

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