

**DEPARTMENT OF ENERGY**

**48 CFR Parts 928, 931, 932, 933, 935, 936, 937, 941, 942, 949, 950, 951, and 952**

**RIN 1991-AB88**

**Acquisition Regulation: Subchapter E—General Contracting Requirements, Subchapter F—Special Categories of Contracting, and Subchapter G—Contract Management**

**AGENCY:** Department of Energy.

**ACTION:** Final rule.

**SUMMARY:** The Department of Energy (DOE) is amending the Department of Energy Acquisition Regulation (DEAR) Subchapters E—General Contracting Requirements, F—Special Categories of Contracting, and G—Contract Management to make changes to conform to the FAR, remove out-of-date coverage, and to update references. Today's rule does not alter substantive rights or obligations under current law.

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

**SUPPLEMENTARY INFORMATION:**

Changes are to DEAR parts 928, 931, 932, 933, 935, 936, 937, 941, 942, 949, 950, 951, and 952. No changes are proposed for DEAR parts 927, 929, 930, 934, 938, 939, 940, 943, 944, 945, 946, 947, and 948. DOE will separately propose rules for changes to parts 927 and 945, respectively.

I. Background

II. Comments and Responses

III. Procedural Requirements

- A. Review Under Executive Order 12866
- B. Review Under Executive Order 12988
- C. Review Under the Regulatory Flexibility Act
- D. Review Under the Paperwork Reduction Act
- E. Review Under the National Environmental Policy Act
- F. Review Under Executive Order 13132
- G. Review Under the Unfunded Mandates Reform Act of 1995
- H. Review Under the Treasury and General Government Appropriations Act, 1999
- I. Review Under Executive Order 13211
- J. Review Under the Treasury and General Government Appropriations Act, 2001
- K. Review Under the Small Business Regulatory Enforcement Fairness Act of 1996
- L. Approval by the Office of the Secretary of Energy

**I. Background**

This action updates the existing Department of Energy Acquisition Regulation (DEAR). Subchapters E, F, and G have sections that need to be

updated to conform to the FAR. None of the 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 January 7, 2010 (75 FR 964), with a public comment period ending on February 8, 2010. DOE received no comments.

DOE amends the DEAR as follows:

1. Section 932.501-2 is amended to reflect current procedures for unusual progress payments.
2. Subpart 932.6 is amended to update the DEAR to conform with changes to a FAR section title within subpart 32.6 which was revised by Federal Acquisition Circular 2005-027 effective October 18, 2008.

3. Section 935.010 is amended by revising paragraphs (c) and (d). The report submittal process has been changed to electronic submission using the DOE Energy Link System (E-Link) at <http://www.osti.gov/elink>. The contracting officer shall require the contractors to use E-Link to submit a record with each report.

4. Part 936 is amended to redesignate 936.202 as 936.202-70 and change the title of that section to read "specification charges."

5. Part 937 is revised to add a new subpart, Subpart 937.2—Advisory and Assistance Services and section 937.204 Guidelines for determining availability of personnel. Sections 937.204(a), (b), (d), and (e) are added to conform to FAR 37.204 to provide the DOE guidelines for determining availability of sufficient personnel with the requisite training and capabilities to perform the evaluation or analysis of proposals. It also clarifies which DOE officials are responsible for making the determinations prescribed at FAR 37.204 (a), (b), (d), and (e).

6. Section 941.201-70 is amended to update the DOE Order reference by removing the remainder of the sentence after the second "FAR" and adding in its place "part 41 and the Department of Energy (DOE) Order 430.2B, Departmental Energy, Renewable Energy and Transportation Management, or its successor."

7. Section 942.803 is amended at paragraph (c) by removing the reference to 942.70 Audit Services which is no longer a subpart.

8. Section 949.101 is revised to add "Senior" before "Procurement Executive." to conform the use of the Procurement Executive title within the FAR.

9. Subpart 949.5 is removed and reserved. There is no longer a need for

a DEAR termination clause for Architect-Engineer contracts.

10. Section 951.102 paragraph (e)(4) is amended to remove the "(iii)" in the paragraph numbering to conform with numbering in the FAR.

11. Section 952.247-70 is amended to remove repetitive language.

12. The rule text is amended as noted in the table at paragraph 16, by removing "FAR" or "FAR part" and replacing it with "48 CFR" or "48 CFR part" and by updating other CFR citations. Section 931.205-47(h)(1) is amended by changing the capitalization of the word "part" in two places. Section 952 has several changes in punctuation at 952.235-71 and 952.250-70.

**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 parts 928, 931, 932, 933, 935, 936, 937, 941, 942, 949, 950, 951, and 952**

Government procurement.

Issued in Washington, DC on May 19, 2010.

**Patrick M. Ferraro,**

*Acting Director, Department of Energy.*

**Joseph F. Waddell,**

*Acting 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.

■ 1. The authority citations for parts 928, 931, 932, 933, 935, 936, 941, and 942, continue to read as follows:

**Authority:** 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

**PART 932—CONTRACT FINANCING**

■ 2. Section 932.501–2 is amended by revising paragraph (a)(3) to read as follows:

**932.501–2 Unusual progress payments.**

(a)(3) For DOE, the Head of the Contracting Activity shall forward all requests which are considered favorable, with supporting information, to the DOE Senior Procurement Executive, who, after coordination with the Chief Financial Officer, Headquarters, will approve or deny the request. For NNSA, the NNSA Senior Procurement Executive will coordinate with the NNSA Chief Financial Officer before approving or denying the request.

\* \* \* \* \*

**932.605 [Redesignated as 932.602]**

■ 3. Section 932.605 is redesignated as 932.602 and newly redesignated 932.602 is amended by:

■ a. Revising the section heading as set forth below; and

■ b. Removing the paragraph designation “(b)”.

■ The revision reads as follows:

**932.602 Responsibilities.**

\* \* \* \* \*

**PART 935—RESEARCH AND DEVELOPMENT CONTRACTING**

■ 4. Revise section 935.010 to read as follows:

**935.010 Scientific and technical reports.**

(c) All research and development contracts which require reporting of research and development results conveyed in scientific and technical

information (STI) shall include an instruction requiring the contractor to submit all STI, including reports and notices relating thereto, electronically to the U.S. Department of Energy (DOE), Office of Scientific and Technical Information (OSTI), using the DOE Energy Link System (E-link) at <http://www.osti.gov/mlink>. The phrase “reports and notices relating thereto” does not include reports or notices concerning administrative matters such as contract cost or financial data and information. The DOE Order 241.1B Scientific and Technical Information Management, or its successor version, sets forth requirements for STI management.

(d) As prescribed in DOE Order 241.1B, the contracting officer shall ensure that the requirements of the attendant Contractor Requirements Document are included in applicable contracts.

**PART 936—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS**

■ 5. Section 936.202 is redesignated as 936.202–70 and the section heading is revised to read as follows:

**936.202–70 Specifications charges.**

\* \* \* \* \*

■ 6. The authority citation for parts 937 and 949 is revised to read as follows:

**Authority:** 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

**PART 937—SERVICE CONTRACTING**

■ 7. Add a new subpart 937.2, consisting of section 937.204, to read as follows:

**Subpart 937.2—Advisory and Assistance Services**

**937.204 Guidelines for determining availability of personnel.**

(a) The determination, that there is sufficient DOE personnel with the requisite training and capabilities for each evaluation or analysis of proposals, shall be determined in accordance with 915.207–70(f)(2)(i).

(b) If it is determined that there is no such DOE personnel available, then other Federal agencies may have the required personnel with the requisite training and capabilities for the evaluation or the analysis of proposals. The determination, to use employees of other Federal agencies for the evaluation or analysis of proposals, shall be in accordance with 915.207–70(f)(2)(ii).

(d) The determination, to employ non-Federal evaluators or advisors, shall be determined in accordance with 915.207–70(f)(3).

(e) The determination that covered personnel are unavailable for a class of proposals, necessitating employment of non-Federal evaluators or advisors, shall be determined in accordance with 915.207–70(f)(3).

**PART 941—ACQUISITION OF UTILITY SERVICES**

■ 8. Section 941.201–70 is revised to read as follows:

**941.201–70 DOE Directives.**

Utility services (defined at 48 CFR 41.101) shall be acquired in accordance with 48 CFR part 41 and the Department of Energy (DOE) Order 430.2B, Departmental Energy, Renewable Energy and Transportation Management, or its successor.

**PART 942—CONTRACT ADMINISTRATION**

**942.803 [Amended]**

■ 9. Amend section 942.803 in the last sentence of paragraph (c)(1) by removing the phrase “, as discussed in 942.70 Audit Services”.

**PART 949—TERMINATION OF CONTRACTS**

**949.101 [Amended]**

■ 10. Section 949.101 is amended by adding “Senior” before “Procurement Executive”.

**Subpart 949.5 [Removed and Reserved]**

■ 11. Subpart 949.5, consisting of section 949.501 and 949.505, is removed and reserved.

**PART 950—EXTRAORDINARY CONTRACTUAL ACTIONS AND THE SAFETY ACT**

■ 12. The authority citation for part 950 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.*

**PART 951—USE OF GOVERNMENT SOURCES BY CONTRACTORS**

■ 13. The authority citation for part 951 continues to read as follows:

**Authority:** 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

**951.102 [Amended]**

■ 14. Section 951.102 is amended by revising the paragraph designation “(e)(4)(iii)” to read “(e)(4)”.

**PART 952—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

■ 15. The authority citation for part 952 is revised 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.*

■ 16. Section 952.247–70 is amended by:

- a. Revising the date of the clause to read as set forth below; and
- b. Removing “or its successor Official Foreign Travel, or any subsequent version of the order” in the clause and adding in its place “Official Foreign Travel, or its successor”.

The revision reads as follows:

**952.247–70 Foreign travel.**

\* \* \* \* \*

**FOREIGN TRAVEL JUN 2010**

\* \* \* \* \*

**PARTS 928, 931, 932, 933, 936, 937, 941, 942, 950, 951, and 952 [AMENDED]**

■ 17. 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                  |
|---|-------------------------|----------------------|
| 928.101–1   | “FAR”                   | “48 CFR”             |
| 928.301   | “FAR Part”              | “48 CFR part”        |
| 931.102 in 2 places   | “FAR”                   | “48 CFR”             |
| 931.102   | “FAR Part 31”           | “48 CFR part 31”     |
| 931.205–32(a)   | “FAR”                   | “48 CFR”             |
| 931.205–47(h)(1), in the Employee whistleblower action definition | “29 CFR Part 24,”       | “29 CFR part 24,”    |
| 931.205–47(h)(1), in the Employee whistleblower action definition | “10 CFR Part 708”       | “10 CFR part 708”    |
| 932.006–4(a)  | “FAR”                   | “48 CFR”             |
| 932.803(d)  | “FAR”                   | “48 CFR”             |
| 932.7004–1 in 3 places  | “FAR”                   | “48 CFR”             |
| 932.7004–3(a)   | “FAR”                   | “48 CFR”             |
| 933.103(k)  | “FAR”                   | “48 CFR”             |
| 933.104(b)  | “FAR”                   | “48 CFR”             |
| 933.104(c)  | “FAR”                   | “48 CFR”             |
| 933.104(g)  | “FAR”                   | “48 CFR”             |
| 933.106(a)  | “FAR”                   | “48 CFR”             |
| 936.602–70(a)(8)  | “FAR”                   | “48 CFR”             |
| 936.609–3   | “FAR”                   | “48 CFR”             |
| 936.7100  | “FAR Part”              | “48 CFR part”        |
| 937.7040  | “FAR”                   | “48 CFR”             |
| 942.704(b) in 2 places  | “FAR”                   | “48 CFR”             |
| 942.705–1(b)(1)   | “FAR”                   | “48 CFR”             |
| 950.7003(a) in the first sentence                                 | “(DOE)”                 | “DOE”                |
| 951.102(a)  | “FAR Part”              | “48 CFR part”        |
| 951.102(a)  | “DOE PMR 41 CFR 109–26” | “DOE PMR 41 CFR 109” |
| 952.233–2 in the introductory text                                | “FAR”                   | “48 CFR”             |
| 952.233–4(a)  | “FAR”                   | “48 CFR”             |
| 952.233–4(b)  | “FAR”                   | “48 CFR”             |
| 952.235–71(b)(1)  | “warranted;”            | “warranted.”         |
| 952.250–70(e)(2)  | “which;”                | “which—”             |

[FR Doc. 2010–12520 Filed 5–25–10; 8:45 am]

BILLING CODE 6450–01–P

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 648**

[Docket No.: 0910051338–0167–03]

RIN 0648–AY29

**Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Revisions to Framework Adjustment 44 to the Northeast Multispecies Fishery Management Plan and Sector Annual Catch Entitlements: Updated Annual Catch Limits for Sectors and the Common Pool for Fishing Year 2010**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Temporary rule; adjustment to specifications.

**SUMMARY:** Based on finalized Northeast (NE) multispecies sector rosters submitted on April 30, 2010, NMFS announces adjustments to the NE multispecies fishing year (FY) 2010 specification of annual catch limits (ACLs) for common pool vessels (common pool sub-ACLs), ACLs for sector vessels (sector sub-ACLs), and sector Annual Catch Entitlements (ACEs) for each of the 20 groundfish stocks managed under the NE Multispecies Fishery Management Plan (FMP). This revision to catch levels is necessary because some vessel owners have chosen to drop out of sectors and fish in the common pool for FY 2010.

**DATES:** Effective May 21, 2010 through April 30, 2011.

**FOR FURTHER INFORMATION CONTACT:** Travis Ford, Fishery Management Specialist, (978) 281–9233.