National Nuclear Security Administration

NNSA Policy Letter: BOP 540.3
Date: May 8, 2007

TITLE: Class Deviations to FAR and DEAR

I. OBJECTIVE:

i. The objective of this Policy Letter is to provide easy access to all FAR and
ii. DEAR class deviations that are currently approved for use with NNSA contracts.

II. BACKGROUND:

A. FAR 1.102(d) provides, "The role of each member of the Acquisition Team is to exercise personal initiative and sound business judgment in providing the best value product or service to meet the customer's needs. In exercising initiative, Government members of the Acquisition Team may assume if a specific strategy, practice, policy or procedure is in the best interests of the Government and is not addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation, that the strategy, practice, policy or procedure is a permissible exercise of authority." This gives the Contracting Officer (CO) broad latitude to structure acquisitions in a manner that will obtain the best value products and services for the customer while protecting taxpayer funds. However, as the FAR recognizes, there are in fact legal and regulatory constraints on the exercise of CO authority.

B. To provide maximum flexibility FAR Subpart 1.4 prescribes policies and procedures for authorizing deviations to the FAR. Of note is this statement from FAR 1.402, "The development and testing of new techniques and methods of acquisition should not be stifled simply because such action would require a FAR deviation. The fact that deviation authority is required should not, of itself, deter agencies in their development and testing of new techniques and acquisition methods."

C. There are two types of deviations:
a. Individual deviations, which affect only one contract action, and
b. Class deviations, which affect more than one contract action.

III. APPLICABILITY:

All NNSA elements.

IV. RESPONSIBILITY:

A. The Office of Acquisition and Supply Management (NA-63) is responsible for maintaining attachment 1, List of Approved FAR and DEAR Class Deviations.
B. Contracting Officers are responsible for adherence to the attached deviations.

V. CANCELLATIONS:

The class deviations in the following BOPs are now reflected in Attachment 1 to this BOP. These BOPs are superseded and canceled.

A. BOP-003.0403R1 (Revision 1) Deviation to DEAR 909.4 Debarment, Suspension, and Ineligibility January 14, 2005.
B. BOP-003.0502 Deviation to DEAR Definitions Coverage January 24, 2005.

VI. POINT OF CONTACT FOR ADMINISTRATION OF POLICY LETTER: Scott Clemons, Procurement Analyst, 202-586-4937, e-mail address: scott.clemons@nnsa.doe.gov.

BY ORDER OF THE SENIOR PROCUREMENT EXECUTIVE:

David O. Boyd
Senior Procurement Executive
National Nuclear Security Administration

Attachment 1, List of Approved FAR and DEAR Class Deviations
As of June 10, 2005

- DEAR 902, Definitions of Words and Terms
- DEAR 909.4, Debarment, Suspension, and Ineligibility
- DEAR 909.5, Organizational and Consultant Conflicts of Interest
- DEAR 952.204-2, Security Requirements
- DEAR 952.217-70 Acquisition of Real Property
- DEAR 952.247-70, Foreign Travel
- DEAR 970.1504, Contract Pricing, and associated 970.5215 clauses
- DEAR 970.5203-2, Performance Improvement and Collaboration
- DEAR 970.5203-3 Contractor's Organization
- DEAR 970.5204-2, Laws, Regulations, and DOE Directives
- DEAR 970.5215-2, Make-or-Buy Plan
- DEAR 970.5215-3, Conditional Payment of Fee, Profit, and Other Incentives – Facility Management Contracts
- DEAR 970.5237-2, Facilities Management
- DEAR 970.5244-1, Contractor Purchasing System

Findings and Determination
Class Deviation to the
Department of Energy Acquisition Regulation (DEAR)

Findings:

1. DEAR Subpart 902.2 requires that Contracting Officers modify the FAR Definitions clause at 52.202-1 to make certain changes to paragraph (a) defining "agency head" and identifies Senior Procurement Executives within DOE. The DEAR prescription applies to a FAR clause that has since been revised and the DEAR instructions no longer provide clear guidance on authorities, roles, and responsibilities.

2. The DEAR reads as follows:

PART 902. ----DEFINITIONS OF WORDS AND TERMS

Subpart 902.2 ---- Definitions Clause

902.200 Definitions Clause

Authority: 42 U.S.C. 7254; 40 U.S.C. 486(c).

Subpart 902.2. ----Definitions Clause

902.200 -- Definitions clause.

As prescribed by FAR Subpart 2.2, insert the clause at FAR 52.202-1, Definitions, but modify it to limit the definition at paragraph (a) of the clause, to encompass only the Secretary, Deputy Secretary, or the Under Secretaries of the Department of Energy, and the Chairman, Federal Energy Regulatory Commission. The contracting officer shall also add paragraphs (h) and (i) or (g) and (h) if Alternate I of the FAR clause is used. Paragraph (h) defines "DOE" as meaning the United States Department of Energy, "FERC" as meaning the Federal Energy Regulatory Commission, and "NNSA" as meaning the National Nuclear Security Administration. Paragraph (i) identifies the Senior Procurement Executive, DOE, as the Director, Office of Procurement and Assistance Management; the Senior Procurement Executive, NNSA, as the Administrator for Nuclear Security, NNSA; and the Senior Procurement Executive, FERC, as the Chairman, Federal Energy Regulatory Commission.

3. The DEAR applied to the following out-of-date FAR language:

52.202-1 Definitions.

As prescribed in section 2.201, insert the following clause:

Definitions (June 2004)

(a) "Agency head" or "head of the agency" means the Secretary (Attorney General, Administrator, Governor, Chairperson, or other chief official, as appropriate) of the agency, unless otherwise indicated, including any deputy or assistant chief official of the executive agency.
(b) ...(g)

(End of clause)

Alternate I (May 2001). If the contract is for personal services; construction; architect-engineer services; or dismantling, demolition, or removal of improvements, delete paragraph (g) of the basic clause.

4. The current FAR material in question reads:

52.202-1 -- Definitions.

As prescribed in section 2.201, insert the following clause:

Definitions (July 2004)

(a) When a solicitation provision or contract clause uses a word or term that is defined in the Federal Acquisition Regulation (FAR), the word or term has the same meaning as the definition in FAR 2.101 in effect at the time the solicitation was issued, unless--

(1) The solicitation, or amended solicitation, provides a different definition;

(2) The contracting parties agree to a different definition;

(3) The part, subpart, or section of the FAR where the provision or clause is prescribed provides a different meaning; or

(4) The word or term is defined in FAR Part 31, for use it the cost principles and procedures.

(b) The FAR Index is a guide to words and terms the FAR defines and shows where each definition is located. The FAR Index is available via the Internet at http://www.acqnet.gov at the end of the FAR, after the FAR Appendix.

5. FAR 2.101 provides these definitions:

"Agency head" or "head of the agency" means the Secretary, Attorney General, Administrator, Governor, Chairperson, or other chief official of an executive agency, unless otherwise indicated, including any deputy or assistant chief official of an executive agency.

"Senior Procurement Executive" means the individual appointed pursuant to section 16(3) of the Office of Federal Procurement Policy Act (41 U.S.C. 414(3)) who is

responsible for management direction of the acquisition system of the executive agency, including implementation of the unique acquisition policies, regulations, and standards of the executive agency.

Determination:

I hereby determine that the attached DEAR class deviation is needed to update the DEAR to reflect current FAR material and to continue to provide the intended DEAR definitions regarding NNSA acquisition roles, responsibilities, and authorities. The definitions in this deviation also apply to internal acquisition related policies and procedures, e.g., Acquisition Letters.

Robert C. Braden

Robert C. Braden
Senior Procurement Executive
National Nuclear Security Administration

1/31/05
Date

ATTACHMENT

NNSA Deviation to DEAR Part 902

DEAR Subpart 902.1 shall read as follows:

In lieu of the definitions of "agency head" and "senior procurement executive" in FAR 2.201, the following definitions shall be used

"Agency head" or "head of agency" means the Secretary, Deputy Secretary, or the Under Secretary and Administrator for National Nuclear Security Administration of the Department of Energy.

"Senior Procurement Executive" means, the individuals who are responsible for management direction of the acquisition system of NNSA, including implementation of the unique acquisition policies, regulations, and standards of NNSA. For NNSA, it is the Administrator for Nuclear Security and the Director, Acquisition and Supply Management.

DEAR Subpart 902.2 shall read as follows:

902.200 -- Definitions clause.

As prescribed by FAR Subpart 2.2, insert the clause at FAR 52.202-1, Definitions, but modify the clause to add the definitions contained in the NNSA deviation to DEAR 902.1 as paragraph (c).

NATIONAL NUCLEAR SECURITY ADMINISTRATION

DETERMINATION AND FINDINGS

DEPARTMENT OF ENERGY ACQUISITION REGULATION (DEAR) CLASS DEVIATION REGARDING DEAR SUBPART 909.4 DEBARMENT, SUSPENSION, AND INELIGIBILITY

FINDINGS

1. DEAR subpart 909.4 erroneously names the DOE Deputy Assistant Secretary for Procurement and Assistance Management as the individual that may make the determinations required by Federal Acquisition Regulation, 9.405(a). See DEAR 909.405(e).

2. The NNSA Act vests procurement authority directly in NNSA and prohibits DOE employees from exercising supervision or control over NNSA employees or NNSA contractors.

3. The interim final rule to effectuate a correction of the DEAR was published in the Federal Register on December 15, 2004 but did not make all the corrections required in subpart 909.4 for NNSA to comply with the NNSA Act.

DETERMINATION

I hereby authorize a class deviation from the requirements of DEAR subpart 909.4, Debarment, Suspension, and Ineligibility to correctly identify the proper individuals in NNSA that are responsible for debarment, suspension, and ineligibility activities.

APPROVAL

Robert C. Braden

Robert C. Braden
Senior Procurement Executive

DATE

January 14, 2005

Subpart 909.4 Debarment, Suspension, and Ineligibility

909.400 Scope of subpart. (NNSA coverage paragraph (a) (1), (3) and (4))

(a) This subpart.

(1) Prescribes policies and procedures governing the debarment and suspension of organizations and individuals from participating in National Nuclear Security Administration (NNSA) contracts, procurement sales contracts, and real property purchase agreements, and from participating in NNSA approved subcontracts and subagreements.

(3) Sets forth the causes, procedures, and requirements for determining the scope, duration, and effect of NNSA debarment and suspension actions; and

(4) Implements and supplements 48 CFR subpart 9.4 with respect to the exclusion of organizations and individuals from procurement contracting and Government approved subcontracting.

909.401 Applicability.

This subpart applies to all procurement debarment and suspension actions initiated by NNSA on or after the effective date of this deviation. Nonprocurement debarment and suspension rules are codified in 10 CFR part 1036.

909.403 Definitions.

In addition to the definitions set forth at 48 CFR 9.403, the following definitions apply to this subpart:

Debarring Official. The NNSA Debarring Official is the Director, Office of Acquisition and Supply Management, or designee.

Suspending Official. The NNSA Suspending Official is the Director, Office of Acquisition and Supply Management, or designee.

909.405 Effect of listing (NNSA coverage paragraph (e), (f), (g) and (h))

(e) The NNSA may not solicit offers from, award contracts to, or consent to subcontract with contractors debarred, suspended or proposed for debarment unless the Head of the Contracting Activity makes a written determination justifying that there is a compelling reason for such action in accordance with 48 CFR 9.405(a).

(f) NNSA may disapprove or not consent to the selection (by a contractor) of an individual to serve as a principal investigator, as a project manager, in a position of responsibility for the administration of Federal funds, or in another key personnel position, if the individual is listed in the Excluded Parties List System (EPLS).

(g) NNSA shall not conduct business with an agent or representative of a contractor if the agent's or representative's name appears in the EPLS.

(h) NNSA shall review the EPLS before conducting a preaward survey or soliciting proposals, awarding contracts, renewing or otherwise extending the duration of existing contracts, or approving or consenting to the award, extension, or renewal of subcontracts.

909.406 Debarment.

909.406-2 Causes for debarment. (NNSA coverage paragraphs (c) and (d))

(c) The Debarring Official may debar a contractor for any other cause of so serious or compelling a nature that it affects the present responsibility of a NNSA contractor. Such cause may include but is not limited to:

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a private contract or subcontract; and

(2) Inexcusable, prolonged, or repeated failure to pay a debt (including disallowed costs and overpayments) owed to NNSA, provided the contractor has been notified of the determination of indebtedness, and further provided that the time for initiating any administrative or legal action to oppose or appeal the determination of indebtedness has expired or that such action, if initiated, has been concluded.

(d) The Debarring Official may debar a contractor:

(1) On the basis that an individual or organization is an affiliate of a debarred contractor, subject to the requirements of FAR 9.406-1(b) and 9.406-3(c);

(2) For failure to observe the material provisions of a voluntary exclusion (see 10 CFR 1036.315 for discussion of voluntary exclusion).

909.406-3 Procedures. (NNSA coverage paragraphs (a), (b) and (d))

(a) *Investigation and referral.* (1) Offices responsible for the award and administration of contracts are responsible for reporting to both the Director, Acquisition and Supply Management and the DOE Inspector General information about possible fraud, waste, abuse, or other wrongdoing which may constitute or contribute to a cause(s) for debarment under this subpart. Circumstances that involve possible criminal or fraudulent activities must be reported to the Office of the Inspector General in accordance with 10 CFR Part 1010, Conduct of Employees, Sec. 1010.217(b), Cooperation with the Inspector General.

(2) At a minimum, referrals for consideration of debarment action must be in writing and should include the following information:

(i) The recommendation and rationale for the referral;

(ii) A statement of facts;

(iii) Copies of documentary evidence and a list of witnesses, including addresses and telephone numbers, together with a statement concerning their availability to appear at a fact-finding proceeding and the subject matter of their testimony;

(iv) A list of parties including the contractor, principals, and affiliates (including last known home and business addresses, zip codes and DUNS Number);

(v) NNSA's acquisition history with the contractor, including recent experience under contracts and copies of pertinent contracts;

(vi) A list of any known active or potential criminal investigations, criminal or civil proceedings, or administrative claims before the Board of Contract Appeals; and

(vii) A statement regarding the impact of the debarment action on NNSA programs. This statement is not required for referrals by the Inspector General.

(3) Referrals may be returned to the originator for further information or development.

(b) *Decision making process.* Contractors propose for debarment shall be afforded an opportunity to submit information and argument in opposition to the proposed debarment.

(1) In actions, based upon a conviction or civil judgment, or in which there is no genuine dispute over material facts, the Debarring Official shall make a decision on the basis of all the information in the administrative record, including any submissions made by the contractor. If the respondent fails to submit a timely written response to a notice of proposed debarment, the Debarring Official shall notify the respondent in accordance with FAR 9.406-3(e) that the contractor is debarred.

(2) In actions, not based upon a conviction or civil judgment, the contractor may request a fact-finding hearing to resolve a genuine dispute of material fact. In its request, the contractor must identify the material facts in dispute and the basis for disputing the facts. If the Debarring Official determines that there is a genuine dispute of material fact, the Debarring Official shall refer the matter to the Energy Board of Contract Appeals for a fact-finding conference.

(3) *Meeting.* Upon receipt of a timely request therefore from a contractor proposed for debarment, the Debarring Official shall schedule a meeting between the Debarring Official and the respondent, to be held no later than 30 days from the date the request is received. The Debarring Official determines that there is a genuine dispute of material fact, the Debarring Official shall refer the matter to the Energy Board of Contract Appeals for a fact-finding conference.

(4) *Fact-finding conference.* The purpose of a fact-finding conference under this section is to provide the respondent an opportunity to dispute material facts through the submission of oral and written evidence; resolve facts in dispute; and provide the Debarring Official with findings of fact based, as applicable, on adequate evidence or on a preponderance of the evidence. The fact-finding conference shall be conducted in accordance with rules consistent with FAR 9.406-3(b) promulgated by the Energy Board of Contract Appeals. The Energy Board of Contract Appeals will notify the affected parties of the schedule for the hearing. The Energy Board of Contract Appeals shall deliver written findings of fact to the Debarring Official (together with a transcription of the proceeding, if made) within a certain time period after the hearing record closes, as specified in the Energy Board of Contract Appeals Rules. The findings shall resolve any

disputes over material facts based upon a preponderance of the evidence, if the case involves a proposal to debar, or on adequate evidence, if the case involves a suspension. Since convictions or civil judgments generally establish the cause for debarment by a preponderance of the evidence, there usually is no genuine dispute over a material fact that would warrant a fact-finding conference for those proposed debarments based on convictions or civil judgments.

(5) *Debarring Official's decision.* The Debarring Official's final decision shall be based on the administrative record. In those actions where additional proceedings are necessary as to disputed material facts, written findings of fact shall be prepared and included in the final decision. In those cases where the contractor has requested and received a fact-finding conference, the written findings of fact shall be those findings prepared by the Energy Board of Contract Appeals. Findings of fact shall be final and conclusive unless within 15 days of receipt of the findings, the NNSA or the respondent requests reconsideration, as provided in the Board's Rules, or unless set aside by a court of competent jurisdiction. The Energy Board of Contract Appeals shall be provided a copy of the Debarring Official's final decision.

909.406-70 Requests for reconsideration of debarment.

(a) At any time during a period of debarment, a respondent may submit to the Debarring or Suspending Official a written request for reconsideration of the scope, duration, or effects of the suspension/debarment action because of new information or changed circumstances, as discussed at FAR 9.406-4(c).

(b) In reviewing a request for reconsideration, the debarring or Suspending Official may, in his or her discretion, use any of the procedures (meeting and fact-finding) set forth in 48 CFR (DEAR) 909.406-3 and 909.407-3 as may be modified by this deviation. The Debarring or Suspending Official's final disposition of the reconsideration request shall be in writing and shall set forth the reasons why the request has been granted or denied. A notice transmitting a copy of the disposition of the request for reconsideration shall be sent to the respondent and, if a fact-finding conference under 48 CFR (DEAR) 909.406-3(b)(4) as may be modified by this deviation is pending (as in the case of a request for reconsideration of a suspension, where the proposed debarment is the subject of a fact-finding conference), a copy of the disposition shall be transmitted to the Energy Board of Contract Appeals.

909.407-2 Causes for suspension. (NNSA coverage paragraph (d))

(d) The Suspending Official may suspend an organization or individual:

(1) Indicted for or suspected, upon adequate evidence, of the causes described in 48 CFR (DEAR) 909.406-2©(1) as may be modified by the deviation.

(2) On the basis of the causes set forth in 48 CFR (DEAR) 909.406-2(d)(2) as may be modified by this deviation.

(3) On the basis that an organization or individual is an affiliate of a suspended or debarred contractor.

909.407-3 Procedures. (NNSA coverage paragraphs (b) and (e))

(b) Decision making process.

(1) In actions based on an indictment, the Suspending Official shall make a decision based upon the administrative record, which shall include submissions made by the contractor in accordance with 48 CFR (DEAR) 909.406-3(b)(1) and 909.406-3(b)(3) as may be modified by this deviation.

(2) For actions not based on an indictment, the procedures in 48 CFR (DEAR) 909.406-3(b)(2) as may be modified by this deviation and FAR 9.407-3(b)(2) apply.

(3) Coordination with the Department of Justice. Whenever a meeting or fact-finding conference is requested, the Suspending Official's legal representative shall obtain the advice of the appropriate Department of Justice officials concerning the impact disclosure of evidence at the meeting or fact-finding conference could have on any pending civil or criminal investigation or legal proceeding. If such Department of Justice official requests in writing that evidence needed to establish the existence of a cause for suspension not be disclosed to the respondent, the Suspending Official shall:

(i) Decline to rely on such evidence and withdraw (without prejudice) the suspension or proposed debarment until such time as disclosure of the evidence is authorized; or

(ii) Deny the request for a meeting or fact-finding and base the suspension decision solely upon the information in the administrative record, including any submission made by the respondent.

(e) Notice of suspending official's decision. In actions in which additional proceedings have been held, following such proceedings, the Suspending Official shall notify respondent, as applicable, in accordance with paragraphs (e)(1) or (e)(2) of this section.

(1) Upon deciding to sustain a suspension, the Suspending Official shall promptly send each affected respondent a notice containing the following information:

(i) A reference to the notice of suspension, the meeting and the fact-finding conference;

(ii) The Suspending Official's findings of fact and conclusions of law;

(iii) The reasons for sustaining a suspension;

(iv) A reference to the Suspending Official's waiver authority under 48 CFR (DEAR) 909.405 as may be modified by this deviation;

(v) A statement that the suspension is effective throughout the Executive Branch as provided in FAR 9.407-1(d);

(vi) Modifications, if any, of the initial terms of the suspension;

(vii) If less that a copy of the suspension notice was sent to GSA and that the respondent's name and address will be added to the EPLS; and

(viii) If less than an entire organization is suspended, specification of the organizational element(s) or individual(s) included within the scope of the suspension.

(2) If the Suspending Official decides to terminate a suspension, the Suspending Official shall promptly send, by certified mail, return receipt requested, each affected respondent a copy of the final decision required under this section.

ATTACHMENT 1

National Nuclear Security Administration
Determination and Findings
Class Deviation to the
Department of Energy Acquisition Regulation (DEAR)

On the basis of the following findings and determination, a class deviation from the DEAR procedures for addressing advisory and assistance services organizational conflicts of interest, is authorized pursuant to the authority of FAR 1.403.

FINDINGS:

1. The provision at DEAR 952.209-8 entitled "ORGANIZATIONAL CONFLICTS OF INTEREST DISCLOSURE - ADVISORY AND ASSISTANCE SERVICES" requires the apparently successful offeror (or where individual contracts are negotiated with all firms in the competitive range, all such firms) to provide

(1) A statement of past, present or planned financial, contractual, organizational, or other interests relating to performance of the statement of work; and

(2) A statement that no actual or potential conflict of interest or unfair competitive advantage exists; or that any actual or potential conflict of interest or unfair competitive advantage has been disclosed.

2. DEAR 909.504 requires the contracting officer to evaluate this submission and make a written determination as to whether the interests identified create an actual or significant potential organizational conflict of interest (OCI). If an actual or significant potential OCI is found, the contracting officer must identify actions needed to avoid, neutralize or mitigate such conflict. The DEAR recognizes several alternatives to avoid, neutralize or mitigate an OCI, including discussions with an offeror, disqualification of an offeror, and obtaining approval to award notwithstanding a conflict of interest.

3. At present DEAR 909.504 and 952.209-8 may necessitate discussions with one or more offerors. NNSA intends to award the LANL M&O contract without discussions, and the DEAR OCI requirements have been identified as a potential barrier to execution of this strategy. The LANL M&O Source Evaluation Board contracting officer has proposed a deviation to DEAR 952.209-8, which is designed to enable award without discussions. The proposed deviation would require offerors to submit the information contemplated by DEAR 952.209-8 with their proposals, rather than through a final negotiation process. It would also require offerors to submit a plan to avoid, neutralize or mitigate any actual or significant potential OCI. Discussions would be required only if an OCI or significant potential OCI cannot be avoided, neutralized or mitigated to the contracting officer's satisfaction, even after taking into consideration an offeror's plan to do so.

ATTACHMENT 1

4. The proposed deviation provides an efficient mechanism for identifying and resolving OCI, consistent with the intent of DEAR 952.209-8 and DEAR 909.504. By ensuring that an offeror's plan for OCI resolution is obtained with its proposal, rather than during final negotiations, the proposed deviation enables NNSA to award the LANL M&O contract without discussions. For these reasons the proposed deviation should be approved for all NNSA solicitations where it is intended that award be made without discussions.

DETERMINATION:

Based on the above findings, I hereby authorize a class deviation from DEAR 909.504, 909.507-1 and 952.209-8 (ATTACHMENT 2) to provide an efficient mechanism for identifying and resolving OCI when NNSA intends to make award without discussions.

EXPIRATION:

Authority to exercise this deviation shall expire on September 30, 2007, or upon issuance of superseding revisions to the DEAR, whichever occurs first.

Robert C Brado

Senior Procurement Executive
National Nuclear Security Administration

May 17, 2005
Date

ATTACHMENT 1

Determination and Findings
Class Deviations to the
Department of Energy Acquisition Regulation (DEAR)

On the basis of the following findings and determination, class deviations to seven DEAR clauses are authorized pursuant to the authority of FAR 1.403.

FINDINGS:

1. The DEAR requires use of two outdated clauses (Findings 2 and 3 below), which have been superseded by DOE Orders. Two other DEAR clauses (Findings 4 and 5 below) merely specify compliance with a DOE Order. NNSA contracts may require compliance with numerous DOE and NNSA directives (Orders, Manuals, Standards, etc.). Specifying compliance with these directives through individual clauses, through separate reference in the contract, or through both, is cumbersome and confusing. When compliance with DOE or NNSA directives is required, the directives should be listed in the contract's Statement of Work; an attachment to the contract; or, for M&O contracts, by incorporation in the List of Applicable Directives referenced in the Laws, Regulations, and DOE Directives clause (DEAR 970.5204-2). Another DEAR clause requires correction of an out-of-date reference to a DOE Order (Finding 6). Finally (Findings 7 and 8), two DEAR clauses require various administrative revisions to facilitate contract administration. The proposed deviations should be applied to the class of all contracts for which the DEAR prescribes use of these clauses.

2. DEAR 952.217-70 Acquisition of Real Property. This clause, dated APR 1984, requires the Contractor to obtain prior approval of the Contracting Officer when the Contractor acquires or proposes to acquire use of real property and to flow down the clause requirements to its subcontractors. This clause has since been overcome by DOE Order 430.1B, Real Property Asset Management, dated September 24, 2003. The Order includes a Contractor Requirements Document that specifies requirements for contracts involving acquisition, management, maintenance, disposition, or disposal of real property assets. Therefore, the DEAR clause is no longer needed. Requiring compliance with DOE Order 430.1B, rather than including the clause, will streamline contracts and ensure that they include the current real property requirements.

3. DEAR 970.5237-2 Facilities Management. The DEAR clause, as written, identifies requirements associated with Site development planning (paragraph (a)); General Design criteria (paragraph (b)); Energy Management (paragraph (c)); and a flow-down requirement (paragraph (d)). As explained below, this clause is outdated and superfluous, considering current Departmental requirements, which need to be incorporated into M&O contracts.

a. With respect to Paragraph (a), there is no current Life Cycle Facility Operations Series. The clause states "The Government shall provide to the contractor site development guidance for the facilities and lands for which the contractor is responsible under the terms and conditions of this contract." The paragraph further contains a

requirement for the Contractor to "...prepare...a "Long Range Site Development Plan" and further requires "In developing this Plan, the contractor shall follow the procedural guidance set forth in the applicable DOE Directives in the Life Cycle Facility Operations Series listed elsewhere in this contract." The prescribed standard clause at DEAR 970.5237-2 – Facilities Management, as published in the Federal Register on December 22, 2000, is unchanged from the previous version, DEAR 970.5204-60 - Facilities Management (Nov 1997). The November 1997 version of the Facilities Management clause was seriously outdated at the time it was published and did not reflect the Department's adoption of Life Cycle Asset Management (LCAM) at the time. Since its first issuance on August 24, 1995, DOE O 430.1 – Life Cycle Asset Management (LCAM), provided for cancellation of a number of other directives, including DOE O 6430.1 - General Design Criteria, and DOE O 4320.1B - Site Development Planning. Regardless, these two orders continue to be referred to in the Facilities Management clause. The Order 430.1B – Real Property Asset Management, dated September 24, 2003, now cancels DOE O 430.1A – Life-Cycle Asset Management, dated October 14, 1998. The Order 430.1B contains a Contractor Requirements Document (CRD) which is intended to apply to all site and facility management contracts which involve acquisition, maintenance, disposition or disposal of real property assets. That CRD and other CRDs appended to other applicable orders governing facility management are intended to contain the Department's requirements for M&O contracts concerning facility management. Therefore, any Facilities Management clause is superfluous.

b. The DEAR clause Paragraph (b), General design criteria, contains a requirement for the Contractor to comply with a cancelled DOE Order. Furthermore, the criteria should not be applied to leases, modular buildings, etc., as no commercial buildings were ever constructed to meet the Order. This paragraph requires the Contractor to follow the general design criteria contained "in the applicable DOE Directives 6430, Design Criteria, series listed elsewhere in this contract." However, the 6430 series was subsequently replaced in turn by DOE Order 430.1 "Life Cycle Asset Management"; DOE Order 430.1A; and DOE Order 430.1B.

c. The DEAR clause Paragraph (c), Energy Management, the paragraph's requirements for energy management are not consistent with the requirements of DOE Order 430.2A "Departmental Energy and Utilities Management, dated April 15, 2002, which is applicable and will be incorporated into the contract's List of Applicable Directives. This paragraph establishes requirements for extensive and expensive new work and reporting, which could lead to implicit requirements for new NNSA approvals of energy conservation reports. The DEAR clause's requirements for "an energy conservation report for each new building or addition project" are costly and inappropriate for smaller projects. The potential for new, required NNSA approvals of such reports before proceeding with projects or "additions" may lead to project delays, cost increases, and adverse mission customer impacts. The DEAR Clause requirements for a "10-year energy management plan" appear to go beyond the current requirements of either DOE Order 430.2, *In-House Energy Management*, or DOE Order 430.2A, *Departmental Energy and Utilities Management*. Thus, the inclusion of the DEAR

clause's paragraph (c) with the DOE Order 430.2A creates an ambiguity in contract requirements.

d. The Order 430.1B also requires "That is, contractors will (a) ensure that they and their subcontractors comply with the requirements of this CRD..." which is synonymous with the DEAR clause's paragraph (d) subcontractor flow-down requirement.

e. Thus, the out-of-date DEAR Clause is not needed and conflicts with DOE's current applicable Directives.

4. DEAR 952.247-70 Foreign Travel. The DEAR clause requires the Contractor to conduct Foreign Travel in accordance with the January 31, 2000 DOE Order 551.1 "Official Foreign Travel," or a subsequent version of the Order in effect at the time of award. Instead of specifying compliance with the DOE Order through this clause, NNSA contracts should list the Order elsewhere in the contract, along with any other applicable directives, as noted at paragraph 1 above.

5. DEAR 952.204-2 Security Requirements. As explained below, this clause needs to be revised to enable the government to require the contractor to comply with current security regulations and to correct a reference to an Executive Order which is no longer in effect.

a. Paragraph (b) of this DEAR Clause requires the Contractor to comply with all DOE security regulations and requirements in effect at date of award. However, DOE and NNSA security requirements may change with some frequency during the term of the contract. Therefore, the clause should be modified to refer to only those DOE/NNSA security requirements incorporated into the contract. Changes to DOE/NNSA security requirements and/or regulations that pertain to the Contractor can be implemented in the contract via the contract's clause entitled "Laws, Regulations, and DOE Directives" (M&O contracts) that allows for NNSA to unilaterally incorporate into the contract new security requirements issued during post-award. For non-M&O contracts, DOE/NNSA security requirements and required changes to them should be implemented through the contract's Statement of Work, Contract Security Classification Specification or other attachment to the contract, as appropriate.

b. With respect to paragraphs (f), (h), and (i), EO 12958 revoked EO 12356 on October 14, 1995, yet the DEAR clause has not been updated to reflect this change.

c. Inclusion of the DEAR clause "as is" adds conflicting terms and conditions to the contract; thus, rendering the DEAR clause ineffective.

6. DEAR 970.5215-3 Conditional Payment of Fee, Profit, and Other Incentives -- Facility Management Contracts. DOE Order 232.1A, referred to in paragraph (c)(3)(i) of the clause was replaced by DOE Order 231.1A, Chg 1, Environment, Safety and Health Reporting, which is not applicable to contractors or M&O contracts. The current DOE Manual 231.1-2, Occurrence Reporting and Processing of Operations Information,

incorporates the requirements associated with contractor deficiencies/non-compliances (occurrence) reporting and needs to be added to the DEAR clause (in place of DOE Order 232.1A) in order to remove a conflict between the DEAR Clause and the DOE Manual 231.1-2, which is included in the contract's List of Applicable Directives.

7. DEAR 970.5204-2 Laws, Regulations, and DOE Directives. As explained below, from time to time this clause requires administrative revisions to facilitate contract administration. In addition, certain administrative corrections to the clause are required.

a. The use of the terms "List A" and "List B" (as included in the DEAR clause) add confusion for the reader since, in some instances, there is no List A-List of Applicable Laws and Regulations incorporated into the contract, and the item generally referenced as List B, the List of Applicable Directives, is actually included in an appendix (e.g., Appendix "G") to the contract. The deviation enables clause "clean-up" thereby making it more readable, and eliminates confusion without changing the requirements or intent of the clause.

b. The deviation's change to the last sentence of paragraph (b) is required to remove an ambiguity between this Laws, Regulations, and DOE Directives clause and the clause at 970.5243-1 entitled "Changes." The last sentence states: "The contractor and the contracting officer shall identify and, if appropriate, agree to any changes <u>to other contract terms and conditions, including cost and schedule,</u> associated with the revision to List B pursuant to the clause of this contract entitled, "Changes." However, the Changes clause, only provides for changes <u>to fee.</u> In order to remove the ambiguity between the two clauses, the proposed deviation to this Laws, Regulations, and DOE Directives clause separates the authority for changing "terms and conditions, including cost and schedule" from the authority to change fee. This allows for any changes to be made pursuant to paragraph (b) of the "Laws, Regulations, and DOE Directives" clause and any adjustments to fee, if required, to be made pursuant to the "Changes" clause.

c. Pursuant to Section 3212(b)(2) of Public Law 106-65, NNSA has established a system for managing policy, directives and business management practices within NNSA. Specifically, NAP-1 provides that:

> This system, to be called Policy Letters, codifies how the Administration will establish policy, and provide direction and guidance to all its elements. The Administration's Policy Letter system is a process which will: (1) establish new policy or directives that are unique to the Administration; (2) supplement or indicate how the Administration will implement a Departmental Directive including implementation of directives in a cost efficient manner; and/or (3) provide business and operating guidance. Administration Policy Letters will take two forms:
> - Directives Policy Letters which are related to (1) and (2) above; and
> - Business and Operating Policy Letters which relate to (3) above.

Therefore, the deviation's change to the clause's paragraph (b) (insertion of "National Nuclear Security Administration Policy Letters" in the first sentence) is in recognition that the Administrator has established "NNSA Policy Letters," which may be applicable to NNSA M&O contractors. Thus, the deviation facilitates the incorporation of such NNSA Policy Letters into NNSA M&O contracts.

ATTACHMENT 1

8. DEAR 970.5203-3 Contractor's Organization. The proposed deviation would make various administrative changes to the DEAR clause, as described below.

a. Deviation to paragraph (a): The purpose of this deviation is to require the contractor to provide an organization chart that reflects not only key personnel, but also the Contractor's Parent Organization's responsible official for administering the Oversight Plan. This change will provide NNSA better insight regarding the individual responsible for making important management decisions that affect an M&O contractor's operations and performance.

b. Deviation to paragraph (b): The purpose of this deviation is to identify the individual or position title of the "resident supervisory representative of the contractor" in charge of the work performed under the contract at any site and at all times.

c. Deviation to paragraph (c): With respect to control of contractor's employees, the proposed deviation provides the NNSA Administrator the right to require the contractor to remove an employee from work under the contract. The paragraph stipulates that it does not impair the statutory or contractual collective bargaining rights of union-represented contractor employees.

d. Deviation to add new paragraph (e): This new paragraph was added to recognize that the terms and conditions of this DEAR Clause or implementation are not intended to conflict with law or otherwise affect the scientific integrity of persons who provide, under the contract, independent technical judgments on the safety, security, and reliability of nuclear weapons systems maintained by the Contractor for the NNSA.

e. The proposed deviations to this clause are complementary to NNSA's Model Clauses contained in Contract Section H, which are focused on improving management and performance above current performance levels and NNSA's commitment to redefining the federal/contractor relationship to improve management and performance within the Nuclear Weapons Complex. These Model Clauses were written in response to the NNSA Administrator's Report to Congress:

*"**Trust, teamwork, and verify** will be the watchwords in program management."*

and

*"**New governance approach.** With these principles in mind, NNSA will develop and implement a simpler, less adversarial contracting model that capitalizes on the private-sector expertise and experience of the management and operating contractors while simultaneously increasing contractor accountability for high performance and responsiveness to NNSA program and stewardship requirements."*

f. The benefit the Government will receive by the deviations to this clause is to (1) gain insight into how the Contractor's parent organization's staff will provide contract support while recognizing that (i) it is the identified individual or position title of the "resident supervisory representative" of the contractor that is ultimately responsible for contract performance and (ii) the Contractor's parent organization is contractually required to play a higher role in fostering contract performance; and (2) to demonstrate to

ATTACHMENT 1

the Contractor that the Department understands that, given the unique nature of this contract, it will not impair the statutory or collective bargaining rights or scientific integrity relative to those contractor personnel who provide independent technical judgment in relation to their role in certifying the nuclear stockpile.

g. A deviation request similar to the above request was approved for the Sandia National Laboratories M&O contract.

DETERMINATION:

Based upon the above findings, I hereby authorize administrative class deviations from seven DEAR clauses (ATTACHMENTS 2 and 3) that are outdated, or must be removed or revised to facilitate contract administration.

EXPIRATION:

Authority to exercise these deviations shall expire upon issuance of superseding revisions to the DEAR.

Robert C. Brese

Senior Procurement Executive
National Nuclear Security Administration

May 17, 2005
Date

ATTACHMENT 5

Determination and Findings
Individual and Class Deviations to the
Department of Energy Acquisition Regulation (DEAR)

On the basis of the following findings and determination, an individual and two class deviations from the DEAR, consistent with the Department's proposed changes to the DEAR, are authorized for use in the Los Alamos National Laboratory Management & Operating solicitation and contract, pursuant to the authority of FAR 1.403.

FINDINGS:

1. Three deviations related to DOE's make-or-buy plan policy have been proposed by the contracting officer for use in the Los Alamos National Laboratory M&O solicitation and contract. Each proposed deviation is described in the findings that follow. The first proposed deviation (Finding 2) has not been requested before. Two of the proposed deviations (Findings 3 and 4) are similar to individual deviations approved for the Sandia National Laboratories M&O contract, and are identified as class deviations. The proposed deviations are consistent with the Department's proposed rule, published in the Federal Register on December 15, 2004 (Volume 69, No. 240, 69 FR 75017), which would eliminate the requirement for formal make-or-buy plans. The Background section of the proposed rule explains that the Department's reassessment of its make-or-buy program concluded that requiring make-or-buy plans was not cost-effective. Since it is anticipated that finalization of the proposed rule will obviate the need for future deviations, it is requested that the class deviations apply only to the Sandia M&O contract (deviation previously approved) and to the LANL M&O solicitation and contract.

2. DEAR 970.5203-1 Management Controls.

a. The proposed revision to paragraph (a)(1) is consistent with the Department's proposed rule (see Federal Register Vol. 69, No. 240 (15Dec04)) changes to (1) eliminate the DEAR Clause 970.5215-2 Make-Or-Buy Plan, and (2) revise the DEAR Clause 970.5203-1 Management Controls to add a requirement that the Contractor consider outsourcing of functions.

b. The revision to paragraph (a)(4) (not a requested deviation) is made in accordance with the NNSA Senior Procurement's approved class deviation set forth in DOE Acquisition Letter No. AL-2005-04.

c. This deviation has not been previously requested.

3. DEAR 970.5215-2 Make-Or-Buy Plan. The proposed deviation would omit this clause from the solicitation and contract. The proposed deviation is consistent with the Department's proposed rules (see Federal Register Vol. 69, No. 240 (15Dec04)) changes to (1) eliminate the DEAR Clause 970.5215-2 Make-Or-Buy Plan, and (2) revise the DEAR Clause 970.5203-1 Management Controls to add a requirement that the Contractor consider outsourcing of

functions. A similar individual deviation was approved for the Sandia National Laboratories M&O Contract.

4. DEAR 970.5244-1 Contractor Purchasing System. The clause revisions identified by the contracting officer include updates to clause paragraph (g) in accordance with DOE Acquisition Letter 2002-06 (08/14/02), page 13 of 13 (a previously approved DOE administrative deviation). The revision to paragraph (n) is consistent with the Department's proposed rule (see Federal Register Vol. 69, No. 240 (15Dec04)) changes to (1) eliminate the DEAR Clause 970.5215-2 Make-Or-Buy Plan, and (2) revise the DEAR Clause 970.5203-1 Management Controls to add a requirement that the Contractor consider outsourcing of functions. A similar individual deviation was approved for the Sandia National Laboratories M&O Contract.

DETERMINATION:

Based on the above findings, I hereby determine that deviations from the requirements of the DEAR clauses at 970.5203-1 Management Controls, 970.5215-2 Make-Or-Buy Plan, and 970.5244-1 Contractor Purchasing System (ATTACHMENTS 6 and 7) are necessary to implement improvements to the Department's make-or-buy policies, as contemplated by proposed changes to the DEAR. I hereby authorize an individual deviation from the requirements of DEAR clause 970.5203-1 for the LANL M&O solicitation and contract. Class deviations from the requirements of the DEAR clauses 970.5215-2 and 970.5244-1 for use in the LANL M&O solicitation and contract, in addition to the previously approved similar deviation for the Sandia National Laboratories M&O contract, are also authorized.

EXPIRATION:

Authority to exercise these deviations shall expire upon issuance of the LANL M&O solicitation or upon finalization of the Department's proposed rule, whichever occurs first.

Robert C Brese

Senior Procurement Executive
National Nuclear Security Administration

5/17/2005
Date

ATTACHMENT 8

Determination and Findings
Class Deviation to the
Department of Energy Acquisition Regulation (DEAR)

On the basis of the following findings and determination, a class deviation from the DEAR to enable use of specialized performance improvement clauses, is authorized pursuant to the authority of FAR 1.403.

FINDINGS:

1. DEAR 970.5203-2 Performance Improvement and Collaboration. The proposed deviation would exclude the DEAR clause from the LANL M&O contract and replace its requirements with tailored Special Clauses H-1 through H-13, which are geared to accomplish similar objectives. Since a similar deviation was approved for the Sandia National Laboratories M&O contract, the requested deviation is identified as a class deviation.

2. The objectives of the DEAR clause are parallel to some of the goals of the NNSA Model for Improving Management and Performance, which will be embodied into the new LANL M&O contract. These objectives are captured in expanded form and included as new Contractor requirements in the LANL M&O solicitation's Special Clauses H-1 through H-13. These proposed Special H clauses duplicate and expand with specificity upon the performance improvement objectives and requirements of the DEAR clause. For example, incorporated into Section H of the contract will be a clause entitled; "Contractor Multi-Year Strategy for Performance Improvement" which requires that the Contractor to:

...develop a multi-year strategy (1) detailing its planned efforts and expected accomplishments by year, to continuously improve management and performance at the Laboratory, and (2) the planned efforts and contributions of its corporate parent. The multi-year strategy shall also address planned efforts to (1) enhance Contractor communications, cooperation and integration with the NNSA Weapon Complex, with emphasis on Lawrence Livermore National Laboratory; and, (2) contribute to overall NNSA Weapon Complex improvements."

This clause will require offerors to submit planned efforts and expected accomplishments for Contract Years 1 and 2 and will require subsequent annual updates for Contracting Officer approval. Therefore, the DEAR clause requirements for performance improvement and collaboration are unnecessary in light of the proposed Section H clauses.

3. The benefit the Government would gain by implementing the proposed deviation is to bring the resulting Contract terms and conditions in line with the NNSA Administrator's goal of improved contractor management and performance as indicated in NNSA's February 2002 REPORT TO CONGRESS ON THE ORGANIZATION AND OPERATIONS OF THE NATIONAL NUCLEAR SECURITY ADMINISTRATION. This report, in part, states:

"Federal employees, with contractor input, will establish broad program objectives and goals. Contractors, in consultation with federal employees, will be given the flexibility to execute programs efficiently and will be held accountable for meeting those objectives and goals." "NNSA will begin this new approach immediately by developing a contractor governance strategy based predominantly on commercial standards and the best industrial practices. The governance strategy will be accompanied by an assurance model that will rely as much as practicable

on third-party, private-sector assurance systems such as comprehensive internal auditing, oversight by boards and external panels, third-party certification, and direct engagement between oversight bodies and NNSA's leadership."

4. It is anticipated that the Lawrence Livermore National Laboratory (LLNL) M&O competitive solicitation will also require use of this deviation.

DETERMINATION:

Based on the above findings, I hereby determine that a class deviation from the DEAR requirements for use of the clause at 970.5203-2 Performance Improvement and Collaboration (ATTACHMENT 9) is necessary to enable use of specialized performance improvement clauses in the Los Alamos National Laboratory M& O solicitation/contract, as well as in the LLNL M&O solicitation/contract. I hereby authorize a class deviation from the requirements of DEAR clause 970.5203-2 for use in the LANL and LLNL M&O solicitations/contracts, in addition to the previously approved similar deviation for the Sandia National Laboratories M&O contract.

EXPIRATION:

Authority to exercise this deviation shall expire on September 30, 2007.

Robert C Brese

Senior Procurement Executive
National Nuclear Security Administration

5/17/2005
Date

ATTACHMENT 10

Determination and Finding
Individual Deviation to the
Department of Energy Acquisition Regulation (DEAR)

On the basis of the following finding and determination, a deviation to administratively modify DEAR clause 970.5215-3, Conditional Payment of Fee, Profit, and Other Incentives -- Facility Management Contracts, is authorized pursuant to the authority of FAR 1.403.

FINDING:

DEAR 970.5215-3 clause paragraph (a)(4) is written with the assumption that the contract also contains the DEAR 970.5215-1 (Total Available Fee: Base Fee Amount and Performance Fee Amount) clause, which is applicable to contracts awarded on a Cost-Plus-Award-Fee (CPAF) basis. Since the LANL RFP is not written on a CPAF basis, the reference to the 970.5215-1 clause should be removed. The remaining wording in the 970.5215-3 clause paragraph (a)(4) is appropriate for use in the LANL RFP.

DETERMINATION:

Based on the above finding, I hereby determine that a deviation from the DEAR, to permit an administrative modification to the clause at 970.5215-3 Conditional Payment of Fee, Profit, and Other Incentives -- Facility Management Contracts (ATTACHMENT 11), is necessary for the LANL M&O solicitation and contract.

Robert C. Brese

Senior Procurement Executive
National Nuclear Security Administration

5/17/2005
Date

ATTACHMENT 12

Determination and Finding
Individual Deviation to the
Department of Energy Acquisition Regulation (DEAR)

On the basis of the following finding and determination, an individual deviation from the requirements of DEAR 970.1504 and the associated clause at 970.5215-5, in order to allow the contracting officer to negotiate an appropriate fee arrangement for the LANL M&O contract, is authorized pursuant to the authority of FAR 1.403.

FINDING:

DEAR 970.5215-5 Limitation on Fee. An individual deviation, to omit this clause from the LANL M&O solicitation and contract, is requested. DOE's Fee Policy requires the inclusion of the DEAR clause 970.5215-5 as part of its rewards/penalties fee system. This clause provides that available fee shall not exceed the total allowed through the formulaic approach at 48 CFR 970.1504-1-1 and that the Government reserves the right to limit total available fee to not exceed an amount established pursuant to 48 CFR 970.1504-1-9. NNSA plans to pursue an alternative fee policy that is based on rewarding and penalizing its M&O Contractor's based on performance (NNSA Policy Letter BOP 540.2 dated January 10, 2005). NNSA's fee policy is designed to simplify the computation of the amount of total available fee and to reduce the cost of fee policy implementation. The LANL RFP's contract clauses adequately reflect NNSA's position with respect to setting maximum fees, payment of fees, and reduction of fees for performance detrimental to NNSA's mission. Hence, the fee computation methodology contemplated by DEAR 970.5215-5 should not be applied to the LANL M&O contract.

DETERMINATION:

Based on the above finding, I hereby determine that a deviation from the requirements of DEAR 970.1504 and the associated clause at 970.5215-5 Limitation on Fee (ATTACHMENT 13) is necessary to allow the contracting officer to negotiate an appropriate fee arrangement for the LANL M&O contract.

Robert C. Brese

Senior Procurement Executive
National Nuclear Security Administration

5/17/2005
Date

ATTACHMENT 1

Determination and Findings
Class Deviations to the
Department of Energy Acquisition Regulation (DEAR)

On the basis of the following findings and determination, class deviations to seven DEAR clauses are authorized pursuant to the authority of FAR 1.403.

FINDINGS:

1. The DEAR requires use of two outdated clauses (Findings 2 and 3 below), which have been superseded by DOE Orders. Two other DEAR clauses (Findings 4 and 5 below) merely specify compliance with a DOE Order. NNSA contracts may require compliance with numerous DOE and NNSA directives (Orders, Manuals, Standards, etc.). Specifying compliance with these directives through individual clauses, through separate reference in the contract, or through both, is cumbersome and confusing. When compliance with DOE or NNSA directives is required, the directives should be listed in the contract's Statement of Work; an attachment to the contract; or, for M&O contracts, by incorporation in the List of Applicable Directives referenced in the Laws, Regulations, and DOE Directives clause (DEAR 970.5204-2). Another DEAR clause requires correction of an out-of-date reference to a DOE Order (Finding 6). Finally (Findings 7 and 8), two DEAR clauses require various administrative revisions to facilitate contract administration. The proposed deviations should be applied to the class of all contracts for which the DEAR prescribes use of these clauses.

2. DEAR 952.217-70 Acquisition of Real Property. This clause, dated APR 1984, requires the Contractor to obtain prior approval of the Contracting Officer when the Contractor acquires or proposes to acquire use of real property and to flow down the clause requirements to its subcontractors. This clause has since been overcome by DOE Order 430.1B, Real Property Asset Management, dated September 24, 2003. The Order includes a Contractor Requirements Document that specifies requirements for contracts involving acquisition, management, maintenance, disposition, or disposal of real property assets. Therefore, the DEAR clause is no longer needed. Requiring compliance with DOE Order 430.1B, rather than including the clause, will streamline contracts and ensure that they include the current real property requirements.

3. DEAR 970.5237-2 Facilities Management. The DEAR clause, as written, identifies requirements associated with Site development planning (paragraph (a)); General Design criteria (paragraph (b)); Energy Management (paragraph (c)); and a flow-down requirement (paragraph (d)). As explained below, this clause is outdated and superfluous, considering current Departmental requirements, which need to be incorporated into M&O contracts.

a. With respect to Paragraph (a), there is no current Life Cycle Facility Operations Series. The clause states "The Government shall provide to the contractor site development guidance for the facilities and lands for which the contractor is responsible under the terms and conditions of this contract." The paragraph further contains a

requirement for the Contractor to "...prepare...a "Long Range Site Development Plan" and further requires "In developing this Plan, the contractor shall follow the procedural guidance set forth in the applicable DOE Directives in the Life Cycle Facility Operations Series listed elsewhere in this contract." The prescribed standard clause at DEAR 970.5237-2 – Facilities Management, as published in the Federal Register on December 22, 2000, is unchanged from the previous version, DEAR 970.5204-60 - Facilities Management (Nov 1997). The November 1997 version of the Facilities Management clause was seriously outdated at the time it was published and did not reflect the Department's adoption of Life Cycle Asset Management (LCAM) at the time. Since its first issuance on August 24, 1995, DOE O 430.1 – Life Cycle Asset Management (LCAM), provided for cancellation of a number of other directives, including DOE O 6430.1 - General Design Criteria, and DOE O 4320.1B - Site Development Planning. Regardless, these two orders continue to be referred to in the Facilities Management clause. The Order 430.1B – Real Property Asset Management, dated September 24, 2003, now cancels DOE O 430.1A – Life-Cycle Asset Management, dated October 14, 1998. The Order 430.1B contains a Contractor Requirements Document (CRD) which is intended to apply to all site and facility management contracts which involve acquisition, maintenance, disposition or disposal of real property assets. That CRD and other CRDs appended to other applicable orders governing facility management are intended to contain the Department's requirements for M&O contracts concerning facility management. Therefore, any Facilities Management clause is superfluous.

b. The DEAR clause Paragraph (b), General design criteria, contains a requirement for the Contractor to comply with a cancelled DOE Order. Furthermore, the criteria should not be applied to leases, modular buildings, etc., as no commercial buildings were ever constructed to meet the Order. This paragraph requires the Contractor to follow the general design criteria contained "in the applicable DOE Directives 6430, Design Criteria, series listed elsewhere in this contract." However, the 6430 series was subsequently replaced in turn by DOE Order 430.1 "Life Cycle Asset Management"; DOE Order 430.1A; and DOE Order 430.1B.

c. The DEAR clause Paragraph (c), Energy Management, the paragraph's requirements for energy management are not consistent with the requirements of DOE Order 430.2A "Departmental Energy and Utilities Management, dated April 15, 2002, which is applicable and will be incorporated into the contract's List of Applicable Directives. This paragraph establishes requirements for extensive and expensive new work and reporting, which could lead to implicit requirements for new NNSA approvals of energy conservation reports. The DEAR clause's requirements for "an energy conservation report for each new building or addition project" are costly and inappropriate for smaller projects. The potential for new, required NNSA approvals of such reports before proceeding with projects or "additions" may lead to project delays, cost increases, and adverse mission customer impacts. The DEAR Clause requirements for a "10-year energy management plan" appear to go beyond the current requirements of either DOE Order 430.2, *In-House Energy Management*, or DOE Order 430.2A, *Departmental Energy and Utilities Management*. Thus, the inclusion of the DEAR

clause's paragraph (c) with the DOE Order 430.2A creates an ambiguity in contract requirements.

d. The Order 430.1B also requires "That is, contractors will (a) ensure that they and their subcontractors comply with the requirements of this CRD..." which is synonymous with the DEAR clause's paragraph (d) subcontractor flow-down requirement.

e. Thus, the out-of-date DEAR Clause is not needed and conflicts with DOE's current applicable Directives.

4. DEAR 952.247-70 Foreign Travel. The DEAR clause requires the Contractor to conduct Foreign Travel in accordance with the January 31, 2000 DOE Order 551.1 "Official Foreign Travel," or a subsequent version of the Order in effect at the time of award. Instead of specifying compliance with the DOE Order through this clause, NNSA contracts should list the Order elsewhere in the contract, along with any other applicable directives, as noted at paragraph 1 above.

5. DEAR 952.204-2 Security Requirements. As explained below, this clause needs to be revised to enable the government to require the contractor to comply with current security regulations and to correct a reference to an Executive Order which is no longer in effect.

a. Paragraph (b) of this DEAR Clause requires the Contractor to comply with all DOE security regulations and requirements in effect at date of award. However, DOE and NNSA security requirements may change with some frequency during the term of the contract. Therefore, the clause should be modified to refer to only those DOE/NNSA security requirements incorporated into the contract. Changes to DOE/NNSA security requirements and/or regulations that pertain to the Contractor can be implemented in the contract via the contract's clause entitled "Laws, Regulations, and DOE Directives" (M&O contracts) that allows for NNSA to unilaterally incorporate into the contract new security requirements issued during post-award. For non-M&O contracts, DOE/NNSA security requirements and required changes to them should be implemented through the contract's Statement of Work, Contract Security Classification Specification or other attachment to the contract, as appropriate.

b. With respect to paragraphs (f), (h), and (i), EO 12958 revoked EO 12356 on October 14, 1995, yet the DEAR clause has not been updated to reflect this change.

c. Inclusion of the DEAR clause "as is" adds conflicting terms and conditions to the contract; thus, rendering the DEAR clause ineffective.

6. DEAR 970.5215-3 Conditional Payment of Fee, Profit, and Other Incentives -- Facility Management Contracts. DOE Order 232.1A, referred to in paragraph (c)(3)(i) of the clause was replaced by DOE Order 231.1A, Chg 1, Environment, Safety and Health Reporting, which is not applicable to contractors or M&O contracts. The current DOE Manual 231.1-2, Occurrence Reporting and Processing of Operations Information,

incorporates the requirements associated with contractor deficiencies/non-compliances (occurrence) reporting and needs to be added to the DEAR clause (in place of DOE Order 232.1A) in order to remove a conflict between the DEAR Clause and the DOE Manual 231.1-2, which is included in the contract's List of Applicable Directives.

7. DEAR 970.5204-2 Laws, Regulations, and DOE Directives. As explained below, from time to time this clause requires administrative revisions to facilitate contract administration. In addition, certain administrative corrections to the clause are required.

a. The use of the terms "List A" and "List B" (as included in the DEAR clause) add confusion for the reader since, in some instances, there is no List A-List of Applicable Laws and Regulations incorporated into the contract, and the item generally referenced as List B, the List of Applicable Directives, is actually included in an appendix (e.g., Appendix "G") to the contract. The deviation enables clause "clean-up" thereby making it more readable, and eliminates confusion without changing the requirements or intent of the clause.

b. The deviation's change to the last sentence of paragraph (b) is required to remove an ambiguity between this Laws, Regulations, and DOE Directives clause and the clause at 970.5243-1 entitled "Changes." The last sentence states: "The contractor and the contracting officer shall identify and, if appropriate, agree to any changes to other contract terms and conditions, including cost and schedule, associated with the revision to List B pursuant to the clause of this contract entitled, "Changes." However, the Changes clause, only provides for changes to fee. In order to remove the ambiguity between the two clauses, the proposed deviation to this Laws, Regulations, and DOE Directives clause separates the authority for changing "terms and conditions, including cost and schedule" from the authority to change fee. This allows for any changes to be made pursuant to paragraph (b) of the "Laws, Regulations, and DOE Directives" clause and any adjustments to fee, if required, to be made pursuant to the "Changes" clause.

c. Pursuant to Section 3212(b)(2) of Public Law 106-65, NNSA has established a system for managing policy, directives and business management practices within NNSA. Specifically, NAP-1 provides that:

> This system, to be called Policy Letters, codifies how the Administration will establish policy, and provide direction and guidance to all its elements. The Administration's Policy Letter system is a process which will: (1) establish new policy or directives that are unique to the Administration; (2) supplement or indicate how the Administration will implement a Departmental Directive including implementation of directives in a cost efficient manner; and/or (3) provide business and operating guidance. Administration Policy Letters will take two forms:
> - Directives Policy Letters which are related to (1) and (2) above; and
> - Business and Operating Policy Letters which relate to (3) above.

Therefore, the deviation's change to the clause's paragraph (b) (insertion of "National Nuclear Security Administration Policy Letters" in the first sentence) is in recognition that the Administrator has established "NNSA Policy Letters," which may be applicable to NNSA M&O contractors. Thus, the deviation facilitates the incorporation of such NNSA Policy Letters into NNSA M&O contracts.

ATTACHMENT 1

8. DEAR 970.5203-3 Contractor's Organization. The proposed deviation would make various administrative changes to the DEAR clause, as described below.

a. Deviation to paragraph (a): The purpose of this deviation is to require the contractor to provide an organization chart that reflects not only key personnel, but also the Contractor's Parent Organization's responsible official for administering the Oversight Plan. This change will provide NNSA better insight regarding the individual responsible for making important management decisions that affect an M&O contractor's operations and performance.

b. Deviation to paragraph (b): The purpose of this deviation is to identify the individual or position title of the "resident supervisory representative of the contractor" in charge of the work performed under the contract at any site and at all times.

c. Deviation to paragraph (c): With respect to control of contractor's employees, the proposed deviation provides the NNSA Administrator the right to require the contractor to remove an employee from work under the contract. The paragraph stipulates that it does not impair the statutory or contractual collective bargaining rights of union-represented contractor employees.

d. Deviation to add new paragraph (e): This new paragraph was added to recognize that the terms and conditions of this DEAR Clause or implementation are not intended to conflict with law or otherwise affect the scientific integrity of persons who provide, under the contract, independent technical judgments on the safety, security, and reliability of nuclear weapons systems maintained by the Contractor for the NNSA.

e. The proposed deviations to this clause are complementary to NNSA's Model Clauses contained in Contract Section H, which are focused on improving management and performance above current performance levels and NNSA's commitment to redefining the federal/contractor relationship to improve management and performance within the Nuclear Weapons Complex. These Model Clauses were written in response to the NNSA Administrator's Report to Congress:

*"**Trust, teamwork, and verify** will be the watchwords in program management."*

and

*"**New governance approach.** With these principles in mind, NNSA will develop and implement a simpler, less adversarial contracting model that capitalizes on the private-sector expertise and experience of the management and operating contractors while simultaneously increasing contractor accountability for high performance and responsiveness to NNSA program and stewardship requirements."*

f. The benefit the Government will receive by the deviations to this clause is to (1) gain insight into how the Contractor's parent organization's staff will provide contract support while recognizing that (i) it is the identified individual or position title of the "resident supervisory representative" of the contractor that is ultimately responsible for contract performance and (ii) the Contractor's parent organization is contractually required to play a higher role in fostering contract performance; and (2) to demonstrate to

ATTACHMENT 1

the Contractor that the Department understands that, given the unique nature of this contract, it will not impair the statutory or collective bargaining rights or scientific integrity relative to those contractor personnel who provide independent technical judgment in relation to their role in certifying the nuclear stockpile.

g. A deviation request similar to the above request was approved for the Sandia National Laboratories M&O contract.

DETERMINATION:

Based upon the above findings, I hereby authorize administrative class deviations from seven DEAR clauses (ATTACHMENTS 2 and 3) that are outdated, or must be removed or revised to facilitate contract administration.

EXPIRATION:

Authority to exercise these deviations shall expire upon issuance of superseding revisions to the DEAR.

Robert C. Brese

Senior Procurement Executive
National Nuclear Security Administration

May 17, 2005
Date

ATTACHMENT 2

NNSA Deviation to DEAR 952.204-2 Security Requirements.

Whenever the clause entitled "SECURITY (MAY 2002)" is prescribed for use by the DEAR, substitute the following clause:

SECURITY (MAY 2002)(DEVIATION)

(a) *Responsibility*. It is the contractor's duty to safeguard all classified information, special nuclear material, and other DOE property. The contractor shall, in accordance with DOE security regulations and requirements, be responsible for safeguarding all classified information and protecting against sabotage, espionage, loss or theft of the classified documents and material in the contractor's possession in connection with the performance of work under this contract. Except as otherwise expressly provided in this contract, the contractor shall, upon completion or termination of this contract, transmit to DOE any classified matter in the possession of the contractor or any person under the contractor's control in connection with performance of this contract. If retention by the contractor of any classified matter is required after the completion or termination of the contract, the contractor shall identify the items and types or categories of matter proposed for retention, the reasons for the retention of the matter, and the proposed period of retention. If the retention is approved by the contracting officer, the security provisions of the contract shall continue to be applicable to the matter retained. Special nuclear material shall not be retained after the completion or termination of the contract.

(b) *Regulations*. The contractor agrees to comply with all security regulations and requirements of DOE as incorporated into the contract.

(c) *Definition of classified information*. The term "classified information" means Restricted Data, Formerly Restricted Data, or National Security Information.

(d) *Definition of restricted data*. The term "Restricted Data" means all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to Section 142 of the Atomic Energy Act of 1954, as amended.

(e) *Definition of formerly restricted data*. The term *"Formerly Restricted Data"* means all data removed from the Restricted Data category under section 142 d. of the Atomic Energy Act of 1954, as amended.

(f) *Definition of National Security Information*. The term "National Security Information" means any information or material, regardless of its physical form or characteristics, that is owned by, produced for or by, or is under the control of the United States Government, that has been determined pursuant to Executive Order 12958 or prior Orders to require protection against unauthorized disclosure, and which is so designated.

ATTACHMENT 2

(g) *Definition of Special Nuclear Material (SNM). SNM* means: (1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which pursuant to the provisions of Section 51 of the Atomic Energy Act of 1954, as amended, has been determined to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material.

(h) *Security clearance of personnel.* The contractor shall not permit any individual to have access to any classified information, except in accordance with the Atomic Energy Act of 1954, as amended, Executive Order 12958, and the DOE's regulations or requirements applicable to the particular level and category of classified information to which access is required.

(i) *Criminal liability.* It is understood that disclosure of any classified information relating to the work or services ordered hereunder to any person not entitled to receive it, or failure to safeguard any classified information that may come to the contractor or any person under the contractor's control in connection with work under this contract, may subject the contractor, its agents, employees, or subcontractors to criminal liability under the laws of the United States. (See the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011 et seq.; 18 U.S.C. 793 and 794; and E.O. 12958.)

(j) Foreign Ownership, Control or Influence.

(1) The Contractor shall immediately provide the cognizant security office written notice of any change in the extent and nature of foreign ownership, control or influence over the Contractor which would affect any answer to the questions presented in the Certificate Pertaining to Foreign Interests, Standard Form 328 or the Foreign Ownership, Control or Influence questionnaire executed by the Contractor prior to the award of this contract. In addition, any notice of changes in ownership or control which are required to be reported to the Securities and Exchange Commission, the Federal Trade Commission, or the Department of Justice shall also be furnished concurrently to the Contracting Officer.

(2) If a Contractor has changes involving foreign ownership, control or influence, DOE must determine whether the changes will pose an undue risk to the common defense and security. In making this determination, DOE will consider proposals made by the Contractor to avoid or mitigate foreign influences.

(3) If the cognizant security office at any time determines that the Contractor is, or is potentially, subject to foreign ownership, control or influence, the Contractor shall comply with such instructions as the Contracting Officer shall provide in writing to safeguard any classified information or special nuclear material.

(4) The Contractor agrees to insert terms that conform substantially to the language of this clause, including this paragraph, in all subcontracts under this contract that will require subcontractor employees to possess access authorizations. Additionally, the Contractor must require subcontractors to have an existing DOD or DOE Facility

ATTACHMENT 2

Clearance or submit a completed Certificate Pertaining to Foreign Interests, Standard Form 328, required in DEAR 952.204-73 prior to award of a subcontract. Information to be provided by a subcontractor pursuant to this clause may be submitted directly to the Contracting Officer. For purposes of this clause, subcontractor means any subcontractor at any tier and the term "Contracting Officer" means the DOE Contracting Officer. When this clause is included in a subcontract, the term "Contractor" shall mean Subcontractor and the term "contract" shall mean subcontract.

(5) The Contracting Officer may terminate this contract for default either if the Contractor fails to meet obligations imposed by this clause or if the Contractor creates a FOCI situation in order to avoid performance or a termination for default. The Contracting Officer may terminate this contract for convenience if the Contractor becomes subject to FOCI and for reasons other than avoidance of performance of the contract, cannot, or chooses not to, avoid or mitigate the FOCI problem.

ATTACHMENT 3

Administrative Deviations – Clause "Mark-ups"

DEAR 952.204-2 Security Requirements.

SECURITY (MAY 2002)(DEVIATION)

(a) *Responsibility.* It is the contractor's duty to safeguard all classified information, special nuclear material, and other DOE property. The contractor shall, in accordance with DOE security regulations and requirements, be responsible for safeguarding all classified information and protecting against sabotage, espionage, loss or theft of the classified documents and material in the contractor's possession in connection with the performance of work under this contract. Except as otherwise expressly provided in this contract, the contractor shall, upon completion or termination of this contract, transmit to DOE any classified matter in the possession of the contractor or any person under the contractor's control in connection with performance of this contract. If retention by the contractor of any classified matter is required after the completion or termination of the contract, the contractor shall identify the items and types or categories of matter proposed for retention, the reasons for the retention of the matter, and the proposed period of retention. If the retention is approved by the contracting officer, the security provisions of the contract shall continue to be applicable to the matter retained. Special nuclear material shall not be retained after the completion or termination of the contract.

(b) *Regulations.* The contractor agrees to comply with all security regulations and requirements of DOE ~~in effect on the date of award~~ **as incorporated into the contract**.

(c) *Definition of classified information.* The term "classified information" means Restricted Data, Formerly Restricted Data, or National Security Information.

(d) *Definition of restricted data.* The term "Restricted Data" means all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to Section 142 of the Atomic Energy Act of 1954, as amended.

(e) *Definition of formerly restricted data.* The term *"Formerly Restricted Data"* means all data removed from the Restricted Data category under section 142 d. of the Atomic Energy Act of 1954, as amended.

(f) *Definition of National Security Information.* The term "National Security Information" means any information or material, regardless of its physical form or characteristics, that is owned by, produced for or by, or is under the control of the United States Government, that has been determined pursuant to Executive Order ~~12356~~ **12958** or prior Orders to require protection against unauthorized disclosure, and which is so designated.

ATTACHMENT 3

(g) *Definition of Special Nuclear Material (SNM). SNM* means: (1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which pursuant to the provisions of Section 51 of the Atomic Energy Act of 1954, as amended, has been determined to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material.

(h) *Security clearance of personnel.* The contractor shall not permit any individual to have access to any classified information, except in accordance with the Atomic Energy Act of 1954, as amended, Executive Order ~~12356~~ **12958**, and the DOE's regulations or requirements applicable to the particular level and category of classified information to which access is required.

(i) *Criminal liability*. It is understood that disclosure of any classified information relating to the work or services ordered hereunder to any person not entitled to receive it, or failure to safeguard any classified information that may come to the contractor or any person under the contractor's control in connection with work under this contract, may subject the contractor, its agents, employees, or subcontractors to criminal liability under the laws of the United States. (See the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011 et seq.; 18 U.S.C. 793 and 794; and E.O. ~~12356~~ **12958**.)

(j) Foreign Ownership, Control or Influence.

(1) The Contractor shall immediately provide the cognizant security office written notice of any change in the extent and nature of foreign ownership, control or influence over the Contractor which would affect any answer to the questions presented in the Certificate Pertaining to Foreign Interests, Standard Form 328 or the Foreign Ownership, Control or Influence questionnaire executed by the Contractor prior to the award of this contract. In addition, any notice of changes in ownership or control which are required to be reported to the Securities and Exchange Commission, the Federal Trade Commission, or the Department of Justice shall also be furnished concurrently to the Contracting Officer.

(2) If a Contractor has changes involving foreign ownership, control or influence, DOE must determine whether the changes will pose an undue risk to the common defense and security. In making this determination, DOE will consider proposals made by the Contractor to avoid or mitigate foreign influences.

(3) If the cognizant security office at any time determines that the Contractor is, or is potentially, subject to foreign ownership, control or influence, the Contractor shall comply with such instructions as the Contracting Officer shall provide in writing to safeguard any classified information or special nuclear material.

(4) The Contractor agrees to insert terms that conform substantially to the language of this clause, including this paragraph, in all subcontracts under this contract that will require subcontractor employees to possess access authorizations. Additionally, the Contractor must require subcontractors to have an existing DOD or DOE Facility

ATTACHMENT 3

Clearance or submit a completed Certificate Pertaining to Foreign Interests, Standard Form 328, required in DEAR 952.204-73 prior to award of a subcontract. Information to be provided by a subcontractor pursuant to this clause may be submitted directly to the Contracting Officer. For purposes of this clause, subcontractor means any subcontractor at any tier and the term "Contracting Officer" means the DOE Contracting Officer. When this clause is included in a subcontract, the term "Contractor" shall mean Subcontractor and the term "contract" shall mean subcontract.

(5) The Contracting Officer may terminate this contract for default either if the Contractor fails to meet obligations imposed by this clause or if the Contractor creates a FOCI situation in order to avoid performance or a termination for default. The Contracting Officer may terminate this contract for convenience if the Contractor becomes subject to FOCI and for reasons other than avoidance of performance of the contract, cannot, or chooses not to, avoid or mitigate the FOCI problem.

ATTACHMENT 1

Determination and Findings
Class Deviations to the
Department of Energy Acquisition Regulation (DEAR)

On the basis of the following findings and determination, class deviations to seven DEAR clauses are authorized pursuant to the authority of FAR 1.403.

FINDINGS:

1. The DEAR requires use of two outdated clauses (Findings 2 and 3 below), which have been superseded by DOE Orders. Two other DEAR clauses (Findings 4 and 5 below) merely specify compliance with a DOE Order. NNSA contracts may require compliance with numerous DOE and NNSA directives (Orders, Manuals, Standards, etc.). Specifying compliance with these directives through individual clauses, through separate reference in the contract, or through both, is cumbersome and confusing. When compliance with DOE or NNSA directives is required, the directives should be listed in the contract's Statement of Work; an attachment to the contract; or, for M&O contracts, by incorporation in the List of Applicable Directives referenced in the Laws, Regulations, and DOE Directives clause (DEAR 970.5204-2). Another DEAR clause requires correction of an out-of-date reference to a DOE Order (Finding 6). Finally (Findings 7 and 8), two DEAR clauses require various administrative revisions to facilitate contract administration. The proposed deviations should be applied to the class of all contracts for which the DEAR prescribes use of these clauses.

2. DEAR 952.217-70 Acquisition of Real Property. This clause, dated APR 1984, requires the Contractor to obtain prior approval of the Contracting Officer when the Contractor acquires or proposes to acquire use of real property and to flow down the clause requirements to its subcontractors. This clause has since been overcome by DOE Order 430.1B, Real Property Asset Management, dated September 24, 2003. The Order includes a Contractor Requirements Document that specifies requirements for contracts involving acquisition, management, maintenance, disposition, or disposal of real property assets. Therefore, the DEAR clause is no longer needed. Requiring compliance with DOE Order 430.1B, rather than including the clause, will streamline contracts and ensure that they include the current real property requirements.

3. DEAR 970.5237-2 Facilities Management. The DEAR clause, as written, identifies requirements associated with Site development planning (paragraph (a)); General Design criteria (paragraph (b)); Energy Management (paragraph (c)); and a flow-down requirement (paragraph (d)). As explained below, this clause is outdated and superfluous, considering current Departmental requirements, which need to be incorporated into M&O contracts.

a. With respect to Paragraph (a), there is no current Life Cycle Facility Operations Series. The clause states "The Government shall provide to the contractor site development guidance for the facilities and lands for which the contractor is responsible under the terms and conditions of this contract." The paragraph further contains a

requirement for the Contractor to "...prepare...a "Long Range Site Development Plan" and further requires "In developing this Plan, the contractor shall follow the procedural guidance set forth in the applicable DOE Directives in the Life Cycle Facility Operations Series listed elsewhere in this contract." The prescribed standard clause at DEAR 970.5237-2 – Facilities Management, as published in the Federal Register on December 22, 2000, is unchanged from the previous version, DEAR 970.5204-60 - Facilities Management (Nov 1997). The November 1997 version of the Facilities Management clause was seriously outdated at the time it was published and did not reflect the Department's adoption of Life Cycle Asset Management (LCAM) at the time. Since its first issuance on August 24, 1995, DOE O 430.1 – Life Cycle Asset Management (LCAM), provided for cancellation of a number of other directives, including DOE O 6430.1 - General Design Criteria, and DOE O 4320.1B - Site Development Planning. Regardless, these two orders continue to be referred to in the Facilities Management clause. The Order 430.1B – Real Property Asset Management, dated September 24, 2003, now cancels DOE O 430.1A – Life-Cycle Asset Management, dated October 14, 1998. The Order 430.1B contains a Contractor Requirements Document (CRD) which is intended to apply to all site and facility management contracts which involve acquisition, maintenance, disposition or disposal of real property assets. That CRD and other CRDs appended to other applicable orders governing facility management are intended to contain the Department's requirements for M&O contracts concerning facility management. Therefore, any Facilities Management clause is superfluous.

b. The DEAR clause Paragraph (b), General design criteria, contains a requirement for the Contractor to comply with a cancelled DOE Order. Furthermore, the criteria should not be applied to leases, modular buildings, etc., as no commercial buildings were ever constructed to meet the Order. This paragraph requires the Contractor to follow the general design criteria contained "in the applicable DOE Directives 6430, Design Criteria, series listed elsewhere in this contract." However, the 6430 series was subsequently replaced in turn by DOE Order 430.1 "Life Cycle Asset Management"; DOE Order 430.1A; and DOE Order 430.1B.

c. The DEAR clause Paragraph (c), Energy Management, the paragraph's requirements for energy management are not consistent with the requirements of DOE Order 430.2A "Departmental Energy and Utilities Management, dated April 15, 2002, which is applicable and will be incorporated into the contract's List of Applicable Directives. This paragraph establishes requirements for extensive and expensive new work and reporting, which could lead to implicit requirements for new NNSA approvals of energy conservation reports. The DEAR clause's requirements for "an energy conservation report for each new building or addition project" are costly and inappropriate for smaller projects. The potential for new, required NNSA approvals of such reports before proceeding with projects or "additions" may lead to project delays, cost increases, and adverse mission customer impacts. The DEAR Clause requirements for a "10-year energy management plan" appear to go beyond the current requirements of either DOE Order 430.2, *In-House Energy Management*, or DOE Order 430.2A, *Departmental Energy and Utilities Management*. Thus, the inclusion of the DEAR

clause's paragraph (c) with the DOE Order 430.2A creates an ambiguity in contract requirements.

d. The Order 430.1B also requires "That is, contractors will (a) ensure that they and their subcontractors comply with the requirements of this CRD..." which is synonymous with the DEAR clause's paragraph (d) subcontractor flow-down requirement.

e. Thus, the out-of-date DEAR Clause is not needed and conflicts with DOE's current applicable Directives.

4. DEAR 952.247-70 Foreign Travel. The DEAR clause requires the Contractor to conduct Foreign Travel in accordance with the January 31, 2000 DOE Order 551.1 "Official Foreign Travel," or a subsequent version of the Order in effect at the time of award. Instead of specifying compliance with the DOE Order through this clause, NNSA contracts should list the Order elsewhere in the contract, along with any other applicable directives, as noted at paragraph 1 above.

5. DEAR 952.204-2 Security Requirements. As explained below, this clause needs to be revised to enable the government to require the contractor to comply with current security regulations and to correct a reference to an Executive Order which is no longer in effect.

a. Paragraph (b) of this DEAR Clause requires the Contractor to comply with all DOE security regulations and requirements in effect at date of award. However, DOE and NNSA security requirements may change with some frequency during the term of the contract. Therefore, the clause should be modified to refer to only those DOE/NNSA security requirements incorporated into the contract. Changes to DOE/NNSA security requirements and/or regulations that pertain to the Contractor can be implemented in the contract via the contract's clause entitled "Laws, Regulations, and DOE Directives" (M&O contracts) that allows for NNSA to unilaterally incorporate into the contract new security requirements issued during post-award. For non-M&O contracts, DOE/NNSA security requirements and required changes to them should be implemented through the contract's Statement of Work, Contract Security Classification Specification or other attachment to the contract, as appropriate.

b. With respect to paragraphs (f), (h), and (i), EO 12958 revoked EO 12356 on October 14, 1995, yet the DEAR clause has not been updated to reflect this change.

c. Inclusion of the DEAR clause "as is" adds conflicting terms and conditions to the contract; thus, rendering the DEAR clause ineffective.

6. DEAR 970.5215-3 Conditional Payment of Fee, Profit, and Other Incentives -- Facility Management Contracts. DOE Order 232.1A, referred to in paragraph (c)(3)(i) of the clause was replaced by DOE Order 231.1A, Chg 1, Environment, Safety and Health Reporting, which is not applicable to contractors or M&O contracts. The current DOE Manual 231.1-2, Occurrence Reporting and Processing of Operations Information,

incorporates the requirements associated with contractor deficiencies/non-compliances (occurrence) reporting and needs to be added to the DEAR clause (in place of DOE Order 232.1A) in order to remove a conflict between the DEAR Clause and the DOE Manual 231.1-2, which is included in the contract's List of Applicable Directives.

7. DEAR 970.5204-2 Laws, Regulations, and DOE Directives. As explained below, from time to time this clause requires administrative revisions to facilitate contract administration. In addition, certain administrative corrections to the clause are required.

a. The use of the terms "List A" and "List B" (as included in the DEAR clause) add confusion for the reader since, in some instances, there is no List A-List of Applicable Laws and Regulations incorporated into the contract, and the item generally referenced as List B, the List of Applicable Directives, is actually included in an appendix (e.g., Appendix "G") to the contract. The deviation enables clause "clean-up" thereby making it more readable, and eliminates confusion without changing the requirements or intent of the clause.

b. The deviation's change to the last sentence of paragraph (b) is required to remove an ambiguity between this Laws, Regulations, and DOE Directives clause and the clause at 970.5243-1 entitled "Changes." The last sentence states: "The contractor and the contracting officer shall identify and, if appropriate, agree to any changes <u>to other contract terms and conditions, including cost and schedule,</u> associated with the revision to List B pursuant to the clause of this contract entitled, "Changes." However, the Changes clause, only provides for changes <u>to fee.</u> In order to remove the ambiguity between the two clauses, the proposed deviation to this Laws, Regulations, and DOE Directives clause separates the authority for changing "terms and conditions, including cost and schedule" from the authority to change fee. This allows for any changes to be made pursuant to paragraph (b) of the "Laws, Regulations, and DOE Directives" clause and any adjustments to fee, if required, to be made pursuant to the "Changes" clause.

c. Pursuant to Section 3212(b)(2) of Public Law 106-65, NNSA has established a system for managing policy, directives and business management practices within NNSA. Specifically, NAP-1 provides that:

> This system, to be called Policy Letters, codifies how the Administration will establish policy, and provide direction and guidance to all its elements. The Administration's Policy Letter system is a process which will: (1) establish new policy or directives that are unique to the Administration; (2) supplement or indicate how the Administration will implement a Departmental Directive including implementation of directives in a cost efficient manner; and/or (3) provide business and operating guidance. Administration Policy Letters will take two forms:
> - Directives Policy Letters which are related to (1) and (2) above; and
> - Business and Operating Policy Letters which relate to (3) above.

Therefore, the deviation's change to the clause's paragraph (b) (insertion of "National Nuclear Security Administration Policy Letters" in the first sentence) is in recognition that the Administrator has established "NNSA Policy Letters," which may be applicable to NNSA M&O contractors. Thus, the deviation facilitates the incorporation of such NNSA Policy Letters into NNSA M&O contracts.

ATTACHMENT 1

8. DEAR 970.5203-3 Contractor's Organization. The proposed deviation would make various administrative changes to the DEAR clause, as described below.

a. Deviation to paragraph (a): The purpose of this deviation is to require the contractor to provide an organization chart that reflects not only key personnel, but also the Contractor's Parent Organization's responsible official for administering the Oversight Plan. This change will provide NNSA better insight regarding the individual responsible for making important management decisions that affect an M&O contractor's operations and performance.

b. Deviation to paragraph (b): The purpose of this deviation is to identify the individual or position title of the "resident supervisory representative of the contractor" in charge of the work performed under the contract at any site and at all times.

c. Deviation to paragraph (c): With respect to control of contractor's employees, the proposed deviation provides the NNSA Administrator the right to require the contractor to remove an employee from work under the contract. The paragraph stipulates that it does not impair the statutory or contractual collective bargaining rights of union-represented contractor employees.

d. Deviation to add new paragraph (e): This new paragraph was added to recognize that the terms and conditions of this DEAR Clause or implementation are not intended to conflict with law or otherwise affect the scientific integrity of persons who provide, under the contract, independent technical judgments on the safety, security, and reliability of nuclear weapons systems maintained by the Contractor for the NNSA.

e. The proposed deviations to this clause are complementary to NNSA's Model Clauses contained in Contract Section H, which are focused on improving management and performance above current performance levels and NNSA's commitment to redefining the federal/contractor relationship to improve management and performance within the Nuclear Weapons Complex. These Model Clauses were written in response to the NNSA Administrator's Report to Congress:

*"**Trust, teamwork, and verify** will be the watchwords in program management."*

and

*"**New governance approach.** With these principles in mind, NNSA will develop and implement a simpler, less adversarial contracting model that capitalizes on the private-sector expertise and experience of the management and operating contractors while simultaneously increasing contractor accountability for high performance and responsiveness to NNSA program and stewardship requirements."*

f. The benefit the Government will receive by the deviations to this clause is to (1) gain insight into how the Contractor's parent organization's staff will provide contract support while recognizing that (i) it is the identified individual or position title of the "resident supervisory representative" of the contractor that is ultimately responsible for contract performance and (ii) the Contractor's parent organization is contractually required to play a higher role in fostering contract performance; and (2) to demonstrate to

ATTACHMENT 1

the Contractor that the Department understands that, given the unique nature of this contract, it will not impair the statutory or collective bargaining rights or scientific integrity relative to those contractor personnel who provide independent technical judgment in relation to their role in certifying the nuclear stockpile.

g. A deviation request similar to the above request was approved for the Sandia National Laboratories M&O contract.

DETERMINATION:

Based upon the above findings, I hereby authorize administrative class deviations from seven DEAR clauses (ATTACHMENTS 2 and 3) that are outdated, or must be removed or revised to facilitate contract administration.

EXPIRATION:

Authority to exercise these deviations shall expire upon issuance of superseding revisions to the DEAR.

Robert C. Brese

Senior Procurement Executive
National Nuclear Security Administration

May 17, 2005
Date

ATTACHMENT 2

NNSA Deviation to DEAR 917.7403 Application.

Remove: "The clause at 48 CFR 952.217-70 shall be included in contracts or modifications where contractor acquisitions are expected to be made."

Replace with: "Include the requirements of DOE Order 430.1B Real Property Asset Management in contracts or modifications where contractor acquisitions are expected to be made."

NNSA Deviation to DEAR 952.217-70 Acquisition of Real Property.

Remove this paragraph, including the clause at DEAR 952.217-70, entitled "Acquisition of Real Property (Apr 1984)."

Replace with:

DEAR 952.217-70 [Reserved] (DEVIATION)

ATTACHMENT 1

Determination and Findings
Class Deviations to the
Department of Energy Acquisition Regulation (DEAR)

On the basis of the following findings and determination, class deviations to seven DEAR clauses are authorized pursuant to the authority of FAR 1.403.

FINDINGS:

1. The DEAR requires use of two outdated clauses (Findings 2 and 3 below), which have been superseded by DOE Orders. Two other DEAR clauses (Findings 4 and 5 below) merely specify compliance with a DOE Order. NNSA contracts may require compliance with numerous DOE and NNSA directives (Orders, Manuals, Standards, etc.). Specifying compliance with these directives through individual clauses, through separate reference in the contract, or through both, is cumbersome and confusing. When compliance with DOE or NNSA directives is required, the directives should be listed in the contract's Statement of Work; an attachment to the contract; or, for M&O contracts, by incorporation in the List of Applicable Directives referenced in the Laws, Regulations, and DOE Directives clause (DEAR 970.5204-2). Another DEAR clause requires correction of an out-of-date reference to a DOE Order (Finding 6). Finally (Findings 7 and 8), two DEAR clauses require various administrative revisions to facilitate contract administration. The proposed deviations should be applied to the class of all contracts for which the DEAR prescribes use of these clauses.

2. DEAR 952.217-70 Acquisition of Real Property. This clause, dated APR 1984, requires the Contractor to obtain prior approval of the Contracting Officer when the Contractor acquires or proposes to acquire use of real property and to flow down the clause requirements to its subcontractors. This clause has since been overcome by DOE Order 430.1B, Real Property Asset Management, dated September 24, 2003. The Order includes a Contractor Requirements Document that specifies requirements for contracts involving acquisition, management, maintenance, disposition, or disposal of real property assets. Therefore, the DEAR clause is no longer needed. Requiring compliance with DOE Order 430.1B, rather than including the clause, will streamline contracts and ensure that they include the current real property requirements.

3. DEAR 970.5237-2 Facilities Management. The DEAR clause, as written, identifies requirements associated with Site development planning (paragraph (a)); General Design criteria (paragraph (b)); Energy Management (paragraph (c)); and a flow-down requirement (paragraph (d)). As explained below, this clause is outdated and superfluous, considering current Departmental requirements, which need to be incorporated into M&O contracts.

a. With respect to Paragraph (a), there is no current Life Cycle Facility Operations Series. The clause states "The Government shall provide to the contractor site development guidance for the facilities and lands for which the contractor is responsible under the terms and conditions of this contract." The paragraph further contains a

requirement for the Contractor to "...prepare...a "Long Range Site Development Plan" and further requires "In developing this Plan, the contractor shall follow the procedural guidance set forth in the applicable DOE Directives in the Life Cycle Facility Operations Series listed elsewhere in this contract." The prescribed standard clause at DEAR 970.5237-2 – Facilities Management, as published in the Federal Register on December 22, 2000, is unchanged from the previous version, DEAR 970.5204-60 - Facilities Management (Nov 1997). The November 1997 version of the Facilities Management clause was seriously outdated at the time it was published and did not reflect the Department's adoption of Life Cycle Asset Management (LCAM) at the time. Since its first issuance on August 24, 1995, DOE O 430.1 – Life Cycle Asset Management (LCAM), provided for cancellation of a number of other directives, including DOE O 6430.1 - General Design Criteria, and DOE O 4320.1B - Site Development Planning. Regardless, these two orders continue to be referred to in the Facilities Management clause. The Order 430.1B – Real Property Asset Management, dated September 24, 2003, now cancels DOE O 430.1A – Life-Cycle Asset Management, dated October 14, 1998. The Order 430.1B contains a Contractor Requirements Document (CRD) which is intended to apply to all site and facility management contracts which involve acquisition, maintenance, disposition or disposal of real property assets. That CRD and other CRDs appended to other applicable orders governing facility management are intended to contain the Department's requirements for M&O contracts concerning facility management. Therefore, any Facilities Management clause is superfluous.

b. The DEAR clause Paragraph (b), General design criteria, contains a requirement for the Contractor to comply with a cancelled DOE Order. Furthermore, the criteria should not be applied to leases, modular buildings, etc., as no commercial buildings were ever constructed to meet the Order. This paragraph requires the Contractor to follow the general design criteria contained "in the applicable DOE Directives 6430, Design Criteria, series listed elsewhere in this contract." However, the 6430 series was subsequently replaced in turn by DOE Order 430.1 "Life Cycle Asset Management"; DOE Order 430.1A; and DOE Order 430.1B.

c. The DEAR clause Paragraph (c), Energy Management, the paragraph's requirements for energy management are not consistent with the requirements of DOE Order 430.2A "Departmental Energy and Utilities Management, dated April 15, 2002, which is applicable and will be incorporated into the contract's List of Applicable Directives. This paragraph establishes requirements for extensive and expensive new work and reporting, which could lead to implicit requirements for new NNSA approvals of energy conservation reports. The DEAR clause's requirements for "an energy conservation report for each new building or addition project" are costly and inappropriate for smaller projects. The potential for new, required NNSA approvals of such reports before proceeding with projects or "additions" may lead to project delays, cost increases, and adverse mission customer impacts. The DEAR Clause requirements for a "10-year energy management plan" appear to go beyond the current requirements of either DOE Order 430.2, *In-House Energy Management*, or DOE Order 430.2A, *Departmental Energy and Utilities Management*. Thus, the inclusion of the DEAR

clause's paragraph (c) with the DOE Order 430.2A creates an ambiguity in contract requirements.

d. The Order 430.1B also requires "That is, contractors will (a) ensure that they and their subcontractors comply with the requirements of this CRD..." which is synonymous with the DEAR clause's paragraph (d) subcontractor flow-down requirement.

e. Thus, the out-of-date DEAR Clause is not needed and conflicts with DOE's current applicable Directives.

4. DEAR 952.247-70 Foreign Travel. The DEAR clause requires the Contractor to conduct Foreign Travel in accordance with the January 31, 2000 DOE Order 551.1 "Official Foreign Travel," or a subsequent version of the Order in effect at the time of award. Instead of specifying compliance with the DOE Order through this clause, NNSA contracts should list the Order elsewhere in the contract, along with any other applicable directives, as noted at paragraph 1 above.

5. DEAR 952.204-2 Security Requirements. As explained below, this clause needs to be revised to enable the government to require the contractor to comply with current security regulations and to correct a reference to an Executive Order which is no longer in effect.

a. Paragraph (b) of this DEAR Clause requires the Contractor to comply with all DOE security regulations and requirements in effect at date of award. However, DOE and NNSA security requirements may change with some frequency during the term of the contract. Therefore, the clause should be modified to refer to only those DOE/NNSA security requirements incorporated into the contract. Changes to DOE/NNSA security requirements and/or regulations that pertain to the Contractor can be implemented in the contract via the contract's clause entitled "Laws, Regulations, and DOE Directives" (M&O contracts) that allows for NNSA to unilaterally incorporate into the contract new security requirements issued during post-award. For non-M&O contracts, DOE/NNSA security requirements and required changes to them should be implemented through the contract's Statement of Work, Contract Security Classification Specification or other attachment to the contract, as appropriate.

b. With respect to paragraphs (f), (h), and (i), EO 12958 revoked EO 12356 on October 14, 1995, yet the DEAR clause has not been updated to reflect this change.

c. Inclusion of the DEAR clause "as is" adds conflicting terms and conditions to the contract; thus, rendering the DEAR clause ineffective.

6. DEAR 970.5215-3 Conditional Payment of Fee, Profit, and Other Incentives -- Facility Management Contracts. DOE Order 232.1A, referred to in paragraph (c)(3)(i) of the clause was replaced by DOE Order 231.1A, Chg 1, Environment, Safety and Health Reporting, which is not applicable to contractors or M&O contracts. The current DOE Manual 231.1-2, Occurrence Reporting and Processing of Operations Information,

incorporates the requirements associated with contractor deficiencies/non-compliances (occurrence) reporting and needs to be added to the DEAR clause (in place of DOE Order 232.1A) in order to remove a conflict between the DEAR Clause and the DOE Manual 231.1-2, which is included in the contract's List of Applicable Directives.

7. DEAR 970.5204-2 Laws, Regulations, and DOE Directives. As explained below, from time to time this clause requires administrative revisions to facilitate contract administration. In addition, certain administrative corrections to the clause are required.

a. The use of the terms "List A" and "List B" (as included in the DEAR clause) add confusion for the reader since, in some instances, there is no List A-List of Applicable Laws and Regulations incorporated into the contract, and the item generally referenced as List B, the List of Applicable Directives, is actually included in an appendix (e.g., Appendix "G") to the contract. The deviation enables clause "clean-up" thereby making it more readable, and eliminates confusion without changing the requirements or intent of the clause.

b. The deviation's change to the last sentence of paragraph (b) is required to remove an ambiguity between this Laws, Regulations, and DOE Directives clause and the clause at 970.5243-1 entitled "Changes." The last sentence states: "The contractor and the contracting officer shall identify and, if appropriate, agree to any changes <u>to other contract terms and conditions, including cost and schedule,</u> associated with the revision to List B pursuant to the clause of this contract entitled, "Changes." However, the Changes clause, only provides for changes <u>to fee.</u> In order to remove the ambiguity between the two clauses, the proposed deviation to this Laws, Regulations, and DOE Directives clause separates the authority for changing "terms and conditions, including cost and schedule" from the authority to change fee. This allows for any changes to be made pursuant to paragraph (b) of the "Laws, Regulations, and DOE Directives" clause and any adjustments to fee, if required, to be made pursuant to the "Changes" clause.

c. Pursuant to Section 3212(b)(2) of Public Law 106-65, NNSA has established a system for managing policy, directives and business management practices within NNSA. Specifically, NAP-1 provides that:

> This system, to be called Policy Letters, codifies how the Administration will establish policy, and provide direction and guidance to all its elements. The Administration's Policy Letter system is a process which will: (1) establish new policy or directives that are unique to the Administration; (2) supplement or indicate how the Administration will implement a Departmental Directive including implementation of directives in a cost efficient manner; and/or (3) provide business and operating guidance. Administration Policy Letters will take two forms:
> - Directives Policy Letters which are related to (1) and (2) above; and
> - Business and Operating Policy Letters which relate to (3) above.

Therefore, the deviation's change to the clause's paragraph (b) (insertion of "National Nuclear Security Administration Policy Letters" in the first sentence) is in recognition that the Administrator has established "NNSA Policy Letters," which may be applicable to NNSA M&O contractors. Thus, the deviation facilitates the incorporation of such NNSA Policy Letters into NNSA M&O contracts.

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8. DEAR 970.5203-3 Contractor's Organization. The proposed deviation would make various administrative changes to the DEAR clause, as described below.

a. Deviation to paragraph (a): The purpose of this deviation is to require the contractor to provide an organization chart that reflects not only key personnel, but also the Contractor's Parent Organization's responsible official for administering the Oversight Plan. This change will provide NNSA better insight regarding the individual responsible for making important management decisions that affect an M&O contractor's operations and performance.

b. Deviation to paragraph (b): The purpose of this deviation is to identify the individual or position title of the "resident supervisory representative of the contractor" in charge of the work performed under the contract at any site and at all times.

c. Deviation to paragraph (c): With respect to control of contractor's employees, the proposed deviation provides the NNSA Administrator the right to require the contractor to remove an employee from work under the contract. The paragraph stipulates that it does not impair the statutory or contractual collective bargaining rights of union-represented contractor employees.

d. Deviation to add new paragraph (e): This new paragraph was added to recognize that the terms and conditions of this DEAR Clause or implementation are not intended to conflict with law or otherwise affect the scientific integrity of persons who provide, under the contract, independent technical judgments on the safety, security, and reliability of nuclear weapons systems maintained by the Contractor for the NNSA.

e. The proposed deviations to this clause are complementary to NNSA's Model Clauses contained in Contract Section H, which are focused on improving management and performance above current performance levels and NNSA's commitment to redefining the federal/contractor relationship to improve management and performance within the Nuclear Weapons Complex. These Model Clauses were written in response to the NNSA Administrator's Report to Congress:

*"**Trust, teamwork**, and **verify** will be the watchwords in program management."*

and

*"**New governance approach.** With these principles in mind, NNSA will develop and implement a simpler, less adversarial contracting model that capitalizes on the private-sector expertise and experience of the management and operating contractors while simultaneously increasing contractor accountability for high performance and responsiveness to NNSA program and stewardship requirements."*

f. The benefit the Government will receive by the deviations to this clause is to (1) gain insight into how the Contractor's parent organization's staff will provide contract support while recognizing that (i) it is the identified individual or position title of the "resident supervisory representative" of the contractor that is ultimately responsible for contract performance and (ii) the Contractor's parent organization is contractually required to play a higher role in fostering contract performance; and (2) to demonstrate to

ATTACHMENT 1

the Contractor that the Department understands that, given the unique nature of this contract, it will not impair the statutory or collective bargaining rights or scientific integrity relative to those contractor personnel who provide independent technical judgment in relation to their role in certifying the nuclear stockpile.

g. A deviation request similar to the above request was approved for the Sandia National Laboratories M&O contract.

DETERMINATION:

Based upon the above findings, I hereby authorize administrative class deviations from seven DEAR clauses (ATTACHMENTS 2 and 3) that are outdated, or must be removed or revised to facilitate contract administration.

EXPIRATION:

Authority to exercise these deviations shall expire upon issuance of superseding revisions to the DEAR.

Robert C. Brese

Senior Procurement Executive
National Nuclear Security Administration

May 17, 2005
Date

ATTACHMENT 2

NNSA Deviation to DEAR 947.7002 -- Contract clause.

Remove "DEAR 947.7002 -- Contract clause" and the paragraph that reads "When foreign travel may be required under the contract, the contracting officer shall insert the clause at 48 CFR 952.247-70, Foreign Travel."

Replace with:

DEAR 947.7002 [Reserved] (DEVIATION).

NNSA Deviation to DEAR 952.247-70 – Foreign travel.

Remove this paragraph, including the clause entitled "Foreign Travel (Dec 2000)."

Replace with:

DEAR 952.247-70 [Reserved] (DEVIATION)

ATTACHMENT 8

Determination and Findings
Class Deviation to the
Department of Energy Acquisition Regulation (DEAR)

On the basis of the following findings and determination, a class deviation from the DEAR to enable use of specialized performance improvement clauses, is authorized pursuant to the authority of FAR 1.403.

FINDINGS:

1. DEAR 970.5203-2 Performance Improvement and Collaboration. The proposed deviation would exclude the DEAR clause from the LANL M&O contract and replace its requirements with tailored Special Clauses H-1 through H-13, which are geared to accomplish similar objectives. Since a similar deviation was approved for the Sandia National Laboratories M&O contract, the requested deviation is identified as a class deviation.

2. The objectives of the DEAR clause are parallel to some of the goals of the NNSA Model for Improving Management and Performance, which will be embodied into the new LANL M&O contract. These objectives are captured in expanded form and included as new Contractor requirements in the LANL M&O solicitation's Special Clauses H-1 through H-13. These proposed Special H clauses duplicate and expand with specificity upon the performance improvement objectives and requirements of the DEAR clause. For example, incorporated into Section H of the contract will be a clause entitled; "Contractor Multi-Year Strategy for Performance Improvement" which requires that the Contractor to:

...develop a multi-year strategy (1) detailing its planned efforts and expected accomplishments by year, to continuously improve management and performance at the Laboratory, and (2) the planned efforts and contributions of its corporate parent. The multi-year strategy shall also address planned efforts to (1) enhance Contractor communications, cooperation and integration with the NNSA Weapon Complex, with emphasis on Lawrence Livermore National Laboratory; and, (2) contribute to overall NNSA Weapon Complex improvements."

This clause will require offerors to submit planned efforts and expected accomplishments for Contract Years 1 and 2 and will require subsequent annual updates for Contracting Officer approval. Therefore, the DEAR clause requirements for performance improvement and collaboration are unnecessary in light of the proposed Section H clauses.

3. The benefit the Government would gain by implementing the proposed deviation is to bring the resulting Contract terms and conditions in line with the NNSA Administrator's goal of improved contractor management and performance as indicated in NNSA's February 2002 REPORT TO CONGRESS ON THE ORGANIZATION AND OPERATIONS OF THE NATIONAL NUCLEAR SECURITY ADMINISTRATION. This report, in part, states:

"Federal employees, with contractor input, will establish broad program objectives and goals. Contractors, in consultation with federal employees, will be given the flexibility to execute programs efficiently and will be held accountable for meeting those objectives and goals." "NNSA will begin this new approach immediately by developing a contractor governance strategy based predominantly on commercial standards and the best industrial practices. The governance strategy will be accompanied by an assurance model that will rely as much as practicable

on third-party, private-sector assurance systems such as comprehensive internal auditing, oversight by boards and external panels, third-party certification, and direct engagement between oversight bodies and NNSA's leadership."

4. It is anticipated that the Lawrence Livermore National Laboratory (LLNL) M&O competitive solicitation will also require use of this deviation.

DETERMINATION:

Based on the above findings, I hereby determine that a class deviation from the DEAR requirements for use of the clause at 970.5203-2 Performance Improvement and Collaboration (ATTACHMENT 9) is necessary to enable use of specialized performance improvement clauses in the Los Alamos National Laboratory M& O solicitation/contract, as well as in the LLNL M&O solicitation/contract. I hereby authorize a class deviation from the requirements of DEAR clause 970.5203-2 for use in the LANL and LLNL M&O solicitations/contracts, in addition to the previously approved similar deviation for the Sandia National Laboratories M&O contract.

EXPIRATION:

Authority to exercise this deviation shall expire on September 30, 2007.

Robert C Brese

Senior Procurement Executive
National Nuclear Security Administration

5/17/2005
Date

ATTACHMENT 9

NNSA Deviation to DEAR 970.0370-2 -- Contract clause

Remove subparagraph (b), prescribing use of the clause at 970.5203-2, Performance Improvement and Collaboration.

Replace with:

(b) [Reserved] (DEVIATION)

NNSA Deviation to DEAR 970.5203-2 -- Performance improvement and collaboration

As prescribed in 48 CFR 970.0370-2(b), insert the following clause:

Remove this paragraph, including the clause at DEAR 970.5203-2, entitled "Performance Improvement and Collaboration (DEC 2000)."

Replace with:

DEAR 970.5203-3 [Reserved] (DEVIATION)

ATTACHMENT 1

Determination and Findings
Class Deviations to the
Department of Energy Acquisition Regulation (DEAR)

On the basis of the following findings and determination, class deviations to seven DEAR clauses are authorized pursuant to the authority of FAR 1.403.

FINDINGS:

1. The DEAR requires use of two outdated clauses (Findings 2 and 3 below), which have been superseded by DOE Orders. Two other DEAR clauses (Findings 4 and 5 below) merely specify compliance with a DOE Order. NNSA contracts may require compliance with numerous DOE and NNSA directives (Orders, Manuals, Standards, etc.). Specifying compliance with these directives through individual clauses, through separate reference in the contract, or through both, is cumbersome and confusing. When compliance with DOE or NNSA directives is required, the directives should be listed in the contract's Statement of Work; an attachment to the contract; or, for M&O contracts, by incorporation in the List of Applicable Directives referenced in the Laws, Regulations, and DOE Directives clause (DEAR 970.5204-2). Another DEAR clause requires correction of an out-of-date reference to a DOE Order (Finding 6). Finally (Findings 7 and 8), two DEAR clauses require various administrative revisions to facilitate contract administration. The proposed deviations should be applied to the class of all contracts for which the DEAR prescribes use of these clauses.

2. DEAR 952.217-70 Acquisition of Real Property. This clause, dated APR 1984, requires the Contractor to obtain prior approval of the Contracting Officer when the Contractor acquires or proposes to acquire use of real property and to flow down the clause requirements to its subcontractors. This clause has since been overcome by DOE Order 430.1B, Real Property Asset Management, dated September 24, 2003. The Order includes a Contractor Requirements Document that specifies requirements for contracts involving acquisition, management, maintenance, disposition, or disposal of real property assets. Therefore, the DEAR clause is no longer needed. Requiring compliance with DOE Order 430.1B, rather than including the clause, will streamline contracts and ensure that they include the current real property requirements.

3. DEAR 970.5237-2 Facilities Management. The DEAR clause, as written, identifies requirements associated with Site development planning (paragraph (a)); General Design criteria (paragraph (b)); Energy Management (paragraph (c)); and a flow-down requirement (paragraph (d)). As explained below, this clause is outdated and superfluous, considering current Departmental requirements, which need to be incorporated into M&O contracts.

a. With respect to Paragraph (a), there is no current Life Cycle Facility Operations Series. The clause states "The Government shall provide to the contractor site development guidance for the facilities and lands for which the contractor is responsible under the terms and conditions of this contract." The paragraph further contains a

requirement for the Contractor to "...prepare...a "Long Range Site Development Plan" and further requires "In developing this Plan, the contractor shall follow the procedural guidance set forth in the applicable DOE Directives in the Life Cycle Facility Operations Series listed elsewhere in this contract." The prescribed standard clause at DEAR 970.5237-2 – Facilities Management, as published in the Federal Register on December 22, 2000, is unchanged from the previous version, DEAR 970.5204-60 - Facilities Management (Nov 1997). The November 1997 version of the Facilities Management clause was seriously outdated at the time it was published and did not reflect the Department's adoption of Life Cycle Asset Management (LCAM) at the time. Since its first issuance on August 24, 1995, DOE O 430.1 – Life Cycle Asset Management (LCAM), provided for cancellation of a number of other directives, including DOE O 6430.1 - General Design Criteria, and DOE O 4320.1B - Site Development Planning. Regardless, these two orders continue to be referred to in the Facilities Management clause. The Order 430.1B – Real Property Asset Management, dated September 24, 2003, now cancels DOE O 430.1A – Life-Cycle Asset Management, dated October 14, 1998. The Order 430.1B contains a Contractor Requirements Document (CRD) which is intended to apply to all site and facility management contracts which involve acquisition, maintenance, disposition or disposal of real property assets. That CRD and other CRDs appended to other applicable orders governing facility management are intended to contain the Department's requirements for M&O contracts concerning facility management. Therefore, any Facilities Management clause is superfluous.

b. The DEAR clause Paragraph (b), General design criteria, contains a requirement for the Contractor to comply with a cancelled DOE Order. Furthermore, the criteria should not be applied to leases, modular buildings, etc., as no commercial buildings were ever constructed to meet the Order. This paragraph requires the Contractor to follow the general design criteria contained "in the applicable DOE Directives 6430, Design Criteria, series listed elsewhere in this contract." However, the 6430 series was subsequently replaced in turn by DOE Order 430.1 "Life Cycle Asset Management"; DOE Order 430.1A; and DOE Order 430.1B.

c. The DEAR clause Paragraph (c), Energy Management, the paragraph's requirements for energy management are not consistent with the requirements of DOE Order 430.2A "Departmental Energy and Utilities Management, dated April 15, 2002, which is applicable and will be incorporated into the contract's List of Applicable Directives. This paragraph establishes requirements for extensive and expensive new work and reporting, which could lead to implicit requirements for new NNSA approvals of energy conservation reports. The DEAR clause's requirements for "an energy conservation report for each new building or addition project" are costly and inappropriate for smaller projects. The potential for new, required NNSA approvals of such reports before proceeding with projects or "additions" may lead to project delays, cost increases, and adverse mission customer impacts. The DEAR Clause requirements for a "10-year energy management plan" appear to go beyond the current requirements of either DOE Order 430.2, *In-House Energy Management*, or DOE Order 430.2A, *Departmental Energy and Utilities Management*. Thus, the inclusion of the DEAR

clause's paragraph (c) with the DOE Order 430.2A creates an ambiguity in contract requirements.

d. The Order 430.1B also requires "That is, contractors will (a) ensure that they and their subcontractors comply with the requirements of this CRD..." which is synonymous with the DEAR clause's paragraph (d) subcontractor flow-down requirement.

e. Thus, the out-of-date DEAR Clause is not needed and conflicts with DOE's current applicable Directives.

4. DEAR 952.247-70 Foreign Travel. The DEAR clause requires the Contractor to conduct Foreign Travel in accordance with the January 31, 2000 DOE Order 551.1 "Official Foreign Travel," or a subsequent version of the Order in effect at the time of award. Instead of specifying compliance with the DOE Order through this clause, NNSA contracts should list the Order elsewhere in the contract, along with any other applicable directives, as noted at paragraph 1 above.

5. DEAR 952.204-2 Security Requirements. As explained below, this clause needs to be revised to enable the government to require the contractor to comply with current security regulations and to correct a reference to an Executive Order which is no longer in effect.

a. Paragraph (b) of this DEAR Clause requires the Contractor to comply with all DOE security regulations and requirements in effect at date of award. However, DOE and NNSA security requirements may change with some frequency during the term of the contract. Therefore, the clause should be modified to refer to only those DOE/NNSA security requirements incorporated into the contract. Changes to DOE/NNSA security requirements and/or regulations that pertain to the Contractor can be implemented in the contract via the contract's clause entitled "Laws, Regulations, and DOE Directives" (M&O contracts) that allows for NNSA to unilaterally incorporate into the contract new security requirements issued during post-award. For non-M&O contracts, DOE/NNSA security requirements and required changes to them should be implemented through the contract's Statement of Work, Contract Security Classification Specification or other attachment to the contract, as appropriate.

b. With respect to paragraphs (f), (h), and (i), EO 12958 revoked EO 12356 on October 14, 1995, yet the DEAR clause has not been updated to reflect this change.

c. Inclusion of the DEAR clause "as is" adds conflicting terms and conditions to the contract; thus, rendering the DEAR clause ineffective.

6. DEAR 970.5215-3 Conditional Payment of Fee, Profit, and Other Incentives -- Facility Management Contracts. DOE Order 232.1A, referred to in paragraph (c)(3)(i) of the clause was replaced by DOE Order 231.1A, Chg 1, Environment, Safety and Health Reporting, which is not applicable to contractors or M&O contracts. The current DOE Manual 231.1-2, Occurrence Reporting and Processing of Operations Information,

incorporates the requirements associated with contractor deficiencies/non-compliances (occurrence) reporting and needs to be added to the DEAR clause (in place of DOE Order 232.1A) in order to remove a conflict between the DEAR Clause and the DOE Manual 231.1-2, which is included in the contract's List of Applicable Directives.

7. DEAR 970.5204-2 Laws, Regulations, and DOE Directives. As explained below, from time to time this clause requires administrative revisions to facilitate contract administration. In addition, certain administrative corrections to the clause are required.

a. The use of the terms "List A" and "List B" (as included in the DEAR clause) add confusion for the reader since, in some instances, there is no List A-List of Applicable Laws and Regulations incorporated into the contract, and the item generally referenced as List B, the List of Applicable Directives, is actually included in an appendix (e.g., Appendix "G") to the contract. The deviation enables clause "clean-up" thereby making it more readable, and eliminates confusion without changing the requirements or intent of the clause.

b. The deviation's change to the last sentence of paragraph (b) is required to remove an ambiguity between this Laws, Regulations, and DOE Directives clause and the clause at 970.5243-1 entitled "Changes." The last sentence states: "The contractor and the contracting officer shall identify and, if appropriate, agree to any changes <u>to other contract terms and conditions, including cost and schedule,</u> associated with the revision to List B pursuant to the clause of this contract entitled, "Changes." However, the Changes clause, only provides for changes <u>to fee.</u> In order to remove the ambiguity between the two clauses, the proposed deviation to this Laws, Regulations, and DOE Directives clause separates the authority for changing "terms and conditions, including cost and schedule" from the authority to change fee. This allows for any changes to be made pursuant to paragraph (b) of the "Laws, Regulations, and DOE Directives" clause and any adjustments to fee, if required, to be made pursuant to the "Changes" clause.

c. Pursuant to Section 3212(b)(2) of Public Law 106-65, NNSA has established a system for managing policy, directives and business management practices within NNSA. Specifically, NAP-1 provides that:

> This system, to be called Policy Letters, codifies how the Administration will establish policy, and provide direction and guidance to all its elements. The Administration's Policy Letter system is a process which will: (1) establish new policy or directives that are unique to the Administration; (2) supplement or indicate how the Administration will implement a Departmental Directive including implementation of directives in a cost efficient manner; and/or (3) provide business and operating guidance. Administration Policy Letters will take two forms:
> - Directives Policy Letters which are related to (1) and (2) above; and
> - Business and Operating Policy Letters which relate to (3) above.

Therefore, the deviation's change to the clause's paragraph (b) (insertion of "National Nuclear Security Administration Policy Letters" in the first sentence) is in recognition that the Administrator has established "NNSA Policy Letters," which may be applicable to NNSA M&O contractors. Thus, the deviation facilitates the incorporation of such NNSA Policy Letters into NNSA M&O contracts.

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8. DEAR 970.5203-3 Contractor's Organization. The proposed deviation would make various administrative changes to the DEAR clause, as described below.

a. Deviation to paragraph (a): The purpose of this deviation is to require the contractor to provide an organization chart that reflects not only key personnel, but also the Contractor's Parent Organization's responsible official for administering the Oversight Plan. This change will provide NNSA better insight regarding the individual responsible for making important management decisions that affect an M&O contractor's operations and performance.

b. Deviation to paragraph (b): The purpose of this deviation is to identify the individual or position title of the "resident supervisory representative of the contractor" in charge of the work performed under the contract at any site and at all times.

c. Deviation to paragraph (c): With respect to control of contractor's employees, the proposed deviation provides the NNSA Administrator the right to require the contractor to remove an employee from work under the contract. The paragraph stipulates that it does not impair the statutory or contractual collective bargaining rights of union-represented contractor employees.

d. Deviation to add new paragraph (e): This new paragraph was added to recognize that the terms and conditions of this DEAR Clause or implementation are not intended to conflict with law or otherwise affect the scientific integrity of persons who provide, under the contract, independent technical judgments on the safety, security, and reliability of nuclear weapons systems maintained by the Contractor for the NNSA.

e. The proposed deviations to this clause are complementary to NNSA's Model Clauses contained in Contract Section H, which are focused on improving management and performance above current performance levels and NNSA's commitment to redefining the federal/contractor relationship to improve management and performance within the Nuclear Weapons Complex. These Model Clauses were written in response to the NNSA Administrator's Report to Congress:

"Trust, teamwork, and verify will be the watchwords in program management."

and

"New governance approach. *With these principles in mind, NNSA will develop and implement a simpler, less adversarial contracting model that capitalizes on the private-sector expertise and experience of the management and operating contractors while simultaneously increasing contractor accountability for high performance and responsiveness to NNSA program and stewardship requirements."*

f. The benefit the Government will receive by the deviations to this clause is to (1) gain insight into how the Contractor's parent organization's staff will provide contract support while recognizing that (i) it is the identified individual or position title of the "resident supervisory representative" of the contractor that is ultimately responsible for contract performance and (ii) the Contractor's parent organization is contractually required to play a higher role in fostering contract performance; and (2) to demonstrate to

ATTACHMENT 1

the Contractor that the Department understands that, given the unique nature of this contract, it will not impair the statutory or collective bargaining rights or scientific integrity relative to those contractor personnel who provide independent technical judgment in relation to their role in certifying the nuclear stockpile.

g. A deviation request similar to the above request was approved for the Sandia National Laboratories M&O contract.

DETERMINATION:

Based upon the above findings, I hereby authorize administrative class deviations from seven DEAR clauses (ATTACHMENTS 2 and 3) that are outdated, or must be removed or revised to facilitate contract administration.

EXPIRATION:

Authority to exercise these deviations shall expire upon issuance of superseding revisions to the DEAR.

Robert C. Brand

Senior Procurement Executive
National Nuclear Security Administration

May 17, 2005
Date

ATTACHMENT 2

NNSA Deviation to DEAR 970.5204-2 -- Laws, regulations, and DOE directives.

As prescribed in 48 CFR 970.0470-2, insert the following clause:

Laws, Regulations, and DOE Directives (DEC 2000)(DEVIATION)

(a) In performing work under this contract, the contractor shall comply with the requirements of applicable Federal, State, and local laws and regulations (including DOE regulations), unless relief has been granted in writing by the appropriate regulatory agency.

(b) In performing work under this contract, the contractor shall comply with the requirements of those Department of Energy directives, or parts thereof, and National Nuclear Security Administration Policy Letters identified in the contract's Section J Appendix entitled "List of Applicable Directives" (the List). Except as otherwise provided for in paragraph (d) of this clause, the contracting officer may, from time to time and at any time, revise List by unilateral modification to the contract to add, modify, or delete specific requirements. Prior to revising the List, the contracting officer shall notify the contractor in writing of the Department's intent to revise the List and provide the contractor with the opportunity to assess the effect of the contractor's compliance with the revised list on contract cost and funding, technical performance, and schedule; and identify any potential inconsistencies between the revised list and the other terms and conditions of the contract. Within 30 days after receipt of the contracting officer's notice, the contractor shall advise the contracting officer in writing of the potential impact of the contractor's compliance with the revised list. Based on the information provided by the contractor and any other information available, the contracting officer shall decide whether to revise the List and so advise the contractor not later than 30 days prior to the effective date of the revision of the List. The contractor and the contracting officer shall identify and, if appropriate, agree to any changes to other contract terms and conditions, including cost and schedule, associated with the revision of the List pursuant to the clause of this contract entitled, "Changes."

(c) Environmental, safety, and health (ES&H) requirements appropriate for work conducted under this contract may be determined by a DOE approved process to evaluate the work and the associated hazards and identify an appropriately tailored set of standards, practices, and controls, such as a tailoring process included in a DOE approved Safety Management System implemented under the clause entitled "Integration of Environment, Safety, and Health into Work Planning and Execution." When such a process is used, the set of tailored (ES&H) requirements, as approved by DOE pursuant to the process, shall be incorporated into the List as contract requirements with full force and effect. These requirements shall supersede, in whole or in part, the contractual environmental, safety, and health requirements previously made applicable to the contract by the List. If the tailored set of requirements identifies an alternative requirement varying from an ES&H requirement of an applicable law or regulation, the contractor shall request an exemption or other appropriate regulatory relief specified in the regulation.

ATTACHMENT 2

(d) Except as otherwise directed by the contracting officer, the contractor shall procure all necessary permits or licenses required for the performance of work under this contract.

(e) Regardless of the performer of the work, the contractor is responsible for compliance with the requirements of this clause. The contractor is responsible for flowing down the requirements of this clause to subcontracts at any tier to the extent necessary to ensure the contractor's compliance with the requirements.

(End of Clause)

ATTACHMENT 3

DEAR 970.5204-2 – Laws, regulations, and DOE directives.

Laws, Regulations, and DOE Directives (DEC 2000)(DEVIATION)

(a) In performing work under this contract, the contractor shall comply with the requirements of applicable Federal, State, and local laws and regulations (including DOE regulations), unless relief has been granted in writing by the appropriate regulatory agency. ~~A List of Applicable Laws and Regulations (List A) may be appended to this contract for information purposes. Omission of any applicable law or regulation from List A does not affect the obligation of the contractor to comply with such law or regulation pursuant to this paragraph.~~

(b) In performing work under this contract, the contractor shall comply with the requirements of those Department of Energy directives, or parts thereof, **and National Nuclear Security Administration Policy Letters** identified in the **contract's Section J Appendix entitled "**List of Applicable Directives**"** ~~(List B)~~ **(the List)** ~~appended to this contract~~. Except as otherwise provided for in paragraph (d) of this clause, the contracting officer may, from time to time and at any time, revise the List ~~B~~ by unilateral modification to the contract to add, modify, or delete specific requirements. Prior to revising **the** List ~~B~~, the contracting officer shall notify the contractor in writing of the Department's intent to revise **the** List ~~B~~ and provide the contractor with the opportunity to assess the effect of the contractor's compliance with the revised list on contract cost and funding, technical performance, and schedule; and identify any potential inconsistencies between the revised list and the other terms and conditions of the contract. Within 30 days after receipt of the contracting officer's notice, the contractor shall advise the contracting officer in writing of the potential impact of the contractor's compliance with the revised list. Based on the information provided by the contractor and any other information available, the contracting officer shall decide whether to revise **the** List ~~B~~ and so advise the contractor not later than 30 days prior to the effective date of the revision of **the** List ~~B~~. The contractor and the contracting officer shall identify and, if appropriate, agree to any changes to other contract terms and conditions, including cost and schedule, associated with the revision of **the** List ~~B~~ **and fee may be adjusted** pursuant to the clause of this contract entitled, "Changes."

(c) Environmental, safety, and health (ES&H) requirements appropriate for work conducted under this contract may be determined by a DOE approved process to evaluate the work and the associated hazards and identify an appropriately tailored set of standards, practices, and controls, such as a tailoring process included in a DOE approved Safety Management System implemented under the clause entitled "Integration of Environmental, Safety, and Health into Work Planning and Execution." When such a process is used, the set of tailored (ES&H) requirements, as approved by DOE pursuant to the process, shall be incorporated into **the** List ~~B~~ as contract requirements with full force and effect. These requirements shall supersede, in whole or in part, the contractual

environmental, safety, and health requirements previously made applicable to the contract by the List ~~B~~. If the tailored set of requirements identifies an alternative requirement varying from an ES&H requirement of an applicable law or regulation, the contractor shall request an exemption or other appropriate regulatory relief specified in the regulation.

(d) Except as otherwise directed by the contracting officer, the contractor shall procure all necessary permits or licenses required for the performance of work under this contract.

(e) Regardless of the performer of the work, the contractor is responsible for compliance with the requirements of this clause. The contractor is responsible for flowing down the requirements of this clause to subcontracts at any tier to the extent necessary to ensure the contractor's compliance with the requirements.

ATTACHMENT 5

Determination and Findings
Individual and Class Deviations to the
Department of Energy Acquisition Regulation (DEAR)

On the basis of the following findings and determination, an individual and two class deviations from the DEAR, consistent with the Department's proposed changes to the DEAR, are authorized for use in the Los Alamos National Laboratory Management & Operating solicitation and contract, pursuant to the authority of FAR 1.403.

FINDINGS:

1. Three deviations related to DOE's make-or-buy plan policy have been proposed by the contracting officer for use in the Los Alamos National Laboratory M&O solicitation and contract. Each proposed deviation is described in the findings that follow. The first proposed deviation (Finding 2) has not been requested before. Two of the proposed deviations (Findings 3 and 4) are similar to individual deviations approved for the Sandia National Laboratories M&O contract, and are identified as class deviations. The proposed deviations are consistent with the Department's proposed rule, published in the Federal Register on December 15, 2004 (Volume 69, No. 240, 69 FR 75017), which would eliminate the requirement for formal make-or-buy plans. The Background section of the proposed rule explains that the Department's reassessment of its make-or-buy program concluded that requiring make-or-buy plans was not cost-effective. Since it is anticipated that finalization of the proposed rule will obviate the need for future deviations, it is requested that the class deviations apply only to the Sandia M&O contract (deviation previously approved) and to the LANL M&O solicitation and contract.

2. DEAR 970.5203-1 Management Controls.

a. The proposed revision to paragraph (a)(1) is consistent with the Department's proposed rule (see Federal Register Vol. 69, No. 240 (15Dec04)) changes to (1) eliminate the DEAR Clause 970.5215-2 Make-Or-Buy Plan, and (2) revise the DEAR Clause 970.5203-1 Management Controls to add a requirement that the Contractor consider outsourcing of functions.

b. The revision to paragraph (a)(4) (not a requested deviation) is made in accordance with the NNSA Senior Procurement's approved class deviation set forth in DOE Acquisition Letter No. AL-2005-04.

c. This deviation has not been previously requested.

3. DEAR 970.5215-2 Make-Or-Buy Plan. The proposed deviation would omit this clause from the solicitation and contract. The proposed deviation is consistent with the Department's proposed rules (see Federal Register Vol. 69, No. 240 (15Dec04)) changes to (1) eliminate the DEAR Clause 970.5215-2 Make-Or-Buy Plan, and (2) revise the DEAR Clause 970.5203-1 Management Controls to add a requirement that the Contractor consider outsourcing of

functions. A similar individual deviation was approved for the Sandia National Laboratories M&O Contract.

4. DEAR 970.5244-1 Contractor Purchasing System. The clause revisions identified by the contracting officer include updates to clause paragraph (g) in accordance with DOE Acquisition Letter 2002-06 (08/14/02), page 13 of 13 (a previously approved DOE administrative deviation). The revision to paragraph (n) is consistent with the Department's proposed rule (see Federal Register Vol. 69, No. 240 (15Dec04)) changes to (1) eliminate the DEAR Clause 970.5215-2 Make-Or-Buy Plan, and (2) revise the DEAR Clause 970.5203-1 Management Controls to add a requirement that the Contractor consider outsourcing of functions. A similar individual deviation was approved for the Sandia National Laboratories M&O Contract.

DETERMINATION:

Based on the above findings, I hereby determine that deviations from the requirements of the DEAR clauses at 970.5203-1 Management Controls, 970.5215-2 Make-Or-Buy Plan, and 970.5244-1 Contractor Purchasing System (ATTACHMENTS 6 and 7) are necessary to implement improvements to the Department's make-or-buy policies, as contemplated by proposed changes to the DEAR. I hereby authorize an individual deviation from the requirements of DEAR clause 970.5203-1 for the LANL M&O solicitation and contract. Class deviations from the requirements of the DEAR clauses 970.5215-2 and 970.5244-1 for use in the LANL M&O solicitation and contract, in addition to the previously approved similar deviation for the Sandia National Laboratories M&O contract, are also authorized.

EXPIRATION:

Authority to exercise these deviations shall expire upon issuance of the LANL M&O solicitation or upon finalization of the Department's proposed rule, whichever occurs first.

Robert C Brese

Senior Procurement Executive
National Nuclear Security Administration

5/17/2005
Date

ATTACHMENT 6

NNSA Deviation to DEAR 970.1504-5 -- Solicitation provision and contract clauses

Remove subparagraph (b), prescribing use of the clause at 48 CFR 970.5215-2, Make-or-Buy Plan.

Replace with:

(b) [Reserved] (DEVIATION)

NNSA Deviation to DEAR 970.5215-2 -- Make-or-buy plan

Remove this paragraph, including the clause at DEAR 970.5215-2, entitled "Make-or-Buy Plan (Dec 2000)."

Replace with:

DEAR 970.5215-2 [Reserved] (DEVIATION)

ATTACHMENT 5

Determination and Findings
Individual and Class Deviations to the
Department of Energy Acquisition Regulation (DEAR)

On the basis of the following findings and determination, an individual and two class deviations from the DEAR, consistent with the Department's proposed changes to the DEAR, are authorized for use in the Los Alamos National Laboratory Management & Operating solicitation and contract, pursuant to the authority of FAR 1.403.

FINDINGS:

1. Three deviations related to DOE's make-or-buy plan policy have been proposed by the contracting officer for use in the Los Alamos National Laboratory M&O solicitation and contract. Each proposed deviation is described in the findings that follow. The first proposed deviation (Finding 2) has not been requested before. Two of the proposed deviations (Findings 3 and 4) are similar to individual deviations approved for the Sandia National Laboratories M&O contract, and are identified as class deviations. The proposed deviations are consistent with the Department's proposed rule, published in the Federal Register on December 15, 2004 (Volume 69, No. 240, 69 FR 75017), which would eliminate the requirement for formal make-or-buy plans. The Background section of the proposed rule explains that the Department's reassessment of its make-or-buy program concluded that requiring make-or-buy plans was not cost-effective. Since it is anticipated that finalization of the proposed rule will obviate the need for future deviations, it is requested that the class deviations apply only to the Sandia M&O contract (deviation previously approved) and to the LANL M&O solicitation and contract.

2. DEAR 970.5203-1 Management Controls.

a. The proposed revision to paragraph (a)(1) is consistent with the Department's proposed rule (see Federal Register Vol. 69, No. 240 (15Dec04)) changes to (1) eliminate the DEAR Clause 970.5215-2 Make-Or-Buy Plan, and (2) revise the DEAR Clause 970.5203-1 Management Controls to add a requirement that the Contractor consider outsourcing of functions.

b. The revision to paragraph (a)(4) (not a requested deviation) is made in accordance with the NNSA Senior Procurement's approved class deviation set forth in DOE Acquisition Letter No. AL-2005-04.

c. This deviation has not been previously requested.

3. DEAR 970.5215-2 Make-Or-Buy Plan. The proposed deviation would omit this clause from the solicitation and contract. The proposed deviation is consistent with the Department's proposed rules (see Federal Register Vol. 69, No. 240 (15Dec04)) changes to (1) eliminate the DEAR Clause 970.5215-2 Make-Or-Buy Plan, and (2) revise the DEAR Clause 970.5203-1 Management Controls to add a requirement that the Contractor consider outsourcing of

functions. A similar individual deviation was approved for the Sandia National Laboratories M&O Contract.

4. DEAR 970.5244-1 Contractor Purchasing System. The clause revisions identified by the contracting officer include updates to clause paragraph (g) in accordance with DOE Acquisition Letter 2002-06 (08/14/02), page 13 of 13 (a previously approved DOE administrative deviation). The revision to paragraph (n) is consistent with the Department's proposed rule (see Federal Register Vol. 69, No. 240 (15Dec04)) changes to (1) eliminate the DEAR Clause 970.5215-2 Make-Or-Buy Plan, and (2) revise the DEAR Clause 970.5203-1 Management Controls to add a requirement that the Contractor consider outsourcing of functions. A similar individual deviation was approved for the Sandia National Laboratories M&O Contract.

DETERMINATION:

Based on the above findings, I hereby determine that deviations from the requirements of the DEAR clauses at 970.5203-1 Management Controls, 970.5215-2 Make-Or-Buy Plan, and 970.5244-1 Contractor Purchasing System (ATTACHMENTS 6 and 7) are necessary to implement improvements to the Department's make-or-buy policies, as contemplated by proposed changes to the DEAR. I hereby authorize an individual deviation from the requirements of DEAR clause 970.5203-1 for the LANL M&O solicitation and contract. Class deviations from the requirements of the DEAR clauses 970.5215-2 and 970.5244-1 for use in the LANL M&O solicitation and contract, in addition to the previously approved similar deviation for the Sandia National Laboratories M&O contract, are also authorized.

EXPIRATION:

Authority to exercise these deviations shall expire upon issuance of the LANL M&O solicitation or upon finalization of the Department's proposed rule, whichever occurs first.

Robert C Brese

Senior Procurement Executive
National Nuclear Security Administration

5/17/2005
Date

ATTACHMENT 6

NNSA Deviation to DEAR 970.1504-5 -- Solicitation provision and contract clauses

Remove subparagraph (b), prescribing use of the clause at 48 CFR 970.5215-2, Make-or-Buy Plan.

Replace with:

(b) [Reserved] (DEVIATION)

NNSA Deviation to DEAR 970.5215-2 -- Make-or-buy plan

Remove this paragraph, including the clause at DEAR 970.5215-2, entitled "Make-or-Buy Plan (Dec 2000)."

Replace with:

DEAR 970.5215-2 [Reserved] (DEVIATION)

ATTACHMENT 1

Determination and Findings
Class Deviations to the
Department of Energy Acquisition Regulation (DEAR)

On the basis of the following findings and determination, class deviations to seven DEAR clauses are authorized pursuant to the authority of FAR 1.403.

FINDINGS:

1. The DEAR requires use of two outdated clauses (Findings 2 and 3 below), which have been superseded by DOE Orders. Two other DEAR clauses (Findings 4 and 5 below) merely specify compliance with a DOE Order. NNSA contracts may require compliance with numerous DOE and NNSA directives (Orders, Manuals, Standards, etc.). Specifying compliance with these directives through individual clauses, through separate reference in the contract, or through both, is cumbersome and confusing. When compliance with DOE or NNSA directives is required, the directives should be listed in the contract's Statement of Work; an attachment to the contract; or, for M&O contracts, by incorporation in the List of Applicable Directives referenced in the Laws, Regulations, and DOE Directives clause (DEAR 970.5204-2). Another DEAR clause requires correction of an out-of-date reference to a DOE Order (Finding 6). Finally (Findings 7 and 8), two DEAR clauses require various administrative revisions to facilitate contract administration. The proposed deviations should be applied to the class of all contracts for which the DEAR prescribes use of these clauses.

2. DEAR 952.217-70 Acquisition of Real Property. This clause, dated APR 1984, requires the Contractor to obtain prior approval of the Contracting Officer when the Contractor acquires or proposes to acquire use of real property and to flow down the clause requirements to its subcontractors. This clause has since been overcome by DOE Order 430.1B, Real Property Asset Management, dated September 24, 2003. The Order includes a Contractor Requirements Document that specifies requirements for contracts involving acquisition, management, maintenance, disposition, or disposal of real property assets. Therefore, the DEAR clause is no longer needed. Requiring compliance with DOE Order 430.1B, rather than including the clause, will streamline contracts and ensure that they include the current real property requirements.

3. DEAR 970.5237-2 Facilities Management. The DEAR clause, as written, identifies requirements associated with Site development planning (paragraph (a)); General Design criteria (paragraph (b)); Energy Management (paragraph (c)); and a flow-down requirement (paragraph (d)). As explained below, this clause is outdated and superfluous, considering current Departmental requirements, which need to be incorporated into M&O contracts.

a. With respect to Paragraph (a), there is no current Life Cycle Facility Operations Series. The clause states "The Government shall provide to the contractor site development guidance for the facilities and lands for which the contractor is responsible under the terms and conditions of this contract." The paragraph further contains a

requirement for the Contractor to "...prepare...a "Long Range Site Development Plan" and further requires "In developing this Plan, the contractor shall follow the procedural guidance set forth in the applicable DOE Directives in the Life Cycle Facility Operations Series listed elsewhere in this contract." The prescribed standard clause at DEAR 970.5237-2 – Facilities Management, as published in the Federal Register on December 22, 2000, is unchanged from the previous version, DEAR 970.5204-60 - Facilities Management (Nov 1997). The November 1997 version of the Facilities Management clause was seriously outdated at the time it was published and did not reflect the Department's adoption of Life Cycle Asset Management (LCAM) at the time. Since its first issuance on August 24, 1995, DOE O 430.1 – Life Cycle Asset Management (LCAM), provided for cancellation of a number of other directives, including DOE O 6430.1 - General Design Criteria, and DOE O 4320.1B - Site Development Planning. Regardless, these two orders continue to be referred to in the Facilities Management clause. The Order 430.1B – Real Property Asset Management, dated September 24, 2003, now cancels DOE O 430.1A – Life-Cycle Asset Management, dated October 14, 1998. The Order 430.1B contains a Contractor Requirements Document (CRD) which is intended to apply to all site and facility management contracts which involve acquisition, maintenance, disposition or disposal of real property assets. That CRD and other CRDs appended to other applicable orders governing facility management are intended to contain the Department's requirements for M&O contracts concerning facility management. Therefore, any Facilities Management clause is superfluous.

b. The DEAR clause Paragraph (b), General design criteria, contains a requirement for the Contractor to comply with a cancelled DOE Order. Furthermore, the criteria should not be applied to leases, modular buildings, etc., as no commercial buildings were ever constructed to meet the Order. This paragraph requires the Contractor to follow the general design criteria contained "in the applicable DOE Directives 6430, Design Criteria, series listed elsewhere in this contract." However, the 6430 series was subsequently replaced in turn by DOE Order 430.1 "Life Cycle Asset Management"; DOE Order 430.1A; and DOE Order 430.1B.

c. The DEAR clause Paragraph (c), Energy Management, the paragraph's requirements for energy management are not consistent with the requirements of DOE Order 430.2A "Departmental Energy and Utilities Management, dated April 15, 2002, which is applicable and will be incorporated into the contract's List of Applicable Directives. This paragraph establishes requirements for extensive and expensive new work and reporting, which could lead to implicit requirements for new NNSA approvals of energy conservation reports. The DEAR clause's requirements for "an energy conservation report for each new building or addition project" are costly and inappropriate for smaller projects. The potential for new, required NNSA approvals of such reports before proceeding with projects or "additions" may lead to project delays, cost increases, and adverse mission customer impacts. The DEAR Clause requirements for a "10-year energy management plan" appear to go beyond the current requirements of either DOE Order 430.2, *In-House Energy Management*, or DOE Order 430.2A, *Departmental Energy and Utilities Management*. Thus, the inclusion of the DEAR

clause's paragraph (c) with the DOE Order 430.2A creates an ambiguity in contract requirements.

d. The Order 430.1B also requires "That is, contractors will (a) ensure that they and their subcontractors comply with the requirements of this CRD..." which is synonymous with the DEAR clause's paragraph (d) subcontractor flow-down requirement.

e. Thus, the out-of-date DEAR Clause is not needed and conflicts with DOE's current applicable Directives.

4. DEAR 952.247-70 Foreign Travel. The DEAR clause requires the Contractor to conduct Foreign Travel in accordance with the January 31, 2000 DOE Order 551.1 "Official Foreign Travel," or a subsequent version of the Order in effect at the time of award. Instead of specifying compliance with the DOE Order through this clause, NNSA contracts should list the Order elsewhere in the contract, along with any other applicable directives, as noted at paragraph 1 above.

5. DEAR 952.204-2 Security Requirements. As explained below, this clause needs to be revised to enable the government to require the contractor to comply with current security regulations and to correct a reference to an Executive Order which is no longer in effect.

a. Paragraph (b) of this DEAR Clause requires the Contractor to comply with all DOE security regulations and requirements in effect at date of award. However, DOE and NNSA security requirements may change with some frequency during the term of the contract. Therefore, the clause should be modified to refer to only those DOE/NNSA security requirements incorporated into the contract. Changes to DOE/NNSA security requirements and/or regulations that pertain to the Contractor can be implemented in the contract via the contract's clause entitled "Laws, Regulations, and DOE Directives" (M&O contracts) that allows for NNSA to unilaterally incorporate into the contract new security requirements issued during post-award. For non-M&O contracts, DOE/NNSA security requirements and required changes to them should be implemented through the contract's Statement of Work, Contract Security Classification Specification or other attachment to the contract, as appropriate.

b. With respect to paragraphs (f), (h), and (i), EO 12958 revoked EO 12356 on October 14, 1995, yet the DEAR clause has not been updated to reflect this change.

c. Inclusion of the DEAR clause "as is" adds conflicting terms and conditions to the contract; thus, rendering the DEAR clause ineffective.

6. DEAR 970.5215-3 Conditional Payment of Fee, Profit, and Other Incentives -- Facility Management Contracts. DOE Order 232.1A, referred to in paragraph (c)(3)(i) of the clause was replaced by DOE Order 231.1A, Chg 1, Environment, Safety and Health Reporting, which is not applicable to contractors or M&O contracts. The current DOE Manual 231.1-2, Occurrence Reporting and Processing of Operations Information,

incorporates the requirements associated with contractor deficiencies/non-compliances (occurrence) reporting and needs to be added to the DEAR clause (in place of DOE Order 232.1A) in order to remove a conflict between the DEAR Clause and the DOE Manual 231.1-2, which is included in the contract's List of Applicable Directives.

7. DEAR 970.5204-2 Laws, Regulations, and DOE Directives. As explained below, from time to time this clause requires administrative revisions to facilitate contract administration. In addition, certain administrative corrections to the clause are required.

a. The use of the terms "List A" and "List B" (as included in the DEAR clause) add confusion for the reader since, in some instances, there is no List A-List of Applicable Laws and Regulations incorporated into the contract, and the item generally referenced as List B, the List of Applicable Directives, is actually included in an appendix (e.g., Appendix "G") to the contract. The deviation enables clause "clean-up" thereby making it more readable, and eliminates confusion without changing the requirements or intent of the clause.

b. The deviation's change to the last sentence of paragraph (b) is required to remove an ambiguity between this Laws, Regulations, and DOE Directives clause and the clause at 970.5243-1 entitled "Changes." The last sentence states: "The contractor and the contracting officer shall identify and, if appropriate, agree to any changes <u>to other contract terms and conditions, including cost and schedule,</u> associated with the revision to List B pursuant to the clause of this contract entitled, "Changes." However, the Changes clause, only provides for changes <u>to fee.</u> In order to remove the ambiguity between the two clauses, the proposed deviation to this Laws, Regulations, and DOE Directives clause separates the authority for changing "terms and conditions, including cost and schedule" from the authority to change fee. This allows for any changes to be made pursuant to paragraph (b) of the "Laws, Regulations, and DOE Directives" clause and any adjustments to fee, if required, to be made pursuant to the "Changes" clause.

c. Pursuant to Section 3212(b)(2) of Public Law 106-65, NNSA has established a system for managing policy, directives and business management practices within NNSA. Specifically, NAP-1 provides that:

> This system, to be called Policy Letters, codifies how the Administration will establish policy, and provide direction and guidance to all its elements. The Administration's Policy Letter system is a process which will: (1) establish new policy or directives that are unique to the Administration; (2) supplement or indicate how the Administration will implement a Departmental Directive including implementation of directives in a cost efficient manner; and/or (3) provide business and operating guidance. Administration Policy Letters will take two forms:
> - Directives Policy Letters which are related to (1) and (2) above; and
> - Business and Operating Policy Letters which relate to (3) above.

Therefore, the deviation's change to the clause's paragraph (b) (insertion of "National Nuclear Security Administration Policy Letters" in the first sentence) is in recognition that the Administrator has established "NNSA Policy Letters," which may be applicable to NNSA M&O contractors. Thus, the deviation facilitates the incorporation of such NNSA Policy Letters into NNSA M&O contracts.

ATTACHMENT 1

8. DEAR 970.5203-3 Contractor's Organization. The proposed deviation would make various administrative changes to the DEAR clause, as described below.

a. Deviation to paragraph (a): The purpose of this deviation is to require the contractor to provide an organization chart that reflects not only key personnel, but also the Contractor's Parent Organization's responsible official for administering the Oversight Plan. This change will provide NNSA better insight regarding the individual responsible for making important management decisions that affect an M&O contractor's operations and performance.

b. Deviation to paragraph (b): The purpose of this deviation is to identify the individual or position title of the "resident supervisory representative of the contractor" in charge of the work performed under the contract at any site and at all times.

c. Deviation to paragraph (c): With respect to control of contractor's employees, the proposed deviation provides the NNSA Administrator the right to require the contractor to remove an employee from work under the contract. The paragraph stipulates that it does not impair the statutory or contractual collective bargaining rights of union-represented contractor employees.

d. Deviation to add new paragraph (e): This new paragraph was added to recognize that the terms and conditions of this DEAR Clause or implementation are not intended to conflict with law or otherwise affect the scientific integrity of persons who provide, under the contract, independent technical judgments on the safety, security, and reliability of nuclear weapons systems maintained by the Contractor for the NNSA.

e. The proposed deviations to this clause are complementary to NNSA's Model Clauses contained in Contract Section H, which are focused on improving management and performance above current performance levels and NNSA's commitment to redefining the federal/contractor relationship to improve management and performance within the Nuclear Weapons Complex. These Model Clauses were written in response to the NNSA Administrator's Report to Congress:

*"**Trust, teamwork, and verify** will be the watchwords in program management."*

and

*"**New governance approach.** With these principles in mind, NNSA will develop and implement a simpler, less adversarial contracting model that capitalizes on the private-sector expertise and experience of the management and operating contractors while simultaneously increasing contractor accountability for high performance and responsiveness to NNSA program and stewardship requirements."*

f. The benefit the Government will receive by the deviations to this clause is to (1) gain insight into how the Contractor's parent organization's staff will provide contract support while recognizing that (i) it is the identified individual or position title of the "resident supervisory representative" of the contractor that is ultimately responsible for contract performance and (ii) the Contractor's parent organization is contractually required to play a higher role in fostering contract performance; and (2) to demonstrate to

ATTACHMENT 1

the Contractor that the Department understands that, given the unique nature of this contract, it will not impair the statutory or collective bargaining rights or scientific integrity relative to those contractor personnel who provide independent technical judgment in relation to their role in certifying the nuclear stockpile.

g. A deviation request similar to the above request was approved for the Sandia National Laboratories M&O contract.

DETERMINATION:

Based upon the above findings, I hereby authorize administrative class deviations from seven DEAR clauses (ATTACHMENTS 2 and 3) that are outdated, or must be removed or revised to facilitate contract administration.

EXPIRATION:

Authority to exercise these deviations shall expire upon issuance of superseding revisions to the DEAR.

Robert C Brese

Senior Procurement Executive
National Nuclear Security Administration

May 17, 2005
Date

ATTACHMENT 2

NNSA Deviation to DEAR 970.5215-3 Conditional payment of fee, profit, or incentives.

Revise paragraph (c)(3)(i) of the clause prescribed in 48 CFR 970.1504-5(c) by removing the reference to "DOE Order 232.1A" and replacing it with "DOE Manual 231.1-2." Insert "(DEVIATION)" following the clause date. The pertinent sections of the modified clause are as follows:

CONDITIONAL PAYMENT OF FEE, PROFIT, AND OTHER INCENTIVES — FACILITY MANAGEMENT CONTRACTS (JAN 2004)(DEVIATION)

(a) [*No changes*]

(b) [*No changes*]

(c) Environment, Safety and Health (ES&H). Performance failures occur if the contractor does not comply with the contract's ES&H terms and conditions, including the DOE approved contractor ISMS. The degrees of performance failure under which reductions of earned or fixed fee, profit, or share of cost savings will be determined are:

(1) First Degree: Performance failures that are most adverse to ES&H. Failure to develop and obtain required DOE approval of an ISMS is considered first degree. The Government will perform necessary review of the ISMS in a timely manner and will not unreasonably withhold approval of the contractor's ISMS. The following performance failures or performance failures of similar import will be considered first degree.

(i) Type A accident (defined in DOE Order 225.1A).

(ii) Two Second Degree performance failures during an evaluation period.

(2) Second Degree: Performance failures that are significantly adverse to ES&H. They include failures to comply with an approved ISMS that result in an actual injury, exposure, or exceedence that occurred or nearly occurred but had minor practical long-term health consequences. They also include breakdowns of the Safety Management System. The following performance failures or performance failures of similar import will be considered second degree:

(i) Type B accident (defined in DOE Order 225.1A).

(ii) Non-compliance with an approved ISMS that results in a near miss of a Type A or B accident. A near miss is a situation in which an inappropriate action occurs, or a necessary action is omitted, but does not result in an adverse effect.

(iii) Failure to mitigate or notify DOE of an imminent danger situation after discovery, where such notification is a requirement of the contract.

ATTACHMENT 2

(3) Third Degree: Performance failures that reflect a lack of focus on improving ES&H. They include failures to comply with an approved ISMS that result in potential breakdown of the System. The following performance failures or performance failures of similar import will be considered third degree:

(i) Failure to implement effective corrective actions to address deficiencies/non-compliances documented through: external (e.g., Federal) oversight and/or reported per DOE Order 232.1A requirements; or internal oversight of DOE Manual 231.1-2 requirements.

(ii) Multiple similar non-compliances identified by external (e.g., Federal) oversight that in aggregate indicate a significant programmatic breakdown.

(iii) Non-compliances that either have, or may have, significant negative impacts to the worker, the public, or the environment or that indicate a significant programmatic breakdown.

(iv) Failure to notify DOE upon discovery of events or conditions where notification is required by the terms and conditions of the contract.

(d) [*No changes*]

ATTACHMENT 3

DEAR 970.5215-3 Conditional payment of fee, profit, or incentives.

CONDITIONAL PAYMENT OF FEE, PROFIT, AND OTHER INCENTIVES — FACILITY MANAGEMENT CONTRACTS (JAN 2004)(DEVIATION)

(a) [*No changes*]

(b) [*No changes*]

(c) Environment, Safety and Health (ES&H). Performance failures occur if the contractor does not comply with the contract's ES&H terms and conditions, including the DOE approved contractor ISMS. The degrees of performance failure under which reductions of earned or fixed fee, profit, or share of cost savings will be determined are:

(1) First Degree: Performance failures that are most adverse to ES&H. Failure to develop and obtain required DOE approval of an ISMS is considered first degree. The Government will perform necessary review of the ISMS in a timely manner and will not unreasonably withhold approval of the contractor's ISMS. The following performance failures or performance failures of similar import will be considered first degree.

(i) Type A accident (defined in DOE Order 225.1A).

(ii) Two Second Degree performance failures during an evaluation period.

(2) Second Degree: Performance failures that are significantly adverse to ES&H. They include failures to comply with an approved ISMS that result in an actual injury, exposure, or exceedence that occurred or nearly occurred but had minor practical long-term health consequences. They also include breakdowns of the Safety Management System. The following performance failures or performance failures of similar import will be considered second degree:

(i) Type B accident (defined in DOE Order 225.1A).

(ii) Non-compliance with an approved ISMS that results in a near miss of a Type A or B accident. A near miss is a situation in which an inappropriate action occurs, or a necessary action is omitted, but does not result in an adverse effect.

(iii) Failure to mitigate or notify DOE of an imminent danger situation after discovery, where such notification is a requirement of the contract.

(3) Third Degree: Performance failures that reflect a lack of focus on improving ES&H. They include failures to comply with an approved ISMS that result in potential breakdown of the System. The following performance failures or performance failures of similar import will be considered third degree:

ATTACHMENT 3

(i) Failure to implement effective corrective actions to address deficiencies/non-compliances documented through: external (e.g., Federal) oversight and/or reported per DOE ~~Order 232.1A~~ **Manual 231.1-2** requirements; or internal oversight of DOE Order 440.1A requirements.

(ii) Multiple similar non-compliances identified by external (e.g., Federal) oversight that in aggregate indicate a significant programmatic breakdown.

(iii) Non-compliances that either have, or may have, significant negative impacts to the worker, the public, or the environment or that indicate a significant programmatic breakdown.

(iv) Failure to notify DOE upon discovery of events or conditions where notification is required by the terms and conditions of the contract.

(d) [*No changes*]

ATTACHMENT 1

Determination and Findings
Class Deviations to the
Department of Energy Acquisition Regulation (DEAR)

On the basis of the following findings and determination, class deviations to seven DEAR clauses are authorized pursuant to the authority of FAR 1.403.

FINDINGS:

1. The DEAR requires use of two outdated clauses (Findings 2 and 3 below), which have been superseded by DOE Orders. Two other DEAR clauses (Findings 4 and 5 below) merely specify compliance with a DOE Order. NNSA contracts may require compliance with numerous DOE and NNSA directives (Orders, Manuals, Standards, etc.). Specifying compliance with these directives through individual clauses, through separate reference in the contract, or through both, is cumbersome and confusing. When compliance with DOE or NNSA directives is required, the directives should be listed in the contract's Statement of Work; an attachment to the contract; or, for M&O contracts, by incorporation in the List of Applicable Directives referenced in the Laws, Regulations, and DOE Directives clause (DEAR 970.5204-2). Another DEAR clause requires correction of an out-of-date reference to a DOE Order (Finding 6). Finally (Findings 7 and 8), two DEAR clauses require various administrative revisions to facilitate contract administration. The proposed deviations should be applied to the class of all contracts for which the DEAR prescribes use of these clauses.

2. DEAR 952.217-70 Acquisition of Real Property. This clause, dated APR 1984, requires the Contractor to obtain prior approval of the Contracting Officer when the Contractor acquires or proposes to acquire use of real property and to flow down the clause requirements to its subcontractors. This clause has since been overcome by DOE Order 430.1B, Real Property Asset Management, dated September 24, 2003. The Order includes a Contractor Requirements Document that specifies requirements for contracts involving acquisition, management, maintenance, disposition, or disposal of real property assets. Therefore, the DEAR clause is no longer needed. Requiring compliance with DOE Order 430.1B, rather than including the clause, will streamline contracts and ensure that they include the current real property requirements.

3. DEAR 970.5237-2 Facilities Management. The DEAR clause, as written, identifies requirements associated with Site development planning (paragraph (a)); General Design criteria (paragraph (b)); Energy Management (paragraph (c)); and a flow-down requirement (paragraph (d)). As explained below, this clause is outdated and superfluous, considering current Departmental requirements, which need to be incorporated into M&O contracts.

a. With respect to Paragraph (a), there is no current Life Cycle Facility Operations Series. The clause states "The Government shall provide to the contractor site development guidance for the facilities and lands for which the contractor is responsible under the terms and conditions of this contract." The paragraph further contains a

requirement for the Contractor to "...prepare...a "Long Range Site Development Plan" and further requires "In developing this Plan, the contractor shall follow the procedural guidance set forth in the applicable DOE Directives in the Life Cycle Facility Operations Series listed elsewhere in this contract." The prescribed standard clause at DEAR 970.5237-2 – Facilities Management, as published in the Federal Register on December 22, 2000, is unchanged from the previous version, DEAR 970.5204-60 - Facilities Management (Nov 1997). The November 1997 version of the Facilities Management clause was seriously outdated at the time it was published and did not reflect the Department's adoption of Life Cycle Asset Management (LCAM) at the time. Since its first issuance on August 24, 1995, DOE O 430.1 – Life Cycle Asset Management (LCAM), provided for cancellation of a number of other directives, including DOE O 6430.1 - General Design Criteria, and DOE O 4320.1B - Site Development Planning. Regardless, these two orders continue to be referred to in the Facilities Management clause. The Order 430.1B – Real Property Asset Management, dated September 24, 2003, now cancels DOE O 430.1A – Life-Cycle Asset Management, dated October 14, 1998. The Order 430.1B contains a Contractor Requirements Document (CRD) which is intended to apply to all site and facility management contracts which involve acquisition, maintenance, disposition or disposal of real property assets. That CRD and other CRDs appended to other applicable orders governing facility management are intended to contain the Department's requirements for M&O contracts concerning facility management. Therefore, any Facilities Management clause is superfluous.

b. The DEAR clause Paragraph (b), General design criteria, contains a requirement for the Contractor to comply with a cancelled DOE Order. Furthermore, the criteria should not be applied to leases, modular buildings, etc., as no commercial buildings were ever constructed to meet the Order. This paragraph requires the Contractor to follow the general design criteria contained "in the applicable DOE Directives 6430, Design Criteria, series listed elsewhere in this contract." However, the 6430 series was subsequently replaced in turn by DOE Order 430.1 "Life Cycle Asset Management"; DOE Order 430.1A; and DOE Order 430.1B.

c. The DEAR clause Paragraph (c), Energy Management, the paragraph's requirements for energy management are not consistent with the requirements of DOE Order 430.2A "Departmental Energy and Utilities Management, dated April 15, 2002, which is applicable and will be incorporated into the contract's List of Applicable Directives. This paragraph establishes requirements for extensive and expensive new work and reporting, which could lead to implicit requirements for new NNSA approvals of energy conservation reports. The DEAR clause's requirements for "an energy conservation report for each new building or addition project" are costly and inappropriate for smaller projects. The potential for new, required NNSA approvals of such reports before proceeding with projects or "additions" may lead to project delays, cost increases, and adverse mission customer impacts. The DEAR Clause requirements for a "10-year energy management plan" appear to go beyond the current requirements of either DOE Order 430.2, *In-House Energy Management*, or DOE Order 430.2A, *Departmental Energy and Utilities Management*. Thus, the inclusion of the DEAR

clause's paragraph (c) with the DOE Order 430.2A creates an ambiguity in contract requirements.

d. The Order 430.1B also requires "That is, contractors will (a) ensure that they and their subcontractors comply with the requirements of this CRD..." which is synonymous with the DEAR clause's paragraph (d) subcontractor flow-down requirement.

e. Thus, the out-of-date DEAR Clause is not needed and conflicts with DOE's current applicable Directives.

4. DEAR 952.247-70 Foreign Travel. The DEAR clause requires the Contractor to conduct Foreign Travel in accordance with the January 31, 2000 DOE Order 551.1 "Official Foreign Travel," or a subsequent version of the Order in effect at the time of award. Instead of specifying compliance with the DOE Order through this clause, NNSA contracts should list the Order elsewhere in the contract, along with any other applicable directives, as noted at paragraph 1 above.

5. DEAR 952.204-2 Security Requirements. As explained below, this clause needs to be revised to enable the government to require the contractor to comply with current security regulations and to correct a reference to an Executive Order which is no longer in effect.

a. Paragraph (b) of this DEAR Clause requires the Contractor to comply with all DOE security regulations and requirements in effect at date of award. However, DOE and NNSA security requirements may change with some frequency during the term of the contract. Therefore, the clause should be modified to refer to only those DOE/NNSA security requirements incorporated into the contract. Changes to DOE/NNSA security requirements and/or regulations that pertain to the Contractor can be implemented in the contract via the contract's clause entitled "Laws, Regulations, and DOE Directives" (M&O contracts) that allows for NNSA to unilaterally incorporate into the contract new security requirements issued during post-award. For non-M&O contracts, DOE/NNSA security requirements and required changes to them should be implemented through the contract's Statement of Work, Contract Security Classification Specification or other attachment to the contract, as appropriate.

b. With respect to paragraphs (f), (h), and (i), EO 12958 revoked EO 12356 on October 14, 1995, yet the DEAR clause has not been updated to reflect this change.

c. Inclusion of the DEAR clause "as is" adds conflicting terms and conditions to the contract; thus, rendering the DEAR clause ineffective.

6. DEAR 970.5215-3 Conditional Payment of Fee, Profit, and Other Incentives -- Facility Management Contracts. DOE Order 232.1A, referred to in paragraph (c)(3)(i) of the clause was replaced by DOE Order 231.1A, Chg 1, Environment, Safety and Health Reporting, which is not applicable to contractors or M&O contracts. The current DOE Manual 231.1-2, Occurrence Reporting and Processing of Operations Information,

incorporates the requirements associated with contractor deficiencies/non-compliances (occurrence) reporting and needs to be added to the DEAR clause (in place of DOE Order 232.1A) in order to remove a conflict between the DEAR Clause and the DOE Manual 231.1-2, which is included in the contract's List of Applicable Directives.

7. DEAR 970.5204-2 Laws, Regulations, and DOE Directives. As explained below, from time to time this clause requires administrative revisions to facilitate contract administration. In addition, certain administrative corrections to the clause are required.

a. The use of the terms "List A" and "List B" (as included in the DEAR clause) add confusion for the reader since, in some instances, there is no List A-List of Applicable Laws and Regulations incorporated into the contract, and the item generally referenced as List B, the List of Applicable Directives, is actually included in an appendix (e.g., Appendix "G") to the contract. The deviation enables clause "clean-up" thereby making it more readable, and eliminates confusion without changing the requirements or intent of the clause.

b. The deviation's change to the last sentence of paragraph (b) is required to remove an ambiguity between this Laws, Regulations, and DOE Directives clause and the clause at 970.5243-1 entitled "Changes." The last sentence states: "The contractor and the contracting officer shall identify and, if appropriate, agree to any changes <u>to other contract terms and conditions, including cost and schedule,</u> associated with the revision to List B pursuant to the clause of this contract entitled, "Changes." However, the Changes clause, only provides for changes <u>to fee.</u> In order to remove the ambiguity between the two clauses, the proposed deviation to this Laws, Regulations, and DOE Directives clause separates the authority for changing "terms and conditions, including cost and schedule" from the authority to change fee. This allows for any changes to be made pursuant to paragraph (b) of the "Laws, Regulations, and DOE Directives" clause and any adjustments to fee, if required, to be made pursuant to the "Changes" clause.

c. Pursuant to Section 3212(b)(2) of Public Law 106-65, NNSA has established a system for managing policy, directives and business management practices within NNSA. Specifically, NAP-1 provides that:

> This system, to be called Policy Letters, codifies how the Administration will establish policy, and provide direction and guidance to all its elements. The Administration's Policy Letter system is a process which will: (1) establish new policy or directives that are unique to the Administration; (2) supplement or indicate how the Administration will implement a Departmental Directive including implementation of directives in a cost efficient manner; and/or (3) provide business and operating guidance. Administration Policy Letters will take two forms:
> - Directives Policy Letters which are related to (1) and (2) above; and
> - Business and Operating Policy Letters which relate to (3) above.

Therefore, the deviation's change to the clause's paragraph (b) (insertion of "National Nuclear Security Administration Policy Letters" in the first sentence) is in recognition that the Administrator has established "NNSA Policy Letters," which may be applicable to NNSA M&O contractors. Thus, the deviation facilitates the incorporation of such NNSA Policy Letters into NNSA M&O contracts.

ATTACHMENT 1

8. DEAR 970.5203-3 Contractor's Organization. The proposed deviation would make various administrative changes to the DEAR clause, as described below.

a. Deviation to paragraph (a): The purpose of this deviation is to require the contractor to provide an organization chart that reflects not only key personnel, but also the Contractor's Parent Organization's responsible official for administering the Oversight Plan. This change will provide NNSA better insight regarding the individual responsible for making important management decisions that affect an M&O contractor's operations and performance.

b. Deviation to paragraph (b): The purpose of this deviation is to identify the individual or position title of the "resident supervisory representative of the contractor" in charge of the work performed under the contract at any site and at all times.

c. Deviation to paragraph (c): With respect to control of contractor's employees, the proposed deviation provides the NNSA Administrator the right to require the contractor to remove an employee from work under the contract. The paragraph stipulates that it does not impair the statutory or contractual collective bargaining rights of union-represented contractor employees.

d. Deviation to add new paragraph (e): This new paragraph was added to recognize that the terms and conditions of this DEAR Clause or implementation are not intended to conflict with law or otherwise affect the scientific integrity of persons who provide, under the contract, independent technical judgments on the safety, security, and reliability of nuclear weapons systems maintained by the Contractor for the NNSA.

e. The proposed deviations to this clause are complementary to NNSA's Model Clauses contained in Contract Section H, which are focused on improving management and performance above current performance levels and NNSA's commitment to redefining the federal/contractor relationship to improve management and performance within the Nuclear Weapons Complex. These Model Clauses were written in response to the NNSA Administrator's Report to Congress:

*"**Trust, teamwork, and verify** will be the watchwords in program management."*

and

*"**New governance approach.** With these principles in mind, NNSA will develop and implement a simpler, less adversarial contracting model that capitalizes on the private-sector expertise and experience of the management and operating contractors while simultaneously increasing contractor accountability for high performance and responsiveness to NNSA program and stewardship requirements."*

f. The benefit the Government will receive by the deviations to this clause is to (1) gain insight into how the Contractor's parent organization's staff will provide contract support while recognizing that (i) it is the identified individual or position title of the "resident supervisory representative" of the contractor that is ultimately responsible for contract performance and (ii) the Contractor's parent organization is contractually required to play a higher role in fostering contract performance; and (2) to demonstrate to

ATTACHMENT 1

the Contractor that the Department understands that, given the unique nature of this contract, it will not impair the statutory or collective bargaining rights or scientific integrity relative to those contractor personnel who provide independent technical judgment in relation to their role in certifying the nuclear stockpile.

g. A deviation request similar to the above request was approved for the Sandia National Laboratories M&O contract.

DETERMINATION:

Based upon the above findings, I hereby authorize administrative class deviations from seven DEAR clauses (ATTACHMENTS 2 and 3) that are outdated, or must be removed or revised to facilitate contract administration.

EXPIRATION:

Authority to exercise these deviations shall expire upon issuance of superseding revisions to the DEAR.

Robert C. Brese

May 17, 2005
Date

Senior Procurement Executive
National Nuclear Security Administration

ATTACHMENT 2

NNSA Deviation to DEAR 970.3770-2 -- Contract clause.

Delete: The contracting officer shall insert the clause at 48 CFR 970.5237-2, Facilities Management, in all management and operating contracts.

Replace with:

The contracting officer shall include applicable DOE facilities management requirements in the List of Applicable Directives in all management and operating contracts.

NNSA Deviation to DEAR 970.5237-2 -- Facilities management.

Remove this paragraph, including the clause at DEAR 970.5237-2, entitled "Facilities Management (Dec 2000)."

Replace with:

DEAR 970.5237-2 [Reserved] (DEVIATION)

ATTACHMENT 5

Determination and Findings
Individual and Class Deviations to the
Department of Energy Acquisition Regulation (DEAR)

On the basis of the following findings and determination, an individual and two class deviations from the DEAR, consistent with the Department's proposed changes to the DEAR, are authorized for use in the Los Alamos National Laboratory Management & Operating solicitation and contract, pursuant to the authority of FAR 1.403.

FINDINGS:

1. Three deviations related to DOE's make-or-buy plan policy have been proposed by the contracting officer for use in the Los Alamos National Laboratory M&O solicitation and contract. Each proposed deviation is described in the findings that follow. The first proposed deviation (Finding 2) has not been requested before. Two of the proposed deviations (Findings 3 and 4) are similar to individual deviations approved for the Sandia National Laboratories M&O contract, and are identified as class deviations. The proposed deviations are consistent with the Department's proposed rule, published in the Federal Register on December 15, 2004 (Volume 69, No. 240, 69 FR 75017), which would eliminate the requirement for formal make-or-buy plans. The Background section of the proposed rule explains that the Department's reassessment of its make-or-buy program concluded that requiring make-or-buy plans was not cost-effective. Since it is anticipated that finalization of the proposed rule will obviate the need for future deviations, it is requested that the class deviations apply only to the Sandia M&O contract (deviation previously approved) and to the LANL M&O solicitation and contract.

2. DEAR 970.5203-1 Management Controls.

a. The proposed revision to paragraph (a)(1) is consistent with the Department's proposed rule (see Federal Register Vol. 69, No. 240 (15Dec04)) changes to (1) eliminate the DEAR Clause 970.5215-2 Make-Or-Buy Plan, and (2) revise the DEAR Clause 970.5203-1 Management Controls to add a requirement that the Contractor consider outsourcing of functions.

b. The revision to paragraph (a)(4) (not a requested deviation) is made in accordance with the NNSA Senior Procurement's approved class deviation set forth in DOE Acquisition Letter No. AL-2005-04.

c. This deviation has not been previously requested.

3. DEAR 970.5215-2 Make-Or-Buy Plan. The proposed deviation would omit this clause from the solicitation and contract. The proposed deviation is consistent with the Department's proposed rules (see Federal Register Vol. 69, No. 240 (15Dec04)) changes to (1) eliminate the DEAR Clause 970.5215-2 Make-Or-Buy Plan, and (2) revise the DEAR Clause 970.5203-1 Management Controls to add a requirement that the Contractor consider outsourcing of

functions. A similar individual deviation was approved for the Sandia National Laboratories M&O Contract.

4. DEAR 970.5244-1 Contractor Purchasing System. The clause revisions identified by the contracting officer include updates to clause paragraph (g) in accordance with DOE Acquisition Letter 2002-06 (08/14/02), page 13 of 13 (a previously approved DOE administrative deviation). The revision to paragraph (n) is consistent with the Department's proposed rule (see Federal Register Vol. 69, No. 240 (15Dec04)) changes to (1) eliminate the DEAR Clause 970.5215-2 Make-Or-Buy Plan, and (2) revise the DEAR Clause 970.5203-1 Management Controls to add a requirement that the Contractor consider outsourcing of functions. A similar individual deviation was approved for the Sandia National Laboratories M&O Contract.

DETERMINATION:

Based on the above findings, I hereby determine that deviations from the requirements of the DEAR clauses at 970.5203-1 Management Controls, 970.5215-2 Make-Or-Buy Plan, and 970.5244-1 Contractor Purchasing System (ATTACHMENTS 6 and 7) are necessary to implement improvements to the Department's make-or-buy policies, as contemplated by proposed changes to the DEAR. I hereby authorize an individual deviation from the requirements of DEAR clause 970.5203-1 for the LANL M&O solicitation and contract. Class deviations from the requirements of the DEAR clauses 970.5215-2 and 970.5244-1 for use in the LANL M&O solicitation and contract, in addition to the previously approved similar deviation for the Sandia National Laboratories M&O contract, are also authorized.

EXPIRATION:

Authority to exercise these deviations shall expire upon issuance of the LANL M&O solicitation or upon finalization of the Department's proposed rule, whichever occurs first.

Robert C Brese

Senior Procurement Executive
National Nuclear Security Administration

5/17/2005
Date

ATTACHMENT 6

NNSA Deviation to DEAR 970.5244-1 -- Contractor purchasing system.

Revise the clause by deleting paragraph (n) and marking it "[Reserved]." Insert "(DEVIATION)" following the clause date. The pertinent sections of the modified clause are as follows:

Contractor Purchasing System (DEC 2000)(DEVIATION)

(a) - (m) [*No changes*]

(n) **[Reserved]**

(o) - (y) [*No changes*]

(End of Clause)

NATIONAL NUCLEAR SECURITY ADMINISTRATION

DETERMINATIONS AND FINDINGS

DEPARTMENT OF ENERGY ACQUISITION REGULATION (DEAR) CLASS DEVIATION REGARDING
DEAR 970.1504 and associated 970.5215 clauses

FINDINGS

1. DEAR fee policies may be appropriate for the broad range of diversified contracts administered by DOE e.g., site closure, Office of Science laboratories. However, they are neither optimal, nor are they efficient in motivating and rewarding NNSA contractors for excelling in performance of activities in support of the NNSA nuclear enterprise.
2. The DEAR fee policies are of necessity complex in order to accommodate the diverse DOE mission. These complexities require the expenditure of substantial resources each year by both the Federal staff and the contractor staff. Yet, analysis of actual fees paid over a period of several years shows that there is little or no variance in the amount of fee actually paid to DOE contractors operating under the DEAR fee policies.
3. NNSA's focused mission requires that senior NNSA management be able to address and reward its various contractors on, among other things, the basis of their contribution to the overall success of the NNSA mission. Such flexibilities are precluded by the DEAR fee policies. The DEAR "one-size-fits-all" approach to fee policy has resulted in fee payments to NNSA contractors that distort the relative value and difficulties of performing certain functions within the NNSA complex.
4. "Work for Others" is a valuable program at NNSA facilities. It allows NNSA to expand the scope of and improve its expertise in science and manufacturing. It also helps defray administrative and fixed expenses at our facilities. DEAR fee policies fail to recognize and reward facilities that expand the work for others program to new customers.

DETERMINATION

I hereby authorize a class deviation from the requirements of DEAR 970-1504 and associated 970-5215 clauses in order to allow NNSA Contracting Officers to negotiate more appropriate fee arrangements with NNSA Management and Operating contractors. NNSA Contracting Officers shall comply with the attached NNSA fee policy in lieu of the DEAR fee policies.

APPROVAL Robert C. Braden Jr. DATE 1/10/2005
Robert C. Braden Jr.
Director of Acquisition and Supply Management
National Nuclear Security Administration

DEAR 970.1504 – Contract pricing. DEVIATION

970.1504-1 – Price Analysis.

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

This subsection sets forth NNSA's policies on fees for management and operating (M&O) contracts.

970.1504-1-2 – Fee policy.

(a) Three basic principles underlie NNSA's fee policy:

(1) Fee arrangements should not be overly complex, must be clearly stated, and easily understood.

(2) The total amount of available fee should reflect the importance to NNSA of the outcomes incentivized in the Performance Evaluation Plan and the difficulty the contractor faces in accomplishing those outcomes and earning the fee.

(3) M&O contracts should include an award term incentive.

(b) Available fee, if any, as well as the type of fee arrangement, will normally be established on a fiscal year basis. Both will be established at the time of award, at the time of option exercise, or at the start of the fiscal year. Once established, fee is subject to adjustment only in the event of a significant change (greater than +/-25%) to a single year budget or work scope established at the beginning of a fiscal year.

(c) In order to meet cash flow and other contractor management needs, 35% of the total fee pool is available for provisional payment to the contractor at the rate of 1/12 of the available amount per month. No other fee payments will be made prior to the final fee determination.

(d) thru (h) Removed and reserved.

(i) No deviation from DEAR.

970.1504-1-3 –Fee Arrangement.

(a) Consistent with the concept of a performance-based management contract, contract types that incentivize superior performance, increased efficiency, cost control, and contractor assumption of risk are preferred. Generally, this requires that the total fee pool be at risk.

(b) The maximum fee amount for M&O contracts is * % of the estimated annual budget for that contract. The Senior Procurement Executive may approve other empirical measures to establish the fee; e.g., a factor that considers the number of full time equivalent employees devoted to direct mission accomplishment versus the number devoted in indirect support functions. Great care must be exercised in using nontraditional factors to avoid the

possibility of contractor manipulation of the factors and to ensure that no aspects of contract performance are slighted or sacrificed.

* Separate percentages for the FFRDCs and the plants and site are determined periodically by the Senior Procurement Executive.

(c) The maximum fee amount for each M&O contract will be adjusted annually prior to the performance assessment period by the Fee Determining Official.

(d) Work for Others that the contractor generates from non-DOE sources can help defray facility-operating expenses, retain critical skills, and advance NNSA's mission in other ways. Innovative fee arrangements that recognize the contractor's contribution to developing new sources of work for others are encouraged. Such work must:

- Be performed on a noninterference basis,
- Be within the existing scope and purpose of the contract, and
- Cannot be undertaken if the work would place the contractor in competition with the private sector.

970.1504-1-4 -- Special considerations: fee limitations.

If objective performance incentives are of unusual difficulty or if successful completion of the performance incentives would provide extraordinary value to NNSA, fees in excess of those allowed under 48 CFR 970.1504-1-3 DEVIATION may be permitted with the approval of the Senior Procurement Executive. In no case can the total available fees exceed the statutory limitations imposed by 10 U.S.C. 2306(d) and 41 U.S.C. 254(b).

970.1504-1-5 – Shared savings.

Aggressive pursuit of operational efficiencies without sacrificing mission needs can result in substantial savings and program benefits. Much like traditional value engineering, operational efficiencies can have a savings impact beyond the immediate task or project. Contractors should be encouraged to maximize such savings through "shared savings" arrangements that are not part of the fee structure.

Cost and operational efficiencies arising from, for example, innovative product designs, process improvements, supply chain management initiatives, or integration of life cycle cost approaches for the design and development of systems that minimize maintenance and operations costs can save NNSA substantial program funds. This fact should be recognized and shared savings arrangements should be included in contracts to reward contractors that generate better ideas and management improvements that will benefit the NNSA contract or program.

Shared savings arrangements require the approval of the Senior Procurement Executive.

970.1504-2 – Price negation. No deviation to DEAR.

970.1504-3 – Documentation. No deviation to DEAR.

970.1504-4 – Special cost or pricing areas. No deviation to DEAR.

970.1504 – 5 Solicitation provision and contract clauses.

(a) Removed and reserved.
(b) No deviation to DEAR.
(c) No deviation to DEAR.
(d) The Contracting Officer shall insert a clause, substantially the same as the clause at 48 CFR 970.5215-4 Shared Savings, in M&O contracts if the Senior Procurement Executive has approved inclusion of cost savings programs.
(e) The Contracting Officer shall insert the provision at 48 CFR 970.5215-5, Limitation on Fee, DEVIATION in solicitations for M&O contracts.

Subpart 970.52 Solicitation Provisions and Contract Clauses for Management and Operating Contracts

970.5215-1 Removed and reserved.

970.5215-2 – Make-or-buy plan. No deviation to DEAR.

970.5215-3 – Conditional payment of fee, profit, or incentives. No deviation to DEAR

970.5215-4 – Shared savings.

As prescribed in 48CFR 970.1504-5(d) DEVIATION, the contracting officer shall insert the following clause in M&O contracts.

Shared Savings (JAN 2005)

(a) **General.** NNSA's facilities and laboratories must be operated in an efficient and effective manner. The Contractor shall assess its operations and identify areas where cost and operational efficiencies arising from, for example, innovative product designs, process improvements, supply chain management initiatives, or integration of life cycle cost approaches for the design and development of systems that minimize maintenance and operations costs can bring cost efficiencies to its operations without adversely affecting the level of performance required by the contract.

(b) **Definition.**
"Shared savings" means a reduction in the total amount of the cost of performing the effort where the savings revert to NNSA direction or control and may be available for other program priorities. Shared savings can result from a design, process, method change, or other initiative occurring in the fiscal year in which the change is accepted and may apply in subsequent fiscal years. They are the difference between the estimated cost of performing an effort as originally planned and the actual

allowable cost of performing that same effort using an approved revised approach intended to reduce costs. Savings resulting from formal or informal direction given by NNSA or changes in the mission, work scope, or routine reorganization of the Contractor due to changes in the budget are not shared savings and do not qualify for incentive sharing.

(c) **Shared savings proposals (S2P).**
S2Ps shall be submitted to the Contracting Officer and shall contain:

(1) Current Method (Baseline)-A description of the current scope of work, cost, and schedule to be impacted by the initiative with supporting documentation.

(2) New Method (New Proposed Baseline)-A description how the initiative will be accomplished, the new scope of work, detailed cost/price estimate, and schedule with supporting documentation.

(3) Feasibility Assessment-A description and evaluation of the proposed initiative and benefits, risks, and impacts of implementation. This evaluation shall include an assessment of the difference between the current method and the proposed new method including all related costs.

(4) The proposed contractual arrangement.

(5) A discussion of the extent to which acceptance of the S2P may:

(i) Pose a risk to the health and safety of workers, the community, or to the environment;

(ii) Result in a waiver or deviation from NNSA requirements, such as DOE/NNSA Orders and joint oversight agreements;

(iii) Require a change in other contractual agreements;

(iv) Result in significant organizational or personnel impacts;

(v) Create a negative impact on the cost, schedule, or scope of work in another area or to other contractors in the NNSA Complex; and

(vi) Impact successful and timely completion of any of the work in the cost, technical, and schedule baseline.

S2Ps that may exceed $5M in savings shall be submitted through the Contracting Officer to the Senior Procurement Executive, NNSA.

(d) **Acceptance or Rejection of S2P.** Acceptance or rejection of an S2P is a unilateral determination of the Contracting Officer. The Contracting Officer will notify the Contractor that an S2P has been accepted, rejected, or deferred within (Insert Number) days after receipt. To be acceptable, an S2P must:

(1) Result in net savings (in the sharing period if a design, process, or method change);

(e) **Sharing Arrangement.** If an S2P is accepted, the Contractor may share in the net savings. For

(2) Not reappear as costs in subsequent periods; and

(3) Not result in impairment of essential functions.

(e) **Sharing Arrangement**. If an S2P is accepted, the Contractor may share in the net savings. For an S2P negotiated as a cost savings incentive resulting from a design, process, or method change, the Contractor's share shall not to exceed 25% of the shared net savings, unless approved in advance by the Senior Procurement Executive. The specific percentage and sharing period will be set forth in the contractual document.

(f) **Subcontracts**. The Contractor may include a clause similar to this clause in any subcontract. In calculating any estimated shared net savings in an S2P under this contract, the Contractor's administration, development, and implementation costs shall include any subcontractor's allowable costs, and any S2P incentive payments to a subcontractor. The Contractor may choose any arrangement for subcontractor S2P incentive payments, provided that the payments do not reduce NNSA's share of net savings.

(End of Clause)

970.5215-5 -- Limitation on fee.

As prescribed in 48 CFR 970.1504- 5 (e) DEVIATION, the contracting officer shall insert the following provision in solicitations for Management and Operating contracts:

Limitation on Fee DEVIATION (JAN 2005)

(a) For the purpose of this solicitation, fee amounts shall not exceed the total available fee allowed by the fee policy at 48 CFR 970.1504-1-1 DEVIATION, or as specifically stated elsewhere in the solicitation.

(b) The Government reserves the unilateral right, in the event an offeror's proposal is selected for award, to limit total available fee to an amount not to exceed an amount established pursuant to 48 CFR 970.1504-1-1 DEVIATION or to an amount as specifically stated elsewhere in the solicitation.

(End of Provision)

Attachment #2 to BOP 540.3

AWARD TERM

(a) Commencing in the second year of contract performance, the contract's term as set forth in the Section F clause entitled "Period of Performance" may be extended if: the Contractor is rated "Outstanding" on the performance objectives contained in its annual NNSA Performance Evaluation Report and meets or exceeds the performance objectives set forth in the award term section of the Performance Evaluation Plan (PEP). If the Contractor does not receive an "Outstanding" rating, this clause is inoperable for the associated evaluation period.

(b) The Contractor's performance in the areas described in the award term section of the PEP will be subjectively evaluated as part of the annual performance evaluation. The Site Office Manager will make an award term recommendation to the Fee Determination Official (FDO). The award term decision will be made in conjunction with the annual performance incentive fee determination.

(c) The award term decision is a unilateral determination of the FDO.

(d) If the FDO determines to award additional term, the Contracting Officer shall modify the contract unilaterally to extend the contract term by one year.

(e) The contract term, including all earned award term, shall not exceed 20 years.

(f) If the Contractor fails 3 times to earn award term, the operation of this clause shall cease.

(g) A significant failure of the Contractor's management controls, as defined in the clause entitled "Management Controls," or a catastrophic event, as defined in the clause entitled "Conditional Payment Of Fee, Profit, Or Incentives," may result in the forfeiture of up to 3-years of previously earned award term in addition to the other remedies provided for in the contract.

(end of clause)