

**Department of Energy
Assistance Regulation**

No. AL-2007-04
Date 02/28/07



ACQUISITION LETTER

This Acquisition Letter is issued under the authority of the Procurement Executives of DOE and NNSA

Subject: DOE Contractor Worker Safety and Health — 10 CFR 851

References:

10 CFR 851 [71 FR 6858 (February 29, 2006) The rule and other information is available at <http://www.hss.energy.gov/healthsafety/WSHP/rule851/851final.html>]
48 CFR 923.7002
48 CFR 952.223-76
48 CFR 952.223-77
48 CFR 970.5215-3

When is this Acquisition Letter (AL) Effective?

This AL is effective immediately upon issuance.

When does this AL Expire?

The AL remains in effect until it is canceled.

Who are the Points of Contact?

Richard Langston, Office of Procurement and Assistance Policy, MA-61, (202) 287-1339 or Richard.Langston@hq.doe.gov or for NNSA, Mr. Stephen Law, Office of Acquisition and Supply Management Office, NA-63, (202) 586-4321 or Stephen.Law@mnsa.doe.gov .

What is the Purpose of this AL?

The purpose of this AL is to provide guidance on 10 CFR 851, DOE Worker Safety and Health Program for contractors other than management and operating contractors performing work at a DOE controlled facility, such as in a federal office building. Additional guidance concerning Part 851 may be issued in the future.

What is the Background?

The 2002 Bob Stump National Defense Authorization Act amended the Atomic Energy Act by adding section 234C "Worker Health and Safety Rules for Department of Energy Nuclear Facilities." 42 USC 2282c. The statute covers contracts with Price Anderson indemnification (42 USC 2210(d)) and requires that contract fee penalty provisions be added to contracts. The statute also subjects indemnified contractors to civil penalties for worker safety and health violations and requires implementing regulations establishing worker safety and health standards and an administrative process for the imposition of civil penalties.

Subparagraph (d)(1) of 42 USC 2282c limits DOE to either civil penalties or fee reductions, but not both. For this reason, DEAR 923.7002 requires coordination between the contracting officer and the Office of Enforcement before a fee reduction occurs. It should also be noted that because DOE's authority to impose civil penalties only extends to contracts containing Price Anderson nuclear indemnification, any contract without the indemnification can be subject to an investigation and a finding of a violation, but not the imposition of a civil penalty.

Amendments to the DEAR implementing the statute's requirement for contract fee penalties included policy guidance to contracting officers and conditional payment of fee clauses for contracts.

Congress acknowledged the currently satisfactory health and safety standards used by DOE and its contractors within the statute itself when it stated "Such regulations shall provide a level of protection for workers at such facilities that is substantially equivalent to the level of protection currently provided to such workers at such facilities." The DOE regulation, 10 CFR 851, Worker Safety and Health Program, was published as a final rule in the Federal Register on February 9, 2006. It establishes a set of worker safety and health requirements based on the requirements then contained in DOE O 440.1A, and in that order's contract requirements document.

As a regulator already engaged in the regulation of worker safety and health standards in many, if not all, of the facilities controlled, DOE exercised its prerogative as a regulator and extended the regulation's coverage beyond just those contractors covered by Price Anderson indemnification.

The Office of Health, Safety and Security has had a working group in place to implement this program with the management and operating contractors and the field offices administering those contracts. As a result of this field working group, many of the field offices have or are in the process of implementing these requirements for their other on-site contracts.

What is the Contractor applicability?

10 CFR 851.1(a) states the regulation covers the conduct of contractor activities at a DOE site. Section 851.3 of the regulation defines "DOE site" as "a DOE-owned or leased area or location or other area controlled by DOE where activities and operations are performed at one or more facilities or places by a contractor in furtherance of a DOE mission."

Title 10 CFR 851 also applies to subcontractors, at all tiers, that are performing work in DOE space. Contractors will need to inform their subcontractors working at DOE sites of these requirements.

Are there exceptions to this applicability?

Yes. Under section 851.2(a), the regulation does not apply to work at a site regulated by the Occupational Health and Safety Administration or sites operated under the Naval Nuclear Propulsion Program. For example, the following DOE sites are not covered by 10 CFR 851:

Power Marketing Administrations;
National Energy Technology Laboratory;
Strategic Petroleum Reserve; and,
Naval Petroleum and Oil Shale Reserves.

The rule also exempts contractors providing transportation services to or from a DOE site [10 CFR 851.2(c)] and vendors are exempt as they are not considered contractors for the purpose of the regulation (page 6873 of the preamble of the rulemaking).

What is the Guidance?

Contracting activities may need to notify contractors, such as support contractors under direct contract with DOE and performing work at a DOE controlled site regarding the applicability of this regulation. Many of the field offices have already done this. A sample letter is attached (Attachment 1) along with an approval letter to be issued following successful review and approval of the contractor's safety program or the contractor's acceptance of the requirements of a Federal Occupational Safety and Health Program. The letters should be appropriately modified to identify the issuing Office and the specific Federal program being used. The approval letter should be signed by the Head of the Field Element or equivalent pursuant to section 851.11 of the rule. The local Procurement Office should obtain and transmit this approval to the contractor.

A letter regarding applicability should include notice that the Department does not anticipate that this requirement will increase costs under the contract. This is the case because covered contractors should already be regulated under DOE's self-regulation and OSHA exemption authority.

What about management and operating contracts?

It is anticipated that the management and operating contractors have been made aware of this requirement because of their participation in the rulemaking process and other interactions with the Department.

When must the Contractor Worker Safety and Health Programs be effective?

The rule provides, at section 851.11(b) that contractors must achieve compliance by May 25, 2007 and that no work may be performed at a covered workplace unless an approved worker safety and health program is in place for the workplace.