

Congress and to the Comptroller General of the United States. Section 808 allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and public procedure is impracticable, unnecessary, or contrary to the public interest. This determination must be supported by a brief statement. 5 U.S.C. 808(2). As stated previously, EPA has made a good cause finding to forego public notice and comment procedures. Today's stay eliminates a numeric limitation for which the record is inadequate and any opportunity for confusion. Any additional delay in correcting the calculation error would only increase the potential confusion and could require states to incorporate an incorrect numeric limitation in their construction permits. EPA sets an effective date to make the stay effective 60 days after publication in the **Federal Register**. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

#### List of Subjects in 40 CFR Part 450

Environmental protection, Construction industry, Land development, Erosion, Sediment, Stormwater, Water pollution control.

Dated: November 1, 2010.

**Lisa P. Jackson**,  
Administrator.

■ For the reasons set forth in the preamble, EPA is amending 40 CFR part 450 as follows:

#### PART 450—CONSTRUCTION AND DEVELOPMENT POINT SOURCE CATEGORY

■ 1. The authority citation for part 450 is revised to read as follows:

**Authority:** 33 U.S.C. 101, 301, 304, 306, 308, 401, 402, 501 and 510.

■ 2. Section 450.22(a) and (b) are stayed indefinitely.

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## DEPARTMENT OF ENERGY

### 48 CFR Part 970

RIN 1991-AB91

#### Acquisition Regulation: Agency Supplementary Regulations

**AGENCY:** Department of Energy.

**ACTION:** Final rule.

**SUMMARY:** The Department of Energy (DOE) is amending the Department of Energy Acquisition Regulation (DEAR) on DOE Management and Operating Contracts to make changes to conform to the Federal Acquisition Regulation (FAR), remove out-of-date coverage, and update references. Today's rule does not alter substantive rights or obligations under current law.

**DATES:** *Effective Date:* December 6, 2010.

**FOR FURTHER INFORMATION CONTACT:** Barbara Binney at (202) 287-1340 or by e-mail, [barbara.binney@hq.doe.gov](mailto:barbara.binney@hq.doe.gov).

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#### I. Background

This final rule amends the existing Department of Energy Acquisition Regulation (DEAR) Subchapter I. The purpose of this rule is to update DEAR Subchapter I—Agency Supplementary Regulations, Part 970—DOE Management and Operating Contracts to conform it to the FAR. None of today's changes are substantive or of a nature to cause any significant expense for DOE or its contractors.

#### II. Comments and Responses

DOE published a notice of proposed rulemaking on June 9, 2010 (75 FR 32719), with a public comment period ending on July 9, 2010. DOE received no comments.

DOE amends the DEAR as follows:

1. Section 970.0100 is amended to add the references for the Code of Federal Regulation (CFR) chapters 1 and 9.

2. Section 970.0103 is revised to remove "DEAR" before 970.0309 and remove "FAR" before 3.9 and add in its place "48 CFR subpart" in paragraph (a)(3).

3. Section 970.0404-2 is amended to update the DOE Order to 475.1, Counterintelligence Program.

4. Section 970.19 is amended to revise the subpart heading and the 970.1907 section heading to conform to the FAR.

5. Section 970.1907-1 is redesignated as 970.1907-4 to conform to the FAR.

6. Part 970 is revised by adding a new subpart "970.25 Foreign Acquisition" and section "970.2570 Contract clauses" which provides instructions on when to insert and how to modify the clauses at FAR 52.225-1, Buy American Act—Supplies, and FAR 52.225-9, Buy American Act—Construction Materials, in management and operating contracts.

7. Section 970.3102-05-6 paragraphs (a)(7)(i) and (ii) are amended to clarify that the contract will set forth the reimbursable costs for compensation for personal services, it removes the reference to the personnel appendix. Paragraph (p)(1) revises the reference to the FAR from the "Federal Acquisition Regulation" to "48 CFR."

8. Subpart 970.34 is amended by redesignating 970.3400 as 970.3405 and 970.3400-1 as 970.3405-2 to conform with the FAR.

9. Subpart 970.37 is revised to add the new section "970.3706 Performance-based acquisition" and "970.3706-1 General" which references 970.1100 for policy and guidance on performance-based contracting for management and operating (M&O) contracts.

10. Section 970.3770-1 is amended by adding that the use of DOE directives is prescribed in 970.0470.

11. Section 970.5204-1 is amended by revising the date of the clause and removing "DOE Order 5670.3, Counterintelligence Program" in paragraph (a) of the clause and adding in its place "DOE Order 475.1, Counterintelligence Program, or its successor".

12. Section 970.5223-3 is amended by revising the date of the provision and adding that DOE may grant an extension to the notification or implementation period if necessary as per 10 CFR 707.5 (g) in paragraph (b). This change will provide the contracting officer the authority to extend the time needed for the contractor to submit the workplace substance abuse program plan.

13. Section 970.5223–4 is amended by revising the date of the clause and revising the clause to permit the contracting officer to agree to different date beyond the 30-day notice by the contractor for the submission of the workplace substance abuse program plan. This change will provide the Contracting Officer the authority to extend the time needed for the Contractor to submit the workplace substance abuse program plan.

14. Section 970.5226–1 is amended by revising the punctuation in the last sentence of the clause.

15. Section 970.5232–3 is amended at paragraph (h)(1) to add “or subcontractor’s” after “contractor’s” and to add “and to interview any current employee regarding such transactions” after “hereunder.” Section 871 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 and section 902 of Title IX of the Recovery Act formalized the current practices permitting access to the Government Accountability Office to records and to interview current employees of contractors and subcontractors administering contracts.

16. Section 970.5235–1 is amended to update the clause to reference the clause 48 CFR 970.5217–1 in paragraph (c) since this clause applies the Work for Others Program. Also, paragraph (d) is amended to add the full title of DOE order 481.1.

17. The rule text is amended as noted in paragraph 11 and in the tables at paragraphs 20 and 21 by removing “FAR” or “DEAR” and adding “48 CFR”; removing “FAR” or “48 CFR”; adding “48 CFR”, revising the punctuation; and capitalizing Contractor, Contractor’s, and Contracting Officer.

### III. Procedural Requirements

#### A. Review Under Executive Order 12866

Today’s regulatory action has been determined not to be a “significant regulatory action” under Executive Order 12866, “Regulatory Planning and Review,” (58 FR 51735, October 4, 1993). Accordingly, this rule is not subject to review under that Executive Order by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB).

#### B. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, “Civil Justice Reform,” 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting

errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the United States Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or if it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this rule meets the relevant standards of Executive Order 12988.

#### C. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires that an agency prepare an initial regulatory flexibility analysis for any regulation for which a general notice or rulemaking is required, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities (5 U.S.C. 605(b)). This rule updates references in the DEAR that apply to public contracts and does not impose any additional requirements on small businesses. Today’s rule does not alter any substantive rights or obligations and, consequently, today’s rule will not have a significant cost or administrative impact on contractors, including small entities. On the basis of the foregoing, DOE certifies that this rule would not have a significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis for this rulemaking. DOE’s certification and supporting statement of factual basis will be provided to the Chief Counsel for Advocacy of the Small Business Administration pursuant to 5 U.S.C. 605(b).

#### D. Review Under the Paperwork Reduction Act

This final rule does not impose a collection of information requirement subject to the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Existing burdens associated with the collection of certain contractor data under the DEAR have been cleared under OMB control number 1910–4100.

#### E. Review Under the National Environmental Policy Act

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

#### F. Review Under Executive Order 13132

Executive Order 13132, 64 FR 43255 (August 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. The Executive Order requires agencies to have an accountability process to ensure meaningful and timely input by state and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations (65 FR 13735). DOE has examined today’s rule and has determined that it does not preempt State law and does not have a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

#### G. Review Under the Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) generally

requires a Federal agency to perform a written assessment of costs and benefits of any rule imposing a Federal mandate with costs to State, local or tribal governments, or to the private sector, of \$100 million or more. This rule does not impose any federal mandate on state, local or tribal governments or on the private sector.

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

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105-277), requires Federal agencies to issue a Family Policymaking Assessment for any rulemaking or policy that may affect family well-being. This rule will have no impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

*I. Review Under Executive Order 13211*

Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use, 66 FR 28355, (May 22, 2001), requires Federal agencies to prepare and submit to Office of Information and Regulatory Affairs of the Office of Management and Budget, a Statement of Energy Effects for any proposed significant energy action. A "significant energy action" is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. Today's rule is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

*J. Review Under the Treasury and General Government Appropriations Act, 2001*

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency

pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed today's rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

*K. Review Under the Small Business Regulatory Enforcement Fairness Act of 1996*

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

*L. Approval by the Office of the Secretary of Energy*

Issuance of today's rule has been approved by the Office of the Secretary.

**List of Subjects in 48 CFR Part 970**

Government procurement.

Issued in Washington, DC.

**Patrick M. Ferraro,**

*Acting Director, Office of Procurement and Assistance Management, Department of Energy.*

**Joseph F. Waddell,**

*Director, Office of Acquisition and Supply Management, National Nuclear Security Administration.*

■ For the reasons set out in the preamble, the Department of Energy amends Chapter 9 of Title 48 of the Code of Federal Regulations as set forth below.

**PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS**

■ 1. The authority citation for part 970 continues to read as follows:

**Authority:** 42 U.S.C. 2201; 2282a; 2282b; 2282c; 42 U.S.C. 7101 *et seq.*; 50 U.S.C. 2401 *et seq.*

**Subpart 970.01—Management and Operating Contract Regulatory System**

**970.0100 [Amended]**

■ 2. Section 970.0100 is amended in the first sentence, by adding, "(Chapter 1 of Title 48 Code of Federal Regulations (CFR))" after "(FAR)" and by adding "(Chapter 9 of Title 48 CFR)" after "DEAR".

**970.0103 [Amended]**

■ 3. Section 970.0103 is amended by:

■ a. Removing, in introductory paragraph (a) heading, "part" and adding in its place "Part";

■ b. Removing, in paragraph (a)(3), "DEAR"; and

■ c. Removing, in paragraph (a)(3), "FAR 3.9" and adding in its place "48 CFR subpart 3.9".

**970.0404-2 [Amended]**

■ 4. Section 970.0404-2 is amended in paragraph (b) by removing "5670.3 (as amended)." at the end of the second sentence and adding in its place "475.1, Counterintelligence Program, or its successor."

**Subpart 970.19—Small Business Programs**

■ 5. Revise subpart 970.19 subpart heading to read as set forth above.

■ 6. Revise 970.1907 section heading to read as set forth below:

**970.1907 The Small Business Subcontracting Program.**

\* \* \* \* \*

**970.1907-1 [Redesignated as 970.1907-4]**

■ 7. Section 970.1907-1 is redesignated as 970.1907-4.

■ 8. Add subpart 970.25, consisting of 970.2570, to read as follows:

**Subpart 970.25—Foreign Acquisition**

**970.2570 Contract clauses.**

Contracting officers shall insert the clauses at 48 CFR 52.225-1, Buy American Act—Supplies, and 48 CFR 52.225-9, Buy American Act—Construction Materials, in management and operating contracts. The clause at 48 CFR 52.225-1 shall be modified in paragraph (d) by substituting the word "use" for the word "deliver."

**970.2673-1 [Amended]**

■ 9. Section 970.2673-1 is amended by:

■ a. Removing the "," in introductory text and adding in its place a "—";

■ b. Removing the "," in paragraph (a) and adding in its place a " "; and

■ c. Removing the "," in paragraph (b) and adding in its place a " ";

■ 10. Section 970.3102-05-6 is amended by:

■ a. Revising paragraphs (a)(7)(i) and (a)(7)(ii) to read as set forth below; and

■ b. Removing "Federal Acquisition Regulation" in paragraph (p)(1) and adding in its place "48 CFR".

■ 10. Section 970.3102-05-6 is amended by:

■ a. Revising paragraphs (a)(7)(i) and (a)(7)(ii) to read as set forth below; and

■ b. Removing "Federal Acquisition Regulation" in paragraph (p)(1) and adding in its place "48 CFR".

■ 10. Section 970.3102-05-6 is amended by:

■ a. Revising paragraphs (a)(7)(i) and (a)(7)(ii) to read as set forth below; and

■ b. Removing "Federal Acquisition Regulation" in paragraph (p)(1) and adding in its place "48 CFR".

**970.3102-05-6 Compensation for personal services.**

(a) \* \* \*

(7)(i) Reimbursable costs for compensation for personal services are to be set forth in the contract. This compensation shall be set forth using the principles and policies of 48 CFR 31.205-6, Compensation, as

supplemented by this section, 970.3102-05-6, and other pertinent parts of the DEAR. Costs that are unallowable under other contract terms shall not be allowable as compensation for personnel services.

(ii) The contract sets forth, in detail, personnel costs and related expenses allowable under the contract and documents personnel policies, practices and plans which have been found acceptable by the contracting officer. The contractor will advise DOE of any proposed changes in any matters covered by these policies, practices, or plans which relate to personnel costs. Types of personnel costs and related expenses addressed in the contract are as follows: Salaries and wages; bonuses and incentive compensation; overtime, shift differential, holiday, and other premium pay for time worked; welfare benefits and retirement programs; paid time off, and salaries and wages to employees in their capacity as union stewards and committeemen for time spent in handling grievances, or serving on labor management (contractor) committees provided, however, that the contracting officer's approval is required in each instance of total compensation to an individual employee above an annual rate as specified in the contract.

\* \* \* \* \*

**970.3102-05-46 [Amended]**

■ 11. Section 970.3102-05-46 is amended in paragraph (e)(3) introductory text by adding "48 CFR" before "31.109".

**970.3400 [Redesignated as 970.3405]**

■ 12a. Redesignate 970.3400 as 970.3405 and 970.3400-1 as 970.3405-2.

**970.3400-1 [Redesignated as 970.3405-2]**

■ 12b. Redesignate 970.3400-1 as 970.3405-2.  
 ■ 13. Add sections 970.3706 and 970.3706-1 to subpart 970.37 to read as follows:

**970.3706 Performance-based acquisition.**

**970.3706-1 General.**

For policy and guidance on performance-based contracting for management and operating (M&O) contracts, see 970.1100.

■ 14. Section 970.3770-1 is revised to read as follows:

**970.3770-1 Policy.**

Contractors managing the Department of Energy (DOE) facilities shall be required to comply with the DOE Directives applicable to facilities management. The use of the DOE Directives is prescribed in 970.0470.

■ 15. Section 970.5204-1 is amended by:

- a. Revising the date of the clause to read as set forth below; and
- b. Removing "DOE Order 5670.3, Counterintelligence Program;" in paragraph (a) of the clause and adding in its place "DOE Order 475.1, Counterintelligence Program, or its successor;"

The revision reads as follows:

**970.5204-1 Counterintelligence.**

\* \* \* \* \*

**COUNTERINTELLIGENCE (DEC 2010)**

\* \* \* \* \*

■ 16. Section 970.5223-3 is amended by:

- a. Revising the date of the provision to read as set forth below; and
- b. Adding a new sentence at the end of paragraph (b) as set forth below.

The revision and addition read as follows:

**970.5223-3 Agreement regarding Workplace Substance Abuse Programs at DOE Sites.**

\* \* \* \* \*

**AGREEMENT REGARDING WORKPLACE SUBSTANCE ABUSE PROGRAMS AT DOE SITES (DEC 2010)**

\* \* \* \* \*

(b) \* \* \* DOE may grant an extension to the notification or implementation period if necessary as per 10 CFR 707.5(g).

\* \* \* \* \*

■ 17. Section 970.5223-4 is amended by:

- a. Revising the date of the clause to read as set forth below; and
- b. Revising paragraph (c)(1).

The revisions read as follows:

**970.5223-4 Workplace Substance Abuse Programs at DOE sites.**

\* \* \* \* \*

**WORKPLACE SUBSTANCE ABUSE PROGRAMS AT DOE SITES (DEC 2010)**

\* \* \* \* \*

(c) *Subcontracts.* (1) The Contractor agrees to notify the Contracting Officer

reasonably in advance of, but not later than 30 days prior to, the award of any subcontract the Contractor believes may be subject to the requirements of 10 CFR part 707, unless the Contracting Officer agrees to a different date.

\* \* \* \* \*

■ 18. Section 970.5232-3 is amended by:

- a. Revising the date of the clause to read as set forth below; and
- b. Adding "or subcontractor's" after "contractor's" and adding "and to interview any current employee regarding such transactions" after "hereunder" in paragraph (h)(1).

The revision reads as follows:

**970.5232-3 Accounts, records, and inspection.**

\* \* \* \* \*

**ACCOUNTS, RECORDS, AND INSPECTION (DEC 2010)**

\* \* \* \* \*

■ 19. Section 970.5235-1 is amended by:

- a. Revising the introductory text and the date of the clause to read as set forth below;
- b. Removing "DOE Order 481.1, Work for Others (Non-Department of Energy Funded Work) (see current version)." in paragraph (c) and adding in its place "the clause 48 CFR 970.5217-1 Work for Others Program."; and
- c. Adding ", Work for Others (Non-Department of Energy Funded Work), or its successor" after "DOE Order 481.1" in paragraph (d).

The revisions read as follows:

**970.5235-1 Federally funded research and development center sponsoring agreement.**

As prescribed in 970.3501-4, insert the following clause:

**FEDERALLY FUNDED RESEARCH AND DEVELOPMENT CENTER SPONSORING AGREEMENT (DEC 2010)**

\* \* \* \* \*

**PART 970—[AMENDED]**

■ 20. In the table below, for each section indicated in the left column, remove the word indicated in the middle column from where it appears in the section, and add the word in the right column:

Section	Remove	Add
970.1504-1-4(e) introductory text and (e)(2) introductory text	“.”	“_”
970.2201-1-1	“48 CFR Subpart”	“48 CFR subpart”
970.2201-1-2(a)(1)(ii)(A)	“A review must:”	“A review must —”
970.2201-1-2(a)(1)(ii)(C)	“including those:”	“including those —”

Section	Remove	Add
970.2201-1-2(a)(1)(iii) .....	“10 CFR Part 707.4” .....	“10 CFR 707.4”
970.2201-1-2(a)(1)(iii) .....	“10 CFR Part 707” .....	“10 CFR part 707”
970.2201-1-2(a)(1)(v)(A) .....	“authorization:” .....	“authorization —“
970.2305-2(b) .....	“48 CFR 23.5” .....	“48 CFR subpart 23.5”
970.2306(b)(4) .....	“48 CFR 970.5223-3” .....	“970.5223-3”
970.2672-2 .....	“48 CFR” .....	“subpart”
970.5215-3(b)(4)(iii) in the first sentence .....	“contracting officer” .....	“Contracting Officer”
970.3204-1(a) .....	“48 CFR subpart 932.4” .....	“subpart 932.4”
970.5222-1 in the last sentence .....	“contractor” .....	“Contractor”
970.5223-1(b) in the third sentence .....	“contractor’s” .....	“Contractor’s”
970.5223-1(b)(2) .....	“(ES&H)” .....	“ES&H”
970.5226-1 .....	“contracting officer” .....	“Contracting Officer”
970.5226-1 in the second sentence .....	“contractor” .....	“Contractor”
970.5226-1 in the third sentence .....	“Appendix.” .....	“the Appendix.”
970.5232-2(e)(2)(iv)(B) in the last sentence .....	“contractor” .....	“Contractor”
970.5232-3(d) in the second sentence .....	“Clause _____” .....	“Clause 970.5204-3,”
970.5232-3(j) in the last sentence .....	“Penalties for Unallowable costs;” ..	“Penalties for Unallowable Costs;”

■ 21. In the table below, for each section indicated in the left column, remove the word indicated in the right column from where it appears in the section:

Section	Remove	Section	Remove
970.2201-1-2(a)(1)(ii) .....	“48 CFR”	970.5226-3 introductory text .....	“48 CFR”
970.2671-2 .....	“48 CFR”	970.5232-5(b) in two places .....	“FAR”
970.2672-3 .....	“48 CFR”		
970.2673-2 .....	“48 CFR”		
970.5226-1 introductory text .....	“48 CFR”		
970.5226-2 introductory text .....	“48 CFR”		

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