the rule to enable contractors to gauge their real financial exposure and to limit the effect of the rule on most subcontractors, it is not likely that there will be a significant increase in DOE costs due to lack of competition for contract or subcontract awards or a significant reduction in amounts available to carry out research and development based solely on this Interim Final Rule.

On the basis of the foregoing, DOE finds that the maximum annual effect on the economy will occur in the first year and that the net cost effects on the M&O contractors and DOE do not constitute major increases in cost. With respect to provisions of the rule which will impose liabilities over and above liabilities independently provided for under any other provision of law such as the Major Fraud Act amendments, DOE estimates that the effect on the economy during the first year will not be substantial. DOE therefore reaffirms its conclusion that today's rule is not a "major rule."

2. OMB Review

In the preamble to the RPR, DOE concluded that the rule was part of a class of procurement rules which are exempt from formal regulatory review by OMB under Executive Order 12291. Critics of that conclusion argued that the rule is not covered by the exemption or that the exemption has expired. Some commenters asked DOE to submit the rule to OMB voluntarily. Although adhering to its prior conclusions, DOE has acceded to the request of some commenters that the rule be submitted voluntarily to OMB. DOE did so informally, and OMB has concluded its review.

B. Review Under the Regulatory Flexibility Act

In the preamble to the RPR, DOE certified under the Regulatory Flexibility Act (Pub. L. 96–354) that the rule will not have a significant economic impact on a substantial number of small entities and said that no regulatory flexibility analysis would be prepared. Some of the comments criticized DOE's determinations under the Regulatory Flexibility Act without much, if any thing, in the way of specifics. In crafting today's rule, DOE has taken into account comments arguing that the RPR would adversely affect small businesses. The RPR, as revised and issued today as an Interim Final Rule, will have even less effect on small businesses than the RPR published for public comment on August 10, 1990. In fact, Small Businesses and Small Disadvantaged Businesses are totally exempt from today's Interim Final Rule, including the Avoidable Costs and insurance provisions.

C. Review Under the Paperwork Reduction Act

In the preamble to the RPR, DOE concluded that there was no need for OMB clearance under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501, *et seq.*). Some of the comments criticized this conclusion on the ground that there would be substantial new recordkeeping burdens as a result of the rule. The comments argued that these alleged burdens should lead DOE to conclude that OMB clearance must or should be sought under that Act.

DOE is not persuaded that there will be substantial new recordkeeping burdens because the comments suggesting that there would be such burdens are purely conclusory. More importantly, today's rule does not contain new "information collection" requirements, and the criteria for paperwork reduction reviews are specifically targeted at reporting requirements which constitute "information collections." It is therefore neither necessary as a matter of law nor appropriate as a matter of policy to submit the rule to OMB for paperwork reduction clearance.

D. Review Under the National Environmental Policy Act

It has been and continues to be DOE's policy that contractors comply with all applicable environmental requirements. DOE anticipates that the DEAR amendments adopted in this Interim Final Rule will act to encourage diligence in fulfilling this commitment. However, it is not possible at this time to speculate concerning specific actions, if any, which may be taken in response to the rule, or whether they would have significant environmental effects. Therefore, no meaningful NEPA analysis can be prepared in conjunction with promulgation of this rule. DOE will continue to examine individual actions to determine the appropriate level of NEPA review.

E. Review Under Executive Order 12612

Executive Order 12612, 52 FR 41285 (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 national 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.

Today's Interim Final Rule will revise certain policy and procedural requirements. However, DOE has determined that none of the revisions will have a substantial direct effect on the institutional interests or traditional functions of States.

V. Additional Opportunity for Public Comment

As the "Background" description indicates, there have been three opportunities for written public comment and one opportunity for a public hearing on the issues in this rulemaking. The record is fully developed and sufficient to support issuance of a final rule.

Nevertheless, DOE has issued today's rule as an interim final rule in order to provide a limited opportunity (60 days) for additional public comment on changes which have been made since publication of the RPR. DOE is providing this opportunity for public reaction on the entire rule, particularly the balance which has been struck in the rule between risk and reward. After evaluating any comments which are received on that issue, DOE will decide whether a response is warranted.

Members of the public are requested not to use this opportunity to restate arguments or raise issues they have already presented, or could have presented, in prior comments. DOE will not respond to such comments. DOE may respond to comments which offer significant, new and previously unavailable information, or which raise significant new arguments or issues in light of changes DOE has made to the proposed rule since the RPR.

No further regulatory action is essential to the legal effectiveness of the Rule, which will become effective March 11, 1991. Absent further action by DOE, this interim rule will become final May 8, 1991.

List of Subjects in 48 CFR Parts 915, 950 and 970

Government contracts, DOE management and operating contracts.

Issued in Washington, DC on January 24, 1991.

Silas B. Fisher,

Director, Office of Procurement, Assistance and Program Management.

PART 915—CONTRACTING BY NEGOTIATION

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

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

2. Section 915.971–5 is amended by revising paragraphs (d), (f), and (h) to read as follows:

915.971–5. Fee 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
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		*0.52

*0.52 percent excess over $500 million.

CONSTRUCTION CONTRACTS SCHEDULE—Continued

Fee base (dollars)	Fee (dollars)	Fee (percent)	Incr (percent)
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	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		*0.52

*0.52 percent excess over $500 million.

* * * * *

(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	1.68	1.29
100,000,000	1,759,000	1.76	
Over $100 million	1,759,000		*1.29

*1.29 percent excee over $100 million.

* * * * *

(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		*0.12

*0.12 percent excess over $300 million.

3. The introductory text to section 915.972(a) is revised to read as follows:

915.972 Special consideration for cost-plus-award-fee contracts.

(a) When a contract is to be awarded on a cost-plus-award-fee basis in accordance with section 916.404–2, several special considerations are appropriate. Fee objectives for management and operating contracts, even those using the Construction or Construction Management fee schedules from section 915.971–5, shall be developed pursuant to the procedures set forth in section 970.1509–8. Fee objectives for other cost-plus-award-fee contracts shall be developed as follows:

* * * * *

PART 950—EXTRAORDINARY CONTRACTUAL ACTIONS

4. The authority citation for part 950 continues to read as follows:

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

5. In section 950.7011 paragraph (c) is revised to read as follows:

950.7011 General contract authority Indemnity.

* * * * *

(c)(1) While it is normally DOE policy to require its non-M&O contractors to obtain insurance coverage against public liability for nonnuclear risks, there may be circumstances in which a contractual indemnity may be warranted to protect a DOE non-M&O contractor against liability for uninsured nonnuclear risks.

(2) It is DOE policy that, except to the extent required by the direction of the Contracting Officer and in the case of Small Businesses and Small Disadvantaged Businesses, M&O contractors shall not obtain reimbursement for bonds or insurance to cover otherwise unallowable Avoidable Costs. M&O contractors may only be reimbursed for insurance against nonnuclear risk above the liability

ceiling provided in section 970.5204–55, subject to the approval of the Contracting Officer.

PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS

6. 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), sec. 201 of the Federal Civilian Employee and Contractor Travel Expenses Act of 1985 (41 U.S.C. 420) and sec. 1534 of the Department of Defense Authorization Act, 1986, Public Law 99–145 (42 U.S.C. 7256a), as amended.

7. Section 970–1509–5 paragraph (b) is revised to read as follows:

970.1509–5. Limitations.

* * * * *

(b) The applicable schedules and maximum fees are:

PRODUCTION EFFORTS

Fee base (dollars)	Fee (dollars)	Fee (percent)	Incr (percent)
Up to $1 mil			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		*0.41

*0.41 percent 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		*0.46

*0.46 percent excess over $500 million.

* * * * *

8. In section 970.1509–8 paragraphs (b), (c), and (d) are revised to read as follows:

970.1509–8 Special considerations—award fee.

* * * * *

(b) In management and operating contracts, the basic fee portion of the fee negotiation objective shall be established equal to the otherwise applicable fixed fee established in accordance with 970.1509–4. 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 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 (d) 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 subparagraph (d) 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 following 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 as set forth below:
Defense Facility—A
Defense Facility—B
Enrichment Plant
Miscellaneous

Individual DOE facilities which are operated under award fee arrangements will be assiged to each category by the Procurement Executive, whose designee shall distribute a list of such assignments to all Heads of Contracting Activities (HCAs). In assigning facilities to categories, the Procurement Executive will consider the factors listed 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.

In considering the above 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):

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 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 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
95 Good	94.0
94 Good	88.0
93 Good	82.0
92 Good	75.0
91 Good	68.0
90 Good	60.0
89 Good	51.0
88 Good	43.0
87 Good	36.0
86 Good	30.0
85 Satisfactory	25.0
84 Satisfactory	20.0
83 Satisfactory	15.0
82 Satisfactory	10.0
81 Satisfactory	5.0
80 Satisfactory	0.0
79 Satisfactory	0.0
78 Satisfactory	0.0
77 Satisfactory	0.0
76 Satisfactory	0.0
75 Marginal	5.0
74 Marginal	10.0
73 Marginal	15.0
72 Marginal	20.0
71 Marginal	25.0
70 Marginal	30.0
69 Marginal	35.0
68 Marginal	40.0
67 Marginal	45.0
66 Marginal	50.0
Below 65 Unsatisfactory	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 42.0% 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 fee 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.

9. Section 970.3102–21 is revised as follows:

970.3102–21 Fines and penalties.

(a) It is DOE policy to reimburse nonprofit management and operating contractors for fines and penalties that are incurred in the performance of their contracts. Any such reimbursement for fines and penalties incurred under the contract will be made as long as such fines and penalties are not the result of the willful misconduct or lack of good faith on the part of the contractor's officers, directors or supervising representatives.

(b)(1) It is DOE policy not to reimburse profit making management and operating contractors for fines and penalties that are incurred in the performance of their contracts where such fines or penalties are incurred as a result of contractor negligence or willful misconduct where the breach of the contractor's legal duty giving rise to such a fine or penalty involves an area of responsibility clearly placed on the contractor.

(2) For purposes of this section the phrase "fines and penalties" means a sum of money the payment of which Federal or state law or regulation exacts as punishment for or deterrence against doing some act which is prohibited, or not doing some act which is required by law or regulation. The assessment is imposed by statute or regulation as a consequence of the commission of an offense or act of omission, and the payment is intended as a punishment or deterrent. The fine or penalty may be imposed in a civil enforcement action or result from a criminal conviction. A fine or penalty shall not be construed as an assessment which is imposed as damages on the basis of civil litigation or which is imposed on the basis of strict liability, that is, without regard to the fault or negligence of the party involved.

(3) In assessing any claim for payment by the contractor for a fine or penalty as

an allowable cost under the contract the Contracting Officer shall, among other factors, consider the following:

(i) Whether the act which resulted in the fine or penalty was a result of negligence, wrongdoing, or strict liability on the part of personnel of the contractor or a subcontractor, at any tier.

(ii) Whether the contractor was newly selected to manage the facility and whether it had sufficient time to discern the problem and report it prior to the imposition of the fine or penalty.

(iii) Whether the assessment of the fine or penalty was due solely to negligence or wrongdoing of personnel of the contractors or its subcontractors or whether DOE contributed to any such action or inaction.

These are only some of the factors, along with the factors specified in section 970.3102–22, to be considered and do not represent all factors which may be pertinent in each case. Criminal fines and penalties which represent the judicial determination beyond a reasonable doubt that the contractor acted wrongfully are generally not considered to be an allowable cost and will not be considered by the Contracting Officer for reimbursement except under extraordinary circumstances. Any final decision to reimburse a criminal fine or penalty shall be made by the Procurement Executive and shall only be made with the concurrence of the General Counsel.

(c) It is DOE's policy not to reimburse any profit making contractor for civil or criminal penalties assessed under the Price-Anderson Amendments Act of 1988, Public Law 100–408, 42 U.S.C. 2273, 2282, and for the costs of litigation relating to such assessments, except as may be specifically provided in regulations implementing those civil and criminal penalties provisions.

(d) For purposes of this section, a nonprofit contractor or subcontractor is one which receives no fee and is considered nonprofit under the laws of the jurisdiction where it is incorporated. A subsidiary may be considered a nonprofit contractor or subcontractor if all entities above it in the corporate structure are considered nonprofit under the laws of the incorporating jurisdiction. A Contracting Officer may also treat as nonprofit a contractor whose particular corporate organization or circumstances, in the judgment of the Contracting Officer, warrants such consideration, provided such contractor is a nonprofit organization as defined at 35 U.S.C. 201(i). All other management and operating contractors are considered profit making.

10. Section 970.3102–22 is added to read as follows:

970.3102–22 Avoidable costs.

In determining whether a cost is an "Avoidable Cost" as specified in sections 970.5204–13(e)(12) and (e)(17)(iv), 970.5204–14(e)(10) and (e)(15)(iv), 970.5204–21(j) and 970.5204–31, the Contracting Officer, shall, among other factors, consider:

(a) Whether the contractor's conduct resulted from compliance with written direction from the Contracting Officer.

(b) Whether the contractor's conduct occurred after specific instances of noncompliance were reported by the contractor to the Contracting Officer and necessary funding or authorization to correct the conditions were unavailable.

(c) Whether the act or failure to act resulted from a violation of a formal DOE regulation or order. The Contracting Officer will also assess the completeness, efficiency and effectiveness of the contractor's internal control systems and procedures (e.g., operational, maintenance, security), as well as determine whether, in the case of damage to or loss of Government property, the contractor has faithfully implemented the DOE-approved property management system, whether proper training and instruction were provided to employees, whether all reasonable precautions were taken, whether problems were promptly identified and reported to the DOE and whether adequate corrective actions were taken to preclude future occurrences.

(d) Whether the contractor voluntarily informed the Contracting Officer in a timely good faith manner of the condition or activity whether later resulted in the incurrence of Avoidable Costs. The period of time that the contractor was aware or should have been aware of the problem prior to reporting it is also pertinent.

(e) Whether the contractor was newly selected to manage the facility and whether it had sufficient time to discern the problem and report it prior to the incurrence of Avoidable Costs.

11. Subsection 970.5204–13 is amended by revising paragraph (e)(12), adding a note followed by new paragraph (e)(17)(iv) and a note followed by new paragraph (e)(36) as follows:

970.5204–13 Allowable costs and fixed fee (Management and Operating contracts).

* * * * *

(e) * * *

(12) *Fines and penalties.*

Note 1: In contracts with nonprofit contractors, use the following paragraph:

Fines and penalties, including assessed interest, resulting from violations of, or failure of the contractor to comply with, Federal, state, local or foreign laws and regulations, except when incurred as a result of compliance with the scope of work, specific terms and conditions, or other provisions of the contract or written instructions from the contracting officer authorizing in advance such payments. Civil or criminal penalties assessed under the Price-Anderson Amendments Act of 1988, 42 U.S.C. 2273, 2282, and the costs of litigation resulting from such assessments, are unallowable except as may be specifically provided in regulations implementing those civil and criminal penalty provisions.

Note 2: In contracts with profit making contractors, use the following paragraph:

Fines and penalties, including assessed interest and cost of litigation, that are incurred as a result of contractor or subcontractor negligence or willful misconduct where the breach of the legal duty of the contractor or its subcontractor giving rise to such fine or penalty involves an area of responsibility clearly placed on the contractor or the subcontractor. Civil or criminal penalties assessed under the Price-Anderson Amendments Act of 1988, 42 U.S.C. 2273, 2282, and the costs of litigation resulting from such assessments are also unallowable except as may be specifically provided in regulations implementing those civil or criminal penalty provisions.

* * * * *

(17) * * *

Note: In contracts with profit making contractors, add the following paragraph:

(iv) Or, are direct costs which are avoidable that are incurred by the contractor or subcontractor, at any tier or level, without any fault of DOE, exclusively as a result of the negligence or willful misconduct on the part of any of the contractor's or its subcontractor's personnel, at any tier or level, in performing work under the contract.

(A) Such direct costs may include, for example, additional programmatic expenses for research and development or production activities, and third party claims against the contractor, but shall not include scrap, waste and other routine damages or losses which occur as part of the cost of doing business and are reasonably anticipated and shall not include consequential damages.

(B) Costs of litigation incurred by the contractor or subcontractor in bringing or defending claims relating to these costs are also unallowable.

* * * * *

(35) * * *

Note: In contracts with profit making contractors, add the following clauses:

(36)(i) The costs of bonds and insurance, notwithstanding any other provision of this contract, are unallowable to the extent they are incurred to protect and indemnify the contractor against otherwise unallowable Avoidable Costs, such as fines and penalties, third party claims, negligently or willfully caused damage to or loss of Government property and theft or unauthorized use of government property, except and only to the

extent that such insurance or bond is required by the specific written direction of the Contracting Officer.

(ii) The unallowable costs provisions of subparagraph (e)(17)(iv) dealing with avoidable costs and subparagraph (i) of this clause, the profit making provision of the clause set forth at section 970.5204–13(e)(12), the clause set forth at section 970.5204–21(j), and the profit making provision of the clause set forth at section 970.5204–31 are not applicable to Small Businesses and Small Disadvantaged Businesses as defined in the clause of this contract entitled "Utilization of Small Business Concerns and Small Disadvantaged Business Concerns." All costs resulting from the actions or inactions of Small Businesses and Small Disadvantaged Businesses which would otherwise be determined to be Avoidable Costs are allowable costs to the contractor.

12. Section 970.5204–14(e) is amended by revising paragraph (e)(10), and by adding a note followed by new paragraph (e)(15)(iv) and a note followed by new paragraph (e)(34) as follows:

970.5204–14 Allowable costs and fixed fee (suport contracts).

* * * * *

(e) * * *

(10) Fines and penalties.

Note 1: In contracts with nonprofit contractors, use the following clauses:

Fines and penalties, including assessed interest, resulting from violations of, or failure of the contractor to comply with Federal, state, local or foreign laws and regulations, except when incurred as a result of compliance with the scope of work, specific terms and conditions, or other provisions of the contract or written instructions from the contracting officer authorizing in advance such payments. Civil or criminal penalties assessed under the Price-Anderson Amendments Act of 1988, 42 U.S.C. 2273, 2282, and the costs of litigation resulting from such assessments, are also unallowable except as may be specifically provided in regulations implementing those civil and criminal penalty provisions.

Note 2: In contracts with profit making contractors, use the following clause:

Fines and penalties, including assessed interest and costs of litigation, that are incurred as a result of contractor or subcontractor negligence or willful misconduct where the breach of the legal duty of the contractor or subcontractor giving rise to such fine or penalty involves an area of responsibility clearly placed on the contractor or subcontractor. Civil or criminal penalties assessed under the Price-Anderson Amendments Act of 1988, 42 U.S.C. 2273, 2282, and the costs of litigation resulting from such assessments are unallowable except as may be specifically provided in regulations implementing those civil or criminal penalty provisions.

* * * * *

(15) * * *

Note: In contracts with profit making contractors, add the following paragraph:

(iv) Or, are direct costs which are avoidable that are incurred by the contractor or subcontractor, at any tier or level, without any fault of DOE, exclusively as a result of the negligence or willful misconduct on the part of any of the contractor's or its subcontractor's personnel, at any tier or level, in performing work under the contract.

(A) Such direct costs may include, for example, additional programmatic expenses for research and development or production activities, and third party claims against the contractor, but shall not include scrap, waste, and other routine damages or losses which occur as part of the cost of doing business and are reasonably anticipated and shall not include consequential damages.

(B) Costs of litigation incurred by the contractor or subcontractor in bringing or defending claims relating to these costs are also unallowable.

* * * * *

(34) * * *

Note: In contracts with profit making contractors, add the following clauses:

(i) Notwithstanding any other provision of this contract, the costs of bonds and insurance are unallowable to the extent they are incurred to protect and indemnify the contractor against otherwise unallowable Avoidable Costs, such as fines and penalties, third party claims, negligently or willfully caused damage to or loss of government property and theft or unauthorized use of government property, except and only to the extent such insurance or bond is required by the specific written direction of the Contracting Officer.

(ii) The unallowable costs provisions of subparagraph (e)(15)(iv) dealing with Avoidable Costs and subparagraph (i) of this clause, the profit making provision of the clause set forth at 970.5204–14(e)(10), the clause set forth at 970.5204–21(j), and the profit making provision of the clause set forth at 970.5204–31 are not applicable to Small Businesses and Small Disadvantaged Businesses as defined in the clause of this contract entitled "Utilization of Small Business Concerns and Small Disadvantaged Business Concerns." All costs resulting from the actions or inactions of Small Business and Small Disadvantaged Businesses which would otherwise be determined to be Avoidable Costs are allowable costs to the contractor.

13. Section 970.5204–16 is amended by revising the heading of the clause and by revising Note 2 to read as follows:

970.5204–16 Payments and advances.

Payments and Advances (January, 1991)

* * * * *

Note 2: *When award-fee provisions in this clause are used, in lieu of paragraph (a), use the following text:*

(a) Payment of Basic Fee and Award Fee. The basic fee shall become due and payable in equal monthly installments, *provided*, however, that the contractor shall refund to the Government a portion of the basic fee if its performance during an evaluation period falls below the level of acceptable performance, i.e, a performance score of 75 or less. Such refund shall be at the rate of 5% of the basic fee allocated to the evaluation period in question for each performance point below 76, as assigned by the Government Fee Determination Official (FDO), provided that no more than 50% of the basic fee shall be required to be refunded under this provision. Award fees earned shall become due and payable following the issuance by the FDO of a Determination of Award Fee Earned, in accordance with the clause of this contract entitled "Award Fee."

* * * * *

14. Section 970.5204–18 is added as follows:

970.5204–18 Definition of Nonprofit and Profit Making Management and Operating contractors.

For purposes of subsections 970.5204–13(e)(12) and (e)(17)(iv), 970.5204–14(e)(10) and (e)(15)(iv), 970.5204–21(j) and 970.5204–31, a nonprofit management and operating contractor is one which receives no fee and is considered nonprofit under the laws of the jurisdiction where it is incorporated. A subsidiary may be a nonprofit contractor if all entities above it in the corporate structure are considered nonprofit under the laws of the incorporating jurisdiction. A Contracting Officer may also treat as nonprofit a contractor whose particular corporate organization or circumstances, in the judgment of the Contracting Officer, warrants such consideration, provided such contractor is a nonprofit organization as defined at 35 U.S.C. 201(i). All other management and operating contractors are considered profit making.

15. Section 970.5204–21 is amended by adding a new paragraph (j):

970.5204–21 Property.

* * * * *

(j) *Additional responsibility for risk of loss of government property.*

The following paragraph (j) shall be added in contracts with profit making contractors:

Notwithstanding the limitation of liability described in paragraph (f) above, the contractor will also be liable for direct costs and expenses resulting from damage to Government property as a direct result of contractor or subcontractor negligence or willful misconduct where the costs which are to be borne by the contractor are those incurred in effecting the repairs to, or replacement of, Government property. These Avoidable Costs do not include scrap, waste and other routine damages or losses which occur as part of the cost of doing business and are reasonably anticipated. Costs which shall not be reimbursable are the result of circumstances: (1) Clearly within the contractor's or subcontractor's sole and exclusive control and (2) resulting from acts or omissions of the contractor or subcontractor, in which the exercise of reasonable care would have avoided the loss or damage. In the event that such direct costs and expenses resulting from damage to Government property are also in part caused by third parties, other than DOE, such costs and expenses will not be reimbursed by DOE.

The allocation of financial responsibility between the contractor and such third party should be determined by the parties involved.

In addition, the contractor shall be liable for direct damage to, or loss of, Government property stemming from theft, embezzlement, unauthorized use, or any other ultra vires activity by any contractor or subcontractor personnel at any level. Under these circumstances the contractor shall be required to bear the cost of repairing or replacing the damaged or lost government property.

For purposes of this clause, negligence is the failure to exercise that standard of care which a reasonable and prudent person would exercise under the same or similar circumstances in an identical or similar environment.

16. Section 970.5204–31 is revised to read as follows:

970.5204–31 Litigation and claims.

(a) *Initiation of litigation.* The contractor may, with the prior written authorization of the Contracting Officer, and shall, upon the request of the Government, initiate litigation against third parties, including proceedings before administrative agencies, in connection with this contract. The contractor shall proceed with such litigation in good faith and as directed from time to time by the Contracting Officer.

(b) *Defense and settlement of claims.*

Note 1: In contracts with nonprofit contractors, add the following clause:

The contractor shall give the Contracting Officer immediate notice in writing (1) Of any action, including any proceeding before an administrative agency, filed against the contractor arising out of the performance of this contract, and (2) of any claim against the contractor, the cost and expense of which is allowable under the clause entitled "Allowable Costs and Fixed-Fee." Except as otherwise directed by the Contracting Officer, in writing, the contractor shall furnish immediately to the Contracting Officer copies of all pertinent papers received by the contractor with respect to such action or claim. To the extent not in conflict with any applicable policy of insurance, the contractor may, with the Contracting Officer's approval, settle any such action or claim; shall effect, at the Contracting Officer's request, an assignment and subrogation in favor of the Government of all of the contractor's rights and claims (except those against the Government) arising out of such action or claim against the contractor; and, if required by the Contracting Officer, shall authorize representatives of the Government to settle or defend any such action or claim and to represent the contractor in, or to take charge of, any action. If the settlement or defense of an action or claim against the contractor is undertaken by the Government, the contractor shall furnish all reasonable assistance in effecting a settlement or asserting a defense. Where an action against the contractor is not covered by a policy of insurance, the contractor shall, with the approval of the Contracting Officer, proceed with the defense of the action in good faith and in such event the defense of the action shall be at the expense of the Government, *provided, however,* That the Government shall not be liable for such expense to the extent that it would have been compensated for by insurance which was required by law or by the written direction of the Contracting Officer, but which the contractor failed to secure or maintain through its own fault or negligence.

Note 2: In contracts with profit making contractors, add the following clause:

(1) The contractor shall give the Contracting Officer immediate notice in writing of any action, including any proceeding before an administrative agency, filed against the contractor arising out of the performance of this contract, and of any claim against the contractor the costs and expense of which the contractor would propose to submit as a claim for allowable costs under the terms of the clause entitled "Allowable Costs and Fixed-Fee."

(2) Except to the extent prohibited by the Major Fraud Act of 1988, 41 U.S.C. 256, the Contracting Officer may choose to instruct the contractor to proceed in good faith with the defense of the claim subject to the direction of the Government. Except as otherwise directed by the Contracting Officer in writing, the contractor shall furnish immediately to the Contracting Officer copies of all pertinent papers received by the contractor with respect to such action or claim. The contractor may, with the Contracting Officer's approval, settle any such action or claim. The contractor shall effect, at the Contracting Officer's request, an assignment and subrogation in favor of the Government of all of the contractor's rights and claims (except those against the Government) arising out of or related to such action or claim against the contractor, and, if required by the Contracting Officer, shall authorize representatives of the Government to settle or defend any such action or claim and to represent the contractor in, or to take charge of, any action. If the settlement or defense of an action or claim against the contractor is undertaken by the Government, the contractor shall furnish all reasonable assistance in effecting a settlement or asserting a defense. If an adverse judgment is entered against the contractor in a case where the Contracting Officer has approved and/or directed the defense as provided in this paragraph, the costs of litigation and liability for any resulting claim or damages shall be at the expense of the Government, *provided, however,* that the Government shall not be liable for such expenses to the extent that they would have been compensated for by insurance which was required by law or by the written direction of the Contracting Officer, but which the contractor failed to secure or maintain through its own fault or negligence.

(3) Should the Contracting Officer not choose to approve or direct the defense of the litigation as provided in paragraph (2), the Government has no liability for the costs of litigation except as provided in paragraphs (4) and (5). The contractor may request that the Contracting Officer assume direction of the litigation at any point when new facts on the matter would so warrant; *provided, however,* That the Contracting Officer may assume direction of the litigation or direct settlement, without a request from the contractor, at any time during the litigation process when the Contracting Officer determines that it is in the best interest of the Government to do so, in which case the liability for any resulting claims or damages shall be at the expense of the Government.

(4) The contractor must inform the Contracting Officer of any proposed settlement agreement. The notification shall be supported by all information available to the contractor which is pertinent to the settlement.

(i) Except to the extent prohibited by the Major Fraud Act of 1988, 41 U.S.C. 256, the Contracting Officer has the option of accepting the settlement reached by the contractor. If the settlement is accepted, the Contracting Officer and the contractor shall negotiate the Government's share of the settlement and litigation expenses. Any agreement reached at this point shall be under the authority, and subject to the restrictions, of FAR 33.210.

(ii) If the contractor proceeds without, or otherwise does not obtain, Contracting Officer approval of the settlement agreement, the cost of the agreement and all related costs of litigation shall be at the contractor's own risk and expense.

(5)(i) If the contractor has suffered a final judgment, a claim for reimbursement of the costs of litigation or any resulting damages or both may be made to the Contracting Officer. Except to the extent prohibited by the Major Fraud Act of 1988, 41 U.S.C. 256, the Contracting Officer is authorized, in his discretion, to negotiate a settlement with the contractor.

(ii) Reimbursement of costs of litigation and judgments under subsection (5)(i) may be paid by the Government notwithstanding the prohibitions contained in subsections 970.5204–13(e) (12) and (17)(iv), subsections 970.5204–14(e) (10) and (15)(iv) and section 970.5204–21(j) and section 970.5204–31.

(6) *Certification of costs.* The Contracting Officer may not accept any settlement or otherwise authorize reimbursement of costs and/or damages where the contractor has not certified, in the form required by the clause of this contract entitled "Disputes," the facts known by the contractor, at the time the matter is submitted for review, which form the basis upon which the contractor seeks reimbursement of these costs.

(c) *Costs of Litigation.*

"Costs of Litigation" as used herein, includes, but are not limited to, administrative and clerical expenses; the cost of legal services, whether performed by in-house or private counsel; the costs of the services of accountants, consultants, or others retained by the contractor to assist it; all elements of compensation, related costs, and expenses of employees, officers, and directors; and any similar costs incurred before, during, and after commencement of a judicial or administrative proceeding which bear direct and substantial relationship to the proceedings.

17. Section 970.5204–32 is revised to read as follows:

970.5204-32 Required bond and insurance-exclusive of Government property.

Note 1: In contracts with nonprofit contractors use the following clause:

The contractor shall procure and maintain such bonds and insurance as are required by law or by the written direction of the Contracting Officer. The terms and conditions of such bonds and insurance shall conform to the directions of the Contracting Officer. In view of the provisions of section 970.5204-21, "Property," the contractor shall not procure or maintain for its own protection any insurance covering loss or destruction of, or damage to, Government property.

Note 2: In contracts with profit making contractors use the following clause:

The contractor shall procure and maintain such bonds and insurance as are required by law or by the written direction of the Contracting Officer. The terms and conditions of any such bonds and insurance shall conform to the directions of the Contracting Officer. In view of the provisions of 970.5204-21, "Property," the contractor may, at its own expense and not as an allowable cost, procure for its own protection insurance covering loss or destruction of, or damage to, Government property to compensate the contractor for any unallowable or nonreimbursable costs incurred in connection with such property.

18. Sections 970.5204-55 and 970.5204-56 are added as follows:

970.5204-55 Ceiling on certain liabilities for profit making contractors.

(a) The contractor's potential financial obligations under the unallowable Avoidable Cost provisions contained in 970.5204-13(e)(12) and (e)(17)(iv), 970.5204-14(e)(10) and (e)(15)(iv), 970.5204-21(j), and 970.5204-31, (including (1) Noncriminal fines and penalties, (2) losses which are avoidable losses or other third party claims including the costs of defense of such litigation, (3) additional programmatic expenses which are Avoidable Costs, and (4) the costs of contractor responsibility for lost or damaged Government property) shall be limited to the amount of the actual award fee earned and the actual basic fee earned under the contract (or the amount of 6-months of fixed fee in the case of cost-plus-fixed fee contracts) in the evaluation period when the event or events which led to the imposition of the incurrence of costs or liabilities or the imposition of fines and penalties occurred. This limitation or ceiling does not apply to any other categories of unallowable costs, nor shall any other unallowable costs be utilized in the calculation of that ceiling for any evaluation period. In the case of continuing activities of the contractor which occur over a number of evaluation periods and result in costs or liabilities described above, the potential financial obligation of the contractor shall be limited to the amount of the actual award fee earned and the actual basic fee earned in the single evaluation period when the incident(s) or event(s) giving rise to the contractor's disallowed cost or expense took place. If it is not possible to relate or reasonably allocate particular activities to individual evaluation periods, the financial obligation of the contractor shall be limited to the amount of the actual award fee earned and actual basic fee earned in the evaluation period when the amount of such nonreimbursable costs or liabilities were finally determined. If the determination as to which award fee period(s) the incident or activity occurred resulting in the unallowable avoidable costs is made following the expiration of the contract, or the contractor is otherwise replaced, the actual award fee earned and the actual basic fee earned for the last evaluation period that the contract was in effect shall be utilized after deducting disallowed Avoidable Costs that were previously charged to the contractor during that period.

(b)(1) The financial obligations of a subcontractor, at any tier or level, under the unallowable Avoidable Cost provisions contained in 970.5204-13(e)(12) and (e)(17)(iv), 970.5204-14(e)(10) and (e)(15)(iv), 970.5204-21(j), and 970.5204-31, (including (i) Noncriminal fines and penalties, (ii) losses which are avoidable losses or other third party claims including the costs of defense of such litigation, (iii) additional programmatic expenses which are Avoidable Costs, and (iv) the costs of subcontractor responsibility for lost or damaged Government property) shall be limited to the cumulative amount of the fee or profit actually earned under the contract, whether cost-plus or fixed-price, during the six-month contractor evaluation period when the event or events which were caused by the subcontractor led to the incurrence of costs or liabilities or the imposition of fines and penalties occurred, *provided, however,* if the Contracting Officer cannot reasonably determine the amount of profit earned, the amount of profit earned shall be deemed to be 15% of the subcontract price, prorated to the applicable six-month award fee period, which shall be the liability cap for such period. This limitation or ceiling does not apply to any other categories of unallowable costs. In the case of continuing activities of the subcontractor which occur over a number of contract evaluation periods and result in costs or liabilities described above, the potential financial obligation of the subcontractor shall be limited to the amount of the fee or profit earned in the single contractor evaluation period when the incident(s) or event(s) giving rise to the subcontractor's disallowed cost or expense took place. If it is not possible to relate or reasonably allocate particular activities to individual contractor evaluation periods, the financial obligation of the subcontractor shall be limited to the amount of the actual fee or profit earned, or the percentage of the contract price designated by the Contracting Officer during the evaluation period when the amount of such nonreimbursable costs or liabilities were finally determined. If the determination as to which award fee period(s) the incident or activity occurred resulting in the unallowable avoidable costs is made following the expiration of the contract, or the subcontractor is otherwise replaced, the actual fee or profit earned, or the percentage of the contract price designated by the Contracting Officer for the last contractor evaluation period that the subcontract was in effect shall be utilized, after deducting disallowed Avoidable Costs that were previously charged to the subcontractor during that period.

(2) Where the amount of fee or profit earned by a subcontractor during the contractor's evaluation period is not sufficient to pay in full all Avoidable Costs incurred during that period, the excess amount of these costs will be reimbursed or otherwise treated as allowable costs by DOE; *provided, however,* That the M&O contractor shall be responsible for the payment of such Avoidable Costs in excess of the subcontractor's ceiling if such costs and/or damages were caused in whole or in part by the negligence of the M&O contractor; *provided, further,* That in any case the M&O contractor's obligation to pay Avoidable Costs incurred by the negligence of the subcontractor is limited to the extent that (i) The subcontractor's profit for that evaluation period was insufficient to pay the Avoidable Costs in full and (ii) the contractor's ceiling on Avoidable Costs liabilities specified in this subsection and in subparagraph (a) of this section has not been reached for that evaluation period. The contractor shall not require a subcontractor, at any tier or level, to provide financial guarantees for the payment of Avoidable Costs beyond the profit or fee earned by the subcontractor in the relevant contractor's six-month evaluation period.

(3) Appropriate provisions to implement the subcontractor liability ceiling contained in this subparagraph (b) shall be inserted into every subcontract, at any tier or level, entered into with an M&O contractor executed after the effective date of these regulations, *provided, however,* That such subcontract shall provide that to the extent that Avoidable Costs incurred by the negligence of the subcontractor are reimbursed by the Government to the M&O contractor, the M&O contractor shall reimburse its subcontractor for all such costs to the extent that such subcontractor has already paid, or incurred without reimbursement, such costs.

(c) The contractor shall be responsible for all costs and liabilities described in paragraph (a) and (b) of this section, up to the amount of the actual award fee earned and the actual basic fee earned in the pertinent evaluation period. The contractor agrees to provide, in such form and amount as shall be satisfactory to the Contracting Officer, a financial guarantee to assure that the contractor will have sufficient resources to satisfy all costs and liabilities up to the amount of the actual award fee earned and the actual basic fee earned for a period based upon the highest amount of fee received over the last four evaluation periods. Alternatively, at the election of the contractor, at the end of each evaluation period the Contracting Officer may retain a percentage of the award fee and basic fee as determined to be sufficient by the Contracting Officer to protect the interests of the Government. With respect to new contracts or contracts that have been in effect for less than two years (or four six-

month evaluation periods), the guarantee shall be in an amount that the Contracting Officer determines to be in the best interest of the Government, but not to exceed the amount of award fee and basic fee available for the upcoming evaluation period. The financial responsibility of the contractor and the guarantee or retainage of the contractor and the guarantee or retainage shall remain in effect for up to one year after the termination or expiration of the contract. Any costs or liabilities to third parties beyond the limitations described above would be reimbursed subject to the other provisions of the contract governing cost reimbursement. The contractor's potential financial risk for proceedings costs under the Major Fraud Act of 1988, 41 U.S.C. 256, or the civil or criminal penalties provisions of the Price-Anderson Amendments Act of 1988, 42 U.S.C. 2273, 2282, will not be limited except as provided in regulations implementing those provisions.

970.5204-56 Determining avoidable costs.

(a)(1) Avoidable Costs are those costs specified in 970.5204-13(e)(12) and (e)(17)(iv), 970.5204-14(e)(10) and (e)(15)(iv), 970.5204-21(j), and 970.5204-31 which are incurred as the result of negligence or willful misconduct by the contractor or its subcontractors, in carrying out the terms and conditions of the contract when:

(i) The work is clearly within the sole and exclusive control of the contractor or subcontractor; and

(ii) The increased costs or expenses result from the actions or inactions of the contractor or subcontractor; and

(iii) DOE is not responsible in any way for the act or omission which resulted in the additional costs.

(2) The cost and expenses of litigation, settlements, and related litigation costs (including attorneys fees), fines, penalties, judgments and liabilities resulting from administrative findings, and damage to, or loss of, Government property when carrying out well understood non-experimental work and damage to, or loss of, Government property as the result of theft, embezzlement or other unauthorized use are unallowable to the extent that the acts or omissions resulting in these costs are Avoidable Costs as defined in paragraph (1) above. Such costs are unallowable except as specifically authorized by the Contracting Officer and within the scope of work in the contract.

(b) For purposes of this section, negligence is the failure to exercise that standard of care which a reasonable and prudent person would exercise under the same or similar circumstances in an identical or similar environment.

(c) Avoidable Costs shall not include the cost of losses or damages incurred by the contractor as a result of the acts or omissions of employees who, during the phase-in period of a new contract, the contractor is required to employ as a result of assuming the management of a DOE facility. The length of this phase-in period shall be — months. It shall in no event, however, exceed twelve months. The contractor is always responsible for the acts or omissions of any employee hired directly by the contractor.

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