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WASHINGTON, D.C. 20548

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RELEASED

ENERGY AND MINERALS DIVISION

July 2, 1979

B-178205.98



The Honorable John A. Durkin
United States Senate

Dear Senator Durkin:

At your request we examined the Department of Energy's policies and implementing procedures for avoiding conflicts of interest when private technical consulting and management support organizations contract with the Department. As agreed to in discussions with your office, we limited our work to contracts awarded by the Department's headquarters purchasing activity.

In 1978, the Department developed a new conflicts-of-interest regulation that went into effect on January 11, 1979. It superseded Temporary Regulation No. 35, issued on June 24, 1977, by the former Energy Research and Development Administration whose functions were transferred to the Department on October 1, 1977. Temporary Regulation No. 35 was used by the Department from that time until the new regulation was issued.

We could not form an opinion as to the effectiveness of the new regulation because of the short time in which it has been applicable, and we found only one contract awarded under the new regulation. Accordingly, as arranged with your office, we are primarily furnishing an informational report which provides background on organizational conflicts of interest, including the legal responsibilities imposed on the Secretary of Energy and potential contractors to avoid conflicts of interest. The report also discusses the significant improvements in the new regulation, including procedures for its implementation. We did find, however, numerous contracts awarded under the prior regulation which should be brought under the new regulation. We are recommending that the Secretary of Energy promptly take action to bring these contracts under the new regulation. (See page 6.)

Letter Report
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BACKGROUND

Organizational conflicts of interest refer to the following relationship or situation: A present or prospective contractor has past, present, or currently planned interests that either directly or indirectly relate to the work to be performed under a Department contract, and these interests may (1) diminish the present or prospective contractor's capacity to give impartial, technically sound, objective assistance and advice or (2) result in the present or prospective contractor being given an unfair advantage when competing for other Department contracts. These direct or indirect interests extend to the present or prospective contractor's chief executives and directors who are to be involved in the contract's performance and to proposed consultants and subcontractors who are to directly participate in the work. Indirect participants, such as subcontractors furnishing general supplies, are normally excluded.

According to the Department's definition, technical consulting and management support services principally provide internal assistance in formulating or administering Department programs, projects, or policies and require access to internal or proprietary data. Such services typically include assistance in preparing program plans; monitoring or reviewing contractors' activities or proposals; and preparing preliminary designs, specifications, or statements of work.

According to Public Law 95-39, dated June 3, 1977, and Public Law 95-70, dated July 21, 1977, 1/ the Secretary of Energy is responsible for requiring a prospective contractor to provide all information relative to whether that contractor has a possible conflict of interest. The successful contractor must insure that consultants and subcontractors he engages to participate in the work also comply with the laws.

In accordance with the laws, the Secretary cannot enter into any contractual arrangement until he finds either that a conflict of interest is not likely to exist or that conditions

1/Public Law 95-39 amends the Federal Nonnuclear Energy Research and Development Act of 1974 (Public Law 93-577, 88 Stat. 1878, 42 U.S.C. 4901) and Public Law 95-70 amends the Federal Energy Administration Act of 1974 (Public Law 93-275, 88 Stat. 96, 15 U.S.C. 761).

can be written into the contract which will avoid or mitigate the conflict. The Secretary has delegated the finding of conflicts of interest to Department contracting officers.

The prospective contractor is required by the regulations to provide the Department with a statement (disclosure statement) which concisely describes all relevant facts concerning any past, present, or currently planned interest (financial, contractual, organizational, or otherwise) relating to the work to be performed and bearing on whether the prospective contractor may have a conflict of interest. In the absence of any relevant interest, the prospective contractor is required to submit a statement (representation statement) certifying that to its best knowledge and belief no such facts exist. The prospective contractor and its proposed consultants and subcontractors are subject to the penalties set forth in 18 U.S.C. 1001, which prescribes a fine of not more than \$10,000 or imprisonment of not more than 5 years, or both, for any false, fictitious, or fraudulent statement or misrepresentation.

NEW ORGANIZATIONAL CONFLICTS-
OF-INTEREST REGULATION

The new organizational conflicts-of-interest regulation has significant improvements over the old regulation. The most significant changes, in our view, are those which relate to

- immediate disclosure by the contractor of a conflict discovered after contract award,
- applicability of the regulation to contract modifications, and
- full disclosure by contractors of past interests that bear on the prospective contract.

(Enclosure I is a copy of the Department's new organizational conflicts-of-interest regulation.)

Under the new regulation, a contractor is required to make a full written disclosure immediately to the contracting officer of any conflicts of interest which it discovers after contract award. The disclosure must describe the action the contractor either has taken or proposes to take to avoid or mitigate such conflicts. For example, the

contract's scope of work could be reduced to avoid any conflicts of interest. The prior regulation did not require any such disclosure.

The contractor is now required to make a disclosure or representation for all subsequent modifications of contractual arrangements entered into after the effective date of the new regulation. Exempted from this requirement are minor changes within the general scope of the contract, such as the place of delivery of the completed work, which have no bearing on conflicts of interest. Where, however, a disclosure or representation statement has previously been submitted regarding the contract to be modified, only an updating of the statement is required. Because these contracts often cover lengthy time periods, we believe this requirement is a substantial improvement.

The prospective contractor is now required to furnish all relevant facts concerning any past interests (financial, contractual, organizational, or otherwise) relating to the work to be performed. While contracts awarded under the prior regulation may have disclosed numerous facts concerning past interests, we believe that the new requirement is a substantial improvement because of the assurance that such interests will be disclosed.

Prospective contractors are informed of the conflicts-of-interest disclosure requirements, which include any past interests, in the Department's contract solicitations. The solicitations contain a statement of the contract clauses required to be included in technical consulting and management support contracts.

According to Department officials, the prospective contractors' responses to the conflicts-of-interest requirements are evaluated by a source evaluation board ^{1/} which also considers technical and price proposals. The source evaluators include procurement, financial, technical, legal, and administrative personnel. The source evaluators are required to determine whether there are any conflicts of interest, to the best of their knowledge and belief. Department officials informed us that the contracting officer, who is responsible for finding whether possible conflicts of interest exist, principally relies on the source evaluators' determination.

^{1/}For contracts under \$5 million, a panel is formed. The panel follows procedures similar to those of the board.

In evaluating the information furnished by a prospective contractor, the contracting officer is required to consider relationships and situations which could influence the contractor to render advice and assistance to the Department that is not impartial, technically sound, nor objective, or which could give the contractor an unfair competitive advantage. Examples of such relationships and situations could be the (1) contractor's subsidiaries which would benefit from detailed knowledge of the work to be performed and (2) prospective contractor's investments in companies which would benefit from knowledge of the work to be performed under the contract.

After evaluation, the contracting officer determines whether a prospective contractor has a possible organizational conflict of interest. If a conflict exists, then the contracting officer is required to (1) disqualify the contractor from award, (2) avoid such conflicts by including appropriate conditions in the contract, or (3) if such conflicts cannot be avoided by an appropriate contract provision and it has been determined that contract award is in the best interest of the United States, award the contract. When the latter occurs, it must be documented and published in the Federal Register and provisions must be included in the contract to mitigate the conflict to the extent feasible prior to any award.

As of April 1979, about 3 months after the effective date of the new regulation, we found only one management support contract which had been awarded under it. We could not form an opinion as to the effectiveness of the Department's new policies and procedures, based on this one contract and the short time period of the applicability of the new regulation.

However, we did find 50 technical consulting and management support master contracts awarded under the prior regulation that we believe should be brought under the new regulation as soon as possible. These contracts, which were awarded in September 1978 to 25 technical consulting and management support firms for 1-year periods with an option for the Department to extend them for another year, could involve expenditures in excess of \$80 million. Since the prior regulation did not require disclosure after award, conflicts of interest which could subsequently arise under these contracts might not come to the Department's attention. These contracts create a pool of resources for the Department to have work performed when requested. The contracts are based on generally defined tasks which are made more explicit by the requests.

The Department's findings on conflict of interest may be obsolete since they were based on tasks that were generally defined when the contracts were awarded in September 1978 and not on the subsequent tasks which are specifically defined. In addition, the specifically defined tasks could offer the contractors access to sensitive in-house or proprietary data without the Department's knowledge of an actual or potential conflict-of-interest situation.

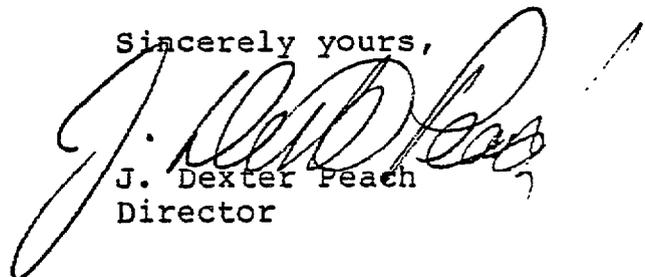
Because of the Department's lack of sufficient knowledge regarding the contractors' conflict-of-interest situation and the substantial funds involved in the contracts, we recommend that the Secretary of Energy promptly amend the master contracts to bring them under the new organizational conflicts-of-interest regulation. We have discussed this recommendation with a representative of the Department's Office of General Counsel who informed us that the matter of bringing the contracts under the new regulation is under consideration by that Office.

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As arranged with your office, we plan no further distribution of this report until 2 days from the date of the report, unless you publicly announce its contents earlier. At that time we will send copies to interested parties and make copies available to others upon request.

As discussed with your office, we did not obtain formal comments on this report; however, the facts were discussed with Department officials and their comments were incorporated as appropriate.

Sincerely yours,



J. Dexter Peach
Director

Enclosure

RULES AND REGULATIONS

[6450-01-M]

Title 41—Public Contracts and
Property ManagementCHAPTER 9—DEPARTMENT OF
ENERGY PROCUREMENT
REGULATIONS

PART 9-1—GENERAL

Organizational Conflicts of Interest

AGENCY: Department of Energy.

ACTION: Final rule.

SUMMARY: This rule establishes policy and procedures for the Department of Energy (the "Department") with respect to the avoidance of organizational conflicts of interest (OCI). The regulation is intended to avoid or mitigate contractual relationships which might lead contractors to give advice and assistance that is not unbiased, impartial, objective and technically sound. Additionally, it seeks to reduce the opportunities for an unfair competitive advantage that might accrue to a contractor. These objectives are sought to be attained by requiring prospective contractors to disclose pertinent information bearing upon possible organizational conflicts of interest and by requiring the inclusion of specified contract clauses designed to prevent such conflicts during and after performance.

EFFECTIVE DATE: Effective upon publication.

FOR FURTHER INFORMATION
CONTACT:

Edward Lovett, Procurement Policy Branch, Policy and Procedures Division, Procurement and Contracts Management Directorate, Room 308RB, 400 1st Street, NW, Washington, D.C. 20545. Telephone: 202-376-9057.

SUPPLEMENTARY INFORMATION:

- I. Background.
- II. Statutory and Regulatory Requirements.
- III. Public Comments.

I. BACKGROUND

Under Section 844 of the Department of Energy Organization Act (hereinafter referred to as the Act) (Pub. L. 95-91, 91 Stat. 565, 42 U.S.C. 7254), the Secretary of the Department is authorized to prescribe such procedural rules and regulations as he may deem necessary or appropriate to effectuate the functions vested in him. These functions include those heretofore authorized by law and transferred to the Secretary under the Act (42 U.S.C. 7251), including the Federal Nonnuclear Energy Research and Development Act of 1974 (Pub. L. 93-577,

88 Stat. 1878, 42 U.S.C. 5901), as amended by Pub. L. 95-39, and the Federal Energy Administration Act of 1974 (Pub. L. 93-275, 88 Stat. 96, 15 U.S.C. 761), as amended by Pub. L. 95-70. Pursuant to these laws, the Secretary is specifically required to promulgate regulations governing the avoidance of organizational conflicts of interest in accordance with statutory criteria therein set forth (Pub. L. 95-39; Pub. L. 95-70). Additionally, public notice of such rules and regulations is required by the Act (42 U.S.C. 7191) in accordance with the Administrative Procedure Act, as amended (5 U.S.C. 551, et. seq.).

On June 24, 1977, the Energy Research and Development Administration (ERDA), whose functions were transferred to the Department by the Act, (Pub. L. 95-91), published in the FEDERAL REGISTER (42 FR 32232), ERDA Temporary Regulation No. 35, which amended the pertinent ERDA organizational conflicts of interest regulation then in effect. Thereafter, on March 27, 1978, the Department published in the FEDERAL REGISTER (43 FR 12727) its proposed OCI regulation and solicited public comments thereon.

On April 14, 1978, the Department published its proposed Procurement Regulations (43 FR 15853), which included the proposed OCI regulation of March 27, 1978. This final OCI rule will also be incorporated into the Department of Energy Procurement Regulations to be published as a final rule in the FEDERAL REGISTER at a later date.

II. STATUTORY AND REGULATORY
REQUIREMENTS

Pursuant to section 501 of the Department of Energy Organization Act (42 U.S.C. 7191) relating to the opportunity for oral presentations on proposed regulations, the Department has determined that no substantial issue of fact or law exists and that this OCI regulation is unlikely to have a substantial impact on the Nation's economy, or large numbers of individuals or businesses. Accordingly, public hearings relating to this OCI regulation were not held. However, all written comments received by the Department in response to its proposed OCI regulation of March 27, 1978, were carefully assessed and fully considered in the formulation of this final OCI rule.

NOTE.—The Department has determined that this regulation does not contain a major proposal requiring preparation of an Inflation Impact Statement under Executive Order 11821, as amended, and OMB Circular A-107. The Department has also determined that the regulation will not affect the quality of the environment and that the requirements of section 702(2) of the Federal Energy Administration Act of 1974, Pub. L. 93 275, do not apply.

III. PUBLIC COMMENTS

This final OCI rule reflects the Department's efforts to comply with statutory criteria contained in Pub. L. 95-39 and Pub. L. 95-70. In addition, the regulation reflects, as fully as possible, consistent with statutory requirements and policy and programmatic needs, the opinions and recommendations expressed by interested parties commenting on the Department's proposed rule of March 27, 1978. It also recognizes the organizational conflict of interest regulation proposed by the Office of Management and Budget (OMB), Office of Federal Procurement Policy (OFPP), and published in the FEDERAL REGISTER on September 30, 1977, (42 FR 47223), as revised October 13, 1978 (43 FR 47480), for use by all Federal executive agencies, and the public hearing held by OFPP on November 17, 1978, on its revised proposed OCI regulation. The Department's proposed OCI rule of March 27, 1978, specified that comments thereon were to be received on or before April 26, 1978. This date for submission of comments was extended by the Department to May 5, 1978. The Department received timely comments from 25 organizations.

A summary of the substantive comments received by the Department is set forth below together with the Department's action regarding the comments.

(1) *Exclusion of Independent Contract Research Organizations (ICRO) and Universities.* It was recommended by some commenters that ICRO's and universities be specifically excluded from OCI coverage. One commenter stated that such organizations should not be excluded from OCI coverage. The Department has adopted the latter position because it believes that ICROs and universities are not immune from being in the position of "serving two masters" or from gaining an unfair competitive advantage. Neither Pub. L. 95-39 nor Pub. L. 95-70 provides for the exclusion of such organizations and the Department does not believe that such exclusion was the intent of Congress. Additionally, OFPP's revised proposed rule does not exclude such organizations from coverage.

(2) *Definition of OCI (§ 9-1.5403(a)).* The term "planned interests" in the definition of OCI was criticized by four organizations as being too broad a term, and they argued that it should either be eliminated or restricted to realistically foreseeable plans. Accordingly, we have revised the language to read "currently planned interests", a revision similar to that made by OFPP. Similarly, several commenters pointed out that past interests could give rise to an OCI. We agree with this observation and have incorporated the

RULES AND REGULATIONS

suggested change in the definition of OCI. It was further noted in the comments that client relationships could give rise to and OCI and should be addressed. While such coverage is implicit in the proposed regulation, clarifying words have been added to the definition of OCI. In the OCI definition, some commenters felt that the words "may result in . . ." an unfair competitive advantage", should be changed to "will result in . . ." an unfair competitive advantage", whereas other commenters were in complete agreement with the existing wording, "may". We believe this recommended change presupposes a degree of certainty which is not always present beforehand. While OFPP has adopted this change, we believe this change would be inconsistent with the Department's statutory criteria which address OCI in terms of possible conflicts of interest. Accordingly, the Department has not adopted this recommended change.

(3) *Inclusion of affiliates and subcontractors* (§§ 9-1.5403(a)(g) and 9-1.5413). Several organizations argued that including affiliates and subcontractors in OCI coverage would unduly burden many contractors. We do not believe such is the case. In any event, both Pub. L. 95-39 and Pub. L. 95-70 explicitly require that OCI apply to subcontractors. In our view, the OCI regulation must also apply to affiliates particularly in the area of possible bias. Indeed, it was precisely such a situation which prompted Congress to pass legislation requiring the Department to promulgate OCI regulations.

(4) *Government Handling of Disclosure Statements* (§§ 9-1.5405 and 9-1.5407). Opposing views were expressed on the release and/or publication of contractor disclosure statements to the public. The Department's position is that it may not and should not release proprietary information such as future business plans, acquisitions, mergers, competitive strategies which prospective contractors may submit for OCI purposes. Accordingly, it has been determined that OCI submissions will be treated in confidence and will be used by the Department only for OCI purposes to the extent permitted by law. As regards disclosure by subcontractors, many commenters requested that subcontractors be permitted to file their disclosure statements directly with the Department rather than through the prime contractor. This recommendation has been adopted.

(5) *Applicability of OCI Requirements—Grants and Financial Assistance*. One organization questioned whether or not the regulation applied to financial assistance awards. Such is not the case and it is felt that the regulation, as proposed, was sufficiently clear on this matter.

(6) *OCI Examples and Illustrative Cases*. Many groups asked that the regulation include more examples and more specific illustrative cases of OCI situations. This request has been accommodated by the addition of an Appendix A.

(7) *Disclosure Format*. Several firms asked for more specific guidance as to the type of information to be disclosed and the format for disclosure. Appendix B has been added to the regulation in order to provide this guidance.

(8) *Nature of Certification* (§§ 9-1.5407 and 9-1.5408-1). Several commenters pointed out that the certification requirement was unclear or ambiguous in that it could be interpreted to mean that prospective contractors could determine and self-certify as to the existence of an OCI. We agree and have clarified the language so that an offeror may certify only that no facts exist relevant to an OCI determination.

(9) *Due Process* (§ 9-1.5414). Many commenters expressed concern that the proposed regulation did not establish separate and distinct due process procedures for adverse OCI determinations. The Department believes that if such separate procedures were to be established, they would be little more than a costly duplication of the administrative and judicial channels already established for use by offerors and contractors seeking redress of Governmental adverse actions in the acquisition process, and this could be time consuming so as to frustrate the Department's procurement process. Accordingly, no separate and distinct due process procedures have been developed for adverse OCI determinations.

(10) *Nature of Nondisclosure or Misrepresentation* (§ 9-1.5414). Several firms requested that terms importing intent such as "knowing", "intentional", or "willful" be used to qualify the nondisclosure or misrepresentation. The Department has carefully considered this aspect and deems it inappropriate and undesirable to use such words. It is our view that to establish intent would impose a substantial burden of proof upon the Government and might well result in vitiating the remedies which this section otherwise permits the Government to invoke for specified acts of commission or omission. Such words importing intent are typically required in statutes relating to serious crimes. They are not contained in the statutes governing Department actions in the OCI area.

(11) *Other Changes Adopted*. The Department's proposed regulation of March 13, 1978 (Sec. 9-1.5405(c)) included a representation procedure for procurements exceeding \$100,000 and for R&D contracts not subject to the disclosure requirement of Pub. L. 95-

70. This provision was based upon the OFPP proposed rule of September 20, 1977 (Sec. 1.2406(a)) in accordance with Pub. L. 93-400 which vests authority for Federal procurement policy in the OFPP Administrator and which requires that agency procurement policies and regulations follow those prescribed by OFPP. In the light of public comments received by the Department regarding this provision, and recognizing that the OFPP revised rule of October 13, 1978 (Sec. 1.2406(a)) has deleted this provision, the Department has eliminated such coverage. However, R&D performed for the Department under Pub. L. 95-70 will still be covered (Sec. 9-1.5405). Similarly, the OCI example of "general benefit to industry" has been deleted (Sec. 9-1.5404).

For the Department of Energy.

Dated: January 8, 1979.

HILARY J. RAUCH,
Deputy Director, Procurement
and Contracts Management
Directorate.

The regulations in 41 CFR Chapter 9, Subpart 9-1.54 is revised to read as follows:

Subpart 9-1.54 Organizational Conflicts of Interest

- Sec.
- 9-1.5401 Scope of subpart.
 - 9-1.5402 Policy.
 - 9-1.5403 Definitions.
 - 9-1.5404 Criteria for recognizing organizational conflicts of interest.
 - 9-1.5405 Disclosure of organizational conflicts of interest.
 - 9-1.5406 Notices and representations: action required of contracting officers.
 - 9-1.5407 Disclosure or representation.
 - 9-1.5408 Contract clauses.
 - 9-1.5408-1 General contract clause.
 - 9-1.5408-2 Special contract clauses.
 - 9-1.5409 Evaluation, findings, and contract award.
 - 9-1.5410 Action in lieu of termination.
 - 9-1.5411 DOE management contractors, subcontractors and consultants.
 - 9-1.5412 Architect-engineering and construction contracts.
 - 9-1.5413 Subcontractors and consultants.
 - 9-1.5414 Remedies.

APPENDIX A—Examples of Contractual Situations or Relationships—Organizational Conflicts of Interest

APPENDIX B—Disclosure Format

AUTHORITY: Sec. 644 of the Department of Energy Organization Act (Pub. L. 95-91) to implement the requirements of the Federal Nonnuclear Energy Research and Development Act of 1974 (Pub. L. 93-577), as amended, and the Federal Energy Administration Act of 1974 (Pub. L. 93-275), as amended.

SUBPART 9-1.54—ORGANIZATIONAL CONFLICTS OF INTEREST

§ 9-1.5401 Scope of subpart.

This subpart sets forth Department of Energy (the "Department") policy

RULES AND REGULATIONS

and procedures regarding organizational conflicts of interest (OCI) and is issued pursuant to section 644 of the Department of Energy Organization Act (Pub. L. 95-91) to implement the requirements of the Federal Nonnuclear Energy Research and Development Act of 1974 (Pub. L. 93-577), as amended, and the Federal Energy Administration Act of 1974 (Pub. L. 93-275), as amended.

§ 9-1.5402 Policy.

It is the policy of the Department to identify and avoid or mitigate organizational conflicts of interest before entering into contracts, agreements, and other arrangements.

§ 9-1.5403 Definitions.

(a) The term "organizational conflicts of interest" means that a relationship or situation exists whereby an offeror or a contractor (including chief executives and directors, to the extent that they will or do become involved in the performance of the contract, and proposed consultants or subcontractors where they may be performing services similar to the services provided by the prime) has past, present, or currently planned interests that either directly or indirectly through a client relationship relate to the work to be performed under a Department contract which (1) may diminish its capacity to give impartial, technically sound, objective assistance and advice or (2) may result in it being given an unfair competitive advantage. It does not include the normal flow of benefits from the performance of the contract.

(b) The term "research and development" means any work or effort the principal purpose of which involves (1) theoretical analysis, exploration, or experimentation; or (2) the extension of investigative findings and theories of a scientific or technical nature into practical application for experimental and demonstration purposes, including the experimental production and testing of models, devices, equipment, materials, and processes.

(c) The term "evaluation services or activities" means any work or effort the principal purpose of which involves the independent study of a technology, process, product, or policy which entails the assessment, appraisal, or survey of such technology, process, product, or policy.

(d) The term "technical consulting and management support services" means any work or effort the principal purpose of which is to provide internal assistance to any program element or other organizational component of the Department in the formulation or administration of its programs, projects, or policies which requires the contractor to be given access to internal or

proprietary data. Such services typically include assistance in the preparation of program plans; evaluation, monitoring or review of contractors' activities or proposals submitted by prospective contractors; preparation of preliminary designs, specifications, or statements of work.

(e) The term "architect-engineering services" means the work or effort of a professional nature associated with the study, tests, design, supervision, and construction, alteration, or repair of real property including utilities and appurtenances thereto. Such services embrace conceptual design and Title I, Title II, and Title III work, as defined in § 9-18.306-50(b).

(f) The term "contract" means any contract, agreement or other arrangement with the Department.

(g) The term "contractor" means any person, firm, unincorporated association, joint venture, partnership, corporation or affiliates thereof, which is a party to a contract with the Department.

(h) The term "affiliates" means business concerns which are affiliates of each other when either directly or indirectly one concern or individual controls or has the power to control another, or when a third party controls or has the power to control both, (see 41 CFR § 1-1.601-1(e)).

(i) The term "subcontractor" means any subcontractor of any tier which performs work under a contract.

(j) The term "offeror" means any person, firm, unincorporated association, joint venture, partnership, corporation or affiliates thereof, submitting a bid or proposal, solicited or unsolicited to the Department to obtain a contract or modification thereof.

§ 9-1.5404 Criteria for recognizing organizational conflicts of interest.

(a) *General.* Two questions should generally be asked in determining whether organizational conflicts of interest exist: (1) Are there conflicting roles which might bias a contractor's judgment in relation to its work for the Department? (2) Is the contractor being given an unfair competitive advantage based on the performance of the contract? The ultimate determination as to whether organizational conflicts of interest exist should be made in the light of common sense and good business judgment based upon the relevant facts and the work to be performed. While it is difficult to identify, and to prescribe in advance, a specific method for avoiding all the various situations or relationships which might involve potential organizational conflicts of interest, Department personnel must pay particular attention to proposed contractual requirements which call for the rendering of advice, consultation or evaluation services, or

similar activities that lay direct groundwork for the Department's decisions on future procurements, research and development programs, production and regulatory activities.

(b) *Situations or relationships involving organizational conflicts of interest.* The following general examples (which are not all-inclusive) illustrate situations or relationships where potential organizational conflicts of interest frequently arise. Specific examples are set forth in Appendix A.

(1) Contract performance involving the preparation and furnishing of complete or essentially complete specifications which are to be used in a competitive procurement for the furnishing of products or services.

(2) Contract performance involving the preparation and furnishing of a detailed plan for specific approaches or methodologies that are to be incorporated in a competitive procurement.

(3) Contract performance involving access to internal information not available to the public concerning Departmental plans or programs and related opinions, clarifications, interpretations and positions.

(4) Contract performance involving access to proprietary information which cannot lawfully be used for purposes other than those authorized by the owners.

(5) Contract performance involving evaluation of the contractor's products or services, or the products or services of another party where the contractor is or has been substantially involved in their development or marketing.

(c) *Other considerations.* An organizational conflict of interest may exist or arise:

(1) Even though no follow-on procurement is anticipated;

(2) Even though a hardware exclusion clause may not be appropriate; and

(3) When a contract is awarded on a noncompetitive or a sole source basis.

(d) An organizational conflict of interest is more likely to be disclosed if a contract is competitive. Accordingly, greater care shall be exercised in the absence of competition.

§ 9-1.5405 Disclosure of organizational conflicts of interest.

When submitting solicitations and unsolicited proposals for (1) evaluation services or activities; (2) technical consulting and management support services and professional services; (3) research and development conducted pursuant to the authority of the Federal Energy Administration Act of 1974 (Pub. L. 93-275), as amended; and (4) other contractual situations where special organizational conflicts of interest provisions are noted in the solicitation and included in the resulting contract, offerors shall be required to

RULES AND REGULATIONS

disclose relevant information bearing on the possible existence of any organizational conflicts of interest or complete the representation required by 9-1.5407. This requirement shall also apply to all modifications of contracts of the types noted above except those issued under the "Changes" clause. Where, however, a disclosure statement of the type required by the Organizational Conflicts of Interest Disclosure or Representation provision has previously been submitted with regard to the contract being modified, only an updating of such statement shall be required. Information submitted by offerors pursuant to the disclosure requirement shall be treated by the Department, to the extent permitted by law, as confidential information to be used solely for OCI purposes.

When the Government finds that an organizational conflict of interest exists or may exist with respect to an offeror or contractor, no contract or contract modification award covered by Section 9-1.5407 shall be made until the organizational conflict of interest has been adequately avoided or mitigated, except as provided in 9-5409 below.

§ 9-1.5406 Notices and representations; action required of contracting officers.

The disclosure or representation required by § 9-1.5407 is designed to alert the contracting officer to situations or relationships which may constitute either present or anticipated organizational conflicts of interest with respect to a particular offeror or contractor. However, this disclosure or representation may not identify a potential organizational conflict of interest involving a successful offeror that could affect the offeror's participation in subsequent procurements arising out of or related to work performed under a contract that results from the solicitation currently under consideration. Accordingly, whenever such potential conflicts are foreseeable by the Government, a special notice also shall be included in the solicitation informing offerors of the fact that such a potential conflict is foreseen and that a special contract clause designed to avoid or mitigate such contract will be included in any resultant contract as required by § 9-1.5407. Such notice shall specify the proposed extent and duration of restrictions to be imposed with respect to participation in subsequent procurements. A fixed term of reasonable duration is measured by the time required to eliminate what would otherwise constitute an unfair competitive advantage. This is a variable; and in no event shall an exclusion be stated which is not related to a specific expiration date or an event certain. In the event a contractor, having performed on one contract,

later seeks work that stems or may be deemed to stem directly from prior performance, such contractor shall not be precluded from proposing on follow-on work unless the prior contract contained an appropriate follow-on restriction.

§ 9-1.5407 Disclosure or representation.

(a) The following disclosure or representation provision shall be included in all solicitations, scope modifications and unsolicited proposals for (1) evaluation services or activities; (2) technical consulting and management support services and professional services; (3) research and development conducted pursuant to the authority of the Federal Energy Administration Act of 1974 (Pub. L. 93-275), as amended; and (4) other contractual situations where special organizational conflicts of interest provisions are noted in the solicitation and included in the resulting contract. Appendix B contains a suggested format for the disclosure submission.

ORGANIZATIONAL CONFLICTS OF INTEREST DISCLOSURE OR REPRESENTATION

It is Department of Energy policy to avoid situations which place an offeror in a position where its judgment may be biased because of any past, present, or currently planned interest, financial or otherwise, the offeror may have which relates to the work to be performed pursuant to this solicitation or where the offeror's performance of such work may provide it with an unfair competitive advantage. (As used herein, "offeror" means the proposer or any of its affiliates or proposed consultants or subcontractors of any tier). Therefore:

(a) The offeror shall provide a statement which describes in a concise manner all relevant facts concerning any past, present, or currently planned interest (financial, contractual, organizational, or otherwise) relating to the work to be performed hereunder and bearing on whether the offeror has a possible organizational conflict of interest with respect to (a) being able to render impartial, technically sound, and objective assistance or advice, or (b) being given an unfair competitive advantage. The offeror may also provide relevant facts that show how its organizational structure and/or management systems limit its knowledge of possible organizational conflicts of interest relating to other divisions or sections of the organization and how that structure or system would avoid or mitigate such organizational conflict.

(b) In the absence of any relevant interests referred to above, the offeror shall submit a statement certifying that to its best knowledge and belief

no such facts exist relevant to possible organizational conflicts of interest. Proposed consultants and subcontractors shall submit such information directly to the contracting officer.

(c) The Department will review the statement submitted and may require additional relevant information from the offeror. All such information, and any other relevant information known to the Department, will be used to determine whether an award to the offeror may create an organizational conflict of interest. If such organizational conflict of interest is found to exist, the Department may (i) impose appropriate conditions which avoid such conflict, (ii) disqualify the offeror, or (iii) determine that it is otherwise in the best interests of the United States to contract with the offeror by including appropriate conditions mitigating such conflict in the contract awarded.

(d) The refusal to provide the disclosure or representation and any additional information as required shall result in disqualification of the offeror for award. The nondisclosure or misrepresentation of any relevant interest may also result in the disqualification of the offeror for award, or if such nondisclosure or misrepresentation is discovered after award the resulting contract may be terminated for default. The offeror may also be disqualified from subsequent related Department contracts, and be subject to such other remedial action as may be permitted or provided by law or in the resulting contract. The attention of the offeror in complying with this provision is directed to 18 U.S.C. 1001.

(e) Depending on the nature of the contract activities, the offeror may, because of possible organizational conflicts of interest, propose to exclude specific kinds of work from the statement of work contained in a solicitation for a negotiated procurement, unless the solicitation specifically prohibits such exclusion. Any such proposed exclusion by an offeror shall be considered by the Department in the evaluation of proposals, and if the Department considers the proposed excluded work to be an essential or integral part of the required work, the proposal may be rejected as unacceptable.

(f) No award shall be made until the disclosure or representation has been evaluated by the Government. Failure to provide the disclosure or representation will be deemed to be a minor informality (FPR § 1-2.405) and the offeror or contractor shall be required to promptly correct the omission.

RULES AND REGULATIONS

§ 9-1.5408 Contract clauses.

§ 9-1.5408-1 General contract clause.

Except where a special clause has been determined to be appropriate, all contracts subject to the disclosure or representation requirement of 9-1.5407 shall include the following clause:

ORGANIZATIONAL CONFLICTS OF INTEREST—GENERAL

(a) The contractor warrants that, to the best of its knowledge and belief, and except as otherwise disclosed, there are no relevant facts which would give rise to organizational conflicts of interest, as defined in 41 CFR § 9-1.5403(a) or that the contractor has disclosed all relevant information.

(b) The contractor agrees that, if after award, an organizational conflict of interest with respect to this contract, is discovered, an immediate and full disclosure in writing shall be made to the contracting officer which shall include a description of the action which the contractor has taken or proposes to take to avoid or mitigate such conflicts. The Department may, however, terminate the contract for its convenience if it deems such termination to be in the best interests of the Government.

(c) In the event that the contractor was aware of an organizational conflict of interest prior to the award of this contract and did not disclose the conflict to the Contracting Officer, the Government may terminate the contract for default.

(d) The provisions of this clause shall be included in all subcontracts for work to be performed similar to the services provided by the prime contractor, and the terms "contract," "contractor," and "contracting officer" modified appropriately to preserve the Government's rights.

§ 9-1.5408.2 Special contract clauses.

(a) If it determine from the nature of the proposed contract that a potential organizational conflict of interest may exist, the contracting officer may determine that such conflict can be avoided through the use of an appropriate special contract clause. Examples of the types of clauses which may be employed include but are not limited to the following:

(1) Hardware exclusion clauses which prohibit the acceptance of production contracts following a related nonproduction contract previously performed by the contractor;

(2) Software exclusion clauses;

(3) Clauses which require the contractor (and/or certain of its key personnel) to avoid certain organizational conflicts of interest;

(4) Clauses which provide for the protection of the confidentiality of

data and guard against its unauthorized use; and

(5) Clauses that prohibit other segments or divisions of the contractor from becoming involved in the performance of the contract work or being in a position to influence such work.

If deemed appropriate, the prospective contractor may be given the opportunity to negotiate the terms and conditions of the clause and its application including the extent and time period of any restrictions.

(b) Contracts for technical consulting and management support services, as defined in § 9-1.5403(d), are particularly susceptible to organizational conflicts of interest. Therefore, the following contract clause shall be included in all contracts for technical consulting and management support services. This clause, after any appropriate modification, may also be included in any contract for professional services and evaluation services and activities:

ORGANIZATIONAL CONFLICTS OF INTEREST

(a) *Purpose.* The primary purpose of this clause is to aid in ensuring that the Contractor (1) is not biased because of its past, present, or currently planned interests (financial, contractual, organizational, or otherwise) which relate to the work under this contract, and (2) does not obtain any unfair competitive advantage over other parties by virtue of its performance of this contract.

(b) *Scope.* The restrictions described herein shall apply to performance or participation by the Contractor and any of its affiliates or their successors in interest (hereinafter collectively referred to as the "Contractor") in the activities covered by this clause as a prime contractor, subcontractor, Co-sponsor, joint venturer, consultant, or in any similar capacity.

(1) Technical consulting and management support services. (b) The Contractor shall be ineligible to participate in any capacity in Department contracts, subcontracts, or proposals therefor (solicited or unsolicited) which stem directly from the contractor's performance of work under this contract. Furthermore, unless so directed in writing by the Contracting Officer, the Contractor shall not perform any technical consulting or management support services work under this contract on any of its products or services or the products or services of another firm if the Contractor is or has been substantially involved in their development or marketing. Nothing in this subparagraph shall preclude the contractor from competing for follow-on contracts for technical consulting and management support services.

(ii) If the Contractor under this contract prepares a complete or essentially complete statement of work or specifications to be used in competitive procurements, the Contractor shall be ineligible to perform or participate in any capacity in any contractual effort which is based on such statement of work or specifications. The Contractor shall not incorporate its products or services in such statement of work or specifications unless so directed in writing by the Contracting Officer, in which case the restriction in this subparagraph shall not apply.

(iii) Nothing in this paragraph shall preclude the Contractor from offering or selling its standard commercial items to the Government.

(2) Access to and Use of Information. (i) If the Contractor, in the performance of this contract, obtains access to information, such as Department plans, policies, reports, studies, financial plans, internal data protected by the Privacy Act of 1974 (Pub. L. 93-579), or data which has not been released or otherwise made available to the public, the Contractor agrees that without prior written approval of the contracting officer it shall not: (a) Use such information for any private purpose unless the information has been released or otherwise made available to the public; (b) compete for work for the Department based on such information for a period of six (6) months after either the completion of this contract, or until such information is released or otherwise made available to the public, whichever is first; (c) submit an unsolicited proposal to the Government which is based on such information until one year after such information is released or otherwise made available to the public; and (d) release such information unless such information has previously been released or otherwise made available to the public by the Department.

(ii) In addition, the Contractor agrees that to the extent it receives or is given access to proprietary data, data protected by the Privacy Act of 1974 (Pub. L. 93-579), or other confidential or privileged technical, business, or financial information under this contract, it shall treat such information in accordance with any restrictions imposed on such information.

(iii) The Contractor shall have, subject to patent and security provisions of this contract, the right to use technical data it first produces under this contract for its private purpose provided that, as of the date of such use, all reporting requirements of this contract have been met.

(c) *Disclosure after Award.* (1) The Contractor agrees that if after award it discovers an organizational conflict of interest with respect to this con-

RULES AND REGULATIONS

tract, an immediate and full disclosure shall be made in writing to Contracting Officer which shall include a description of the action which the Contractor has taken or proposes to take to avoid or mitigate such conflicts. The Department may, however, terminate the contract for convenience if it deems such termination to be in the best interests of the Government.

(2) In the event that the contractor was aware of an organizational conflict of interest prior to the award of this contract and did not disclose the conflict to the contracting officer, the Department may terminate the contract for default.

(d) *Subcontracts.* The Contractor shall include this clause, including this paragraph, in subcontracts of any tier which involve performance or work of the type specified in (b)(1) above or access to information of the type covered in (b)(2) above. The terms "contract", "contractor" and "contracting officer" shall be appropriately modified to preserve the Government's rights.

(e) *Remedies.* For breach of any of the above restrictions or for nondisclosure or misrepresentation of any relevant facts required to be disclosed concerning this contract, the Government may terminate the contract for default, disqualify the Contractor for subsequent related contractual efforts and pursue such other remedies as may be permitted by law or this contract.

(f) *Waiver.* Requests for waiver under this clause shall be directed in writing to the Contracting Officer and shall include a full description of the requested waiver and the reasons in support thereof. If it is determined to be in the best interests of the Government, the Contracting Officer shall grant such a waiver in writing.

§ 9-1.5409 Evaluation, findings, and contract award.

(a) The contracting officer or selection official, as appropriate, shall evaluate all relevant facts submitted by an offeror pursuant to the requirements of § 9-1.5407 and such other relevant information as may be available concerning possible organizational conflicts of interest. After evaluating all such information in accordance with the criteria of § 9-1.5404 and prior to any award, a finding shall be made by the contracting officer whether possible organizational conflicts of interest exist with respect to a particular offeror or whether there is little or no likelihood that such conflicts exist. If the finding indicates that such conflicts exist, then the contracting officer shall:

(1) Disqualify the offeror from award; or

(2) Avoid such conflicts by the inclusion of appropriate conditions in the resulting contract; or

(3) If such conflicts cannot be avoided by an appropriate contract provision, and the Secretary or the Secretary's designee has nevertheless determined that award of the contract to the offeror is in the best interest of the United States, the contract may be awarded. Where such a public interest determination is made, an appropriate written finding and determination shall be published in the FEDERAL REGISTER and an appropriate clause included in the contract to mitigate the conflict, to the extent feasible prior to any award.

(b) Examples of circumstances justifying the determination permitted by § 9-1.5409(a)(3) include but are not limited to:

(1) Situations where the public exigency will not otherwise permit; and

(2) Situations where the work or services cannot otherwise be obtained.

§ 9-1.5410 Action in lieu of termination.

If after award a possible organizational conflict of interest is identified by the contractor or other sources and the contracting officer determines that such a conflict does in fact exist and that it would not be in the best interests of the Government to terminate the contract as provided in the clauses required by § 9-1.5408, the contracting officer shall take every reasonable action to avoid or mitigate the effects of the conflict.

§ 9-1.5411 DOE management contractors, subcontractors and consultants.

The missions and functions of the Department require the use of contractors to operate and manage the Department's facilities on a long-term basis pursuant to Part § 9-50. Where such an operating contract is to be renewed, the contracting officer should exercise special care in incorporating an appropriate organizational conflicts of interest provision therein. Whenever an operating contract is not to be renewed, but a new selection is to be made, the disclosure or representation requirement of § 9-1.5407 and an appropriate clause should be included in the solicitation and resulting contract. In preparing such clause, the contracting officer shall consider provisions which assure appropriate restraints on intercorporate relations between the contractor's organization and personnel operating the Department's facility and its parent corporate body and affiliates, including personnel access to the facility, technical transfer of information from the facility, and the availability from the facility of other advantages flowing from performance of the contract. The subcontractors and consultants of Department oper-

ating contractors should be, to the extent feasible, made subject to the requirements of this subpart as if they were performing the work as prime contractors to the Department.

§ 9-1.5412 Architect-engineering and construction contracts.

(a) The award of related architect-engineering services and construction contracts or subcontracts to the same contractor can result in self-inspection of construction work and permit the contractor to render biased decisions. Such contract awards shall not be permitted unless a waiver is obtained prior to award from the Department's senior procurement official.

(b) The award of architect-engineering services contracts, the principal purpose of which is to provide evaluation services and activities or technical consulting and management support services, shall be subject to the requirements of § 9-1.5407 and § 9-1.5408-2(b).

§ 9-1.5413 Subcontractors and consultants.

The contracting officer shall require offerors and contractors to obtain for the Department a disclosure or representation in accordance with subsection 9-1.5407 from subcontractors and consultants who may be performing services similar to the services provided by the prime except that subcontractors shall not normally be required to submit the disclosure or representation if such subcontract is for supplies. Such disclosure or representation shall be submitted by the subcontractors and consultants directly to the contracting officer and they shall be treated by the Department as confidential information to be used solely for OCI purposes. The contracting officer shall assure that contract clauses in accordance with § 9-1.5408 are included in subcontracts or consultant agreements involving performance of work under a prime contract covered by this subpart.

§ 9-1.5414 Remedies.

In addition to such other remedies as may be permitted by law or contract, for a breach of any of the restrictions in this subpart or for nondisclosure or misrepresentation of any relevant facts required to be disclosed by this subpart, the Department may disqualify the contractor for subsequent Department contracts. Contractors and offerors may also be subject to the criminal penalties expressed in 18 U.S.C. § 1001 for such violations.

APPENDIX A

Specific Examples of Contractual Situations or Relationships—Organizational Conflicts of Interest

RULES AND REGULATIONS

GENERAL

In development work it is normal to select firms which have done the most advanced work in the field. It is to be expected that these firms will design and develop around their own prior knowledge. Development contractors can frequently start production earlier and more knowledgeably than firms which did not participate in the development, and this affects the time and quality of production, both of which are important to the Government. In many instances the Government may have financed such development. Thus, the development contractor may have an unavoidable competitive advantage which is not considered unfair and no prohibition should be imposed.

EXAMPLES

The following examples illustrate types of situations and relationships where organizational conflict of interest questions frequently arise, but they are not all inclusive.

Example 1

Contractor A in connection with the performance of a study contract is given information by the Department regarding the Department plans for future procurements. This information is not available to interested industrial firms.

Guidance. Normally this would constitute an OCI and the contractor should not be permitted to compete with such firms for work relating to such plans.

Example 2

Company A in response to a request for proposals (RFP), proposes to undertake certain analyses of an energy savings device as called for in the RFP. The company is one of several companies considered to be technically well qualified. In response to the inquiry in the RFP, A advises that it is currently performing similar analyses for the manufacturer of the device.

Guidance. Normally this would constitute an OCI and a contract for that particular work would not be awarded to Company A because it would be placed in a position in which its judgment could be biased in relationship to its work for the Department. Since there are other well qualified companies available, there would be no reason for granting a waiver of the policy.

Example 3

Accounting firm A in response to a request for proposal, proposes to undertake an analysis of the profitability of one segment of the energy industry. The firm is one of several firms considered to be technically well qualified. In response to the inquiry in the RFP, A advises that it derives a substantial portion of its income from the industry to be studied.

Guidance. Normally this would constitute an OCI and a contract would not be award-

ed to firm A because it would be placed in a position in which its judgment could be biased in relationship to its work for the Department.

Example 4

Company A prepares updated Government specifications for a standard refrigerator to be procured competitively.

Guidance. Normally this would constitute an OCI and Company A shall not be allowed for a reasonable period of time to compete for supply of the refrigerator.

Example 5

Company A designs or develops new electronics equipment and, as a result of the design or development, prepares specifications.

Guidance. Normally this would not constitute an OCI and the company may supply the electronics equipment.

Example 6

A tool company and/or a machinery company representing the American Tool Institute works under the supervision and control of Government representatives to refine specifications or to clarify the requirements of a specific procurement.

Guidance. Normally this would not constitute an OCI and these companies may supply the item.

Example 7

Prior to procurement of Automatic Data Processing (ADP) Equipment, Company A is awarded a contract to develop software to automate a DOE function. Since software can be written to favor a particular vendor's commercial ADP hardware, a potential conflict of interest exists.

Guidance. Normally this would constitute an OCI and Company A should be barred from at least the initial follow-on ADP hardware procurement using the software developed under its development contract.

Example 8

Company A receives a contract to define the detailed performance characteristics a Government agency will require for the purchase of rocket fuels. A has not developed the particular fuels. At the time the contract is awarded, it is clear to both parties that the performance characteristics arrived at will be used by the Government agency to choose competitively a contractor to develop or produce the fuels.

Guidance. Normally this would constitute an OCI and Company A shall not be permitted to bid on this procurement.

Example 9

Company A receives a contract to prepare a detailed plan for the procurement of services aimed at the advanced scientific and engineering training of the Department's per-

sonnel. It suggests a curriculum which the agency endorses and incorporates in requests for proposals to various institutions to establish and conduct such training.

Guidance. Normally this would constitute an OCI and Company A shall not be permitted to bid on this procurement.

Example 10

Consulting firm A in response to a request for proposals (RFP), proposes to undertake an evaluation of the environmental impacts of coal-fired power plants as called for in the RFP. The company is one of several companies considered to be technically well qualified. In response to the inquiry in the RFP, A advises that it derives a substantial portion of its income from companies which manufacture nuclear power plants.

Guidance. Normally this would constitute an OCI and a contract for that particular work would not be awarded to Company A because it would be placed in a position in which its judgment could be biased in relationship to its work for the Department.

Example 11

Consultant firm A derives a substantial portion of its income from Company B in connection with the study of natural gas production. Company B is also heavily involved with motor gasoline marketing. A discloses these facts in response to an RFP for a study of motor gas marketing.

Guidance. Normally this would constitute an OCI and a contract for the study of motor gasoline marketing plants would not be awarded to Company A because it would be placed in a position in which its judgment could be biased in relationship to its work for the Department.

APPENDIX B

DISCLOSURE FORMAT

With respect to past, present, and currently planned interests (financial, contractual, organizational, or otherwise) the offeror should furnish a list of past, present, and currently planned activities (including contracts) which relate to the work to be performed under the solicitation. The list may be in columnar format showing:

- (a) the company (or agency) for which the work is being, has been, or will be performed;
- (b) nature of the work (a brief description);
- (c) period of performance for the work; and
- (d) dollar value of the work;
- (e) sales and marketing activity.

Similar information should be provided by the covered subcontractors and consultants relating to the work to be performed by them under the solicitation.

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