

## Department of Energy

970.1504-1-2

requirements established in the statement of work and other documents used to establish work requirements.

(d) Quality assurance surveillance plans shall be developed to facilitate the assessment of contractor performance and ensure the appropriateness of any award or incentive fee payment. Such plans shall be tailored to the contract performance objectives, criteria, and measures, and shall, to the maximum extent practicable, focus on the level of performance required by the performance objectives rather than the methodology used by the contractor to achieve that level of performance.

### 970.1100-2 Additional considerations.

(a) While it is not feasible to set forth standard language which would apply to every contract situation, language must be designed for inclusion in a management and operating contract to describe clearly the work being undertaken; the controls, as appropriate, to be exercised by DOE over the performance of that work; and the relationship contemplated between the parties.

(b) The language shall also include the following with respect to subcontracting performance of the work described pursuant to paragraph (a) of this section: "The contractor shall, when directed by DOE and may, but only when authorized by DOE, enter into subcontracts for the performance of any part of the work under this clause."

(c) The provisions required in paragraphs (a) and (b) of this section shall be set forth in the statement of work of the contract.

### 970.1103-4 Contract clause.

Insert the clause at 48 CFR 52.211-5, Material Requirements, in solicitations and contracts.

### 970.1170 Work authorization.

#### 970.1170-1 Policy.

Each contract for the management and operation of a DOE site or facility, and other contracts designated by the DOE or NNSA Procurement Executive, must contain a scope of work section that describes, in general terms, work planned and/or required to be per-

formed. Work to be performed under the contract shall be assigned through the use of a work authorization to control individual work activities performed within the scope of work. Work authorizations must be issued prior to the commencement of the work and inurrence of any costs.

[72 FR 29434, May 29, 2007]

### 970.1170-2 Contract provision.

The Contracting Officer shall insert the clause at 48 CFR 970.5211-1, Work authorization, in each solicitation and contract for the management and operation of a DOE site or facility and in other contracts designated by the DOE or NNSA Procurement Executive.

[72 FR 49434, May 29, 2007]

## Subpart 970.15—Contracting by Negotiation

### 970.1504 Contract pricing.

#### 970.1504-1 Price analysis.

#### 970.1504-1-1 Fees for management and operating contracts.

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

#### 970.1504-1-2 Fee policy.

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

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

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

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

(3) When work elements cannot be fixed price and award fees are employed, they should be tied to either objective or subjective measures. Each

measure should, to the maximum extent appropriate, be directly tied to a specific portion of the fee pool.

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

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

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

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

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

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

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

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

(f) Prior to the issuance of a competitive solicitation or the initiation of negotiations for an extension of an existing contract, the HCA shall coordinate the maximum available fee, as allowed by 48 CFR 970.1504-1-1, and the fee amount targeted for negotiation, if

less, with the Procurement Executive, or designee. Solicitations shall identify maximum available fee under the contract and may invite offerors to propose fee less than the maximum available.

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

(h) Multiple fee arrangements should be used in accordance with 48 CFR 970.1504-1-4.

(i)(1) In addition to other performance requirements specified in the contract, DOE management and operating contractors and other contractors designated by the Procurement Executive, or designee, are subject to performance requirements relating to: environment, safety, and health (ES&H), including worker safety and health (WS&H); and safeguarding of Restricted Data and other classified information. Performance requirements relating to ES&H will be set forth in the contract's ES&H terms and conditions, including a DOE approved Integrated Safety Management System (ISMS), or similar document. As applicable, performance requirements relating to the safeguarding of Restricted Data and other classified information will be set forth in the clauses of the contract entitled "Security" and "Laws, Regulations, and DOE Directives," as well as in other terms and conditions that prescribe requirements for the safeguarding of Restricted Data and other classified information.

(2) If the contractor does not meet the performance requirements of the contract relating to ES&H or to the safeguarding of Restricted Data and other classified information, otherwise earned fee, fixed fee, profit, or share of cost savings may be unilaterally reduced by the contracting officer in accordance with the clause entitled "Conditional Payment of Fee, Profit,

and Other Incentives—Facility Management Contracts.”

(3) The clause entitled “Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts,” provides for reductions of earned fee, fixed fee, profit, or share of cost savings under the contract depending upon the severity of the contractor’s performance failure relating to ES&H requirements and, if applicable, relating to the safeguarding of Restricted Data and other classified information. When reviewing performance failures that would otherwise warrant a potential reduction of earned fee, fixed fee, profit, or share of cost savings, the contracting officer must consider mitigating factors that may warrant a reduction below the applicable range specified in the clause. Some of the mitigating factors that must be considered are included in the clause.

(4) The contracting officer must obtain the concurrence of the cognizant Program Secretarial Officer

(i) Prior to effecting any reduction of fee or profit in accordance with the terms and conditions of the clause entitled, “Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts;” and

(ii) For determinations that no reduction of fee or profit is warranted for a particular performance failure(s) that would otherwise be subject to a reduction.

[65 FR 81009, Dec. 22, 2000, as amended at 68 FR 68781, Dec. 10, 2003]

**970.1504-1-3 Special considerations: Laboratory management and operation.**

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

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

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

(3) Facilities capital or capital equipment acquisition plans;

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

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

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

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

(1) Costs incurred in the operation of a laboratory that are allowable and allocable under the cost principles (*i.e.*, commercial using 48 CFR 31.2, non-profit using OMB Circular A-122, or university-affiliated using OMB Circular A-21), regulations (including 48 CFR 970.31), or statutes applicable to the operating contractor should be classified as direct or indirect (overhead or G&A) charges to the contract and not included as proposed fee. Exceptions must be approved by the Procurement Executive, or designee.

(2) Except as specified in 48 CFR 970.1504-1-3(c)(3), the maximum total amount of fee shall be calculated in accordance with 48 CFR 970.1504-1-5 or 48 CFR 970.1504-1-9, as appropriate. The total amount of fee under any laboratory management and operating contract or other designated contract shall not exceed, and may be significantly less than, the result of that calculation. In determining the total amount of fee, the contracting officer shall consider the evaluation of the factors in paragraph (a) of this subsection as well as any benefits the laboratory operator will receive due to its tax status.

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

(1) The amount of fee may be established as total available fee with a base fee portion and a performance fee portion. Base fee, if any, shall be an amount in recognition of the risk of financial liability assumed by the contractor and shall not exceed the cost risk associated with those liabilities or the amount calculated in accordance with 48 CFR 970.1504-1-5, whichever is