

## Guidance on Who Must Comply With 10 CFR Part 851

The Department of Energy's Worker Safety and Health Program regulation, 10 CFR Part 851, was published in the Federal Register on February 9, 2006. 71 Fed. R. 6858-6948. Since its publication, DOE's Office of General Counsel (OGC) has been asked for guidance regarding the meaning of certain terms in the regulation. The following is intended to address the limited issue of who is required to comply with 10 CFR Part 851. OGC may issue additional guidance on other questions relating to Part 851.

### Question 1: What is a "DOE contractor"?

**Answer:** Title 10 CFR § 851.3, Definitions, defines "contractor" for the purposes of the regulation as "any entity, including affiliated entities, such as a parent corporation, under contract with DOE, or a subcontractor at any tier, that has responsibilities for performing work at a DOE site in furtherance of a DOE mission." Under this definition then, we must determine what is meant by (a) "under contract with DOE" and (b) "in furtherance of a DOE mission."

#### Q1 (a): What does "under contract with DOE" mean?

**Answer:** The term "DOE contractor" must be read in the context of the additional regulatory definition language: "that has responsibilities for *performing work* at a DOE site." See § 851.3 (Emphasis added). This language dictates that a "DOE contractor" for purposes of the regulation, must have a *contract to perform services*, as opposed to merely providing supplies, in order to come within the scope of Part 851. Consequently, a DOE contractor, for the purposes of 10 CFR Part 851, includes any contractor under a contract with DOE to perform services or, a subcontractor to such contractor, at any tier, that performs work at a DOE site "in furtherance of a DOE mission." Size is not a relevant factor in determining whether an entity is a DOE contractor for the purposes of Part 851. Consequently, an individual can fit within the definition as readily as a large corporation employing many thousands of people. Also, the definition of contractor includes professional contractors, including contracts entered pursuant to § 8 (a) of the Small Business Act, *codified at* 15 U.S.C. § 637 (a) (*cf.* 48 CFR Subpart 19.8), and all other types of contractual arrangements with those whom DOE has a direct contractual relationship for work to be performed at a DOE site. Vendors, delivery persons and others who do not have service contracts with DOE, or who are not subcontractors to such contractors, are excluded from the requirements of Part 851.

#### Q 1 (b): What does "in furtherance of a DOE mission" mean?

**Answer:** The term “in furtherance of a DOE mission” means that the contractor is doing work that DOE authorized.

**Question 2: What are the responsibilities of DOE contractors under Part 851?**

**Answer:** DOE contractors (except those in facilities operated under the authority of the Deputy Administrator for Naval Reactors or who are regulated by the Occupational Safety and Health Administration (OSHA)), see § 851.2, are responsible for developing and implementing a DOE approved worker safety and health program consistent with the provisions of 10 CFR Part 851. Pursuant to Part 851, DOE contractors are responsible for the health and safety of their employees while they are present on a DOE site for the purposes of their employment and to maintain the safe condition of all of the DOE workplaces for which they are responsible (see Subpart B, generally) and to coordinate with the other contractors responsible for work at the covered workplaces to ensure that there are clear roles, responsibilities and procedures to ensure the safety and health of workers at multi-contractor workplaces. See § 851.11 (a) (2) (ii). DOE contractors and subcontractors at any tier (with the exceptions noted above) are responsible for compliance with Part 851.

**Question 3: If a DOE contractor leases off-site office space for the conduct of DOE work activities, is the landlord responsible for compliance with 10 CFR 851?**

**Answer:** No. Such a landlord would not come within the definition of a “contractor” for the purposes of Part 851. In addition, unless DOE controls the contractor leased site, the workplace would not be a DOE site, as defined in § 851.3 (“*DOE site* means a DOE-owned or –leased area or location or other area or location 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.”). In that situation, the site would be outside the scope of 10 CFR Part 851 and subject instead to either the OSHA regulations or, possibly, those of a similar State regulatory entity.

**Question 4: If DOE signs a sale and leaseback agreement with a private company, with no other connection to DOE or its contractors, to develop an office building which will be occupied by DOE and/or its contractors, what is the role of 10 CFR Part 851?**

**Answer:** Typically, there is no lease back to DOE until construction is complete. Regardless, if the construction is not performed under contract with DOE, the work is not within the scope of 10 CFR Part 851 and, therefore, its provisions do not apply. Under these circumstances, OSHA or a similar State regulatory agency would have jurisdiction during construction of the building. Once the facility becomes a DOE-leased facility with DOE contractor employees working in the facility, the operations in the building would be within the scope of 10 CFR Part 851 and, therefore, DOE's regulations would apply unless DOE and OSHA agreed that OSHA would continue to regulate worker safety at the facility.

**Question 5: If an off-site municipal fire department provides fire services on site, what is their status under 10 CFR Part 851?**

**Answer:** Normally, there is no contract between DOE or its contractors with off-site fire departments. If DOE or a DOE contractor does not enter into a contract with the fire department to perform services at a DOE site, the fire department would not be regulated under 10 CFR Part 851.

**Question 6: What is the status, with respect to 10 CFR Part 851, of state and municipal highway departments that maintain roads passing through DOE property?**

**Answer:** We expect no change to the status of such entities. State and local governments that maintain highways and roads passing through DOE sites do not have contracts with DOE and, therefore, are not subject to 10 CFR Part 851.

**Question 7: A DOE program office signs a cooperative agreement with a university to conduct energy research on the university campus. What are the jurisdictional implications for 10 CFR Part 851?**

**Answer:** Please see the answer to Question 1, above and, particularly the answer to Q 1(a) where it states: "Consequently, a DOE contractor, for the purposes of 10 CFR Part 851, includes any contractor under a contract with DOE to perform services or, a subcontractor to such contractor, at any tier, that performs work at a DOE site 'in furtherance of a DOE mission.'" As a general rule, cooperative agreements are transactions made pursuant to DOE's "financial assistance" regulation (10 CFR Part 600) and are *not* procurement contracts. However, it is possible that there are cooperative agreements that have some procurement contract terms. Those particular agreements (if they involve work at

a DOE site) should be referred to OGC for a case-by-case review to determine whether Part 851 applies.

**Question 8: A Coca Cola delivery man makes regular rounds two days a week at a DOE site to replenish snack and soda machines. Is his employer required to have an approved worker safety program under 10 CFR Part 851?**

**Answer:** No. Please refer to the answer to Question 1, and, in particular, the answer at Q 1(a) where it states: “Vendors, delivery persons and others who do not have service contracts with DOE or, who are not subcontractors to such contractors, are excluded from the requirements of Part 851.” Therefore, the vendor’s employer is not required to develop and implement a DOE approved health and safety program.

**Question 9: Are Federal Agencies operating pursuant to Memoranda of Understanding and/or Memoranda of Agreement at a DOE site subject to Part 851?**

**Answer:** No. Such agencies do not have contracts with DOE and, therefore, are not subject to Part 851. However, these agencies are required under § 19 (a) of the Occupational Safety and Health Act of 1970, *codified at* 29 U.S.C. § 668 (a) “to establish and maintain an effective and comprehensive occupational safety and health program” and to “provide safe and healthful places and conditions of employment.” Federal Agencies (“except military personnel and uniquely military equipment, systems and operations”) are also required by Executive Order 12196 to adhere to OSHA regulations promulgated for that purpose (see 29 CFR Part 1960) and may be subject to inspections by OSHA. Contractors working under contract with these agencies would be subject to OSHA unless they are subject to another federal regulator (see OSH Act § 4 (b) (1), *codified at* 29 U.S.C. § 653 (b) (1): “Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 2021 of title 42, exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.”)

**Question 10: Are Colleges and Universities performing work on site under a grant from DOE subject to Part 851?**

**Answer:** No. Persons and entities operating under grants and not service contracts with DOE are not subject to Part 851.

**Question 11: What will DOE do to implement 10 CFR Part 851 in DOE's contracts?**

**Answer:** No further action is needed to implement Part 851 in DOE's contracts since Part 851 is an independent regulation issued in DOE's role as a regulator. DOE already published rulemaking implementing fee penalty provisions at 42 U.S.C. § 2282c and established Conditional Fee contract clauses at 48 CFR (DEAR) 952.223-76, 952.223-77, and 970.5215-3.

**Question 12: Are utility providers, such as power or communications providers that may have power or communications lines installed on-site to serve the facility, required to comply with Part 851?**

**Answer:** No. Utility service contracts are covered under 48 CFR (FAR) Part 41 and are not considered service contracts for the purposes of Part 851. They are supply contracts rather than contracts for services and, therefore, not subject to Part 851. As in the case of the soft drink vendor or delivery person, the fact that utility employees must sometimes come on site to service such things as power or communications lines does not convert the contract into a service contract.

**Question 13: How will DOE handle contractors covered by 10 CFR Part 851 but not covered by 42 U.S.C. Sec. 2282c?**

**Answer:** DOE will conduct investigations as necessary for all contracts covered by Part 851. While DOE may not impose civil penalties against contractors not covered by 42 U.S.C. Sec. 2282c, those contractors with a Conditional Fee contract clause (48 CFR (DEAR) 952.223-76, 952.223-77, or 970.5215-3) could be subject to a fee reduction.