

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.3d 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: