

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:

- I. Introduction
- II. Background
- III. Scope of Further Opportunity for Public Comment
- IV. Discussion of Public Comments
- V. Procedural Requirements
 - A. Review of Executive Order 12866
 - B. Review Under the Regulatory Flexibility Act
 - C. Review Under the Paperwork Reduction Act
 - D. Review Under the National Environmental Policy Act
 - E. Review Under Executive Order 13132
 - F. Review Under Executive Order 12988
 - G. Review Under Unfunded Mandates Reform Act of 1995
 - H. Review Under the Treasury and General Government Appropriations Act, 1999
 - I. Review Under the Treasury and Government Appropriations Act, 2001
 - J. Review Under Executive Order 13211
 - K. Review Under the Small Business Regulatory Enforcement Fairness Act

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 (NPR) (66 FR 8560) to amend portions of the DOE Acquisition Regulation (DEAR) (48 CFR chapter 9) that apply to these prime contractors. The NPR 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 NPR, 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 NPR, 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