

to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the CAA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. 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**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 23, 2007. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide,

Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: May 14, 2007.

Russell L. Wright, Jr.,

Acting Regional Administrator, Region 4.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart L—Georgia

■ 2. Section 52.570(c) is amended by revising the entry for "391-3-20" to read as follows:

§ 52.570 Identification of plan.

* * * * *
(c) * * *

EPA-APPROVED GEORGIA REGULATIONS

State citation	Title/subject	State effective date	EPA approval date	Explanation
* * * * *	* * * * *	* * * * *	* * * * *	* * * * *
391-3-20	Enhanced Inspection and Maintenance.	01/10/2007	05/24/2007 [Insert citation of publication].	
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[FR Doc. E7-10057 Filed 5-23-07; 8:45 am]
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DEPARTMENT OF ENERGY

48 CFR Part 970

RIN 1991-AB67

Acquisition Regulation: Implementation of DOE's Cooperative Audit Strategy for Its Management and Operating Contracts

AGENCY: Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE) is amending its Acquisition Regulation (DEAR) by making minor amendments to existing contractor internal audit requirements, through the use of the Cooperative Audit Strategy.

DATES: *Effective Date:* June 25, 2007.

FOR FURTHER INFORMATION CONTACT: Helen Oxberger, U.S. Department of Energy, MA-61, 1000 Independence

Avenue, SW., Washington, DC 20585, telephone (202) 287-1332 or submit electronically to helen.oxberger@hq.doe.gov.

SUPPLEMENTARY INFORMATION:

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I. Background

The Department contracts for the management and operation of its Government-owned or -controlled research, development, special production, or testing facilities through the use of management and operating (M&O) contracts. The Department historically expends approximately 73 percent of its annual appropriations through these M&O prime contracts. Thus, it is imperative for the Department to develop approaches which permit oversight of M&O contractor expenditures in order for the Department to satisfy its oversight responsibility and to ensure that DOE funds are expended on allowable costs.

The creation and maintenance of rigorous business, financial, and accounting systems by contractors are crucial to assuring the integrity and reliability of the cost data used by the DOE's Chief Financial Officer (CFO), the Inspector General (IG), and contracting officers (COs). To ensure the reliability of these systems, DOE requires some of its contractors to maintain an internal

audit activity, that is, an internal audit organization that is responsible for: (i) Performing operational and financial audits including incurred cost audits, and (ii) assessing the adequacy of management control systems.

The Cooperative Audit Strategy is a program that the IG, partnering with contractors' internal audit groups, the CFO, and the Office of DOE Procurement and Assistance Management, developed and implemented in October 1992 to maximize the overall audit coverage of M&O contractors' operations and to fulfill the IG's responsibility for auditing the costs incurred by major facilities contractors. The Cooperative Audit Strategy enhances DOE's efficient use of available audit resources by allowing the IG to rely on the work of contractors' internal audit organizations. The IG has adopted the Cooperative Audit Strategy at most major DOE facilities operated by contractors.

The success of the Cooperative Audit Strategy depends on the IG and contractor internal audit groups working closely with DOE. The contractor internal audit groups are committed to a continuing evaluation of the Cooperative Audit Strategy process and have established the Steering Committee for Quality Auditing to address current issues and implement on-going improvements.

DOE published a Notice of Proposed Rulemaking (NPR) in the **Federal Register** on May 8, 2006 (71 FR 26723). The NPR proposed to amend two Department of Energy Acquisition Regulation (DEAR) clauses to more effectively implement DOE's Cooperative Audit Strategy. The proposed changes would eliminate Alternate II of DEAR clause 970.5232-3, and revise and expand the contract clause to require the use of the DOE's Cooperative Audit Strategy in all M&O contracts. Currently, the Cooperative Audit Strategy is implemented under an alternate clause (Alternate II) in the Accounts, records, and inspection contract clause at 970.5232-3. Because Alternate II is being deleted, DOE has deleted the alternate prescription for the alternate at 970.3270 (a)(2)(ii).

In addition, the Department proposed to amend the DEAR clause 970.5203-1 entitled Management Controls by adding a sentence requiring the contractor to submit audit reports.

Four commenters responded to our May 8, 2006 NPR. All the comments were directed toward the proposed Section 970.5232-3, paragraph (i) Internal Audit and paragraph (j) Remedies. Section II of this preamble presents a summary of the comments by

subject, and the responses to the comments.

II. Discussion of Public Comments

Comments on Internal Audit Requirements

Comment: Four commenters made remarks on paragraph (i) of proposed Section 970.5232-3. One commenter stated that it believes paragraph (i) requirements of the DEAR clause 970.5232-3 for submittal of three reports related to the contractor's internal audit function amount to DOE's significant involvement in the contractor's day-to-day internal audit function operations.

That commenter believes that proposed paragraphs (i) (1), (i) (2), and (i) (3) contradict the Cooperative Audit Strategy objectives and may actually, per paragraph (i) (4), create a structure where the contractors' internal audit function may appear to report to the DOE contracting officer. The commenter argues that the proposed sections would permit the contracting officer to make unilateral decisions on the new requirements, the design plan for internal audits, the annual report, and the annual internal audits, thereby making it difficult for the contractor to manage and control the contractor's own assurance system.

One commenter believes that the proposed paragraph (i) requirements contradict an already existing clause in its contract with DOE, which states that the National Nuclear Security Administration (NNSA) will provide direction as to what NNSA wants and empowers the contractor to determine how the program is executed with the contractor accountable for its performance.

One commenter fully supports DOE's Cooperative Audit Strategy and the Department's efforts to continue an effective and efficient independent audit function at the M&O contractor facilities to ensure that internal audits are conducted reliably.

Response: As stated in the proposed rule, this rule will be used only in DOE's M&O contracts, involving annual reconciliation of expenditures using the DOE's Statement of Cost Incurred and Claimed (SCIC) process. The SCIC process is used in contracts involving well over \$1 billion dollars in annual expenditures by the covered contractor. Those same contractors maintain a special bank account, for reasons of benefit to DOE and the U.S. Treasury, under which those contractors pay contractual obligations directly with DOE funds. The SCIC process would be meaningless without a systematic

process to assess the adequacy of the contractor's system of financial controls. It is imperative for DOE to maintain processes which permit oversight of M&O contractor expenditures in order for DOE to accomplish its oversight responsibilities and to require the contractor to have an independent audit function capable of auditing the contractor's system of the financial controls needed to assure the proper use of the funds.

The purpose of the reports prescribed in paragraph (i) of the clause is to provide DOE's CFO, IG, and COs with confidence in the contractor's system of financial controls. DOE currently receives annual reports and annual plans from the DOE M&O contractor for two of the three required crucial reports. The third report, specified by the final rule as a requirement of the Internal Audit Implementation Plan, is critical to the Government's assurance and confidence in the M&O contractor's financial controls system. By providing the Internal Audit Implementation Plan, the M&O contractor will provide DOE with information about the operation of the contractor's internal audit function, which is important in establishing DOE's ability to rely on the contractor's internal audit organization to perform operational and financial audits, including incurred cost audits, and assessing the adequacy of the contractor's management control systems.

Current policy already exists for contracting officers to be empowered and operate under statutory mandates permitting them to make unilateral decisions, such as a reasonableness determination that is a common practice in Federal contract administration. The contracting officers must have the flexibility, as compelled by their authority, to make prudent decisions that are fair, reasonable and supportable.

DOE believes that this rule provides the necessary framework for a systematic process for use by its M&O contractors in the organization and operation of their internal audit function. The Government needs reasonable assurance that the contractor has an effective internal control structure for accountability and control over its funds. The Government also needs reasonable assurance that the contractor is complying with Federal laws and regulations and the terms and conditions of the contract related to the use of funds. The changes made by this final rule will maximize the overall audit coverage of the contractor's operations and fulfill the IG's responsibility for auditing the costs

incurred by all M&O contractors. The changes made by the final rule will better ensure DOE's efficient use of available audit resources by allowing the IG to rely on the work of the M&O contractor's internal audit organization.

One commenter separately made a comment relating to contract provisions it specifically negotiated and Chapter 70.4 of the Acquisition Guide, respectively. This comment is outside the scope of this rule.

Comments on Remedies Requirements

Comment: Three commenters made comments opposing the stated remedies of paragraph (j) of proposed § 970.5232-3. That paragraph would allow the DOE contracting officer unilaterally to suspend or revoke, in whole or in part, access to the Special Banking Financial Institution Accounts. The commenters asserted that the affected contractors would be subjected to greater risk, without any commensurate increase in associated fee, under such a contract. The commenters also stated that if the M&O contractor's use of the special financial institution account is revoked, there are no criteria for providing alternative compensation to the contractor for use of its working capital. Finally, the commenters contend there is no requirement for the use of this special financial institution account to be restored without undue delay.

One commenter stated that paragraph (j) of the proposed § 970.5232-3 is not consistent with Federal acquisition policy, as expressed in the Federal Acquisition Regulation (FAR) 31.201-2 *Determining allowability*.

Response: DOE disagrees and has not altered the final rule in response to the comments relating to paragraph (j). As explained in the preamble of the proposed rule (71 FR at 26724), DOE is amending two DEAR clauses to more effectively implement DOE's Cooperative Audit Strategy. These changes provide DOE insight into the use of the M&O contractor's SCIC for reconciliation of allowable costs, thus enhancing DOE's confidence in the integrity of its financial control systems. DOE proposed paragraph (j) to expressly include risk mitigation of the special financial institution accounts. The existing system of payment to the DOE's M&O contractor under the Cooperative Audit Strategy relies heavily on the contractor's internal audit function and system of financial controls. That reliance introduces risks. DOE believes that if a DOE contracting officer reasonably loses confidence in an M&O contractor's financial system of controls, he or she must be able to react immediately to prevent additional

expenditures under the special bank account. This authority would be used only as a last resort. The contracting officer's authority to stop payment of funds is not new and he or she must have the ability to restrict access to the funds as a prescribed remedy in dealing with a failure of financial controls. This is a contract financial control issue, not a cost allowability issue. We believe the express statement of these remedies in paragraph (j) will enhance DOE's fulfillment of its fiduciary responsibility by minimizing risk to the Government as a result of a failure of the contractor's financial control system that could impact the SCIC and special bank accounts.

Revisions Incorporated Into This Final Rule

Comment: One commenter agrees with the proposal to use outside auditors to perform peer reviews of the work of a contractor's internal audit organization. The commenter stated that it would solicit the "concurrence of the DOE Contracting Officer before engaging any outside audit firm." The commenter believes that a review performed by such a third party would be no less effective, and perhaps more independent, than a review conducted by another M&O contractor's internal audit organization. The commenter fully supports the Cooperative Audit Strategy but suggests revising the language in paragraph (i) (viii) of proposed section 970.5232-3, regarding the Internal Audit Implementation Design, to permit the use of an independent audit organization approved by DOE.

Response: We have adopted the comment and expanded the language to read:

"The schedule for peer review of internal audits by other contractor internal audit organizations, or other independent third party audit entities approved by the DOE Contracting Officer."

III. Section-by-Section Analysis

DOE is amending the DEAR as follows:

1. Section 970.3270, Standard financial management clause, is amended by deleting the designator "i" from paragraph (a)(2)(i) and deleting paragraph (a)(2)(ii).

2. Section 970.5203-1, Management controls, paragraph (a)(4) is amended by adding a sentence which requires the contractor to annually, or at other times as directed by the contracting officer, provide copies of reports on the status of audit recommendations.

3. Section 970.5232-3, Accounts, records, and inspection, is amended by

deleting Alternate II and by adding new paragraphs (i) and (j).

IV. Procedural Requirements

A. Review Under Executive Order 12866

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

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking" (67 FR 53461, August 16, 2002), DOE published procedures and policies to ensure that the potential impacts of its draft rules on small entities are properly considered during the rulemaking process (68 FR 7990, February 19, 2003), and has made them available on the Office of General Counsel's Web site: <http://www.gc.doe.gov>. DOE has reviewed today's final rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. The final rule would amend procurement policies that apply only to DOE M&O contracts and would impact only DOE's M&O contractors, none of whom are small entities. This rule would not have a significant economic impact on small entities. On the basis of the foregoing, DOE certifies that the final rule, if promulgated, 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.

C. Review Under the Paperwork Reduction Act

Existing burdens associated with the collection of certain contractor audit data have been previously cleared under OMB control number 1910-4100, which expires on April 30, 2008. The Department has concluded that the additional information collection burden resulting from this regulatory

action would apply to less than ten persons in any 12-month period and therefore is less than the threshold for submission to the Office of Management and Budget (OMB) under 5 CFR 1320.3(c). Therefore, DOE has not submitted this action to OMB.

D. Review Under the National Environmental Policy Act

DOE has concluded that promulgation of this final rule falls into a class of actions that would not individually or cumulatively have a significant impact on the human environment, as determined by DOE's regulations implementing the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). Specifically, this final rule deals only with agency procedures, and therefore, is covered under the Categorical Exclusion in paragraph A6 of Appendix A to Subpart D, 10 CFR part 1021. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review Under Executive Order 13132

Executive Order 13132, "Federalism" (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 also 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.

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

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) requires each Federal agency to assess the effects of a Federal regulatory action on State, local, and tribal governments, and the private sector. The Department has determined that today's regulatory action does not impose a 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 rule that may affect family well-being. This final rule would not have any 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 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 guideline 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 notice under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

J. 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 the Office of Information and Regulatory Affairs (OIRA), 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 promulgated 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; and (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 regulatory action is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

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

As required by 5 U.S.C. 801, DOE 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(2).

L. Approval by the Office of the Secretary

The Office of the Secretary of Energy has approved issuance of this rule.

List of Subjects in 48 CFR Part 970

Government procurement.

Issued in Washington, DC, on May 17, 2007.

Edward R. Simpson,

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

David O. Boyd,

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

■ For the reasons stated in the preamble, chapter 9 of title 48 of the Code of Federal Regulations is 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: 42 U.S.C. 2201, 2282a, 2282b, 2282c; 42 U.S.C. 7101 *et seq.*; 41 U.S.C. 418b; 50 U.S.C. 2401 *et seq.*

970.3270 [Amended]

■ 2. Section 970.3270 is amended by removing the paragraph designation “(i)” from paragraph (a)(2)(i) and removing paragraph (a)(2)(ii).

■ 3. Section 970.5203–1 is amended by adding a sentence to the end of paragraph (a)(4).

970.5203–1 Management controls.

* * * * *

(a) * * *

(4) * * * Annually, or at other intervals directed by the contracting officer, the contractor shall supply to the contracting officer copies of the reports reflecting the status of recommendations resulting from management audits performed by its internal audit activity and any other audit organization. This requirement may be satisfied in part by the reports required under paragraph (i) of 970.5232–3, Accounts, records, and inspection.

* * * * *

■ 4. Section 970.5232–3 is amended by:

■ a. Revising the date of the clause;

■ b. Adding new paragraph (i) and (j) before the “(End of clause)”;

■ c. Removing Alternate II (including paragraph (i)).

The additions and revisions, read as follows:

970.5232–3 Accounts, records, and inspection.

* * *

Accounts, Records, and Inspection (JUNE 2007)

* * * * *

(i) *Internal audit.* The contractor agrees to design and maintain an internal audit plan and an internal audit organization.

(1) Upon contract award, the exercise of any contract option, or the extension of the contract, the contractor must submit to the contracting officer for approval an Internal Audit Implementation Design to include the overall strategy for internal audits. The Audit Implementation Design must describe:

(i) The internal audit organization’s placement within the contractor’s organization and its reporting requirements;

(ii) The audit organization’s size and the experience and educational standards of its staff;

(iii) The audit organization’s relationship to the corporate entities of the contractor;

(iv) The standards to be used in conducting the internal audits;

(v) The overall internal audit strategy of this contract, considering particularly the method of auditing costs incurred in the performance of the contract;

(vi) The intended use of external audit resources;

(vii) The plan for audit of subcontracts, both pre-award and post-award; and

(viii) The schedule for peer review of internal audits by other contractor internal audit organizations, or other independent third party audit entities approved by the DOE contracting officer.

(2) By each January 31 of the contract performance period, the contractor must submit an annual audit report,

providing a summary of the audit activities undertaken during the previous fiscal year. That report shall reflect the results of the internal audits during the previous fiscal year and the actions to be taken to resolve weaknesses identified in the contractor’s system of business, financial, or management controls.

(3) By each June 30 of the contract performance period, the contractor must submit to the contracting officer an annual audit plan for the activities to be undertaken by the internal audit organization during the next fiscal year that is designed to test the costs incurred and contractor management systems described in the internal audit design.

(4) The contracting officer may require revisions to documents submitted under paragraphs (i)(1), (i)(2), and (i)(3) of this clause, including the design plan for the internal audits, the annual report, and the annual internal audits.

(j) *Remedies.* If at any time during contract performance, the contracting officer determines that unallowable costs were claimed by the contractor to the extent of making the contractor’s management controls suspect, or the contractor’s management systems that validate costs incurred and claimed suspect, the contracting officer may, in his or her sole discretion, require the contractor to cease using the special financial institution account in whole or with regard to specified accounts, requiring reimbursable costs to be claimed by periodic vouchering. In addition, the contracting officer, where he or she deems it appropriate, may: Impose a penalty under 970.5242–1, Penalties for unallowable costs; require a refund; reduce the contractor’s otherwise earned fee; and take such other action as authorized in law, regulation, or this contract.

(End of Clause)

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