

be allotted at Woodbury in compliance with the Commission's minimum distance separation requirements with a site restriction of 13.0 kilometers (8.1 miles) southeast to avoid short-spacings to the licensed sites of Station WSTR(FM), Channel 231C, Smyrna, Georgia, and Station WYSF(FM), Channel 233C, Birmingham, Alabama. The coordinates for Channel 233A at Woodbury are 32°54'40" North Latitude and 84°28'24" West Longitude.

**DATES:** Comments must be filed on or before March 12, 2001, reply comments on or before March 27, 2001.

**ADDRESSES:** Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Bernice P. Hedrick, P.O. Box 27, 317 Stonegables Court, Gray, Georgia 31032 (Petitioner).

**FOR FURTHER INFORMATION CONTACT:** Sharon P. McDonald, Mass Media Bureau, (202) 418-2180.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 01-13, adopted January 10, 2001, and released January 19, 2001. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Information Center (Room CY-A257), 445 12th Street, SW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, Inc., (202) 857-3800, 1231 20th Street, NW., Washington, DC 20036.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding. Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

#### List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

#### John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

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## DEPARTMENT OF ENERGY

### 48 CFR Parts 904, 952 and 970

#### RIN 1991-AB54

### Acquisition Regulations; Conditional Payment of Fee, Profit, and Other Incentives

**AGENCY:** Department of Energy, (DOE).

**ACTION:** Notice of proposed rulemaking and opportunity for public comment.

**SUMMARY:** The Department of Energy (DOE) proposes to amend its Acquisition Regulation to: Implement, in part, the requirements of Section 3147 of the National Defense Authorization Act for Fiscal Year 2000 relating to the safeguarding of classified information; establish more objective standards and procedures for considering and applying reductions of fee or other amounts payable for contractor performance failures relating to environment, safety, and health (ES&H); and make related technical and conforming amendments.

**DATES:** Written comments must be received on or before the close of business March 5, 2001.

**ADDRESSES:** Comments (3 copies) should be addressed to: Michael L. Righi, U.S. Department of Energy, Office of Procurement and Assistance Management, MA-51, 1000 Independence Avenue, SW., Washington, DC 20585.

#### FOR FURTHER INFORMATION CONTACT:

Michael L. Righi at [michael.l.righi@hq.doe.gov](mailto:michael.l.righi@hq.doe.gov) or (202) 586-8175.

#### SUPPLEMENTARY INFORMATION:

- I. Background
- II. Section by Section Analysis
- III. Public Comments
- IV. Procedural Requirements
  - A. Review Under Executive Order 12866
  - B. Review Under Executive Order 12988
  - C. Review Under the Regulatory Flexibility Act
  - D. Review Under the Paperwork Reduction Act
  - E. Review Under the National Environmental Policy Act
  - F. Review Under Executive Order 13132
  - G. Review Under the Unfunded Mandates Reform Act of 1995
  - H. Review Under the Treasury and General Government Appropriations Act of 1999

#### I. Background

In addition to other performance requirements specified in their contracts, the Department's management and operating contractors and other designated contractors are subject to minimum performance requirements relating to environment, safety, and

health (ES&H), and to safeguarding Restricted Data and other classified information. As a general rule, such performance requirements are so fundamental to the accomplishment of the Department's overall mission objectives that meeting expected levels of performance is considered a prerequisite for the payment of fee, profit, or a share of cost savings under DOE contracts which are subject to such requirements.

In March 1999, the Department amended its Acquisition Regulation to revise its fee policies and related procedures for management and operating contracts and other designated contracts. The objectives of the Department's fee policy are to ensure that fees: are reasonable and commensurate with performance, business and cost risks; create and implement tailored incentives for performance-based management contracts; are structured to attract best business partners; and afford flexibility to provide incentives to contractors to perform better at less cost. The rule prescribed the use of a clause entitled, "Conditional Payment of Fee, Profit, or Incentives." The clause at 48 CFR 970.5204-86 establishes the portion of total available fee, profit, or incentives that is subject to recovery by DOE due to a contractor's failure to meet minimum requirements for a specified level of performance, including cost performance, with an emphasis on requirements relating to ES&H, and the prevention of catastrophic performance failures.

Section 3147 of the National Defense Authorization Act for Fiscal Year 2000 (42 U.S.C. 2282b) requires, in part, that DOE contracts include a clause which provides for an appropriate reduction in the fees or amounts paid to the contractor under the contract in the event of a violation by the contractor or contractor employee of any rule, regulation, or order relating to the safeguarding or security of Restricted Data or other classified or sensitive information. The statute also prescribes that the clause must specify various degrees of violations and the amount of the reduction attributable to each degree of violation. It is noted that since there is currently no rule, regulation or order which defines the term "sensitive information," as used in the Act, this category of information is not addressed in this proposed regulation.

In May 2000, the Secretary of Energy announced an initiative to improve contractor performance management by requiring greater responsibility and accountability from both the Department's senior managers and its

contractors. Due to the potentially serious consequences which can result from performance failures relating to the Department's ES&H and safeguards and security programs, a major provision of the Secretary's initiative is to better define objective standards and procedures for considering and applying fee reductions for contractor performance failures relating to ES&H and the safeguarding of Restricted Data and classified information.

In consideration of the foregoing, the Department proposes to amend its Acquisition Regulation to implement the aforementioned statutory requirements relating to the safeguarding of Restricted Data and other classified information and the Secretary's initiative for improving contractor performance management relating to ES&H. The proposed amendments to the Acquisition Regulation would apply to all DOE contracts and would be accomplished by use of one of two clauses.

This proposed rule would add a clause entitled, "Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information." This clause would be prescribed for use in all DOE contracts which involve or are likely to involve classified information, except for DOE management and operating contracts and other contracts designated by the Procurement Executive, or designee. The clause would provide for reductions of earned fee or profit that is otherwise payable under applicable contracts for contractor violations of laws, regulations, or directives relating to the safeguarding of Restricted Data and other classified information. As proposed, the clause sets forth the conditions which may precipitate a reduction of fee or profit, percentage reduction ranges which correlate to three degrees of violations relating to the safeguarding of Restricted Data or other classified information, and the methodology to be used in determining the amount of earned fee or profit that will be subject to reduction under the clause.

For DOE management and operating contracts and other contracts designated by the Procurement Executive, or designee, the clause at 48 CFR 970.5204-86, would be renamed "Conditional Payment of Fee, Profit, or Other Incentives—Facility Management Contracts", and would be amended to provide for reductions of earned fee, fixed fee, profit, or share of cost savings which may otherwise be payable under the contract: for performance failures relating to ES&H; and, for contracts that involve or are likely to involve

classified information, for contractor violations of laws, regulations, or DOE directives relating to the safeguarding of Restricted Data and other classified information. As proposed, the clause sets forth: the conditions that may precipitate a reduction of earned or fixed fee, profit, or share of cost savings under the contract; percentage fee, profit, or share of cost savings reduction ranges which correlate to three degrees of performance failures relating to ES&H and to the safeguarding of Restricted Data and other classified information; and the methodology to be used in determining the amount of earned or fixed fee, profit, or share of cost savings that will be subject to reduction under the clause.

## II. Section-by-Section Analysis

1. Section 904.402 would be amended to prescribe the Department's implementation of Section 3147 of the National Defense Authorization Act for Fiscal Year 2000 for DOE contracts which involve or are likely to involve the use of classified information, except DOE management and operating contracts and other contracts designated by the Procurement Executive, or designee. The section is also proposed to be amended to prescribe related coordination and approval requirements.

2. Section 904.404 would be amended to add a prescription for the use of the new contract clause entitled, "Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information."

3. Section 952.204-XX would be added to incorporate the text of the new contract clause entitled, "Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information."

4. Section 970.0404-2 would be amended to prescribe the Department's implementation of Section 3147 of the National Defense Authorization Act for Fiscal Year 2000 for DOE management and operating contracts and other contracts designated by the Procurement Executive, or designee.

5. Section 970.15404-4-1 would be amended to prescribe the Department's policy pertaining to the payment of earned fee, fixed fee, profit, or share of cost savings under applicable DOE contracts for achieving minimum performance requirements relating to ES&H and to the safeguarding of Restricted Data and other classified information.

6. Section 970.15404-4-11 would be amended to revise the prescription for use of the clause at 48 CFR 970.5204-86.

7. Section 970.5204-86 would be amended to revise the title of the clause, and to provide for contractual implementation of the Department's policy prescribed at amended 970.15404-4-1 (see paragraph 5.).

8. Technical and conforming amendments would be made to various sections as a result of the amendments described in paragraphs 1. through 7.

## III. Public Comments

Interested persons are invited to participate by submitting data, views or arguments with respect to the new regulation proposed in this notice. Three copies of written comments should be submitted to the address indicated in the **ADDRESSES** section of this notice. All comments received will be available for public inspection as part of the administrative record on file for this rulemaking in the Department of Energy Reading Room, Room 1E-090, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-3142, between the hours 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. All written comments received by the date indicated in the **DATES** section of this notice of proposed rulemaking and all other relevant information in the record will be carefully assessed and fully considered prior to the publication of the final rule. Any information or data considered to be exempt from public disclosure by law must be so identified and submitted in writing, one copy, as well as one complete copy from which the information believed to be exempt from disclosure is deleted. The Department will determine if the information or data is exempt from disclosure.

## IV. 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 action 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; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) 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. The Department has completed the required review and determined that, to the extent permitted by law, the regulations meet the relevant standards of Executive Order 12988.

#### *C. Review Under the Regulatory Flexibility Act*

The Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, requires that a Federal agency prepare a regulatory flexibility analysis for any rule for which the agency is required to publish a general notice of proposed rulemaking. Such an analysis is not required, however, if the agency certifies that the rule would not, if promulgated, have a significant economic impact on a substantial number of small entities (5 U.S.C. 605(b)).

The Department certifies that today's proposal will not have a significant economic impact on a substantial number of small entities. This rule, which implements, in part, the requirements of Section 3147 of the National Defense Authorization Act for Fiscal Year 2000, applies predominantly to DOE's management and operating contractors which are not small entities. The rule will not directly regulate small entities, diminish any preference accorded to small businesses in Federal or DOE procurement programs, or impose requirements which may result in increased administrative costs to contractors.

#### *D. Review Under the Paperwork Reduction Act*

This proposed rule does not contain information collection requirements that require approval by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

#### *E. Review Under the National Environmental Policy Act*

The Department has concluded that promulgation of this proposed rule falls into a class of actions which would not individually or cumulatively have significant impact on the human environment, as determined by Department of Energy 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 proposed rule is categorically excluded from NEPA review because the amendments to the DEAR would be strictly procedural (categorical exclusion A6). Therefore, this proposed 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 10, 1999) requires agencies to develop an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have "federalism implications." As defined in the Executive Order, policies that have federalism implications include regulations that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. The Department has examined this proposed rule and has determined that it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

#### *G. Review Under the Unfunded Mandates Reform Act of 1995*

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) generally requires a Federal agency to perform a 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 rulemaking affects 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. Today's rule does not impact on the autonomy or integrity of the family institution. Accordingly, the Department has concluded that it is not necessary to prepare a Family Policymaking Statement.

#### **List of Subjects in 48 CFR Parts 904, 952, and 970**

Government procurement.

Issued in Washington, DC on January 10, 2001.

**T.J. Glauthier,**

*Deputy Secretary, Department of Energy.*

For the reasons set out in the preamble, DOE proposes to amend Chapter 9 of Title 48 of the Code of Federal Regulations as set forth below.

1. The authority citation for parts 904 and 952 is revised to read as follows:

**Authority:** 42 U.S.C. 7101 *et seq.*; 41 U.S.C. 418b; 50 U.S.C. 2401 *et seq.*

#### **PART 904—ADMINISTRATIVE MATTERS**

2. Section 904.402 is amended by adding a new paragraph (c) to read as follows:

##### **904.402 General.**

\* \* \* \* \*

(c)(1) Section 3147 of the National Defense Authorization Act for Fiscal Year 2000 (42 U.S.C. 2282b) requires that applicable DOE contracts include a clause which provides for an appropriate reduction in the fees or amounts paid to the contractor under the contract in the event of a violation by the contractor or any contractor employee of any rule, regulation, or order relating to the safeguarding or security of Restricted Data or other classified information. The clause is required to specify various degrees of violations and the amount of the reduction attributable to each degree of violation. The clause prescribed in 48 CFR 904.404(d)(5) shall be used for this purpose unless the clause prescribed at 48 CFR 970.15404-4-11(b) is used.

(2) The clause entitled "Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information" provides for reductions of fee or profit that is earned by the

contractor and that may otherwise be payable under the contract depending upon the severity of the contractor's failure to comply with contract terms or conditions relating to the safeguarding of Restricted Data or other classified information. However, when reviewing performance failures that occur during the performance of the contract that would otherwise warrant a potential reduction of earned fee, the contracting officer may consider mitigating factors that may warrant a reduction below the applicable range specified in the clause, including a determination that no reduction should be made. Such factors may include situations in which a contractor self-identifies a problem requiring corrective action, and is actively working to correct the problem.

(3) The contracting officer must obtain the concurrence of the Head of the Contracting Activity—

(i) Prior to effecting any reduction of fee or amounts otherwise payable to the contractor in accordance with the terms and conditions of the clause entitled, "Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information;" and

(ii) For determinations that no reduction of fee is warranted for a particular performance failure(s) that would otherwise be subject to a reduction.

3. Section 904.404 is amended by adding a new paragraph (d)(5) to read as follows:

#### 904.404 Contract clause.

(d) \* \* \*

(5) Except as prescribed in 48 CFR 970.15404-4-11(b), the clause at 48 CFR 952.204-XX, Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information, shall be inserted in all contracts which contain the clause at 48 CFR 952.204-2, Security.

### PART 952—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Section 952.204-XX is added in Subchapter H to read as follows:

#### 952.204-XX Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information.

As prescribed in 48 CFR (DEAR) 904.404(d)(5) insert the following clause.

Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information (Month and Year TBD)

(a) General. (1) The payment of fee or profit (i.e., award fee, fixed fee, and incentive fee or profit) under this contract is dependent upon the contractor's compliance with the

terms and conditions of this contract relating to the safeguarding of Restricted Data and other classified information (i.e., Formerly Restricted Data and National Security Information) including compliance with applicable law, regulation, and DOE directives. The term "contractor" as used in this clause to address failure to comply shall mean "contractor or contractor employee."

(2) In addition to other remedies available to the Federal Government, if the contractor fails to comply with the terms and conditions of this contract relating to the safeguarding of Restricted Data and other classified information, the contracting officer may unilaterally reduce the amount of earned fee, fixed fee, or profit which is otherwise payable to the contractor in accordance with the terms and conditions of this clause.

(3) Any reduction in the amount of fee or profit earned by the contractor will be determined by the severity of the contractor's failure to comply with contract terms and conditions relating to the safeguarding of Restricted data or other classified information pursuant to the degrees specified in paragraph (c) of this clause.

(b) Reduction Amount. (1) If it is found that the contractor has failed to comply with contract terms and conditions relating to the safeguarding of Restricted Data or other classified information, the contractor's earned or fixed fee, or profit may be reduced. Such reduction shall not be less than 51% nor greater than 100% of the total fee or profit earned for a first degree performance failure, not less than 26% nor greater than 50% for a second degree performance failure, and up to 25% for a third degree performance failure. The contracting officer may consider mitigating factors that may warrant a reduction below the specified range, including a determination that no reduction should be made (see 48 CFR 904.402(c)).

(2)(i) For purposes of this clause, the contracting officer will at the time of contract award allocate the total amount of fee or profit that is available under this contract to equal periods of [insert 6 or 12] months to run sequentially for the entire term of the contract (i.e., from the effective date of the contract to the expiration date of the contract, including all options). The amount of fee or profit to be allocated to each period shall be equal to the average monthly fee or profit that is available or otherwise payable during the entire term of the contract, multiplied by the number of months established above for each period.

(ii) The total amount of fee or profit that is subject to reduction under this clause, in combination with any reduction made under any other clause in the contract that provides for a reduction to the fee or profit, shall not exceed the amount of fee or profit that is earned by the contractor in the period established pursuant to paragraph (b)(2)(i) of this clause in which a performance failure warranting a reduction occurs.

(3) For performance-based firm-fixed-price contracts, the contracting officer will at the time of contract award include negative monetary incentives in the contract for contractor violations relating to the safeguarding of Restricted Data and other classified information.

(c) Safeguarding Restricted Data and Other Classified Information. The degrees of performance failures relating to the contractor's obligations under this contract for safeguarding of Restricted Data and other classified information are as follows:

(1) *First Degree:* Performance failures that have been determined, in accordance with applicable DOE regulation or directive, to have resulted in, or that can reasonably be expected to result in, exceptionally grave damage to the national security. The following performance failures or performance failures of similar import will be considered first degree:

(i) Non-compliance with applicable laws, regulations, and DOE directives actually resulting in, or creating a risk of, loss, compromise, or unauthorized disclosure of Restricted Data or other classified information classified as Top Secret.

(ii) Contractor actions that result in a breakdown of the safeguards and security management system that can reasonably be expected to result in the loss, compromise, or unauthorized disclosure of Restricted Data, or other classified information which is classified as Top Secret.

(iii) Failure to implement corrective actions stemming from the loss, compromise, or unauthorized disclosure of Restricted Data or other classified information classified as Top Secret.

(2) *Second Degree:* Performance failures that have been determined, in accordance with applicable DOE regulation or directive, to have actually resulted in, or that can reasonably be expected to result in, serious damage to the national security. The following performance failures or performance failures of similar import will be considered second degree:

(i) Non-compliance with applicable laws, regulations, and DOE directives actually resulting in, or creating risk of, loss, compromise, or unauthorized disclosure of Restricted Data or other classified information which is classified as Secret.

(ii) Contractor actions that result in a breakdown of the safeguards and security management system that can reasonably be expected to result in the loss, compromise, or unauthorized disclosure of Restricted Data, or other classified information which is classified as Secret.

(iii) Failure to promptly report the loss, compromise, or unauthorized disclosure of Restricted Data or other classified information regardless of classification.

(iv) Failure to implement corrective actions stemming from the loss, compromise, or unauthorized disclosure of Restricted Data or other classified information classified as Secret.

(3) *Third Degree:* Performance failures that have been determined, in accordance with applicable DOE regulation or directive, to have actually resulted in, or that can reasonably be expected to result in, undue risk to the common defense and security. In addition, this category includes performance failures that result from a lack of contractor management and/or employee attention to the proper safeguarding of Restricted Data and other classified information. These performance failures may be indicators of

future, more severe performance failures and/or conditions, and if identified and corrected early would prevent serious incidents. The following performance failures or performance failures of similar import will be considered third degree:

(i) Non-compliance with applicable laws, regulations, and DOE directives actually resulting in, or creating risk of, loss, compromise, or unauthorized disclosure of Restricted Data or other classified information which is classified as Confidential.

(ii) Failure to promptly report alleged or suspected violations of laws, regulations, or directives pertaining to the safeguarding of Restricted Data or other classified information.

(iii) Failure to identify or execute corrective actions to mitigate or eliminate identified vulnerabilities and reduce residual risk relating to the protection of Restricted Data or other classified information in accordance with the contractor's Safeguards and Security Plan or other security plan, as applicable.

(iv) Contractor actions that result in performance failures which unto themselves pose minor risk, but when viewed in the aggregate indicate degradation in the integrity of the contractor's safeguards and security management system relating to the protection of Restricted Data and other classified information.

(End of Clause)

## PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS

5. 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.*

6. Section 970.0404–2 is amended by adding paragraph (f) to read as follows:

### 970.0404–2 General.

\* \* \* \* \*

(f) For DOE management and operating contracts and other contracts designated by the Procurement Executive, or designee, the clause entitled, "Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts," implements the requirements of Section 3147 of the National Defense Authorization Act for Fiscal Year 2000 (see 48 CFR 904.402(c)(1)) for the use of a contract clause which provides for an appropriate reduction in the fee or amount paid to the contractor under the contract in the event of a violation by the contractor or any contractor employee of any rule, regulation, or order relating to the safeguarding or security of Restricted Data or other classified information. The clause, in part, provides for reductions in the amount of fee, profit, or share of cost savings that is otherwise earned by the contractor for performance failures

relating to the safeguarding of Restricted Data and other classified information.

7. Section 970.1504–1–2 is amended by adding new paragraph (i) to read as follows:

### 970.1504–1–2 Fee policy.

\* \* \* \* \*

(i)(1) In addition to other performance requirements specified in the contract, DOE management and operating contractors and other contracts designated by the Procurement Executive, or designee, are subject to minimum performance requirements relating to environment, safety, and health (ES&H), and to the safeguarding of Restricted Data and other classified information. Minimum performance requirements relating to ES&H will be set forth in a DOE approved Integrated Safety Management System (ISMS), or similar document, as required by the terms and conditions of the contract. As applicable, requirements relating to the safeguarding of Restricted Data and other classified information will be set forth in the clauses of the contract entitled "Security" and "Laws, Regulations, and DOE Directives," and in other terms and conditions that may be included in the contract which prescribe requirements for the safeguarding of Restricted Data and other classified information.

(2) If the contractor fails to obtain DOE approval of the ISMS, fails to achieve the minimum performance requirements of the contract relating to ES&H, or violates any law, regulation, or directive relating to the safeguarding of Restricted Data and other classified information, otherwise earned fee, fixed fee, profit, or share of cost savings may be unilaterally reduced by the DOE Operations Office/Field Manager, or designee, in accordance with the terms and conditions of the clause entitled "Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts."

(3) The clause entitled "Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts," provides for reductions of earned fee, fixed fee, profit, or share of cost savings under the contract depending upon the severity of a contractor performance failure relating to ES&H requirements and, if applicable, for the safeguarding of Restricted Data and other classified information. However, when reviewing performance failures that occur during the performance of the contract that would otherwise warrant a potential reduction of earned fee, fixed fee, profit, or share of cost savings, the DOE Operations Office/Field Manager, or

designee, may consider mitigating factors that may warrant a reduction below the applicable range specified in the clause, including a determination that no reduction should be made. Such factors may include situations in which a contractor self-identifies a problem requiring corrective action, and is actively working to correct the problem.

(4) The DOE Operations Office/Field Manager, or designee, must obtain the concurrence of the Cognizant Secretarial Officer—

(i) Prior to effecting any reduction of fee or profit in accordance with the terms and conditions of the clause entitled, "Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts;" and

(ii) For determinations that no reduction of fee or profit is warranted for a particular performance failure(s) that would otherwise be subject to a reduction.

### 970.1504–1–3 [Amended]

8. Section 970.1504–1–3 is amended in paragraph (c)(1) by revising "Conditional Payment of Fee, Profit, or Incentives" to read "Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts."

9. Section 970.1504–5 is amended by revising paragraph (b) to read as follows:

### 970.1504–5 Solicitation provision contract clauses.

\* \* \* \* \*

(b) (1) The contracting officer shall insert the clause at 48 CFR 970.5204–86, Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts, in all DOE management and operating contracts and other contracts determined by the Procurement Executive, or designee.

(2) The contracting officer shall include the clause with its Alternate I in contracts which do not contain the clause at 48 CFR 952.204–2, Security.

(3) The contracting officer shall include the clause with its Alternate II in contracts which are awarded on a cost-plus-award-fee, incentive fee, or multiple fee basis.

\* \* \* \* \*

### 970.5215–1 [Amended]

10. Section 970.5215–1 is amended in paragraph (c)(3) by revising "Conditional Payment of Fee, Profit, or Incentives" to read "Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts."

11. Section 970.5215–3 is revised to read as follows:

**970.5215-3 Conditional payment of fee, profit, and other incentives—facility management contracts.**

As prescribed in 48 CFR 970.15404-4-11(b)(1), insert the following clause:

**970.5204.86 Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts (Month and Year TBD)**

(a) General. (1) The payment of earned fee, fixed fee, profit, or share of cost savings under this contract is dependent upon the contractor's development of, and performance under, an approved Integrated Safety Management System (ISMS), and the contractor's or contractor employee's compliance with the terms and conditions of this contract relating to the safeguarding of Restricted Data and other classified information.

(2) The minimum performance requirements of this contract relating to environment, safety, and health (ES&H) will be set forth in an approved ISMS, or similar document, as required by the terms and conditions of this contract. These minimum requirements are: (i) implementation of the DOE-approved ISMS; (ii) compliance with applicable laws, regulations, and DOE directives; (iii) accomplishment of annual performance commitments relating to ES&H and (iv) prevention of catastrophic performance failures (e.g., fatality; serious workplace-related injury or illness to one or more federal, contractor, or subcontractor employees or the general public; significant damage to the environment).

(3) Requirements of this contract relating to the safeguarding of Restricted Data and other classified information will be set forth in the clauses of this contract entitled, "Security" and "Laws, Regulations, and DOE Directives," as well as other terms and conditions that may be prescribed elsewhere in this contract.

(4) If the contractor fails to obtain approval of the ISMS, or otherwise fails to achieve the minimum performance requirements of this contract relating to ES&H or to the safeguarding of Restricted Data and other classified information during any performance evaluation period established under the contract pursuant to the clause of this contract entitled, "Total Available Fee: Base Fee Amount and Performance Fee Amount," otherwise earned fee, fixed fee, profit or share of cost savings may be unilaterally reduced by the DOE Operations Office/Field Manager, or designee.

(b) Reduction Amount. (1) The amount of earned fee, fixed fee, profit, or share of cost savings that is subject to reduction will be determined by the severity of the performance failure relating to ES&H or to the safeguarding of Restricted Data and other classified information pursuant to the degrees specified in paragraphs (c) and (d) of this clause.

(2) If it is found that the facts and circumstances warrant a reduction of earned fee, fixed fee, profit, or share of cost savings, such reduction shall not be less than 51% nor greater than 100% of the amount of earned fee, fixed fee, profit, or the contractor's share of cost savings for a first

degree performance failure, not less than 26% nor greater than 50% for a second degree performance failure, and up to 25% for a third degree performance failure. The DOE Operations Office/Field Manager, or designee, may consider mitigating factors that may warrant a reduction below the applicable range, including a determination that no reduction should be made (see 48 CFR 970.15404-4-1(h)).

(3)(i) The amount of fee, fixed fee, profit, or share of cost savings that is otherwise earned by a contractor during an evaluation period may be reduced in accordance with this clause if it is determined that a performance failure warranting a reduction under this clause occurs within the evaluation period.

(ii) The amount of reduction under this clause, in combination with any reduction made under any other clause in the contract, shall not exceed the amount of fee, fixed fee, profit, or the contractor's share of cost savings that is otherwise earned during the evaluation period.

(iii) For the purposes of this clause, earned fee, fixed fee, profit, or share of cost savings shall mean the amount determined by the contracting officer or fee determining official as otherwise payable based on the contractor's performance during an evaluation period. Where the contract provides for one or more financial incentives which extend beyond a single evaluation period, this amount shall also include any provisional incentive amounts determined otherwise payable, or if provisional payments are not provided for, the allocable amount of any incentive determined otherwise payable at the conclusion of a subsequent evaluation period. The allocable amount shall be the total amount of the earned incentive divided by the number of evaluation periods over which it is earned.

(iv) The Government will effect the reduction at the end of the evaluation period in which the performance failure occurs (unless the Government is not aware of the failure; in this case the Government will effect the reduction as soon as practical), except for that portion of the reduction requiring an allocation. The Government will effect this portion of the reduction at the end of the evaluation period in which it determines the total amount earned under the incentive. If at any time a reduction causes the sum of the payments the contractor has received for fee, fixed fee, profit, or share of cost savings to exceed the sum of fee, fixed fee, profit, or share of cost savings the contractor has earned (provisionally or otherwise), the contractor shall immediately return the excess to the Government. (What the contractor "has earned" reflects any reduction made under this or any other clause of the contract.)

(v) At the end of the contract:

(A) The Government will pay the contractor the amount by which the sum of fee, fixed fee, profit, or share of cost savings the contractor has earned exceeds the sum of the payments the contractor has received; or

(B) The contractor shall return to the Government the amount by which sum of the payments the contractor has received exceed the sum of fee, fixed fee, profit, or share of

cost savings the contractor has earned. (What the contractor "has earned" reflects any reduction made under this or any other clause of the contract.)

(c) Environment, Safety and Health (ES&H). The degrees of ES&H performance failures under which reductions of earned or fixed fee, profit, or share of cost savings will be determined are as follows:

(1) *First Degree:* Performance failures that are considered catastrophic or could threaten the successful completion of a program or project. The following performance failures or performance failures of similar import will be considered first degree:

(i) Failure to develop and obtain required DOE approval of a Safety Management System.

(ii) Failure to comply with an approved Safety Management System which results in any of the following performance failures:

(A) Fatality.

(B) Serious workplace-related injury or illness to one or more Federal, contractor, or subcontractor workers or member(s) of the public.

(C) Significant damage to the environment.

(D) Contractor actions leading to a Type A accident investigation (reference DOE O 225.1A, "Accident Investigations").

(E) Breakdown of the safety management system creating risk of a Type A performance failure.

(F) Non-compliance with applicable environmental, safety, and health laws, regulations, and DOE directives posing a Type A risk.

(G) Failure to notify DOE of an imminent danger situation after discovery.

(H) Failure to report performance failures that could warrant consideration of a Type A or Type B investigation.

(iii) Failure to implement corrective action(s) in response to the occurrence of any first degree performance failure.

(2) *Second Degree:* Performance failures that are significantly adverse to safety or could result in significant additional cost to the Federal Government. The following performance failures or performance failures of similar import will be considered second degree:

(i) Contractor actions leading to a Type B accident investigation (reference DOE O 225.1A, "Accident Investigations").

(ii) Breakdown of the safety management system creating the risk of a Type B performance failure.

(iii) Non-compliance with applicable environmental, safety, and health law, regulation, or DOE directive creating risk of a Type B performance failure.

(iv) Failure to execute DOE approved implementation plans in response to Defense Nuclear Facilities Safety Board recommendations.

(v) Failure to meet key program milestones designed to substantially reduce risk to workers, the public, and the environment.

(vi) Failure to implement corrective action(s) in response to the occurrence of any second degree performance failure.

(3) *Third Degree:* Performance failures that result from lack of management and/or worker attention to safety. These performance failures may be indicators of

future, more severe performance failures and/or conditions, and if identified and corrected early can prevent serious accidents. The following performance failures or performance failures of similar import will be considered third degree:

(i) Failure to implement corrective actions resulting from oversight evaluations, assessments, and inspections.

(ii) Failure to implement actions designed to integrate lessons-learned into work planning and execution.

(iii) Failure to implement corrective actions resulting from self-assessments.

(iv) Contractor actions that result in a lapse in Safety Management System implementation posing less than a Type B risk.

(v) Non-compliance with applicable environmental, safety, and health laws, regulations, and DOE directives posing less than a Type B risk.

(vi) Contractor actions that result in performance failures which unto themselves pose minor risk, but when viewed in the aggregate indicate degradation in the integrity of the safety management system.

(vii) Failure to implement corrective action(s) in response to the occurrence of any third degree performance failure.

(d) Safeguarding Restricted Data and Other Classified Information. The degrees of performance failures relating to the contractor's and contractor employee's obligations under this contract for the safeguarding of Restricted Data and other classified information under which reductions of fee, profit, or share of cost savings will be determined are as follows:

(1) *First Degree*: Performance failures that have been determined, in accordance with applicable DOE regulation or directive, to have resulted in, or that can reasonably be expected to result in, exceptionally grave damage to the national security. The following performance failures or performance failures of similar import will be considered first degree:

(i) Non-compliance with applicable laws, regulations, and DOE directives actually resulting in, or creating a risk of, loss, compromise, or unauthorized disclosure of Restricted Data or other classified information classified as Top Secret.

(ii) Contractor actions that result in a breakdown of the safeguards and security management system that can reasonably be expected to result in the loss, compromise, or unauthorized disclosure of Restricted Data, or other classified information which is classified as Top Secret.

(iii) Failure to implement corrective actions stemming from the loss, compromise, or unauthorized disclosure of Restricted Data or other classified information classified as Top Secret.

(2) *Second Degree*: Performance failures that have been determined, in accordance with applicable DOE regulation or directive, to have actually resulted in, or that can reasonably be expected to result in, serious damage to the national security. The following performance failures or performance failures of similar import will be considered second degree:

(i) Non-compliance with applicable laws, regulations, and DOE directives actually

resulting in, or creating risk of, loss, compromise, or unauthorized disclosure of Restricted Data or other classified information which is classified as Secret.

(ii) Contractor actions that result in a breakdown of the safeguards and security management system that can reasonably be expected to result in the loss, compromise, or unauthorized disclosure of Restricted Data, or other classified information which is classified as Secret.

(iii) Failure to promptly report the loss, compromise, or unauthorized disclosure of Restricted Data or other classified information regardless of classification.

(iv) Failure to implement corrective actions stemming from the loss, compromise, or unauthorized disclosure of Restricted Data or other classified information classified as Secret.

(3) *Third Degree*: Performance failures that have been determined, in accordance with applicable DOE regulation or directive, to have actually resulted in, or that can reasonably be expected to result in, undue risk to the common defense and security. In addition, this category includes performance failures that result from a lack of contractor management and/or employee attention to the proper safeguarding of Restricted Data and other classified information. These performance failures may be indicators of future, more severe performance failures and/or conditions, and if identified and corrected early would prevent serious incidents. The following performance failures or performance failures of similar import will be considered third degree:

(i) Non-compliance with applicable laws, regulations, and DOE directives actually resulting in, or creating risk of, loss, compromise, or unauthorized disclosure of Restricted Data or other classified information which is classified as Confidential.

(ii) Failure to promptly report alleged or suspected violations of laws, regulations, or directives pertaining to the safeguarding of Restricted Data or other classified information.

(iii) Failure to identify or execute corrective actions to mitigate or eliminate identified vulnerabilities and reduce residual risk relating to the protection of Restricted Data or other classified information in accordance with the contractor's Safeguards and Security Plan or other security plan, as applicable.

(iv) Contractor actions that result in performance failures which unto themselves pose minor risk, but when viewed in the aggregate indicate degradation in the integrity of the contractor's safeguards and security management system relating to the protection of Restricted Data and other classified information.

(End of Clause)

Alternate I (Month and Year TBD). As prescribed in 48 CFR 970.15404-4-11(b)(2), replace paragraphs (a) and (b)(1) of the basic clause with the following paragraphs (a) and (b)(1), and delete paragraph (d).

(a) General. (1) The payment of earned fee, fixed fee, profit, or share of cost savings under this contract is dependent upon the contractor's development of, and

performance under, an approved Integrated Safety Management System (ISMS).

(2) The minimum performance requirements of this contract relating to environment, safety, and health (ES&H) will be set forth in an approved ISMS, or similar document, as required by the terms and conditions of this contract. These minimum requirements are: (i) implementation of the DOE-approved ISMS; (ii) compliance with applicable laws, regulations, and DOE directives; (iii) accomplishment of annual performance commitments relating to ES&H; and (iv) prevention of catastrophic performance failures (e.g., fatality; serious workplace-related injury or illness to one or more federal, contractor, or subcontractor employees or the general public; significant damage to the environment).

(3) If the contractor fails to obtain approval of the ISMS, or otherwise fails to achieve the minimum performance requirements of this contract relating to ES&H during the performance evaluation period, otherwise earned fee, fixed fee, profit or share of cost savings may be unilaterally reduced by the DOE Operations Office/Field Manager, or designee.

(b) Reduction Amount. (1) The amount of earned fee, fixed fee, profit, or share of cost savings that is subject to reduction will be determined by the severity of the performance failure relating to ES&H pursuant to the degrees specified in paragraphs (c) of this clause.

Alternate II (Month and Year TBD). As prescribed in 48 CFR 970.15404-4-11(b)(3), insert the following as paragraphs (e) and (f) in contracts awarded on a cost-plus-award fee, incentive fee or multiple fee basis (if Alternate I is also used, redesignate the following as paragraphs (d) and (e)).

(e) Minimum requirements for specified level of performance. (1) At a minimum the contractor must perform the following:

(i) The requirements with specific incentives which do not require the achievement of cost efficiencies in order to be performed at the level of performance set forth in the Statement of Work, Work Authorization Directive, or similar document unless an otherwise minimal level of performance has been established in the specific incentive;

(ii) All of the performance requirements directly related to requirements specifically incentivized which do not require the achievement of cost efficiencies in order to be performed at a level of performance such that the overall performance of these related requirements is at an acceptable level; and

(iii) All other requirements at a level of performance such that the total performance of the contract is not jeopardized.

(2) The evaluation of the Contractor's achievement of the level of performance shall be unilaterally determined by the Government. To the extent that the Contractor fails to achieve the minimum performance levels specified in the Statement of Work, Work Authorization Directive, or similar document, during the performance evaluation period, the DOE Operations/Field Office Manager, or designee, may reduce any otherwise earned fee, fixed fee, profit, or shared net savings for the performance

evaluation period. Such reduction shall not result in the total of earned fee, fixed fee, profit, or shared net savings being less than 25% of the total available fee amount. Such 25% shall include base fee, if any.

(f) Minimum requirements for cost performance. (1) Requirements incentivized by other than cost incentives must be performed within their specified cost constraint and must not adversely impact the costs of performing unrelated activities.

(2) The performance of requirements with a specific cost incentive must not adversely impact the costs of performing unrelated requirements.

(3) The contractor's performance within the stipulated cost performance levels for the performance evaluation period shall be determined by the Government. To the extent the contractor fails to achieve the stipulated cost performance levels, the DOE Operations/Field Office Manager, or designee, may reduce in whole or in part any otherwise earned fee, fixed fee, profit, or shared net savings for the performance evaluation period. Such reduction shall not result in the total of earned fee, fixed fee, profit or shared net savings being less than 25% of the total available fee amount. Such 25% shall include base fee, if any.

[FR Doc. 01-1330 Filed 1-31-01; 8:45 am]

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 622

[I.D. 011601A]

### Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic; Public Hearings

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

**ACTION:** Notice of public hearings; request for comments.

**SUMMARY:** The Gulf of Mexico Fishery Management Council (Council) will convene public hearings to receive comments on the proposed Charter Vessel/Headboat Permit Moratorium Amending the Reef Fish Fishery Management Plan (FMP) and Coastal Migratory Pelagics FMP (Draft Amendment).

**DATES:** Written comments will be accepted until 5 p.m., March 23, 2001. The public hearings will be held in February. For specific dates and times see **SUPPLEMENTARY INFORMATION**.

**ADDRESSES:** Written comments should be sent to, and copies of the Draft Amendment are available from, the Gulf of Mexico Fishery Management Council, 3018 U.S. Highway 301, North, Suite 1000, Tampa, FL 33619. The public hearings will be held in the State of Texas in Port Isabel, Port Aransas, and Galveston; in Larose, LA; in Biloxi, MS; in Orange Beach, AL; and in the State of Florida in Panama City, Key West, Naples, and Madeira Beach. For specific location, see **SUPPLEMENTARY INFORMATION**.

**FOR FURTHER INFORMATION CONTACT:** Mr. Wayne Swingle, Executive Director, Gulf of Mexico Fishery Management Council; telephone: (813) 228-2815.

**SUPPLEMENTARY INFORMATION:** The public hearings will be convened to review new alternatives added by Council members at the November, 2000 Council meeting to the Draft Amendment. The additions principally include alternatives for a charter vessel quota for red snapper based on charter vessel landings for various periods in lieu of implementing the permit moratorium. The Council retained all of the alternatives proposed by the Ad Hoc Charter Vessel/Headboat Advisory Panel along with the preferred alternatives selected by the Council in September. The public hearing document includes a number of alternatives under each of the following issues: Duration of moratorium; a new Gulf permit for the Reef Fish and Coastal Migratory Pelagics Fisheries FMPs; initial eligibility requirements for permits and/or endorsements; annual permit and endorsement transfers during the moratorium; vessel passenger restriction on permit transfers; annual reissuance of permits not renewed (or permanently revoked); appeals process under the moratorium; and, reporting requirements to maintain the new gulf permit/endorsement.

#### Dates, Times, and Locations for Public Hearings

Public hearings for the Draft Amendment are scheduled as follows:

1. Monday, February 5, 2001 - 7 p.m.—Laguna Madre Learning Center, Port Isabel High School, Highway 100, Port Isabel, TX 78578; telephone: 956-943-0052;

2. Tuesday, February 6, 2001 - 7 p.m.—Port Aransas Community Center, 408 North Allister, Port Aransas, TX 78376; telephone: 361-749-4111;

3. Wednesday February 7, 2001 - 7 p.m.—Texas A&M University, 200 Seawolf Parkway, Galveston, TX 77553; telephone: 409-740-4416;

4. Monday, February 12, 2001 - 7 p.m.—Larose Regional Park, 307 East 5th Street, Larose, LA 70373; telephone: 504-693-7380;

5. Tuesday, February 13, 2001 - 6 p.m.—MS Department of Marine Resources, 1141 Bayview Drive, Biloxi, MS 39530; telephone: 228-374-5000;

6. Wednesday, February 14, 2001 - 7 p.m.—Hilton Beachfront Garden Inn, 23092 Perdido Beach Boulevard, Orange Beach, AL 36561; telephone: 334-974-1600;

7. Thursday, February 15, 2001 - 7 p.m.—National Marine Fisheries Service, 3500 Delwood Beach Road, Panama City, FL 32408; telephone: 850-234-6541;

8. Monday, February 19, 2001 - 7 p.m.—Holiday Inn Beachside, 3841 North Roosevelt Boulevard, Key West, FL 33040; telephone: 305-294-2571;

9. Tuesday, February 20, 2001 - 7 p.m.—Naples Depot Civic Cultural Center, 1051 Fifth Avenue South, Naples, FL 34102; telephone: 941-262-1776; and

10. Wednesday February 21, 2001 - 7 p.m.—Madeira Beach City Hall, 300 Municipal Drive, Madeira Beach, FL 33708; telephone: 727-391-9951.

The Council will also hear public testimony at the March Council Meeting during the week of March 26-29, 2001, before taking final action on the Draft Amendment. The exact date for public testimony will be published at a later time.

#### Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Anne Alford at the Council (see **ADDRESSES**) by January 29, 2001.

Dated: January 23, 2001.

**Bruce C. Morehead,**

*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

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