

May 4, 2004

Ruth E. McBurney, CHP, Director
Division of Licensing, Registration and Standards
Bureau of Radiation Control
Texas Department of Health
1100 West 49th Street
Austin, TX 78756-3189

Dear Ms. McBurney:

I am responding to your March 31, 2004 letter requesting an interpretation of 10 CFR 30.12. You requested that we clarify the definition of "subcontractor" in this regulation in connection with the issue of whether a Texas licensee could be considered to be a "subcontractor" of the Department of Energy (DOE) under the equivalent Texas regulations notwithstanding the fact that DOE does not enter into subcontracts.

As an initial matter, under ordinary principles of contract law, a determination of whether this licensee is a "subcontractor" would depend upon the provisions that have been made for payment of this licensee. If the Texas entity is paid by the prime contractor and the prime contractor then bills DOE for the work performed by the Texas entity under its contractual relationship with DOE, the Texas licensee could still be considered to be a subcontractor of DOE, notwithstanding DOE's assertion that it does not enter into subcontracts.

In addition, in order to find that the Texas licensee is entitled to an exemption pursuant to a regulation that is equivalent to 10 CFR 30.12, you would then have to conclude from the facts that this entity is the prime (i.e., chief or leading) subcontractor for DOE. (A finding would also have to be made, in accordance with the criteria in Section 30.12, that the exemption is authorized by law and that under the terms of the subcontract there is adequate assurance that the work thereunder can be accomplished without undue risk to the public health and safety). As we have not been provided a copy of the contract or been provided any information from which we can make a determination as to the arrangement for payment of this licensee, or whether this Texas licensee is, in fact, the prime subcontractor for DOE for handling and transporting Atomic Energy Commission sources for return to Los Alamos, we are unable to advise you as to whether this entity would in fact be eligible for an exemption from a license pursuant to a regulation that is equivalent to 10 CFR 30.12.

We note that section 289.201(c)(2)(D) of the Texas Regulations for Control of Radiation, effective April 29, 2003, requires that the State and the NRC jointly determine whether a prime contractor or a subcontractor may qualify for an exemption from licensing. We advise that you obtain a copy of the contract between the prime contractor and DOE, as well as the contract between the prime contractor and the Texas licensee, so that you can make the determinations described in this letter.

Ruth McBurney

- 2 -

May 4, 2004

If I may be of further assistance to you on this issue, please contact me or Lloyd Bolling at 301-415-2327.

Sincerely,

/RA/

Paul H. Lohaus, Director
Office of State and Tribal Programs

Ruth McBurney

- 2 -

May 4, 2004

If I may be of further assistance to you on this issue, please contact me or Lloyd Bolling at 301-415-2327.

Sincerely,

/RA/

Paul H. Lohaus, Director
Office of State and Tribal Programs

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