715.370 [Added]

8. Section 715.370 is added to read as follows:

715.370 Alternative source selection procedures.

The following selection procedures may be used, when appropriate, for activities covered under Title XII of the Foreign Assistance Act of 1961, as amended.

9. Newly redesignated 715.602 is amended by revising paragraphs (b) and (c) to read as follows:

715.602 Policy.

* * * * *

(B) USAID's basic policies and procedures regarding unsolicited proposals are those established in FAR subpart 15.6 and this subpart.

(c) For detailed information on unsolicited proposals, see 715.604; for initial contact point within USAID, see 715.604(c).

10. Newly redesignated 715.604 is amended by revising the section heading and paragraph (a) and adding paragraph (c) to read as follows:

715.604 Agency points of contact.

(a) Information concerning USAID's policies for unsolicited proposals is available from the U.S. Agency for International Development, Evaluation Division, Room 7.08–005, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20523–7803.

* * * * *

(c) Initial inquiries and subsequent unsolicited proposals should be submitted to the address specified in paragraph (a) of this section.

PART 731—CONTRACT COST PRINCIPLES AND PROCEDURES

Subpart 731.2—Contracts With Commercial Organizations

731.205–71 [Added]

11. Section 731.205–71 is added as follows:

731.205–71 Salary supplements for Host Government employees.

(a) *Definitions.* (1) A Host Government (HG) employee is a person paid by the HG, occupying an established position, either temporary or permanent, part-time or full-time, within a HG institution.

(2) An HG institution is an organization in which the government owns at least a fifty percent share or receives at least fifty percent of its financial support from the government.

(b) *General.* Salary supplement occurs when payments are made that augment an HG employee's base salary or premiums, overtime, extra payments, incentive payment and allowances for which the HG employee would qualify under HG rules or practices for the performance of his/hers regular duties or work performed during his/hers regular office hours. Per diem, invitational travel, honoraria and payment for work carried out outside of normal working hours are not considered to be salary supplements subject to the provisions in USAID policy referenced in paragraph (c) of this section.

(c) Salary supplements are eligible for USAID financing only when authorized in accordance with USAID policy established in the cable State 119780 dated April 15, 1988 (on ADS–CD under USAID Handbooks, Handbook 1). If salary supplements have been authorized in a particular case, the Contracting Officer shall provide written approval to the contractor in order for such costs to be eligible. Any specific requirements or limitations shall be specified in the approval.

(d) Contracting Officers shall insert the Clause at 752.231–71 in all contracts in which there is a possibility of the need of HG employees. It should also be inserted in all subsequent subcontracts.

PART 752—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 752.2—Texts of Provisions and Clauses

12. Section 752.231–71 is added to read as follows:

752.231–71 Salary supplements for HG employees.

As prescribed in 731.205–71, for use in all contracts with a possible need or services of a HG employee. The clause should also be inserted in all subsequent sub-contracts.

SALARY SUPPLEMENTS FOR HG EMPLOYEES (OCT 1998)

(a) Salary supplements are payments made that augment an employee's base salary or premiums, overtime, extra payments, incentive payment and allowances for which the HG employee would qualify under HG rules or practice for the performance of his/hers regular duties or work performed during his/hers regular office hours. Per diem, invitational travel, honoraria and payment for work carried out outside of normal working hours are not considered to be salary supplements.

(b) Salary supplements to HG Employees are not allowable without the written approval of the Contracting Officer.

Dated: March 8, 1999.

Marcus L. Stevenson,

Procurement Executive.

[FR Doc. 99–6609 Filed 4–5–99; 8:45 am]

BILLING CODE 6116–01–M

DEPARTMENT OF ENERGY

48 CFR Parts 909 and 970

RIN 1991–AB44

Acquisition Regulations; Performance Guarantees

AGENCY: Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE) is amending its acquisition regulations to formally require a performance guarantee under circumstances where a prospective awardee has been created solely for the performance of the instant contract and lacks sufficient financial or other resources to fulfill its obligations under the prospective contract. In circumstances where the newly created entity likely will be dependent upon the resources of the parent organization, this rule allows Contracting Officers to consider the resources of the parent in a determination of the newly created entity's responsibility only when the parent provides a performance guarantee or other undertaking satisfactory to the Contracting Officer. While this situation occurs most often in the award of contracts for the management and operation of DOE facilities, this rule makes a form of performance guarantee necessary whenever these circumstances are encountered.

EFFECTIVE DATE: This rule will take effect May 6, 1999.

FOR FURTHER INFORMATION CONTACT: Robert M. Webb, U.S. Department of Energy, Office of Procurement and Assistance Management, 1000 Independence Avenue, SW, Washington, DC 20585, (202) 586–8264.

SUPPLEMENTARY INFORMATION:

H. Review Under the Unfunded Mandates Reform Act of 1995.

I. Background

The Department of Energy in certain cases requires that the contractor be a corporate entity organized specifically for the performance of the contract at a specific DOE site. This requirement occurs regularly in the award of management and operating contracts and is intended (1) to assure the dedication of the contractor to the performance of the contract; (2) to limit involvement of the Department with the corporate parent; (3) to isolate the contractor from the parent for purposes of security and classification matters; (4) to limit the flow of information between the contractor and its parent, limiting a potential source of organizational conflict of interest; (5) to isolate the accounting system of the contractor, since often the budget and accounting systems of such contractors are integrated into DOE's budget and accounting systems; and (6) to limit the necessity of corporate support thereby reducing or negating a basis for charging general and administrative expense to the contract.

Such dedicated contractors, however, generally have limited assets. In most cases, without consideration of the corporate assets of the parent entity(ies), the DOE Contracting Officer would not be able to make a determination that the contractor was financially responsible and had sufficient resources available to assure successful performance of the contract.

It has been a common practice of the Department in such instances for the parent entity(ies) to provide some form of guarantee of performance. While there are other means for the parent to guarantee the subsidiary's fulfillment of all its contractual obligations, such as an unconditional letter of credit, the most appropriate means under these circumstances is a contractually binding performance guarantee. This rulemaking incorporates the requirement for a performance guarantee (or, where appropriate, equivalent enforceable commitment) into the Department of Energy Acquisition Regulation.

The proposed rule was published in the **Federal Register** on November 9, 1998 (63 FR 60268).

II. Resolution of Comment

One comment was received in response to the proposed rule. It suggests that the solicitation provision be modified to state affirmatively that the performance guarantee is not intended to create third party beneficiary status in any third party. The comment further states that DOE recognizes this issue in the model performance guarantee provided in other DOE guidance. The commenter seems to believe that the solicitation provision is intended to be included in the contract. That is not the case. DOE has chosen not to make the suggested change since statements made in solicitation are generally not binding after contract award, and the solicitation provision is intended only to put prospective offerors on notice of the requirement for a performance guarantee acceptable as a condition of award and will not, itself, become part of the contract.

The solicitation notice as published in the proposed rule contained a second paragraph putting prospective offerors on notice that if a proposal is submitted by multiple entities, a performance guarantee must be executed by each, making each jointly and severally liable. We have deleted this paragraph from the notice. It is unnecessary because the same requirement is discussed at both 909.104–3(e) and 970.0902(b) of this rule, and the notice states that the performance guarantee(s) must be to DOE's satisfaction.

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 was 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, these regulations meet the relevant standards of Executive Order 12988.

C. Review Under the Regulatory Flexibility Act

This final rule has been reviewed under the Regulatory Flexibility Act 5 U.S.C. 601, *et seq.*, which 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 contracts to which this rulemaking apply involve award to newly formed subsidiaries organized by a parent corporations to perform specific DOE contracts. In such instances, the parent will be required to guarantee the performance of the subsidiary. There would not be an adverse economic impact on contractors or subcontractors. In addition, DOE management and operating contractors historically have not been small entities. Accordingly, DOE certifies that this final rule would not have a significant economic impact on a substantial number of small entities, and, therefore, no regulatory flexibility analysis has been prepared.

D. Review Under the Paperwork Reduction Act

No additional information or record keeping requirements are imposed by this rulemaking. Accordingly, no OMB clearance is required under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

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 (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*). Specifically, this final 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 12612

Executive Order 12612, (52 FR 41685, October 30, 1987), requires that regulations, rules, legislation, and any other policy actions be reviewed for any substantial direct effects on States, on the relationship between the Federal 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 the Executive Order requires the preparation of a federalism assessment to be used in all decisions involved in promulgating and implementing a policy action. This final rule merely reflects current practice relating to determinations of responsibility. States which contract with DOE will be subject to this rule. However, DOE has determined that this rule would not have a substantial direct effect on the institutional interests or traditional functions of the States.

G. Review Under Small Business Regulatory Enforcement Fairness Act of 1996

As required by 5 U.S.C. 801, DOE will report to Congress promulgation of the rule prior to its effective date. The report will state that it has been determined that this final rule is not a ''major rule'' as defined by 5 U.S.C. 804(3).

H. 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 rulemaking would only affect private sector entities, and the impact is less than $100 million.

List of Subjects in 48 CFR Parts 909 and 970

Government procurement.

Issued in Washington, D.C. on March 30, 1999.

Richard H. Hopf,

Director, Office of Procurement and Assistance Management.

For the reasons set out in the preamble, Chapter 9 of Title 48 of the Code of Federal Regulations is amended as set forth below.

PART 909—CONTRACTOR QUALIFICATIONS

1. The authority citation for Part 909 continues to read as follows:

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

2. Subsection 909.104–3 is added as follows:

909.104–3 Application of standards. (DOE coverage-paragraph (e))

(e) DOE may select an entity which was newly created to perform the prospective contract, including, but not limited to, a joint venture or other similarly binding corporate partnership. In such instances when making the determination of responsibility pursuant to 48 CFR 9.103, the contracting officer may evaluate the financial resources of other entities only to the extent that those entities are legally bound, jointly and severally if more than one, by means of a performance guarantee or other equivalent enforceable commitment to supply the necessary resources to the prospective contractor and to assume all contractual obligations of the prospective contractor. The guaranteeing corporate entity(ies) must be found to have sufficient resources in order to satisfy its guarantee.

PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS

3. The authority citation for Part 970 continues to read:

Authority: Sec. 161 of the Atomic Energy Act of 1954 (42 U.S.C. 2201), sec. 644 of the Department of Energy Organization Act, Pub.L. 95–91 (42 U.S.C. 7254).

4. Section 970.0902 is added as follows:

970.0902 Determination of responsibility.

(a) In the award of a management and operating contract, the contracting officer shall determine that the prospective contractor is a responsible contractor and is capable of providing all necessary financial, personnel, and other resources in performance of the contract.

(b) DOE contracts with entities that have been created solely for the purpose of performing a specific management and operating contract. Such a newly created entity generally will have very limited financial and other resources. In such instances, when making the determination of responsibility required under this section, the contracting officer may evaluate the financial resources of other entities only to the extent that those entities are legally bound, jointly and severally if more than one, by means of a performance guarantee or other equivalent enforceable commitment to supply the necessary resources to the prospective contractor and to assume all contractual obligations of the prospective contractor. A performance guarantee should be the means used unless an equivalent degree of commitment can be obtained by an alternative means.

(c) The guaranteeing corporate entity(ies) must be found to have sufficient resources in order to satisfy its guarantee.

(d) Contracting officers shall insert the provision at 970.5204–89 in solicitations where the awardee is required to be organized solely for performance of the requirement.

5. Section 970.5204–89 is added as follows:

970.5204–89 Requirement for guarantee of performance.

In accordance with 970.0902(d), insert the following provision in appropriate solicitations.

Requirement for Guarantee of Performance (APR 1999)

The successful proposer is required by other provisions of this solicitation to organize a dedicated corporate entity to carry out the work under the contract to be awarded as a result of this solicitation. The successful proposer will be required, as part of the determination of responsibility of the newly organized, dedicated corporate entity and as a condition of the award of the contract to that entity, to furnish a guarantee of that entity's performance. That guarantee of performance must be satisfactory in all respects to the Department of Energy.

[FR Doc. 99–8454 Filed 4–5–99; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF COMMERCE

48 CFR Part 1333

[Docket No. 990127035–9035–01]

RIN 0605–AA15

Commerce Acquisition Regulation; Agency Protest Procedures

AGENCY: Department of Commerce.

ACTION: Final rule.

SUMMARY: The Department of Commerce amends the Commerce Acquisition