DEPARTMENT OF ENERGY

48 CFR Part 970

RIN 1991–AB55

Acquisition Regulations: Revision of Patent Regulations Relating to Department of Energy Management and Operating Contracts

AGENCY: Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy is adopting, with changes, as a final rule the interim final rule published on November 15, 2000, which amended the Department of Energy Acquisition Regulation (DEAR) to improve the patent coverage relating to the Department's management and operating contracts. The final rule generally reflects the contract clauses used by the Department in management and operating contracts over the last 5 years. The changes adapt patent-related clauses to subcontracting under management and operating contracts, restate the clauses in plain language, and provide a complete set of patent clauses for a variety of management and operating contracts.

DATES: This final rule is effective August 26, 2002.

FOR FURTHER INFORMATION CONTACT: Robert M. Webb at (202) 586–8264

SUPPLEMENTARY INFORMATION:

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I. Background

On November 15, 2000, at 65 FR 68932, the Department of Energy (DOE or Department) published an interim final rule containing amendments to the patent regulations covering its management and operating contracts. In response to the notice of interim final rulemaking, DOE received only one comment. That comment took no exception to the interim final rule and opined that the rule had achieved its intended purposes of clarity and organization. Internal deliberations of the Department have resulted in minor changes to the interim final rule. These are discussed in the next portion of this rule. Except as noted in this preamble, the regulations and clauses are as originally promulgated.

Since publication of the interim final rule, the regulations and clauses included in the interim final rule were republished as part of a final rule republishing Part 970 of the DEAR (65 FR 80994, Dec. 22, 2000). While the provisions themselves were not changed in any way in that republication, changes in numbering did occur. The numbering system of this final rule are different than those used in the publication of the interim final rule but are consistent with the republication of DEAR Part 970.

Finally, since the publication of the interim final rule, Congress enacted two statutes that affect the Technology Transfer Mission clause at 970.5227–3. Section 3196 of Pub. L. 106–398 limited the time for agency review and response to proposed joint work statements and proposed Cooperative Research and Development Agreements (CRADAs) at contractor-operated, government-owned laboratories. Also, Section 11 of the Technology Transfer Commercialization Act of 2000, Pub. L. 106–404, directs the Secretary to assure that certain of DOE's laboratory and facilities contractors designate a Technology Partnership Ombudsman to perform specified duties This final rule amends the Technology Transfer Mission clause to implement these statutes. The implementing language follows the statutory direction.

II. Discussion of Changes

In order to reflect Section 3196 of Pub.L. 106–398, changes have been made to paragraph (n) of the Technology Transfer Mission clause, now at 970.5227–3. These changes reflect the time for DOE review of proposed joint work statements and CRADAs that result after enactment of the statute. Additionally, a paragraph (p) has been added to the same clause to reflect Section 11 of the Technology Transfer Commercialization Act of 2000, Pub. L. 106–404. This latter change will assure that DOE's management and operating and other major contractors with a technology transfer mission designate a Technology Partnership Ombudsman to perform specified duties.

The threshold for flowdown of the clause at 970.5227–4, Authorization and Consent, has been raised to $100,000 to reduce the contractor's burden of including it in subcontracts, and paragraph (c) has been reorganized to improve its clarity. The flowdown threshold for the clause at 970.5227–5, Notice and Assistance Regarding Patent and Copyright Infringement, has been raised to $100,000 also to reduce the contractor's burden of including the clause in subcontracts.

The clause at 970.5227–8, Refund of Royalties, was altered as a result of experience gained since the publication of the interim final rule. Changes have been made to limit the scope of the clause to royalties payable for a licensing of an invention. The version originally published covered all royalties, including royalties for copyright. In this day of the purchase of large quantities of commercial software, that inclusion would be burdensome and not provide a return worth the investment of resources by both the contractor and DOE. Additionally, the version of the clause included in the interim final rule was written in a way that assumed there was a solicitation and that the royalties could be identified in the contract price for the term of the contract. While there are more solicitations leading to management and operating contracts than ever before, there remain many instances in which contracts are extended. In neither event would it be possible for the offeror or the contractor to identify all royalties associated with contract performance at the inception of the contract because of the broad research and development nature of these contracts; therefore, the Department has made changes to focus the clause to require that the contractor gain DOE approval before paying patent royalties of more than $250 during contract performance.

The Department has deleted the phrase "as DOE deems appropriate" as the last words of paragraph (b)(6) of the clause at 970.5227–10, Patent Rights-Management and Operating Contracts, Nonprofit Organizations or Small Business Firm Contractor and paragraph (b)(9) of the clause at 970.5227–12, Patent Rights-Management and Operating Contracts, For-Profit Contractor, Advance Class Waiver. The sentence without that phrase accomplishes its intended purpose of requiring the contractor to share royalties with a co-inventor who is a Federal employee. That additional phrase could have been construed as making the sharing scheme subject to DOE dictation or approval, neither of which was intended.

The Department has also inserted specific reference to the National Nuclear Security Administration in the definition of "weapons related inventions" in Alternates I to the clauses at 970.5227–10 and –12.

III. Procedural Requirements

A. Review Under Executive Order 12866

Today's regulatory action has been determined not to be a "significant regulatory action" under Executive Order 12866, "Regulatory Planning and Review," (58 FR 51735, October 4, 1993). Accordingly, this final rule is not subject to review under that Executive Order by the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB).

B. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this final regulation meets the relevant standards of Executive Order 12988.

C. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, requires preparation of an initial regulatory flexibility analysis for any rule that must be proposed for public comment and that is likely to have significant economic impact on a substantial number of small entities. The Regulatory Flexibility Act does not apply to this rulemaking.

D. Review Under the Paperwork Reduction Act

Section 11 of the Technology Transfer Commercialization Act of 2000, Pub. L. 106–404, provides that each technology partnership ombudsman appointed pursuant to the Act "shall * * * report quarterly on the number and nature of complaints and disputes raised, along with the ombudsman's assessment of their resolution, consistent with the protection of confidential and sensitive information" to specified DOE officials and employees. In this final rule, DOE is amending the Technology Transfer Mission clause at 970.5227–3 to include this reporting requirement. Although mandated by statute, the Technology Partnership Ombudsman reporting requirement is subject to review and approval by the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* As provided in OMB's regulations implementing the Act, DOE will soon publish a separate notice in the **Federal Register** inviting public comment on this collection of information, after which it will submit the collection of information to OMB for approval pursuant to 5 CFR 1320.10.

E. Review Under the National Environmental Policy Act

DOE has concluded that promulgation of this final rule falls into a class of actions which would not individually or cumulatively have significant impact on the human environment, as determined by DOE's regulations (10 CFR Part 1021, subpart D) implementing the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*). Specifically, this rule is categorically excluded from NEPA review because the amendments to the DEAR would be strictly procedural (categorical exclusion A6); therefore, this final rule does not require an environmental impact statement or environmental assessment pursuant to NEPA.

F. Review Under Executive Order 13132

Executive Order 13132 (64 FR 43255, August 4, 1999) requires that regulations or rules be reviewed for any substantial direct effects on States, on the relationship between the national government and the States, or in the distribution of power and responsibilities among the various levels of Government. If there are sufficient substantial direct effects, then Executive Order 13132 requires agencies to engage in intergovernmental consultation and take other steps before promulgating such a regulation or rule. This final rule merely provides the Department a single set of clauses to govern patent rights in its contracts for the management and operation of major DOE sites and facilities. The action does not involve any substantial direct effects on States or other considerations stated in Executive Order 13132.

G. Review Under the Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) generally requires a Federal agency to perform a detailed assessment of costs and benefits of any rule imposing a Federal Mandate with costs to State, local or tribal governments, or to the private sector, of $100 million or more. This final rule would only affect private sector entities, and the impact is less than $100 million.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277), requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule or policy that may affect family well-being. This final rule would not affect the family.

I. Congressional Notification

Consistent with the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801), DOE will submit to Congress a report regarding the issuance of today's final rule prior to the effective date set forth at the outset of this notice. The report will note that it has been determined that this rule does not constitute a "major rule" under that Act.

J. Approval by the Office of the Secretary of Energy

Issuance of this final rule has been approved by the Office of the Secretary of Energy.

List of Subjects in 48 CFR Part 970

Government procurement.

Issued in Washington, DC, on July 15, 2002.

Richard H. Hopf,

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

Accordingly, the interim rule amending Chapter 9 of Title 48 of the Code of Federal Regulations which was published at 65 FR 68932 on November 15, 2000, is adopted as a final rule with the following changes.

PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS.

1. The authority citation for Part 970 continues to read as follows:

Authority: 42 U.S.C. 2201; 42 U.S.C. 7101 *et seq.*; 50 U.S.C. 2401 *et seq.*

Subpart 970.27—Patents, Data, and Copyrights.

2. The clause at 970.5227–3, Technology Transfer Mission, is amended as follows:

a. The clause date is revised;

b. Paragraph (n)(1)(iii) is revised;

c. Paragraph (n)(l)(iv) is deleted and paragraph (n)(l)(v) is redesignated as (n)(l)(iv);

d. Redesignated paragraph (n)(l)(iv) is amended by deleting the last sentence; and

e. In Alternate I, paragraph (p) is redesignated as paragraph (q) and the date is revised to read "(August 2002)", and a new paragraph (p) is added to the clause:

970.5227–3 Technology transfer mission.

* * * * *

Technology Transfer Mission (August 2002)

(n) * * *

(1)(i) * * *

(ii) * * *

(iii) Within thirty (30) days after submission of a JWS or proposed CRADA, the contracting officer shall approve, disapprove or request modification to the JWS or CRADA. The contracting officer shall provide a written explanation to the Contractor's Laboratory Director or designee of any disapproval or requirement for modification of a JWS or proposed CRADA.

* * * * *

(p) Technology Partnership Ombudsman.

(1) The Contractor agrees to establish a position to be known as "Technology Partnership Ombudsman," to help resolve complaints from outside organizations regarding the policies and actions of the contractor with respect to technology partnerships (including CRADAs), patents owned by the contractor for inventions made at the laboratory, and technology licensing.

(2) The Ombudsman shall be a senior official of the Contactor's laborratory staff, who is not involved in day-to-day technology partnerships, patents or technology licensing, or, if appointed from outside the laboratory or facility, shall function as such senior official.

(3) The duties of the Technology Partnership Ombudsman shall include:

(i) Serving as the focal point for assisting the public and industry in resolving complaints and disputes with the laboratory or facility regarding technology partnerships, patents, and technology licensing;

(ii) Promoting the use of collaborative alternative dispute resolution techniques such as mediation to facilitate the speedy and low cost resolution of complaints and disputes, when appropriate; and

(iii) Submitting a quarterly report, in a format provided by DOE, to the Secretary of Energy, the Administrator for Nuclear Security, the Director of the DOE Office of Dispute Resolution, and the Contracting Officer concerning the number and nature of complaints and disputes raised, along with the Ombudsman's assessment of their resolution, consistent with the protection of confidential and sensitive information.

(End of clause)

3. The clause at 970.5227–4 is revised to read as follows:

970.5227–4 Authorization and Consent.

Insert the following clause in solicitations and contracts in accordance with 970.2702–1:

Authorization and Consent (August 2002)

(a) The Government authorizes and consents to all use and manufacture of any invention described in and covered by a United States patent in the performance of this contract or any subcontract at any tier.

(b) If the Contractor is sued for copyright infringement or anticipates the filing of such a lawsuit, the Contractor may request authorization and consent to copy a copyrighted work from the contracting officer. Programmatic necessity is a major consideration for DOE in determining whether to grant such request.

(c)(1) The Contractor agrees to include, and require inclusion of, the Authorization and Consent clause at 52.227–1, without Alternate 1, but suitably modified to identify the parties, in all subcontracts expected to exceed $100,000 at any tier for supplies or services, including construction, architect-engineer services, and materials, supplies, models, samples, and design or testing services.

(2) The Contractor agrees to include, and require inclusion of, paragraph (a) of this Authorization and Consent clause, suitably modified to identify the parties, in all subcontracts at any tier for research and development activities expected to exceed $100,000.

(3) Omission of an authorization and consent clause from any subcontract, including those valued less than $100,000 does not affect this authorization and consent.

(End of clause)

970.5227–5 [Amended]

4. Paragraph (c) of the clause at 970.5227–5 is amended by deleting the reference "$25,000" and inserting "$100,000" in its place.

5. The clause at 970.5227–8 is revised to read as follows:

970.5227–8 Refund of Royalties.

Insert the following clause in solicitations and contracts in accordance with 970.2702–4:

Refund of Royalties (August 2002)

(a) During performance of this Contract, if any royalties are proposed to be charged to the Government as costs under this Contract, the Contractor agrees to submit for approval of the Contracting Officer, prior to the execution of any license, the following information relating to each separate item of royalty:

(1) Name and address of licensor;

(2) Patent numbers, patent application serial numbers, or other basis on which the royalty is payable;

(3) Brief description, including any part or model numbers of each contract item or component on which the royalty is payable;

(4) Percentage or dollar rate of royalty per unit;

(5) Unit price of contract item;

(6) Number of units;

(7) Total dollar amount of royalties; and

(8) A copy of the proposed license agreement.

(b) If specifically requested by the Contracting Officer, the Contractor shall furnish a copy of any license agreement entered into prior to the effective date of this clause and an identification of applicable claims of specific patents or other basis upon which royalties are payable.

(c) The term "royalties" as used in this clause refers to any costs or charges in the nature of royalties, license fees, patent or license amortization costs, or the like, for the use of or for rights in patents and patent applications that are used in the performance of this contract or any subcontract hereunder.

(d) The Contractor shall furnish to the Contracting Officer, annually upon request, a statement of royalties paid or required to be paid in connection with performing this Contract and subcontracts hereunder.

(e) For royalty payments under licenses entered into after the effective date of this Contract, costs incurred for royalties proposed under this paragraph shall be allowable only to the extent that such royalties are approved by the Contracting Officer.If the Contracting Officer determines that existing or proposed royalty payments are inappropriate, any payments subsequent to such determination shall be allowable only to the extent approved by the Contracting Officer.

(f) Regardless of prior DOE approval of any individual payments or royalties, DOE may contest at any time the enforceability, validity, scope of, or title to a patent for which the Contractor makes a royalty or other payment.

(g) If at any time within 3 years after final payment under this contract, the Contractor for any reason is relieved in whole or in part from the payment of any royalties to which this clause applies, the Contractor shall promptly notify the Contracting Officer of that fact and shall promptly reimburse the Government for any refunds received or royalties paid after having received notice of such relief.

(h) The Contractor agrees to include, and require inclusion of, this clause, including this paragraph (h), suitably modified to identify the parties in any subcontract at any tier in which the amount of royalties reported during negotiation of the subcontract exceeds $250.

(End of clause)

970.5227–10 [Amended]

6. The clause at 970.5227–10 is amended by:

a. Deleting the phrase "as DOE deems appropriate" at the end of paragraph (b)(6); and

b. By adding the phrase "or the National Nuclear Security Administration" at the end of Alternate 1 Weapons Related Subject Inventions, paragraph (a)(10).

970.5227–12 [Amended]

7. The clause at 970.5227–12 is amended by:

a. Deleting the phrase "as DOE deems appropriate" at the end of paragraph (b)(9); and

b. By adding the phrase "or the National Nuclear Security Administration" at the end of Alternate 1 Weapons Related Subject Inventions, paragraph (a)(9).

[FR Doc. 02–18825 Filed 7–24–02; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atomospheric Administration

50 CFR Parts 600 and 660

[Docket No. 011231209–2090–01; I.D. 062702C]

Magnuson-Stevens Act Provisions; Fisheries Off the West Coast States and in the Western Pacific; Pacific Coast Groundfish Fishery; Groundfish Fishery Management Measures; Corrections

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

ACTION: Corrections to trip limit adjustments in the Pacific Coast groundfish fishery.

SUMMARY: This document contains corrections to trip limit tables in the trip limit adjustments in the Pacific Coast groundfish fishery published on July 5, 2002.

DATES: Effective July 25, 2002.

FOR FURTHER INFORMATION CONTACT: Carrie Nordeen, NMFS, (206) 526–6140.

SUPPLEMENTARY INFORMATION: Changes to current groundfish management measures were recommended by the Pacific Fishery Management Council, in consultation with Pacific Coast Treaty Tribes and the States of Washington, Oregon, and California, at its June 18–21, 2002, meeting in Foster City, CA. Adjustments to trip limits were made to slow the catch of overfished species, particularly darkblotched and bocaccio rockfish, and keep it within the optimum yield (OY) and acceptable biological catch (ABC). The specifications and management measures for the current fishing year (January 1 - December 31, 2002) were initially published in the **Federal Register** as an emergency rule for January 1 - February 28, 2002 (67 FR 1540, January 11, 2002), and as a proposed rule for all of 2002 (67 FR 1555, January 11, 2002), then finalized effective March 1, 2002 (67 FR 10490, March 7, 2002). The final rule was subsequently amended at 67 FR 15338, April 1, 2002; at 67 FR 18117, April 15, 2002; at 67 FR 30604, May 7, 2002; at 67 FR 40870, June 14, 2002; and at 67 FR 44778, July 5, 2002.

Trip limit adjustments published on July 5, 2002, contained errors in trip limit tables that require correction. This document corrects the errors and re-publishes trip limit tables for groundfish taken with limited entry trawl gear, limited entry fixed gear, and open access gear.

Corrections

In the rule FR Doc. 02–16811, in the issue of Friday, July 5, 2002 (67 FR 44778) make the following corrections:

1. On pages 44782 - 44784, Tables 3 and 4, respectively, are corrected to read as follows:

BILLING CODE 3510–22–S