

**BRIEFING TO THE
DEFENSE NUCLEAR FACILITIES
SAFETY BOARD:**

SITE/FACILITY MANAGEMENT CONTRACT

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BACKGROUND

- “Orders” are internal Federal agency directives that typically instruct Federal personnel on a wide range of programmatic, managerial, and administrative matters.
- “Orders” typically do not instruct Federal contractors, although they may instruct Federal officials to instruct contractors through appropriate vehicles.
- DOE has used internal orders to provide direction to and impose requirements on its management and operating contractors directly (presumably using M&O authority).
- Past approach of not differentiating between Feds and contractors resulted in confusion and ambiguity and led to the contractor requirements document (CRD).
- “Laws, Regulations, and DOE Directives” clause, prescribed for M&Os, requires M&Os to comply with CRD.
- By law (41 U.S.C. 418b) and regulation (FAR 1.301(b)) agency contract policies, procedures, forms having effect beyond internal operating procedures or having significant effect on contractors are precluded from taking effect unless published in the Federal Register for public comment.
- Review of DOE order system identified an undisciplined, potentially ineffective approach for ensuring DOE requirements imposed on contractors: ill-defined applications; incorrect assumption of how requirements get into contracts; inappropriate reliance on M&O “Laws, Regulations, and DOE Directives” clause; complications and confusion resulting from migration of M&O contract to other contract forms.

PROPOSED REMEDIES

- Require greater clarity in defining the universe of contractors to whom an order's requirements apply.
- Capture non M&O site and facility steward contractors under broad definition that also encompasses M&Os (regulatory issuance).
- Include "Laws, Regulations, and DOE Directives" clause in all site/facility management contracts (regulatory issuance).
- For other contracts, require order direction to promulgate requirement/clause in accordance with applicable laws and regulations.

1. What is the purpose of the use of this term [site/facility management contractor]?

The purpose of using the term site/facility management contract is to distinguish between those contracts calling for stewardship of a DOE-owned site/facility and other contracts. It is intended to encompass management and operating contracts, former management and operating contracts, and other contract forms where the contractor assumes the management of DOE sites/facilities. We believe that DOE's unique authority with respect to this category of contracts allows the Department to use the unique Laws, Regulations, and DOE Directives clause in them, which grants DOE the right to apply new or revised directives at any time and without agreement by the contractors and without compliance with laws and regulations affecting the promulgation of contract policies, procedures, or forms. We intend to expand the application of this clause to all site/facility management contracts

2. (a) Which existing contractors performing hazardous work at defense nuclear facilities would be excluded under the proposed definition?

Contractors are not covered by the definition if they do not have the "stewardship" responsibilities described in the clause.

2. (b) What criteria were used to determine inclusion or exclusion?

The criteria are included in the definition to be included in revised DOE Order 251. That definition is:

A Site/Facility Management Contract is a contract that tasks the contractor with responsibility for the stewardship of a DOE-owned Site/Facility, including the operation and/or maintenance of its buildings, infrastructure, and other assets. A Management and Operating Contract is a type of Site/Facility Management Contract that tasks the contractor with responsibility for managing and operating an ongoing, continuing DOE mission at the site/facility such as weapons production or the conduct of scientific research and development at a Federally Funded Research and Development Center or other laboratory. An M&O contract is awarded pursuant to and consistent with FAR 17.601 and DEAR 970. In the absence of a continuing DOE mission, a contract for the environmental remediation and closure of a site/facility where the contractor maintains primary responsibility for site/facility stewardship is a Site/Facility Management Contract, but usually will not be structured as a Management and Operating Contract.

2. (c) How are these criteria documented for application to future contracts?

The criteria will be reflected in the definition in revised DOE Order 251, as well as the Department of Energy Acquisition Regulations.

3. With respect to the [excluded] contractors identified in question #2, what mechanism will be used to apply the safety requirements embedded in DOE Orders to those contractors' activities?

The directive will specify that any necessary requirements and related clauses will be promulgated through normal procedures and in accordance with applicable laws and regulations governing the issuance of contracting policies, procedures, and forms.

4. How have DOE program and field offices responsible for assuring safety at defense nuclear facilities been informed of the effect of the proposed change and provided detailed procedures to be followed in imposing safety requirements on contractors falling outside the class of “site/facility management contractors?”

They will be informed through the DOE Directives, the DOE Acquisition Regulation, and through training/workshops. DOE Directives Management has provided a template to responsible organizations. The template matches the revised DOE Order 251.

5. What is the relationship between the proposed change to DOE Order 251.1A and the DEAR clauses regarding (a) integrated safety management and (b) laws, regulations, and directives?

Among other things, the proposed change to DOE Order 251.1A provides a definition for site/facility management contracts. The DEAR will be modified to also include this definition and expand application of the Laws, Regulations, and DOE Directives clause to all site/facility management contracts. The DEAR may also be modified to apply other M&O clauses, such as the ISM clause, to site/facility management contracts.

6. The proposed change to DOE Order 251.1A includes direction to develop changes to the DEAR clauses in cases in which the owner of a DOE Order believes that some or all of the order's requirements should be applied to contractors other than "site/facility management." Does DOE contemplate that rulemaking would be necessary in such cases?

Normally, new DEAR clauses are promulgated via rulemaking; in compelling cases an "Acquisition Letter" may be used if effected in accordance with applicable laws and regulations.