

(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.

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(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.

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(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.

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