

Argonne National Laboratory Prime Contract**Part I. Section H. Special Contract Requirements**

Last revised: September 29, 1999

Clause H.12 - Costs Associated with Whistleblower Actions (Month and Year TBD)**(a) Definitions.**

- (1) "Adverse determination" means
 - (i) A recommended decision under 29 CFR part 24 by an administrative law judge that the Contractor has violated the employee protection provisions of the statutes for which the Secretary of Labor has been assigned responsibility;
 - (ii) An initial agency decision under 10 CFR 708.10, that the Contractor has engaged in conduct prohibited by 10 CFR 708.5; or
 - (iii) A decision against the Contractor by the Secretary under 41 U.S.C. 265(c)(1)
 - (iv) A judgment or other determination of liability against the Contractor and in favor of the employee in an action in a judicial forum.
- (2) "Costs" include any costs or expenses relating to an employee action, as defined below, including but not limited to back pay, damages or other award in the form of relief to the employee; administrative and clerical expenses; the cost of legal services, including litigation costs, whether provided by the Contractor or procured from outside sources; the costs of services of accountants, consultants or other experts retained by the Contractor; all elements of related compensation, costs and expenses of employees, officers and directors; and any similar costs incurred after the commencement of the employee action.
- (3) "Employee action" means an action brought by an employee of the Contractor under 29 CFR part 24, 10 CFR part 708, or 41 U.S.C. 265, or an action filed in federal or state court for redress of discrimination or discriminatory action by a Contractor based on activities that would be actionable under 29 CFR part 24, 10 CFR part 708, or 41 U.S.C. 265.
- (4) "Litigation costs" include attorney, consultant and expert witness fees associated with the defense of an employee action, but exclude the costs of implementing a settlement, judgment, or Secretarial Order.

- (b) Segregation of costs. All litigation costs incurred in the investigation and defense of an employee action under this clause shall be differentiated and accounted for by the

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Contractor so as to be separately identifiable. If the Contracting Officer provisionally disallows such costs, then the Contractor may not use funds advanced by DOE under the contract to finance the litigation.

- (c) Allowability of litigation and other costs.
- (1) Litigation costs, including the use of alternative dispute resolution, and settlement costs incurred in connection with an employee action under this clause are allowable if the employee action is resolved prior to an adverse determination, provided such costs are otherwise allowable under the clauses entitled "Insurance-Litigation and Claims," "Cost Prohibitions Related to Legal and Other Proceeding," and other relevant provisions of this contract.
 - (2) In actions in which an adverse determination is issued, litigation, settlement, and judgment costs, as well as the cost of complying with any Secretarial Order, are not allowable, unless:
 - (i) The Contractor prevails in a proceeding subsequent to the adverse determination at which a final decision is rendered in the action; or
 - (ii) The Contracting Officer has, on the basis that it is in the best interest of the Government, approved the Contractor's request to proceed with defense of an action rather than entering into a settlement with the employee or accepting an adverse determination or other interim decision prior to a final decision.
 - (3) Subsequent to an adverse determination, litigation costs, as well as costs associated with any interim relief granted, may not be paid from contract funds; provided, however, that the Contracting Officer may, in appropriate circumstances, provide for conditional payment from contract funds upon provision of adequate security, or other adequate assurance, and agreements by the Contractor to repay all litigation costs, plus interest, if they are subsequently determined to be unallowable.
 - (4) Litigation costs incurred to defend an appeal by the employee from an interim or final decision in the Contractor's favor are allowable provided they are otherwise allowable under the clauses entitled "Insurance Litigation and Claims" and "Cost Prohibitions Related to Legal and Other Proceedings," and other relevant provisions of the contract.

Argonne National Laboratory Prime Contract

Part I. Section H. Special Contract Requirements

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- (d) The provisions of this clause shall not apply to the defense of suits by employees or ex-employees of the Contractor under section 2 of the Major Fraud Act of 1988 as amended. (See the clause entitled "Cost Prohibitions Related to Legal and Other Proceedings.")