BLM grazing decision; the proposed BLM grazing decision; any protest filed by the appellant under § 4160.2; the final BLM grazing decision; and any other documents that BLM wishes the administrative law judge to consider in deciding the petition for a stay. BLM must serve a copy of any such response on the appellant and any other person named in the decision from which the appeal is taken.

(b) Any person named in the decision from which an appeal is taken (other than the appellant) who wishes to file a response to the petition for a stay may file with the Hearings Division a motion to intervene in the appeal, together with the response, within 10 days after receiving the petition. Within 15 days after filing the motion to intervene and response, the person must serve copies on the appellant, the appropriate office of the Office of the Solicitor in accordance with § 4.413(a) and (c), and any other person named in the decision.

(c) If a petition for a stay has not been filed, BLM must promptly transmit the following documents from the case file to the administrative law judge assigned to the appeal, once the appeal has been docketed by the Hearings Division: the application, permit, lease, or notice of unauthorized use underlying the final BLM grazing decision; the proposed BLM grazing decision; any protest filed by the appellant under § 4160.2; and the final BLM grazing decision.

(d) Within 45 days after the expiration of the time for filing a notice of appeal, an administrative law judge must grant or deny—

(1) A petition for a stay filed under § 4.471(a), in whole or in part; and

(2) A motion to intervene filed with a response to the petition under paragraph (b) of this section.

(e) Any final BLM grazing decision that is not already in effect and for which a stay is not granted will become effective immediately after the administrative law judge denies a petition for a stay or fails to act on the petition within the time set forth in paragraph (d) of this section.

(f) At any appropriate time, any party may file with the Hearings Division a motion to dismiss the appeal or other appropriate motion. The appellant and any other party may file a response to the motion within 30 days after receiving a copy.

(g) Within 15 days after filing a motion or response under paragraph (f) of this section, any moving or responding party must serve a copy on every other party. Service on BLM must be made on the appropriate office of the Office of the Solicitor in accordance with § 4.413(a) and (c).

■ 6. In newly redesignated § 4.474, add paragraphs (c) and (d) to read as follows:

§ 4.474 Authority of administrative law judge.

* * * * *

(c) The administrative law judge may consider and rule on all motions and petitions, including a petition for a stay of a final BLM grazing decision.

(d) An administrative law judge may consolidate two or more appeals for purposes of hearing and decision when they involve a common issue or issues.

■ 7. Revise newly redesignated § 4.478 to read as follows:

§ 4.478 Appeals to the Board of Land Appeals; judicial review.

(a) Any person who has a right of appeal under § 4.410 or other applicable regulation may appeal to the Board from an order of an administrative law judge granting or denying a petition for a stay.

(b) As an alternative to paragraph (a) of this section, any party other than BLM may seek judicial review under 5 U.S.C. 704 of a final BLM grazing decision if the administrative law judge denies a petition for a stay, either directly or by failing to meet the deadline in § 4.472(d).

(c) If a party appeals under paragraph (a) of this section, the Board must issue an expedited briefing schedule and decide the appeal promptly.

(d) Unless the Board or a court orders otherwise, an appeal under paragraph (a) of this section does not—

(1) Suspend the effectiveness of the decision of the administrative law judge; or

(2) Suspend further proceedings before the administrative law judge.

(e) Any party adversely affected by the administrative law judge's decision on the merits has the right to appeal to the Board under the procedures in this part.

■ 8. Revise newly redesignated § 4.479 to read as follows:

§ 4.479 Effectiveness of decision during appeal.

(a) Consistent with the provisions of §§ 4.21(a) and 4.472(e) and except as provided in paragraphs (b) and (c) of this section or other applicable regulation, a final BLM grazing decision will not be effective—

(1) Until the expiration of the time for filing an appeal under § 4.470(a); and

(2) If a petition for a stay is filed under § 4.471(a), until the administrative law judge denies the petition for a stay or fails to act on the petition within the time set forth in § 4.472(d).

(b) Consistent with the provisions of §§ 4160.3 and 4190.1 of this title and notwithstanding the provisions of § 4.21(a), a final BLM grazing decision may provide that the decision will be effective immediately. Such a decision will remain effective pending a decision on an appeal, unless a stay is granted by an administrative law judge under § 4.472 or by the Board under § 4.478(a).

(c) Notwithstanding the provisions of § 4.21(a), when the public interest requires, an administrative law judge may provide that the final BLM grazing decision will be effective immediately.

(d) An administrative law judge or the Board may change or revoke any action that BLM takes under a final BLM grazing decision on appeal.

(e) In order to ensure exhaustion of administrative remedies before resort to court action, a BLM grazing decision is not final agency action subject to judicial review under 5 U.S.C. 704 unless—

(1) A petition for a stay of the BLM decision has been timely filed and the BLM decision has been made effective under § 4.472(e), or

(2) The BLM decision has been made effective under paragraphs (b) or (c) of this section or other applicable regulation, and a stay has not been granted.

(f) Exhaustion of administrative remedies is not required if a stay would not render the challenged portion of the BLM decision inoperative under subpart 4160 of this title.

[FR Doc. 03–30631 Filed 12–9–03; 8:45 am]

BILLING CODE 4310–79–P

DEPARTMENT OF ENERGY

48 CFR Parts 904, 923, 952, and 970

RIN 1991–AB54

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

AGENCY: Department of Energy.

ACTION: Interim final rule.

SUMMARY: The Department of Energy publishes interim final amendments to its Acquisition Regulation setting forth policies for reductions of fee or other amounts payable to DOE prime contractors because of contractor performance failures related to safeguarding of classified information and to adequate protection of environment, health and safety, including the health and safety of workers, at contractor operated sites.

DATES: This rule is effective January 9, 2004. Written comments on specified portions of this interim final rule

implementing section 234C of the Atomic Energy Act must be received by January 26, 2004.

ADDRESSES: Comments (3 copies) on the specified portions of this interim final rule should be addressed to: Michael L. Righi, U.S. Department of Energy, Office of Procurement and Assistance Policy, ME–61, 1000 Independence Avenue, SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: Michael L. Righi, Office of Procurement and Assistance Policy (ME–61), 202–586–8175 or *michael.righi@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

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I. Introduction

Pursuant to the Atomic Energy Act of 1954 (Atomic Energy Act) and other laws, the Department of Energy (DOE or Department) carries out a variety of national defense and energy research, development, and demonstration activities at facilities around the nation that are owned by the United States, under the custody and control of DOE, and operated by prime contractors under the supervision of DOE. On February 1, 2001, DOE published a Notice of Proposed Rulemaking (NOPR) (66 FR 8560) to amend portions of the DOE Acquisition Regulation (DEAR) (48 CFR chapter 9) that apply to these prime contractors. The NOPR contained proposed regulatory amendments dealing with reductions in fee and other payments to these contractors as a result of performance failures in carrying out contract obligations related to: (1) Safeguarding classified information; and (2) protection of environment, health and safety, including the health and safety of workers at contract sites. Although this rulemaking is generally authorized by the Atomic Energy Act (42 U.S.C. 2201), the portion of the proposed rule dealing with safeguarding classified information responded to specific statutory directions in section 234B of the Atomic Energy Act (42 U.S.C. 2282b). Subsequent to publication of the proposed rule, the President signed into law a new section 234C, which contains reduction in fee provisions similar to those in section 234B and provides specific directions with regard to protection of worker health and safety.

Today, DOE publishes a notice of interim final rulemaking that responds to the comments on the proposed rule and contains interim final regulatory amendments to the DEAR pursuant to general Atomic Energy Act authorities, as well as pursuant to the specific terms of sections 234B and 234C of the Atomic Energy Act. Since the provisions of section 234C are substantially similar to those of section 234B, DOE does not believe that there are policy issues with regard to section 234C that differ from those concerning section 234B. However, in addition to its review of comments submitted during the comment period on the NOPR, DOE is inviting public comment limited to the portions of the interim final amendments to the DEAR that implement section 234C to ensure that DOE has not overlooked any subtle, relevant issues that are unique to section 234C. Those portions of the interim final rule are specifically identified in part III of this **SUPPLEMENTARY INFORMATION**.

II. Background

Section 3147 of the National Defense Authorization Act for Fiscal Year 2000 added section 234B to the Atomic Energy Act (42 U.S.C. 2282b). Section 234B requires, in part, that DOE contracts provide 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. Section 234B also prescribes that the implementing regulations must specify various degrees of violations and the amount of the reduction attributable to each degree of violation. Section 234B applies to prime contractors, including management and operating (M&O) contractors and certain non-M&O contractors.

Recent legislation, section 3173 of the National Defense Authorization Act for Fiscal Year 2003, which adds section 234C to the Atomic Energy Act (42 U.S.C. 2282c), requires the Department to include in each contract with a contractor of the Department who has entered into an agreement of Price Anderson indemnification (48 CFR 952.250–70) clauses that provide 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 regulation promulgated to protect worker safety and health (WS&H). Section 234C also requires that contract provisions specify various degrees of violations and the amount of reduction attributable to each degree of violation. The Department is planning a rulemaking action to establish a new regulation at 10 CFR part 851 to set forth WS&H requirements and to address the civil penalty and enforcement aspects of section 234C. Section 234C specifies that in the event of a violation under the regulations, the Department may pursue either civil or contract penalties, but not both. In the case of non-profit entities described at 42 U.S.C. 2282a(d), the total amount of civil and contract penalties in a fiscal year may not exceed the total amount of fees paid by the Department to that entity in that fiscal year.

As opposed to the NOPR, which would have added two clauses, this interim final rule adds four clauses, three for other than management and operating contracts and one for management and operating contracts. The additional clauses reflect the requirements of section 234C.

Consistent with section 234B of the Atomic Energy Act, for other than management and operating contracts, this interim final rule adds a clause entitled, ''Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information'' to DEAR part 952. Except for DOE management and operating contracts and other contracts designated by the Procurement Executive, or designee, this clause is prescribed for use in all DOE contracts that involve or are likely to involve classified information but that do not include the clause at 48 CFR 952.250–70, Nuclear hazards indemnification agreement. 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. Among other things, this clause would provide for fee reductions for violations related to the safeguarding of high risk nuclear weapons-related data. At present, this category consists of data covered by SIGMA 14 or SIGMA 15, but it may include other categories of high risk

nuclear weapons-related data should the Department designate additional categories in the future. The clause sets forth the conditions that may precipitate a reduction of fee or profit and percentage reduction ranges that correlate to three degrees of violations.

Consistent with section 234B and C of the Atomic Energy Act, for other than management and operating contracts, this interim final rule adds a clause entitled, ''Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information and Protection of Worker Safety and Health'' to DEAR part 952. Except for DOE management and operating contracts and other contracts designated by the Procurement Executive, or designee, this clause is prescribed for use in all DOE contracts that involve or are likely to involve classified information and that also include the clause at 48 CFR 952.250–70, Nuclear hazards indemnification agreement. 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 or relating to worker safety and health. The clause sets forth the conditions that may precipitate a reduction of fee or profit and percentage reduction ranges that correlate to three degrees of violations.

Consistent with section 234C of the Atomic Energy Act, for other than management and operating contracts, this interim final rule adds a clause entitled, ''Conditional Payment of Fee or Profit-Protection of Worker Safety and Health'' to DEAR part 952. Except for DOE management and operating contracts and other contracts designated by the Procurement Executive, or designee, this clause is prescribed for use in all DOE contracts that do not involve and are not likely to involve classified information and that do include the clause at 48 CFR 952.250–70, Nuclear hazards indemnification agreement. 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 worker safety and health. The clause sets forth both the conditions that may precipitate a reduction of fee or profit and the percentage reduction ranges that correlate to three degrees of violations.

Consistent with section 234B and C of the Atomic Energy Act, for DOE management and operating contracts and other contracts designated by the Procurement Executive, the clause at 48 CFR 970.5215–3, ''Conditional Payment of Fee, Profit, or Other Incentives—Facility Management Contracts,'' provides for reductions of earned fee, fixed fee, profit, or share of cost savings that may otherwise be payable under the contract if: Performance failures relating to environment, safety and health (ES&H) or the safeguarding of restricted data and other classified information occur (the basic clause); or performance failures relating to ES&H occur (Alternate I of the clause). 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. The clause also sets forth the percentage fee, profit, or share of cost savings reduction ranges that correlate to the three degrees of performance failures relating to ES&H and to the three degrees of performance failures relating to safeguarding of restricted data and other classified information.

A large number of comments DOE received related to the mitigating factors to be considered before a fee reduction by the contracting officer. The provisions in the NOPR permitted consideration of mitigating factors, but did not make consideration of mitigating factors mandatory. In today's interim final rule, the Department has changed the proposed language so that it is now mandatory for a contracting officer to consider mitigating factors when contemplating a fee reduction. DOE also added a non-exhaustive list of mitigating factors that must be considered by the contracting officer.

Another significant number of comments DOE received related to the percentage fee reductions possible for second and third degree performance failures and the descriptions of what might constitute performance failures, especially ES&H failures. In this interim final rule, the Department has changed the proposed rule language to lower the percentage fee reduction for second and third degree performance failures (from maximums of 50 percent and 25 percent to maximums of 25 percent and 10 percent, respectively) and shortened and simplified the description of performance failures for ES&H issues. Additionally, the interim final rule includes language making it clear that performance failures only occur if the contractor does not comply with the related terms and conditions of the contract. The mere occurrence of an event does not necessarily create the potential for a fee reduction.

The numbering system in this interim final rule differs from the one in the NOPR because it conforms to the new DEAR numbering system established by the final rule published in the **Federal Register** on December 22, 2000 (65 FR 80993), titled ''Rewrite of Regulations Governing Management and Operating Contracts.''

Contracting officers must apply these DEAR changes to solicitations issued on or after the effective date of this rule.

Contracting officers may, at their discretion, include these DEAR changes in solicitations issued before the effective date of this rule, provided award of the resulting contract(s) occurs on or after the effective date.

Contracting officers must apply these DEAR changes: to contracts extended in accordance with the Department's extend/compete policies and procedures (48 CFR 917.6, 48 CFR 970.1702–1(a), and internal guidance) if the extend/compete decision is made on or after the effective date of this rule, and to options exercised under competitively awarded management and operating contracts (48 CFR 970.1702–1(b)).

In preparing this notice of interim final rulemaking the Department has made a variety of technical changes, which do not warrant extended discussion.

III. Scope of Further Opportunities for Public Comment

The NOPR of February 1, 2001, contained proposed amendments to the DEAR that are consistent with the subsequently enacted requirements of section 234C. A few minor amendments have been necessary to the originally proposed language to specifically address the new section 234C. The amendments are the interim rule portion of this interim final rule. The amendments are: (1) Revised language at DEAR 970.1504–1–2(i)(1) and at 970.5215–3(a)(1)(i) making it clear that the term ''environment, safety and health (ES&H)'' also includes ''worker safety and health (WS&H)''; (2) a new paragraph (c) is added to DEAR 970.2303–1; (3) a new paragraph (b) is added to DEAR 923.7001; (4) new paragraphs (f) and (g) are added to DEAR 923.7002; and (5) new clauses are added at DEAR 952.223–76 and at DEAR 952.223–77. DOE today provides an opportunity for public comment limited to these five regulatory amendments and relevant issues unique to implementing section 234C.

IV. Discussion of Public Comments

This section of the Supplementary Information addresses the major issues that emerged from the public comments. Many of the comments received in response to the NOPR raised issues related to the civil penalty requirements of section 234B, which were outside the

scope of this fee reduction rule, since this rulemaking only addresses the contractual provisions and fee reduction aspects of the statute. The Department always intended to conduct two separate rulemakings, one establishing civil penalty procedural rules similar to the procedural rules to achieve compliance with DOE nuclear safety requirements found at 10 CFR part 820 and the other establishing procurement clauses like those in this rulemaking action. To establish procedural rules, on April 1, 2002, the Department published a second NOPR (67 FR 15339) to implement subsections a, c and d of section 234B. In the second NOPR, the Department proposed to establish a new part 824 to chapter III of title 10 of the Code of Federal Regulations (CFR) to implement all subsections of section 234B of the Atomic Energy Act, except subsection b. A number of the comments received in response to the first NOPR, intended to implement section b of section 234B, were addressed by the publication of the second NOPR, intended to implement subsections a, c and d of section 234B, and need not be addressed at length in this notice.

Other major issues emerging from the public comments on the proposed rule are discussed below. Sixteen respondents submitted comments to the Department.

Mitigating Factors

Comment: Respondents stated that the proposal lacked a sense of proportion between the seriousness of the violation and the contractor's culpability and that fee reductions should decrease as contractor culpability decreases. Others advocated the use of fault based standards for determining amount of fee reductions and that the Department should exclude matters beyond the contractor's control.

Response: These comments regarding the issue of taking into account mitigating circumstances are addressed in the interim final rule through the addition in each of the contract provisions of a statement that the contractor's overall performance on an issue be considered and a mandatory requirement that a list of mitigating factors be considered.

Comment: Respondents were concerned about the risk of violations and resultant fee reductions that could result from changing contract requirements under the directives system.

Response: The DEAR Laws, regulations, and DOE directives clause allows for contract changes when contract requirements change due to a new or modified directive. The contract changes include changes to any contract term or condition, including cost or schedule, that are appropriate. Therefore, any change to the risk of fee reduction that could result from changing contract requirements under the directives system, whether it be increased risk or decreased risk of fee reduction, can be fairly handled under the clause. In those instances where DOE lays new safety or security requirements on the contractor, the contractor must be given adequate time to comply with the new requirements.

Comment: Respondents stated that contractors should not be penalized with a fee reduction for self reporting a problem.

Response: The Department agrees and self reporting has been included in the list of mitigation factors.

E,S&H

Comment: Respondents recommended DOE eliminate the proposed rule's ES&H coverage because it goes beyond the focus in section 234B of the Atomic Energy Act on security issues and is covered adequately by the current clause.

Response: The NOPR covered issues not addressed in the current DEAR clause because the Department determined it was appropriate to address ES&H-related fee reductions in the same manner as security-related fee reductions. The Department's decision to include degrees of violation for ES&H-related fee reductions was fortuitous since, as discussed in an earlier section of this notice, the Department must now address a statutory requirement for fee reductions for violations related to worker safety and health concerns. The new provisions are required to specify various degrees of violations and amount of reduction attributable to each degree of violation. The new requirement is similar to that contained in section 234B of the Atomic Energy Act, which was focused on security concerns.

The Department's proposed rule also included other potential improvements. The current DEAR clause addressing conditional payment of fee, for example, does not require DOE to consider mitigating circumstances for ES&H performance failures that are not catastrophic in determining fee reductions. Nor does it require, for a catastrophic event, both a failure to comply with the ES&H terms and conditions and a negative result before a fee reduction can be imposed. Rather it merely requires that an event occur. Further, the current clause does not limit performance failures for ES&H or catastrophic events to 25 percent (second degree) or 10 percent (third degree) for lesser failures, since it does not address degrees of failure.

Comment: Respondents stated that the proposed language regarding performance failures for ES&H issues was too subjective or vague.

Response: To satisfy respondents' comments, in this interim final rule, a number of changes have been made to the ES&H-related provisions. The language describing the degrees of performance failure has been streamlined, the criteria for failure determinations have been more clearly oriented to the terms of an individual contract, and the consideration of mitigating factors has become more focused on systemic rather than individual failures.

Appeal Process

Comment: Respondents stated that the fee reduction provisions should be subject to the disputes clause and not left to the unilateral discretion of the contracting officer.

Response: Fee reductions are subject to the disputes clause. The contractor will continue to have appeal rights under the Contract Disputes Act notwithstanding the fact that the contract gives the contracting officer unilateral discretion to make determinations for fee reductions. However, the inclusion of this contract term raises the standard of review to arbitrary or capricious conduct by the fee determination official. *See Burnside-Ott Aviation Training Center* v. *Dalton,* 107 F.3rd 854 (Fed. Cir. 1997).

Security Issues

Comment: Respondents stated that the Department should not make fee reductions for security violations in instances where the violations related to problems inherited by the current contractor, such as documents already misclassified sometime in the past.

Response: While the mitigating factors now listed in the clauses do not specifically use the term pre-existing condition, this is the type of situation contemplated by the mitigating factors. The first mitigating factor, for example, is ''Degree of control the contractor had over the event or incident.''

Comment: Respondents stated that the proposed language was too subjective or vague for the associated penalties. Phrases such as ''reasonably expected to result in'' and ''threaten the successful completion of'' were considered too vague for descriptions that could result in fee reductions. Some suggestions were to:

—Define ''exceptionally grave damage, serious damage, *etc.*'';
—Define ''safeguards and security management system'' breakdown;
—Define or eliminate ''that can reasonably be expected to result in'' damage to national security;
—Eliminate conduct ''creating a risk'' of harm (basing fee reductions on incidents that merely create risk is too subjective);
—Eliminate ''or performance failures of similar import'';

Respondents also stated that since risk is always present, fee reductions should not be imposed for risk. They stated that the rule would undo current standards of acceptable risk in safeguarding classified information, which set appropriate levels of protection against risk based on vulnerability/risk analyses.

Response: The terms used in the proposed rule and this interim final rule are found in DOE Directives, Executive Orders, and the National Industrial Security Program. As for risk, the Department understands risk is present. The interim final rule makes it clear that fee reductions related to a security violation are only possible if there is a performance failure related to a security violation and that failure is the cause of an undesirable outcome, such as events that cause or could reasonably be expected to cause damage to the national security.

Comment: A number of respondents stated that the fee reductions should be tied to a site specific plan that is part of the security agreement between DOE and contractor. That plan would cite controlling directives, the contractor's security plan, and define degrees of performance failure.

Response: The interim final rule specifically allows for site specific performance criteria/requirements that provide additional definition, guidance for the amount of the reduction, or guidance for the applicability of mitigating factors.

Other Issues

Comment: Respondents stated that there should be a distinction in the rule between contracts that have evaluation periods of different lengths.

Response: DOE disagrees because the parties are free to negotiate appropriate evaluation period lengths, taking into account all the elements of the contract to include, among other things, desired outcomes, equitable allocation of risks, suitable rewards, and potential fee reductions for ES&H or security performance failures.

V. 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 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 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 by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking'' (67 FR 53461, August 16, 2002), DOE published procedures and policies to ensure that the potential impacts of its draft rules on small entities are properly considered during the rulemaking process (68 FR 7990, February 19, 2003), and has made them available on the Office of General Counsel's Web site: *http://www.gc.doe.gov.* DOE has reviewed today's rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. Because DOE is contractually obligated to reimburse contractors for the cost of complying with regulatory requirements, the rule will not have a significant economic impact on small entities. Since it is clear that the rule will not have an adverse economic impact, there is no need to determine the exact number of small contractors that might be affected by the new requirements. On the basis of the foregoing, DOE certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. Accordingly, DOE did not prepare a regulatory flexibility analysis for this rule.

C. Review Under the Paperwork Reduction Act

No new information collection requirements subject to the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, are imposed by today's regulatory action.

D. Review Under the National Environmental Policy Act

DOE has concluded that promulgation of this rule falls into a class of actions that would not individually or cumulatively have a significant impact on the human environment, as determined by DOE's regulations implementing the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). Specifically, this rule deals only with agency procedures, and, therefore, is covered under the Categorical Exclusion in paragraph A6 to subpart D, 10 CFR part 1021. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review Under Executive Order 13132

Executive Order 13132, ''Federalism'' (64 FR 43255, August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations (65 FR 13735). DOE has examined today's rule and has determined that it does not preempt State law and does 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.

F. 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 Federal 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. 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 rule meets the relevant standards of Executive Order 12988.

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

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to assess the effects of a Federal regulatory action on State, local, and tribal governments, and the private sector. The Department has determined that today's regulatory action does not impose a Federal mandate on State, local or tribal governments or on the private sector.

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 rule that may affect family well-being. This rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under the Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed today's notice under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

J. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) requires Federal agencies to prepare and submit to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. Today's regulatory action is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

K. Review Under the Small Business Regulatory Enforcement Fairness Act.

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of today's interim final rule prior to its effective date. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 801(2).

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

List of Subjects in 48 CFR Parts 904, 923, 952, and 970

Government procurement.

Issued in Washington, DC on December 2, 2003.

Richard H. Hopf,

Director, Office of Procurement and Assistance Management, Office of Management, Budget and Evaluation, Department of Energy.

Robert C. Braden, Jr.,

Director, Office of Procurement and Assistance Management, National Nuclear Security Administration.

■ For the reasons set out in the preamble, DOE amends 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. 2201, 2282a, 2282b, 2282c, 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 234B of the Atomic Energy Act (42 U.S.C. 2282b) requires that DOE contracts include a clause that 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 for all DOE prime contracts that involve any possibility of contractor access to 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 at 48 CFR 904.404(d)(6) (Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information) or the clause prescribed at 48 CFR 923.7002(f) (Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information and Protection of Worker Safety and Health) shall be used for this purpose unless the clause prescribed at 48 CFR 970.1504–5(c) (Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts) is used.

(2) The clause entitled ''Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information'' and the clause entitled ''Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other

Classified Information and Protection of Worker Safety and Health'' provide for reductions of fee or profit that is earned by the contractor 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. When reviewing performance failures that would otherwise warrant a reduction of earned fee, the contracting officer must consider mitigating factors that may warrant a reduction below the applicable range specified in the clause. Some of the mitigating factors that must be considered are specified in the clause.

(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'' or of the clause entitled ''Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information and Protection of Worker Safety and Health;'' and

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

■ 3. Section 904.404 is amended by adding a new paragraph (d)(6) to read as follows:

904.404 Solicitation provision and contract clause. [DOE Coverage—Paragraph (d)]

(d) * * *

(6) Except as prescribed in 48 CFR 970.1504–5(c), the contracting officer shall insert the clause at 48 CFR 952.204–76, Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information, in all contracts that contain the clause at 48 CFR 952.204–2, Security, but that do not contain the clause at 48 CFR 952.250–70, Nuclear hazards indemnity agreement.

PART 923—ENVIRONMENT, CONSERVATION, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

■ 4. Section 923.7002 is redesignated as § 923.7003 and a new § 923.7002 is added to read as follows:

923.7002 Worker Safety and Health.

(a)(1) Except when the clause prescribed at 48 CFR 970.1504–5(c) is used, the clauses entitled ''Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information and Protection of Worker Safety and Health'' and ''Conditional Payment of Fee or Profit—Protection of Worker Safety and Health'' implement the requirements of section 234C of the Atomic Energy Act for the use of a contract clause that 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 Departmental regulation relating to the enforcement of worker safety and health concerns. The clauses, in part, provide 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 worker safety and health violations under the Department's regulations.

(2) The clauses provide for reductions of fee or profit that is earned by the contractor depending upon the severity of the contractor's failure to comply with contract terms or conditions relating to worker safety and health concerns. When reviewing performance failures that would otherwise warrant a reduction of earned fee, the contracting officer must consider mitigating factors that may warrant a reduction below the applicable range specified in the clauses. Some of the mitigating factors that must be considered are specified in the clauses.

(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 Protection of Worker Safety and Health'' or of the clause entitled ''Conditional Payment of Fee or Profit—Protection of Worker Safety and Health''; and

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

(4) Section 234C of the Atomic Energy Act provides that DOE shall either pursue civil penalties (implemented at 10 CFR part 851) for a violation under section 234C of the Atomic Energy Act (42 U.S.C. 2282c) or a contract fee reduction, but not both.

(5) The contracting officer must coordinate with the Office of Price Anderson Enforcement within the Office of the Assistant Secretary for Environment, Safety and Health (or with any designated successor office) before pursuing a contract fee reduction in the event of a violation by the contractor or any contractor employee of any Departmental regulation relating to the enforcement of worker health and safety concerns.

■ 5. Redesignated § 923.7003 is further amended by adding a new paragraphs (f) and (g) to read as follows:

923.7003 Contract clauses.

* * * * *

(f) Except as prescribed in 48 CFR 970.1504–5(c), the contracting officer shall insert the clause at 48 CFR 952.223–76, Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information and Protection of Worker Safety and Health, in all contracts that contain both the clause at 48 CFR 952.204–2, Security, and the clause at 48 CFR 952.250–70, Nuclear hazards indemnity agreement.

(g) Except as prescribed in 48 CFR 970.1504–5(c), the contracting officer shall insert the clause at 48 CFR 952.223–77, Conditional Payment of Fee or Profit—Protection of Worker Safety and Health, in all contracts that do not contain the clause at 48 CFR 952.204–2, Security, but that do contain the clause at 48 CFR 952.250–70, Nuclear hazards indemnity agreement.

PART 952—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 6. Section 952.204–76 is added in Subchapter H to read as follows:

952.204–76 Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information.

As prescribed at 48 CFR (DEAR) 904.404(d)(6), insert the following clause.

Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information (JAN 2004)

(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 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 fee or

profit that 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 in any period (*see* 48 CFR 952.204–76 (b)(2)) 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 fee or profit of the period may be reduced. Such reduction shall not be less than 26 percent nor greater than 100 percent of the total fee or profit earned for a first degree performance failure, not less than 11 percent nor greater than 25 percent for a second degree performance failure, and up to 10 percent for a third degree performance failure. The contracting officer must consider mitigating factors that may warrant a reduction below the specified range (*see* 48 CFR 904.402(c)). The mitigating factors include, but are not limited to, the following:

(i) Degree of control the contractor had over the event or incident.

(ii) Efforts the contractor had made to anticipate and mitigate the possibility of the event in advance.

(iii) Contractor self-identification and response to the event to mitigate impacts and recurrence.

(iv) General status (trend and absolute performance) of safeguarding Restricted Data and other classified information and compliance in related security areas.

(2)(i) Except in the case of performance-based firm-fixed-price contracts (see paragraph (b)(3) of this clause), the contracting officer, for purposes of this clause, will at the time of contract award, or as soon as practicable thereafter, 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) Under this clause, the total amount of fee or profit that is subject to reduction in a period in which a performance failure occurs, 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.

(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. Performance failures occur if the contractor does not comply with the terms and conditions of this contract relating to the safeguarding of 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 law, regulation, or DOE directive, to have resulted in, or that can reasonably be expected to result in, exceptionally grave damage to the national security. The following are examples of performance failures or performance failures of similar import that 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 Top Secret Restricted Data or other information classified as Top Secret, any classification level of information in a Special Access Program (SAP), information identified as sensitive compartmented information (SCI), or high risk nuclear weapons-related data.

(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 Top Secret Restricted Data, or other information classified as Top Secret, any classification level of information in a SAP, information identified as SCI, or high risk nuclear weapons-related data.

(iii) Failure to promptly report the loss, compromise, or unauthorized disclosure of Top Secret Restricted Data or other information classified as Top Secret, any classification level of information in a SAP, information identified as SCI, or high risk nuclear weapons-related data.

(iv) Failure to timely implement corrective actions stemming from the loss, compromise, or unauthorized disclosure of Top Secret Restricted Data or other information classified as Top Secret, any classification level of information in a SAP, information identified as SCI, or high risk nuclear weapons-related data.

(2) *Second Degree:* Performance failures that have been determined, in accordance with applicable law, regulation, or DOE directive, to have actually resulted in, or that can reasonably be expected to result in, serious damage to the national security. The following are examples of performance failures or performance failures of similar import that 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 Secret Restricted Data or other information 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 Sceret Restricted Data, or other information classified as Secret.

(iii) Failure to promptly report the loss, compromise, or unauthorized disclosure of Restricted Data or other information regardless of classification (except for information covered by paragraph (c)(1)(iii) of this clause).

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

(3) *Third Degree:* Performance failures that have been determined, in accordance with applicable law, regulation, or DOE 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 are examples of performance failures or performance failures of similar import that 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 information 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 timely 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)

■ 7. Section 952.223–76 is added to read as follows:

952.223–76 Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information and Protection of Worker Safety and Health.

As prescribed at 48 CFR (DEAR) 923.7002(f), insert the following clause.

Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information and Protection of Worker Safety and Health (JAN 2004)

(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) and relating to the protection of worker safety and health, 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 or relating to the protection of worker safety and health, the contracting officer may unilaterally reduce the amount of fee or profit that 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 or relating to worker safety and health pursuant to the degrees specified in paragraphs (c) and (d) of this clause.

(b) Reduction Amount. (1) If in any period (*see* 48 CFR 952.223–76 (b)(2)) 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 or relating to the protection of worker safety and health, the contractor's fee or profit of the period may be reduced. Such reduction shall not be less than 26 percent nor greater than 100 percent of the total fee or profit earned for a first degree performance failure, not less than 11 percent nor greater than 25 percent for a second degree performance failure, and up to 10 percent for a third degree performance failure. The contracting officer must consider mitigating factors that may warrant a reduction below the specified range (*see* 48 CFR 904.402(c) and 48 CFR 923.7001(b)). The mitigating factors include, but are not limited to, the following ((v), (vi), (vii), and (viii) apply to WS&H only):

(i) Degree of control the contractor had over the event or incident.

(ii) Efforts the contractor had made to anticipate and mitigate the possibility of the event in advance.

(iii) Contractor self-identification and response to the event to mitigate impacts and recurrence.

(iv) General status (trend and absolute performance) of: Safeguarding Restricted Data and other classified information and compliance in related security areas; or of protecting WS&H and compliance in related areas.

(v) Contractor demonstration to the Contracting Officer's satisfaction that the principles of industrial WS&H standards are routinely practiced (*e.g.,* Voluntary Protection Program Star Status).

(vi) Event caused by ''Good Samaritan'' act by the contractor (*e.g.,* offsite emergency response).

(vii) Contractor demonstration that a performance measurement system is routinely used to improve and maintain WS&H performance (including effective resource allocation) and to support DOE corporate decision-making (*e.g.,* policy, WS&H programs).

(viii) Contractor demonstration that an Operating Experience and Feedback Program is functioning that demonstrably affects continuous improvement in WS&H by use of lessons-learned and best practices inter- and intra-DOE sites.

(2)(i) Except in the case of performance-based, firm-fixed-price contracts (*see* paragraph (b)(3) of this clause), the contracting officer, for purposes of this clause, will at the time of contract award, or as soon as practicable thereafter, 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) Under this clause, the total amount of fee or profit that is subject to reduction in a period in which a performance failure occurs, 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.

(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 and relating to protection of worker safety and health.

(c) Safeguarding Restricted Data and Other Classified Information. Performance failures occur if the contractor does not comply with the terms and conditions of this contract relating to the safeguarding of 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 law, regulation, or DOE directive, to have resulted in, or that can reasonably be expected to result in, exceptionally grave damage to the national security. The following are examples of performance failures or performance failures of similar import that 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 Top Secret Restricted Data or other information classified as Top Secret, any classification level of information in a Special Access Program (SAP), information identified as sensitive compartmented information (SCI), or high risk nuclear weapons-related data.

(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 Top Secret Restricted Data, or other information classified as Top Secret, any classification level of information in a SAP, information identified as SCI, or high risk nuclear weapons-related data.

(iii) Failure to promptly report the loss, compromise, or unauthorized disclosure of Top Secret Restricted Data or other information classified as Top Secret, any classification level of information in a SAP, information identified as SCI, or high risk nuclear weapons-related data.

(iv) Failure to timely implement corrective actions stemming from the loss, compromise, or unauthorized disclosure of Top Secret Restricted Data or other classified information classified as Top Secret, any classification level of information in a SAP, information identified as SCI, or high risk nuclear weapons-related data.

(2) *Second Degree:* Performance failures that have been determined, in accordance with applicable law, regulation, or DOE directive, to have actually resulted in, or that can reasonably be expected to result in, serious damage to the national security. The following are examples of performance failures or performance failures of similar import that 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 Secret Restricted Data or other information 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 Secret Restricted Data, or other information classified as Secret.

(iii) Failure to promptly report the loss, compromise, or unauthorized disclosure of Restricted Data or other classified information regardless of classification (except for information covered by paragraph (c)(1)(iii) of this clause).

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

(3) *Third Degree:* Performance failures that have been determined, in accordance with applicable law, regulation, or DOE 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 are examples of 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 information 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 timely 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.

(d) Protection of Worker Safety and Health. Performance failures occur if the contractor does not comply with the contract's WS&H terms and conditions, which may be included in the DOE approved contractor Integrated Safety Management System (ISMS). The degrees of performance failure under which reductions of fee or profit will be determined are:

(1) First Degree: Performance failures that are most adverse to WS&H or could threaten the successful completion of a program or project. For contracts including ISMS requirements, failure to develop and obtain required DOE approval of WS&H aspects of an ISMS is considered first degree. The Government will perform necessary review of the ISMS in a timely manner and will not unreasonably withhold approval of the WS&H aspects of the contractor's ISMS. The following performance failures or performance failures of similar import will be deemed first degree:

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

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

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

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

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

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

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

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

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

(iii) Non-compliances that either have, or may have, significant negative impacts to workers that indicate a significant WS&H system breakdown.

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

(End of Clause)

■ 8. Section 952.223–77 is added to read as follows:

952.223–77 Conditional Payment of Fee or Profit—Protection of Worker Safety and Health.

As prescribed at 48 CFR (DEAR) 923.7002(g), insert the following clause.

Conditional Payment of Fee or Profit—Protection of Worker Safety and Health (JAN 2004)

(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 protection of worker safety and health (WS&H), 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 protection of worker safety and health, the contracting officer may unilaterally reduce the amount of fee or profit that 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 worker safety and health pursuant to the degrees specified in paragraph (c) of this clause.

(b) Reduction Amount. (1) If in any period (*see* 48 CFR 952.223–77 (b)(2)) it is found that the contractor has failed to comply with contract terms and conditions relating to the protection of worker safety and health, the contractor's fee or profit of the period may be reduced. Such reduction shall not be less than 26% nor greater than 100% of the total fee or profit earned for a first degree performance failure, not less than 11% nor greater than 25% for a second degree performance failure, and up to 10% for a third degree performance failure. The contracting officer must consider mitigating factors that may warrant a reduction below the specified range (*see* 48 CFR 923.7001(b)). The mitigating factors include, but are not limited to, the following:

(i) Degree of control the contractor had over the event or incident.

(ii) Efforts the contractor had made to anticipate and mitigate the possibility of the event in advance.

(iii) Contractor self-identification and response to the event to mitigate impacts and recurrence.

(iv) General status (trend and absolute performance) of protecting WS&H and compliance in related areas.

(v) Contractor demonstration to the Contracting Officer's satisfaction that the principles of industrial WS&H standards are routinely practiced (*e.g.*, Voluntary Protection Program Star Status).

(vi) Event caused by ''Good Samaritan'' act by the contractor (*e.g.*, offsite emergency response).

(vii) Contractor demonstration that a performance measurement system is routinely used to improve and maintain WS&H performance (including effective resource allocation) and to support DOE corporate decision-making (*e.g.*, policy, WS&H programs).

(viii) Contractor demonstration that an Operating Experience and Feedback Program is functioning that demonstrably affects continuous improvement in WS&H by use of lessons-learned and best practices inter- and intra-DOE sites.

(2)(i) Except in the case of performance based firm-fixed-price contracts (*see* paragraph (b)(3) below), the contracting officer, for purposes of this clause, will at the time of contract award, or as soon as practicable thereafter, 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) Under this clause, the total amount of fee or profit that is subject to reduction in a period in which a performance failure occurs, 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.

(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 protection of worker safety and health.

(c) Protection of Worker Safety and Health. Performance failures occur if the contractor does not comply with the contract's WS&H terms and conditions, which may be included in the DOE approved contractor Integrated Safety Management System (ISMS). The degrees of performance failure under which reductions of fee or profit will be determined are:

(1) First Degree: Performance failures that are most adverse to WS&H or could threaten the successful completion of a program or project. For contracts including ISMS requirements, failure to develop and obtain required DOE approval of WS&H aspects of an ISMS is considered first degree. The Government will perform necessary review of the ISMS in a timely manner and will not unreasonably withhold approval of the WS&H aspects of the contractor's ISMS. The following performance failures or performance failures of similar import will be deemed first degree:

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

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

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

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

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

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

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

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

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

(iii) Non-compliances that either have, or may have, significant negative impacts to workers that indicate a significant WS&H system breakdown.

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

(End of Clause)

PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS

■ 9. The authority citation for Part 970 is revised to read as follows:

Authority: 42 U.S.C. 2201, 2282a, 2282b, 2282c; 42 U.S.C. 7101 *et seq.*; 41 U.S.C. 418b; 50 U.S.C. 2401 *et seq.*

■ 10. Section 970.0404–2 is amended by adding paragraph (c) to read as follows:

970.0404–2 General.

* * * * *

(c) 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 234B of the Atomic Energy Act (*see* 48 CFR 904.402(c)(1)) for the use of a contract clause that 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.

■ 11. 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 contractors designated by the Procurement Executive, or designee, are subject to performance requirements relating to: environment, safety, and health (ES&H), including worker safety and health (WS&H); and safeguarding of Restricted Data and other classified information. Performance requirements relating to ES&H will be set forth in the contract's ES&H terms and conditions, including a DOE approved Integrated Safety Management System (ISMS), or similar document. As applicable, performance 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,'' as well as in other terms and conditions that prescribe requirements for the safeguarding of Restricted Data and other classified information.

(2) If the contractor does not meet the performance requirements of the contract relating to ES&H or 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 contracting officer in accordance with 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 the contractor's performance failure relating to ES&H requirements and, if applicable, relating to the safeguarding of Restricted Data and other classified information. When reviewing performance failures that would otherwise warrant a potential reduction of earned fee, fixed fee, profit, or share of cost savings, the contracting officer must consider mitigating factors that may warrant a reduction below the applicable range specified in the clause. Some of the mitigating factors that must be considered are included in the clause.

(4) The contracting officer must obtain the concurrence of the cognizant Program 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]

■ 12. Section 970.1504–1–3 is amended in paragraph (c)(1) in the last sentence by removing ''Conditional Payment of Fee, Profit, or Incentives'' and adding in its place ''Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts.''

■ 13. Section 970.1504–5 is amended by revising the heading and revising paragraph (c) to read as follows:

970.1504–5 Solicitation provision and contract clauses.

* * * * *

(c)(1) The contracting officer shall insert the clause at 48 CFR 970.5215–3,

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 that 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 that are awarded on a cost-plus-award-fee basis. The contracting officer should consider including the clause with its Alternate II in contracts that are awarded on a multiple fee basis if the cost-plus-award-fee portion of the contract is significant.

* * * * *

■ 14. Section 970.2303–1 is amended by adding paragraph (c) to read as follows:

970.2303–1 General.

* * * * *

(c)(1) 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 234C of the Atomic Energy Act for the use of a contract clause that 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 Departmental regulation relating to the enforcement of worker safety and health concerns. 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 worker safety and health violations under the Department's regulations.

(2)(i) Section 234C of the Atomic Energy Act states that DOE shall either pursue civil penalties (implemented at 10 CFR part 851) for a violation under section 234C of the Atomic Energy Act (42 U.S.C. 2282c) or a contract fee reduction, but not both.

(ii) The contracting officer must coordinate with the Office of Price Anderson Enforcement within the Office of the Assistant Secretary for Environment, Safety and Health (or with any designated successor office) before pursuing contract fee reduction in the event of a violation by the contractor or any contractor employee of any Departmental regulation relating to the enforcement of worker safety and health concerns.

970.5215–1 [Amended]

■ 15. Section 970.5215–1 is amended in paragraph (c)(3) in the last sentence by removing ''Conditional Payment of Fee, Profit, or Incentives'' and adding in its place ''Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts.''

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

As prescribed in 48 CFR 970.1504–5(c)(1), insert the following clause:

970.5215–3 Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts (JAN 2004)

(a) General. (1) The payment of earned fee, fixed fee, profit, or share of cost savings under this contract is dependent upon:

(i) The contractor's or contractor employees' compliance with the terms and conditions of this contract relating to environment, safety and health (ES&H), which includes worker safety and health (WS&H), including performance under an approved Integrated Safety Management System (ISMS); and

(ii) The contractor's or contractor employees' compliance with the terms and conditions of this contract relating to the safeguarding of Restricted Data and other classified information.

(2) The ES&H performance requirements of this contract are set forth in its ES&H terms and conditions, including the DOE approved contractor ISMS or similar document. Financial incentives for timely mission accomplishment or cost effectiveness shall never compromise or impede full and effective implementation of the ISMS and full ES&H compliance.

(3) The performance requirements of this contract relating to the safeguarding of Restricted Data and other classified information are set forth in the clauses of this contract entitled, ''Security'' and ''Laws, Regulations, and DOE Directives,'' as well as in other terms and conditions.

(4) If the contractor does not meet the 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 contracting officer.

(b) Reduction Amount. (1) The amount of earned fee, fixed fee, profit, or share of cost savings that may be unilaterally reduced will be determined by the severity of the performance failure pursuant to the degrees specified in paragraphs (c) and (d) of this clause.

(2) If a reduction of earned fee, fixed fee, profit, or share of cost savings is warranted, unless mitigating factors apply, such reduction shall not be less than 26 percent nor greater than 100 percent 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 11 percent nor greater than 25 percent for a second degree performance failure, and up to 10 percent for a third degree performance failure.

(3) In determining the amount of the reduction and the applicability of mitigating factors, the contracting officer must consider the contractor's overall performance in meeting the ES&H or security requirements of the contract. Such consideration must include performance against any site specific performance criteria/requirements that provide additional definition, guidance for the amount of reduction, or guidance for the applicability of mitigating factors. In all cases, the contracting officer must consider mitigating factors that may warrant a reduction below the applicable range (*see* 48 CFR 970.1504–1–2). The mitigating factors include, but are not limited to, the following ((v), (vi), (vii) and (viii) apply to ES&H only).

(i) Degree of control the contractor had over the event or incident.

(ii) Efforts the contractor had made to anticipate and mitigate the possibility of the event in advance.

(iii) Contractor self-identification and response to the event to mitigate impacts and recurrence.

(iv) General status (trend and absolute performance) of: ES&H and compliance in related areas; or of safeguarding Restricted Data and other classified information and compliance in related areas.

(v) Contractor demonstration to the contracting officer's satisfaction that the principles of industrial ES&H standards are routinely practiced (*e.g.*, Voluntary Protection Program, ISO 14000).

(vi) Event caused by ''Good Samaritan'' act by the contractor (*e.g.*, offsite emergency response).

(vii) Contractor demonstration that a performance measurement system is routinely used to improve and maintain ES&H performance (including effective resource allocation) and to support DOE corporate decision-making (*e.g.*, policy, ES&H programs). * * *

(viii) Contractor demonstration that an Operating Experience and Feedback Program is functioning that demonstrably affects continuous improvement in ES&H by use of lessons-learned and best practices inter- and intra-DOE sites.

(4)(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 for the evaluation period shall mean the amount determined by the contracting officer or fee determination official as otherwise

payable based on the contractor's performance during the evaluation period. Where the contract provides for financial incentives that extend beyond a single evaluation period, this amount shall also include: any provisional amounts determined otherwise payable in the evaluation period; and, 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 was earned.

(iv) The Government will effect the reduction as soon as practicable after the end of the evaluation period in which the performance failure occurs. If the Government is not aware of the failure, it will effect the reduction as soon as practical after becoming aware. For any portion of the reduction requiring an allocation the Government will effect 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 the sum of the payments the contractor has received exceeds 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). Performance failures occur if the contractor does not comply with the contract's ES&H terms and conditions, including the DOE approved contractor ISMS. The degrees of performance failure under which reductions of earned or fixed fee, profit, or share of cost savings will be determined are:

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

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

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

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

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

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

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

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

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

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

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

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

(d) Safeguarding Restricted Data and Other Classified Information. Performance failures occur if the contractor does not comply with the terms and conditions of this contract relating to the safeguarding of Restricted Data and other classified information. The degrees of performance failure 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 law, 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 are examples of performance failures or performance failures of similar import that 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 Top Secret Restricted Data or other information classified as Top Secret, any classification level of information in a Special Access Program (SAP), information identified as sensitive compartmented information (SCI), or high risk nuclear weapons-related data.

(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 Top Secret Restricted Data, or other information classified as Top Secret, any classification level of information in a SAP, information identified as SCI, or high risk nuclear weapons-related data.

(iii) Failure to promptly report the loss, compromise, or unauthorized disclosure of Top Secret Restricted Data, or other information classified as Top Secret, any classification level of information in a SAP, information identified as SCI, or high risk nuclear weapons-related data.

(iv) Failure to timely implement corrective actions stemming from the loss, compromise, or unauthorized disclosure of Top Secret Restricted Data or other information classified as Top Secret, any classification level of information in a SAP, information identified as SCI, or high risk nuclear weapons-related data.

(2) Second Degree: Performance failures that have been determined, in accordance with applicable law, 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 are examples of performance failures or performance failures of similar import that 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 Secret Restricted Data or other information 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 Secret Restricted Data, or other information classified as Secret.

(iii) Failure to promptly report the loss, compromise, or unauthorized disclosure of Restricted Data or other classified information regardless of classification (except for information covered by paragraph (d)(1)(iii) of this clause).

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

(3) Third Degree: Performance failures that have been determined, in accordance with applicable law, regulation, or DOE 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 are examples of performance failures or performance failures of similar import that 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 information 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 timely 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 (JAN 2004). As prescribed in 48 CFR 970.1504–5(c)(2), replace paragraphs (a), (b)(1), (b)(2), and (b)(3) of the basic clause with the following paragraphs (a), (b)(1), (b)(2), and (b)(3) 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 or contractor employees' compliance with the terms and conditions of this contract relating to environment, safety and health (ES&H), which includes worker safety and health (WS&H), including performance under an approved Integrated Safety Management System (ISMS).

(2) The ES&H performance requirements of this contract are set forth in its ES&H terms and conditions, including the DOE approved contractor ISMS or similar document. Financial incentives for timely mission accomplishment or cost effectiveness shall never compromise or impede full and effective implementation of the ISMS and full ES&H compliance.

(3) If the contractor does not meet the performance requirements of this contract relating to ES&H 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 contracting officer.

(b) Reduction Amount. (1) The amount of earned fee, fixed fee, profit, or share of cost savings that may be unilaterally reduced will be determined by the severity of the performance failure pursuant to the degrees specified in paragraph (c) of this clause.

(2) If a reduction of earned fee, fixed fee, profit, or share of cost savings is warranted, unless mitigating factors apply, such reduction shall not be less than 26 percent nor greater than 100 percent 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 11 percent nor greater than 25 percent for a second degree performance failure, and up to 10 percent for a third degree performance failure.

(3) In determining the amount of the reduction and the applicability of mitigating factors, the contracting officer must consider the contractor's overall performance in meeting the ES&H requirements of the contract. Such consideration must include performance against any site specific performance criteria/requirements that provide additional definition, guidance for the amount of reduction, or guidance for the applicability of mitigating factors. In all cases, the contracting officer must consider mitigating factors that may warrant a reduction below the applicable range (*see* 48 CFR 970.1504–1–2). The mitigating factors include the following.

(i) Degree of control the contractor had over the event or incident.

(ii) Efforts the contractor had made to anticipate and mitigate the possibility of the event in advance.

(iii) Contractor self-identification and response to the event to mitigate impacts and recurrence.

(iv) General status (trend and absolute performance) of ES&H and compliance in related areas.

(v) Contractor demonstration to the Contracting Officer's satisfaction that the principles of industrial ES&H standards are routinely practiced (*e.g.,* Voluntary Protection Program Star Status, or ISO 14000 Certification).

(vi) Event caused by ''Good Samaritan'' act by the contractor (*e.g.,* offsite emergency response).

(vii) Contractor demonstration that a performance measurement system is routinely used to improve and maintain ES&H performance (including effective resource allocation) and to support DOE corporate decision-making (*e.g.,* policy, ES&H programs).

(viii) Contractor demonstration that an Operating Experience and Feedback Program is functioning that demonstrably affects continuous improvement in ES&H by use of lessons-learned and best practices inter- and intra-DOE sites.

Alternate II (JAN 2004). As prescribed in 48 CFR 970.1504–5(c)(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 minimum 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 percent of the total available fee amount. Such 25 percent 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 percent of the total available fee amount. Such 25 percent shall include base fee, if any.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[I.D. 120103F]

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Closure of the Fall Commercial Red Snapper Component

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

ACTION: Notice of closure.