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(5)
Contractor Conflicts of Interest (43FR3288)

February 21, 1978

Secretary of the Commission
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555

Attention: Docketing and Service Branch

Dear Sir:

Re: Proposed Regulation 41CFR Chapter 20
Section 20-1.5401 through 20-1.5406

We have reviewed the above Proposed Regulation published in the Federal Register, Volume 43, No. 16, dated Tuesday, January 24, 1978, Pages 3288-3292, and would like to offer several suggestions.

The intent of the Proposed Regulation is clearly defined and it is recognized that each situation will be considered on a case-by-case basis. However, the Proposed Regulation does not clearly define the time period over which a conflict of interest might be considered to exist.

For example, assume that our laboratory was under contract several months ago to perform work for a corporation or agency regulated by the Nuclear Regulatory Commission (NRC). Furthermore, assume that our conclusions and recommendations to that agency had been accepted. If at some later date, NRC required work of a similar nature to be performed, incorporating the latest technological state-of-the-art, would our laboratory qualify as a prospective bidder on the proposed NRC work? Because of the time lapse that had occurred and because of the obvious need to take advantage of technological

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Secretary of the Commission
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advances that may have been developed during our work on the previous job, it would seem that the question of conflict of interest should not arise.

We suggest, therefore, that the Proposed Regulation specifically state the time period beyond which a conflict of interest could no longer be considered to exist, or at least indicate that a reasonable interval of time between two jobs may permit the conflict of interest question to be waived. We believe that any work completed by a laboratory such as ours prior to the award of an NRC contract should not be considered as conflict of interest.

Please consider these comments in your revisions to the Proposed Regulation.

Very truly yours,

W. E. K. /vkv

DETAILED COMMENTS OF WESTINGHOUSE

SECTION-BY-SECTION ANALYSIS OF NRC PROPOSED OCI REGULATION

Section 20-1.5401 Policy and Scope

The requirements for disclosure of potential conflicts of interest is too broad. As under the guidelines of ASPR, Appendix G, the choice of a contractor should be based (among other things) on avoiding assignments of work which would create inherent (emphasis added) conflicts of interest. In addition, in Columbia Research Corporation, B-185843, 76-2 CPD 2 (July 1, 1976) the Comptroller General held that a contractor could not be eliminated from the competitive range where a conflict was "remote from the substance to be performed under the proposed contract and ... [the] appearance of conflict is insignificant and too theoretical". Any Organizational Conflicts of Interest must be based on what the circumstances are at the time of award and not what they might potentially be in the future.

Section 20-1.5402 Definition

These definitions are taken in part from the former NRC Regulation ERDA Temporary Regulation 35 and the proposed Office of Federal Procurement Policy (OFPP) Regulation. As in those regulations, the definitions are too vague and too subjective upon which to make any representation. As such, uniform application would be very difficult. In fact, the definition of "Contractor" in paragraph (f) would create for a corporation of any reasonable size an almost impossible task of purging the entire corporate structure for such Organizational Conflict of Interest. Although the definition of "Contractor" under ASPR, Appendix G, is similar, it would not impose similar difficulties since the guidelines of ASPR do not impose unreasonable burdens.

Section 20-1.5403 Criteria for Recognizing Contractor Organizational Conflict of Interest

The use of the general policy criteria, relationships and policy application guidance is confusing. Paragraph (b) is from the general guidelines in the proposed OFPP Regulation, which we understand were subject to much adverse comment not yet resolved. Although the list may be specific in nature, some of the information sought may in fact not result in an Organizational Conflict of Interest and thus places the contractor in a position of having to furnish useless data. Subparagraph (1) and (2) are such situations. There is nothing improper in bias resulting from knowledge; furthermore, if literally interpreted a contractor could be precluded from having a "fair" competitive advantage. This entire section (b) should be deleted. There is no comparable section in ASPR, Appendix G.

Section (d) is also from the proposed OFPP Regulation. Again, reference is made to "potential" Organizational Conflict of Interest which gives rise to an indefinite, open-ended type of exposure. Only "actual" Organizational Conflict of Interest should be addressed. And again, as stated in ASPR, Appendix G, the choice of a contractor should be based on avoiding assignments of work which would create inherent conflicts of interest.

Section 20-1.5404 Representation

Section (b)(4) is too broad. It gives the NRC an unfettered right to include an Organizational Conflict of Interest clause in every request for bid, invitation or proposal. If the ASPR, Appendix G guidelines were adopted by the NRC, there would be no need to have a contract clause at all. Considering the successful experience of the Department of Defense has had working within the framework of its guidelines, and coupled with the fact that the NRC's own experience has indicated little need to adopt stringent regulations, the justification for the NRC to adopt restrictive contract provisions would be quite thin, particularly since such a step has not been mandated by Congress.

We also believe that the representations required are difficult, time-consuming and unrealistic. A contractor is required to know the business of all its divisions and affiliates in order to make an accurate representation. The penalty for an incorrect representation could, under Section (c)(2), result in a termination of the contract for the convenience of the Government, disqualification from subsequent related NRC contracts or other remedial actions which might include debarment or suspension. In effect, one division of Westinghouse for failing to know the work or plans of another could imperil the entire corporation. ASPR, Appendix G, does not require such representations. Since the warranty extends to a corporation's directors, officers, proposed subcontractors and consultants, the requirement for the warranty is clearly unreasonable. When this is also extended to "potential" Organizational Conflict of Interest, the requirement is burdensome. Again, ASPR, Appendix G, imposes no such requirements.

Section 20-1.5405-1 General Contract Clause

The same general comments of the prior section apply here. Furthermore, in Section (d)(iii) of the clause the contractor is faced with the standard of "should have known" an Organizational Conflict of Interest was there. Again, this is too subjective a requirement and because the remedies are so harsh, industry would have serious concerns about accepting such a risk. If ASPR, Appendix G were adopted, a general contract clause would not be needed.