

determine the confidential status of the information and to treat it according to its determination in accordance with 10 CFR 1004.11.

IV. Procedural Requirements

The procedural requirements discussed in section IV of the Supplementary Information of the March 2, 1995, notice of proposed rulemaking (60 FR 11646) apply as well to this amendment of proposed rulemaking.

List of Subjects in 48 CFR Parts 933 and 970

Government procurement.

Issued in Washington, D.C. on April 20, 1995.

Richard H. Hopf,

Deputy Assistant Secretary for Procurement and Assistance Management.

For the reasons set forth in the preamble, chapter 9 of title 48 of the Code of Federal Regulations is proposed to be amended as set forth below.

PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS

1. 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, Pub. L. 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, Pub. L. 99-145 (42 U.S.C. 7256a), as amended.

2. At 970.1901 add paragraphs (c) and (d) as follows:

970.1901 General.

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(c) Contractors may provide in their purchasing systems and methods for the setting aside of requirements for small disadvantaged businesses, provided there are sufficient qualified entities available to assure effective competition, and provided that the cost or price of the successful offer is found by the contractor to be fair and reasonable.

(d) In pursuit of the objective of contractor purchasing of a fair proportion of supplies and services from small business concerns, small disadvantaged business concerns and woman-owned business concerns, the HCA may authorize the use of innovative means after receipt of proper approval by the Procurement Executive and the DOE Office of Small and Disadvantaged Business Utilization.

970.5204-21 Property.

3. At 970.5204-21, Property, remove the phrase "As prescribed in 970.7104-43," from the introductory text.

4. At 970.5204-22, the clause "Contractor Purchasing System" is revised to read as follows:

970.5204-22 Contractor purchasing system.

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Contractor Purchasing System (month year TBE)

(a) General. The contractor shall develop, implement, and maintain formal policies, practices, and procedures to be used in the award of subcontracts consistent with this clause, 48 CFR (DEAR) 970.5204-XX, and 48 CFR (DEAR) 970.71. The contractor's purchasing system and methods shall be fully documented, consistently applied, and acceptable to DOE in accordance with 48 CFR (DEAR) 970.7102. The contractor's purchasing performance will be evaluated against agreed-upon criteria in accordance with the performance criteria and measures clause(s) set forth elsewhere in this contract. DOE reserves the right at any time to require that the contractor submit for approval any or all purchases under this contract. The contractor shall not purchase any item or service the purchase of which is expressly prohibited by the written direction of DOE and shall use such special and directed sources as may be expressly required by the DOE contracting officer.

(b) Acquisition of Utility Services. Utility services shall be acquired in accordance with the requirements of 48 CFR (DEAR) 970.0803.

(c) Acquisition of Real Property. The contractor shall contract for real property in accordance with 48 CFR (DEAR) Subpart 917.74.

(d) Advance Notice of Proposed Subcontract Awards. The contractor shall provide advance notice of proposed subcontract awards in accordance with 48 CFR (DEAR) 970.7109; shall document purchases in writing; and shall establish and maintain subcontract files which present an accurate and adequate record of all purchasing transactions.

(e) Audit of Subcontractors.

(1) The contractor shall assure that its purchasing systems and methods provide for: (i) periodic post-award audit of cost-reimbursement subcontractors at all tiers, and (ii) audits, where necessary, to provide a valid basis for pre-award or cost or price analysis.

(2) Responsibility for determining the costs allowable under each cost-reimbursement subcontract remains with the contractor or next higher-tier subcontractor. Contractors' purchasing systems and methods shall provide, in appropriate cases, for the timely involvement of the contractor and the DOE contracting officer in resolution of subcontract cost allowability.

(3) Where audits of subcontractors of any tier are required, arrangements may be made to have the cognizant Federal agency perform the audit of the subcontract. These arrangements shall be made administratively between DOE and the other agency involved

and shall provide for the cognizant agency to audit in an appropriate manner in light of the magnitude and nature of the subcontract.

(4) Allowable costs for cost reimbursable subcontracts are to be determined in accordance with the cost principles of 48 CFR (FAR) part 31, appropriate for the type of organization to which the subcontract is to be awarded, as supplemented by 48 CFR (DEAR) part 931. Allowable costs in the purchase or transfer from contractor-affiliated sources shall be determined in accordance with 48 CFR (DEAR) 970.7105 and 48 CFR (DEAR) 970.3102-15(b). In no case, however, shall these arrangements preclude determination by the DOE contracting officer of the allowability or unallowability of subcontractor costs claimed for reimbursement by the contractor.

(f) Bonds and Insurance.

(1) The contractor shall obtain from a subcontractor a payment bond on Standard Form 25A, modified to name the contractor as well as the United States of America as obligees, for all fixed price, unit-price and cost-reimbursement construction subcontractors in excess of \$25,000. The penal amounts shall be determined as set forth in 48 CFR (FAR) 28.102-2(b).

(2) The contractor may accept more than one corporate surety upon recognizance, stipulation, bond, or undertaking in both construction and other contracts, provided that in no case will the liability of any co-surety exceed the maximum penal sum for which it is qualified for any one obligation. For subcontracts other than construction, a co-surety may reinsure amounts in excess of its capacity with a corporate surety having the required underwriting capacity that appears on the acceptable list of corporate sureties. No such reinsurance is acceptable in connection with construction subcontracts. Corporate co-sureties may individually obligate themselves for a definite sum less than the full amount of the bond; however, all such obligations must total the entire amount of the bond and each co-surety must bind itself "jointly and severally" for the purpose of allowing a joint action or actions against any or all of the corporate sureties.

(g) Buy American. The contractor shall comply with the provisions of the Buy American Act as reflected in 48 CFR (FAR) 52.225-3, as amended by 48 CFR (DEAR) 970.5203-3.

(h) Construction and Architect-Engineer Contracts.

(1) Independent Estimates. A detailed, independent estimate of costs shall be prepared for all construction work to be subcontracted.

(2) Specifications. Specifications for construction shall be prepared in accordance with the DOE publication entitled "General Design Criteria Manual."

(3) Prevention of Conflict of Interest.

(i) The contractor shall not award a contract for construction to the architect-engineer firm or an affiliate that prepared the design. This prohibition does not preclude the award of a "turnkey" contract so long as the subcontractor assumes all liability for defects in design and construction and consequential damages.

(ii) The contractor shall not award both a cost-reimbursement contract and a fixed-