

CACs were not adequately accounted for after contract performance.

The Councils are proposing to amend the FAR by inserting new paragraphs (d)(1) and (2) under section 4.1301, Policy. Paragraph (d)(1) will provide policy on recovering PIVs. The text in paragraph (d)(1) states that agency procedures shall ensure that Government contractors account for all forms of Government-provided identification issued to Government contractors under a contract, and return such identification to the issuing agency at the earliest of any of the following, unless otherwise determined by the agency: when no longer needed for contract performance; upon completion of a contractor employee's employment; upon contract completion or termination. The text in paragraph (d)(2) states that the contracting officer may delay final payment under a contract if the contractor fails to comply with these requirements.

The Councils are also proposing to modify FAR clause 52.204-9, Personal Identity Verification of Contractor Personnel to be consistent with Part 4.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Councils do not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the requirements of the actions required and the clause are not significantly burdensome. Currently, it is a common business practice to have procedures in place to revoke/return access cards when no longer in use by the contractor. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. We invite comments from small businesses and other interested parties. The Councils will consider comments from small entities concerning the affected FAR Parts 4 and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 2009-027), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose information collection requirements that require the approval of the Office of Management

and Budget under 44 U.S.C. Chapter 35, *et seq.*

List of Subjects in 48 CFR Parts 4 and 52

Government procurement.

Dated: May 17, 2010.

Edward Loeb,

Acting Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 4 and 52 as set forth below:

1. The authority citation for 48 CFR parts 4 and 52 continues to read as follows:

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 4—ADMINISTRATIVE MATTERS

2. Amend section 4.1301 by adding paragraphs (d)(1) and (d)(2) to read as follows:

4.1301 Policy.

* * * * *

(d)(1) Agency procedures shall ensure that Government contractors account for all forms of Government-provided identification issued to Government contractors under a contract, *i.e.*, the Personal Identity Verification (PIV) cards or other similar badges, and shall ensure that contractors return such identification to the issuing agency as soon as any of the following occurs, unless otherwise determined by the agency:

- (i) When no longer needed for contract performance.
- (ii) Upon completion of a contractor employee's employment.
- (iii) Upon contract completion or termination.

(2) The contracting officer may delay final payment under a contract if the contractor fails to comply with these requirements.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. Amend section 52.204-9 by:

- a. Revising the date of the clause;
- b. Redesignating paragraph (b) as paragraph (d), and adding new paragraphs (b) and (c); and revising the newly designated paragraph (d).

The added and revised text reads as follows:

52.204-9 Personal Identity Verification of Contractor Personnel.

* * * * *

PERSONAL IDENTITY VERIFICATION OF CONTRACTOR PERSONNEL (DATE)

(b) The Contractor shall account for all forms of Government-provided

identification issued to the Contractor under this contract. The contractor shall return such identification to the issuing agency at the earliest of any of the following, unless otherwise determined by the Government:

- (1) When no longer needed for contract performance.
- (2) Upon completion of the Contractor employee's employment.
- (3) Upon contract completion or termination.

(c) The contracting officer may delay final payment under a contract if the contractor fails to comply with these requirements.

(d) The Contractor shall insert the substance of this clause, including this paragraph (d), in all subcontracts when the subcontractor is required to have routine physical access to a Federally-controlled facility and/or routine access to a Federally-controlled information system.

(End of clause)

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DEPARTMENT OF ENERGY

48 CFR Parts 904, 952 and 970

RIN 1991-AB85

Acquisition Regulation: Access to and Ownership of Records

AGENCY: Department of Energy.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Energy (DOE) is proposing to amend the Department of Energy Acquisition Regulation (DEAR) to revise the applicability and the policies and procedures involving the access to and ownership of records. Much work at DOE facilities is performed by contractor and subcontractor personnel and involves hazardous materials or the possibility of exposure to radioactive materials. It is necessary for the contractors and subcontractors to maintain extensive records for the Government involving these workers and processes, in particular, personnel; facility; occupational safety and health; environment; and medical records. DOE is proposing to amend these clauses for consistent inclusion in all applicable contracts, not just management and operating (M&O) contracts, based on the type of work being performed, to ensure preservation and Government ownership of records. Additionally, the proposed revisions address

inconsistencies relating to DOE contractor and subcontractor efforts in managing records in accordance with DOE retention requirements. The proposed revisions are being made to establish consistent records maintenance, retention, and disposal; and to ensure certain records generated on groups of individuals in the performance of the contract are maintained as DOE Privacy Act Systems of Records.

DATES: Written comments on the proposed rulemaking must be received on or before close of business June 23, 2010.

ADDRESSES: This proposed rule is available and comments may be submitted to the *Federal Electronic Rulemaking Portal* at <http://www.regulations.gov>. Comments may also be submitted electronically to Richard.Langston@hq.doe.gov. Comments may be mailed to: Richard Langston, Procurement Policy Analyst; MA-61; U. S. Department of Energy; 1000 Independence Avenue, SW.; Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: Richard Langston at 202-287-1339 or Richard.Langston@hq.doe.gov.

SUPPLEMENTARY INFORMATION:

- I. Background
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 - J. Review Under the Treasury and General Government Appropriations Act, 2001
 - K. Approval by the Office of the Secretary of Energy

I. Background

The Access to and Ownership of Records clause, at 48 CFR 970.5204-3, raises a number of concerns, including the lack of inclusion of the clause in non-M&O contracts; records systems identified as contractor-owned may not be operated and records may not be maintained appropriately as Privacy Act Systems of Records and for the required retention period; and the need for the Government to maintain personnel; facility; occupational safety and health; environment; and medical records on contractors and subcontractors long-

term based on NARA-approved DOE Records Disposition Schedules and to support the Energy Employees Occupational Illness Compensation Program Act (EEOICPA), the DOE Former Worker Medical Screening Program (FWP) and other records requests.

In light of the fact that most of the DOE sites have been in existence for as many as 60 years, there are inherent variations in quality, complexity, and completeness of recordkeeping practices. While DOE cannot recreate records that no longer exist, it is vital that DOE preserve ownership of, and access to, records in accordance with laws and regulations. In particular preservation of records that are vital to the safety, health and well being of past, present and future workers and the surrounding communities.

The proposed revisions address inclusion of the clause in all applicable contracts, not just M&O contracts, based on the type of work being performed, provides clarity to the DOE contractor and subcontractor on their records management responsibilities, in particular the maintenance, retention, disposition, and Government ownership of records [see 44 U.S.C. chapters 21, 29, 31, 33, and 35, and 36 CFR chapter 12, subchapter B], including operating and maintaining records as DOE Privacy Act Systems of Records [FAR 52-224-2]; ensures preservation and ownership of personnel, facility; occupational safety and health, environment, medical records [see 10 CFR part 850, 10 CFR part 851, 29 CFR part 1904, and 29 CFR part 1910] and facility records required for decision-making and in support of the administration of the EEOICPA allows for DOE to identify and contact individuals in the future for participation in the FWP; and to meet other future records requests.

These revisions will also serve to stress the importance of complete and accurate documentation and proper recordkeeping to adequately document Government funded activities, preserve institutional memory, protect the legal and financial rights of the Government, and preserve worker and facility records to ensure records are available to the Government when needed.

II. Section-by-Section Analysis

The Department proposes to amend the DEAR as follows.

1. Subpart 904.7—The clause applicability specification for Contractor Records Retention at 904.702 has been revised to update the name of the Integration of Environment, Safety and Health into Work Planning and Execution clause, delete the reference to

the obsolete Nuclear Safety clause, add a requirement to include the Access to and Ownership of Records clause, and specifically reference the “DOE Records Disposition Schedules” in applicable DOE Directives. These changes are being made to ensure that all contracts that generate records include the requirements of the Access to and Ownership of Records clause to ensure Government ownership and access to these records and to establish consistent records management practices in the retention of records.

2. Section 952.223-75—DOE added language to the preservation of individual occupational radiation exposure records that requires such records be operated and maintained by contractors as a DOE Privacy Act Systems of Records (*i.e.*, as DOE-35 Personnel Radiation Exposure Records) and emphasizes the requirement to maintain these records in accordance with the NARA-approved DOE Records Disposition Schedules.

3. Section 970.0407-1-3—The prescription of the Access to and Ownership of Records clause has been expanded to require inclusion in more than just M&O contracts, but must also be included in contracts that contain the Integration of Environment, Safety, and Health into Work Planning and Execution clause at 48 CFR 952.223-71, and the Radiation Protection and Nuclear Criticality clause at 48 CFR 952.223-72. This change is made to ensure that the Access to and Ownership of Records clause is included consistently in all applicable contracts based on the type of work being performed (*e.g.*, work that exposes personnel to hazardous material, radiation or long-term health issues), not just M&O contracts. In addition, the FAR Privacy Act clause at 48 CFR 52.224-2 must also be included in all contracts that include the Access to and Ownership of Records clause as records systems are to be operated, and records generated on groups of individuals in the performance of the contract are to be maintained by the contractor as a DOE Privacy Act Systems of Records.

4. Section 970.5204-3(a)—Language was added to require contractors to operate and maintain certain records classified as Government-owned records as DOE Privacy Act Systems of Records as determined by the Contracting Officer. The Contracting Officer will tailor the list of Government-owned records to be operated and maintained by the contractor as Privacy Act Systems of Records using DOE’s most recent compilation of the Privacy Act Systems of Records (*see* 74 FR 994, January 9, 2009).

5. *Section 970.5204-3(b)(1)*—The words “non-contract related” were added before the words “medical/health-related records” to make it clear that those personnel medical records that are not collected by the contractor in the direct performance of its contract (*i.e.*, corporate wellness programs) could be considered separate and distinct from contract-related personnel medical records.

6. *Section 970.5204-3(b)(2)*—The words “internal corporate governance records” was added to the list of confidential contractor financial information to make it clear that these types of records should be considered to be confidential contractor records.

7. *Section 970.5204-3(c)*—Language was added to clarify the disposition of both Government-owned and contractor-owned records at contract completion or termination. An option was added to allow contractors to deliver “original” records to the Government in lieu of copying these records with assurance that the contractor will have rights to access and copy the records as needed.

8. *Section 970.5204-3(e)*—The applicability of the Access to and Ownership of Records clause was modified to make it clear that the records maintained by the contractor, whether they be Government-owned or contractor-owned, include all records in the possession of the contractor regardless of the date of origin and include those records acquired from a predecessor contractor. Therefore, this paragraph has been updated to not specify just particular paragraphs but the entire clause.

9. *Section 970.5204-3(f)*—The title of this paragraph has been modified to read “Records maintenance and retention” and expanded to more specify the contractors records management responsibilities for the creation, maintenance, and disposition of records in accordance with applicable federal laws, regulations and DOE Directives. The proposed revision provides clear direction to the contractor and subcontractor on their records management responsibilities, in particular maintenance, disposition and ownership of records. The language was also revised to clearly link retention of records to the DOE Records Disposition Schedules and DOE removed language that singles out individual radiation exposure records as such records will be operated and maintained by the contractor as Government-owned DOE Privacy Act Systems of Records.

10. *Section 970.5204-3(g)*—This paragraph is revised to eliminate the \$2 Million threshold for flow down of the

Access to and Ownership of Records clause as its applicability is more appropriately determined by the nature of the work not the cost of the contract (*i.e.*, subcontracts in which contract performance exposes personnel to hazardous material, radiation, or long-term health issues). Therefore, this paragraph has been modified and expanded to require inclusion in subcontracts that contain the Integration of Environment, Safety and Health into work Planning and Execution clause at 952.223-71 or the Radiation Protection and Nuclear Criticality clause at 952.223-72, consistent with the prescription for prime contracts in DEAR 970.0407-1-3, and the contractor records retention applicability in DEAR 904.702. This paragraph has also been modified to include flow down of the Privacy Act clause into subcontracts.

III. Procedural Requirements

A. Review Under Executive Order 12866

This 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 rule is not subject to review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget.

B. 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 executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. With regard to the review required by Section 3(a), 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 that 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, these proposed regulations meet the relevant standards of Executive Order 12988.

C. Review Under the Regulatory Flexibility Act

This proposed rule has been reviewed under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, which requires preparation of an initial regulatory flexibility analysis for any rule that must be proposed for public comment and is likely to have a significant economic impact on a substantial number of small entities. The proposed rule would not have a significant economic impact on small entities because it imposes no significant burdens.

Accordingly, DOE certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities, and, therefore, no regulatory flexibility analysis has been prepared.

D. Review Under Paperwork Reduction Act

This rulemaking contains no new information collection or recordkeeping requirements. Existing information collections imposed by the Department of Energy Acquisition Regulation are covered by OMB Control Number 1910-4100.

E. Review Under the National Environmental Policy Act

DOE has concluded that promulgation of this proposed rule falls into a class of actions which would not individually or cumulatively have significant impact on the human environment, as determined by DOE's regulations (10 CFR part 1021, subpart D) implementing the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*). Specifically, this proposed rule is categorically excluded from NEPA review because the amendments to the DEAR would be strictly procedural (categorical exclusion A6). Therefore, this proposed rule does not require an environmental impact statement or environmental assessment pursuant to NEPA.

F. Review Under Executive Order 13132

Executive Order 13132 (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. DOE has examined today's proposed 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.

G. Review Under the Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) requires a federal agency to perform a detailed assessment of costs and benefits of any rule imposing a federal mandate with costs to state, local or tribal governments, or to the private sector, of \$100 million or more in any single year. This rulemaking 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 or policy that may affect family well-being. This rule will have no impact on family well being.

I. 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 OIRA, OMB, a Statement of Energy Effects for any significant energy action. A "significant energy action" is defined as any action by an agency that promulgates 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 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.

This proposed rule is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

J. 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 implementing 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.

K. Approval by the Office of the Secretary of Energy

The Office of the Secretary of Energy has approved issuance of this proposed rule.

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

Government procurement.

Issued in Washington, DC, on May 18, 2010.

Patrick M. Ferraro,

Acting Director, Office of Procurement and Assistance Management, Office of Management, Department of Energy.

Joseph F. Waddell,

Acting Director, Office of Acquisition and Supply Management, National Nuclear Security Administration.

For the reasons set out in the preamble, DOE proposes to amend chapter 9 of Title 48 of the Code of Federal Regulations as set forth below:

PART 904—ADMINISTRATIVE MATTERS

1. The authority citations for parts 904 and 952 continue to read as follows:

Authority: 42 U.S.C. 7101, *et seq.* and 50 U.S.C. 2401, *et seq.*

2. Revise section 904.702, to read as follows:

904.702 Applicability.

(b) Contracts containing the Integration of Environment, Safety and Health into Work Planning and Execution clause at 952.223-71, or the Radiation Protection and Nuclear Criticality clause at 952.223-72 must also include the Preservation of

Individual Occupational Radiation Exposure Records clause at 952.223-75, and the Access to and Ownership of Records clause at 970.5204-3, which will necessitate retention of records in accordance with DOE Records Disposition Schedules contained in applicable DOE Directives, rather than those found at FAR Subpart 4.7.

PART 952—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. In section 952.223-75, the clause paragraph is revised to read as follows:

952.223-75 Preservation of individual occupational radiation exposure records.

* * * * *

Individual occupational radiation exposure records generated in the performance of work under this contract shall be maintained by the contractor and related contractor record systems shall be operated as DOE Privacy Act Systems of Records, in accordance with the NARA-approved DOE Records Disposition Schedules contained in applicable DOE Directives.

PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS

4. The authority citation for part 970 continues to read as follows:

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

5. Revise section 970.0407-1-3 to read as follows:

970.0407-1-3 Contract clause.

The contracting officer shall insert the clauses at 48 CFR 970.5204-3, Access to and Ownership of Records and 48 CFR 52.224-2, Privacy Act, including the listing of pertinent Privacy Act Systems of Records, in management and operating contracts and all contracts that contain the Integration of Environment, Safety, and Health into Work Planning and Execution clause at 48 CFR 952.223-71 or the Radiation Protection and Nuclear Criticality clause at 48 CFR 952.223-72.

6. Amend 970.5204-3 by:

- a. Revising the clause date;
- b. Revising paragraph (a);
- c. Adding in paragraph (b)(1), the words "non contract related" before the words "medical/health-related records" and removing the words "described by the contract as being maintained in" and adding in its place, the words "operated and maintained by the contractor in a DOE" in the last sentence;
- d. Adding in paragraph (b)(2) the words "internal corporate governance records," after the word "information" in the first sentence;
- e. Revising paragraphs (c), (e), (f) and (g).

The revisions read as follows:

970.5204-3 Access to and ownership of records.

* * * * *

Access to and Ownership of Records (XXX 20XX)

(a) *Government-owned records.* Except as provided in paragraph (b) of this clause, all records acquired or generated by the contractor in its performance of this contract, shall be the property of the Government. The contractor, where applicable, shall maintain DOE Privacy Act Systems of Records in accordance with requirements of FAR 52.224-2 "Privacy Act."

The contractor shall operate and maintain the following DOE Privacy Act Systems of Records: [The Contracting Officer shall insert the list of Government-owned records to be operated and maintained by the contractor as a DOE Privacy Act Systems of Records using DOE's most recent compilation of its Privacy Act Systems of Records.]

* * * * *

(c) *Contract completion or termination.* Upon contract completion or termination, the contractor shall ensure final disposition of all

Government-owned records to a Federal Record Center, the National Archives and Records Administration, to a successor contractor, its designee, or other destinations, as directed by the Contracting Officer. Upon the request of the Government, the contractor shall provide either the original contractor-owned records or copies of the records identified in paragraph (b) of this clause, to DOE or its designees, including successor contractors. Upon delivery, title to such records shall vest in DOE or its designees, and such records shall be protected in accordance with applicable federal laws (including the Privacy Act) as appropriate. If the contractor chooses to provide its original contractor-owned records to the Government or its designee, the contractor shall retain future access rights to copy such records.

* * * * *

(e) *Applicability.* This clause applies to all records maintained by the contractor without regard to the date or origination of such records including all records acquired from a predecessor contractor.

(f) *Records maintenance and retention.* Contractor shall create, maintain, safeguard, and disposition records in accordance with 36 CFR, Chapter 12, Subchapter B and the

National Archives and Records Administration (NARA)-approved records disposition schedules (DOE Records Disposition Schedules), contained in applicable DOE Directives. Records retention standards are applicable for all classes of records described therein, whether or not the records are owned by the Government or the contractor. The Government may waive application of these records disposition schedules, if, upon termination or completion of the contract, the Government exercises its right under paragraph (c) of this clause to obtain copies and delivery of records described in paragraphs (a) and (b) of this clause.

(g) *Subcontracts.* The contractor shall include the requirements of this clause and the Privacy Act clause of FAR 52.224-2 (pursuant to FAR 24.104) in all subcontracts that contain the Integration of Environment, Safety and Health into Work Planning and Execution clause at 952.223-71 or, the Radiation Protection and Nuclear Criticality clause at 952.223-72.

(End of Clause)

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