UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

December 13, 1989

MEMORANDUM FOR: Document Control Desk
P1-37 - White Flint

FROM: Mary Lynn Scott, Acting Chief
Operations Support Staff
Division of Contracts and
Property Management
Office of Administration

SUBJECT: NRC ACQUISITION REGULATION HISTORY

The attached set of documents represents the regulatory history of the NRC Acquisition Regulation 48 CFR Chapter 20. Documents 1 through 8 are to be placed in the PDR, and documents 9 through 59 are to be placed in the central files. The index of these documents, once it is prepared, should be sent to me at Mail Stop P-1118.

If you have any questions concerning these documents, I can be reached at 492-8788.

Mary Lynn Scott

Mary Lynn Scott, Acting Chief
Operations Support Staff
Division of Contracts and
Property Management
Office of Administration

Attachment:
As stated

(R)

PDR

(1) A001-1 PDR

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DAVID PIERPONT GARDNER
President

RONALD W. BRADY
Senior Vice President—
Administration

OFFICE OF THE PRESIDENT
300 LAKESIDE DRIVE
OAKLAND, CALIFORNIA 94612-3550

November 20, 1989

DOCKET NUMBER
PROPOSED RULE PR 48 C 20
(54 FR 40420)

The Secretary of the Commission
U.S. Nuclear Regulatory Commission
Attention: Docketing and Service Branch
Washington, DC 20555

Dear Secretary:

We are writing to offer comments on the proposed issuance of the NRC Acquisition Regulation (NRCAR) that was published in the Federal Register on October 2, 1989. Because of the paperwork implications of this new NRCAR, copies of these comments are also being submitted to Nicolas Garcia/OMB and Brenda Shelton/NRC in response to the notice of proposed information collection published in the Federal Register on October 4, 1989.

Our comments are written from the point of view of a major research university. Although only a small proportion of the NRC budget is spent on research and development ($3.9 million in FY87), it is precisely those dollars that will lead to the new knowledge and technological innovations needed to make improvements in the nuclear energy sector. Thus it is important that research funds be spend as efficiently as possible.

Unfortunately, there are several sections in the proposed NRCAR that would be objectionable if used in contracts supporting research at colleges and universities, because they are inconsistent with the rules that govern work we do under virtually all other federal contracts and grants. In addition, there are other places where the NRCAR deviates from the Federal Acquisition Regulations (FAR) and no clear reason is given for the deviation. These inconsistencies would make administering NRC contracts more burdensome and costly than necessary. We have outlined our concerns below:

NRC Authority

The FAR at 1.304(b) requires that "Agency acquisition regulations shall not --"

Research Administration
2199 Addison Street
Suite 406A Great Western
University of California
Berkeley, CA 94720

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(1) Unnecessarily repeat, paraphrase, or otherwise restate material contained in the FAR . . . ; or

(2) Except as required by law or as provided in Subpart 1.4, conflict or be inconsistent with FAR content.

The only section of the proposed NRCAR that is justified explicitly by reference to a public law is Subpart 2009.5, Organizational Conflicts of Interest. There is no indication that NRC has gone through the formal deviation process for the remainder of its proposed FAR supplement, as required by FAR Subpart 1.4.

We therefore question NRC's authority to issue any material that supplements the FAR (other than Subpart 2009.5 and those sections that merely identify responsible NRC officials) that is not explicitly required by statute or approved pursuant to the formal deviation process outlined in FAR Subpart 1.4.

Paperwork Burdens

The NRC estimates that the "public reporting burden for this collection of information is estimated to average 12 hours per response." We have been unsuccessful after three attempts in obtaining the paperwork clearance packet for the NRCAR, so it is difficult to say how the 12 hour figure was arrived at. Nevertheless, it is clearly wrong with respect to the total potential paperwork burdens imposed by the additional NRC clauses and requirements. The technical reporting requirements alone, with twelve reports due each year, would account for over 30 hours per respondent per year.

We request that NRC perform an adequate paperwork burden analysis for each paperwork burden that may be imposed on NRC contractors, broken down by category: security, debarment, organizational conflicts of interest, purchasing, proposal preparation, subcontracting plans, invention reporting, contract financing, government property management, technical reporting, financial reporting, prior approvals, and other areas.

Administrative Procedures Act

Under the heading "Administrative Procedures Act," NRC declares that the proposed rule is "not significant within the meaning of OFPP Policy Letter No. 83-2," where 'significant' is defined as:

> something which has an effect beyond the internal operating procedures of the agency or has a cost or administrative impact on contractors.

The proposed rule, however, would clearly have a cost or administrative impact on contractors who have to comply with the requirements discussed above under "Paperwork Burdens." We request that NRC retract this claim and admit that the NRCAR does fall under the rubric of OFPP Policy Letter 83-2. We are not aware of any other Federal agency claiming such an exemption for their entire Federal Acquisition Regulation Supplement. If agency Supplements are exempt, then what <u>isn't</u> exempt?

<u>OFPP Regulatory Reduction Efforts</u>

At 24 pages of small, three-column type, this FAR Supplement is one of the longer agency supplements. This is disconcerting at a time when the Office of Federal Procurement Policy is devoting a great deal of effort to reducing the number of pages of procurement regulations. We call NRC's attention to the June 1989 report issued by OFPP titled "Procurement Regulatory Activity Report" in which OFPP efforts to reduce the number of pages in FAR supplements are summarized.

We would strongly urge NRC to re-review every paragraph in this proposed Supplement with a view to determining whether there is not sufficient FAR coverage already and so no need for additional NRC coverage. A high degree of cooperation is necessary if we are not all to drown in a sea of paper.

<u>Subcontracting Plans</u>

FAR Subpart 19.702(a)(1) states that

> In negotiated acquisitions, each solicitation of offers to perform a contract or contract modification, which <u>individually</u> is expected to exceed $500,000 ($1,000,000 for construction) and that has subcontracting possibilities shall require the apparently successful offeror to submit an acceptable subcontracting plan. (emphasis added)

Thus the FAR makes it clear that when considering thresholds for subcontracting plans, each contract or contract modification is to be

considered separately as to whether the amount of that contract or modification exceeds the threshold.

FAR Subpart 19.705-2 goes on to say that

> The contracting officer shall take the following action to determine whether a proposed contractual action requires a subcontracting plan:
>
> (a) Determine whether the proposed contractual action will meet the dollar threshold in 19.702(a)(1) or (2). If the action includes options or similar provisions, include their value in determining whether the threshold is met.

It is clear that the phrase "options or similar provisions" applies to terms of individual contracts or contract modifications; "options or similar provisions" could not encompass contract modifications without contradicting Subpart 19.705-2.

Nevertheless, the NRCAR proposes to state at 2019.705-2, Determining the Need for a Subcontracting Plan, that:

> In determining whether the acquisition meets the dollar threshold established in FAR 19.702 for requiring a subcontracting plan, the total value of the acquisition must be considered, including the value of all proposed option quantities and funding actions.

The only reason for adding this language is to try to include contract modifications within the meaning of "funding actions." This would mean that a contract for $50,000 which may have $50,000 modifications for the following nine years (for a ten year total of $500,000) would have to have subcontracting plans for each of those ten years.

The language in 2019.705-2 is inconsistent with the FAR and should be deleted.

Invention Reports

The FAR at 27.305-3, Follow-up by Government, makes it clear that invention reporting requirements are specified in the patents rights clause used in the particular contract. The Contracting Officer is supposed to make sure that the contractor fulfills its obligations under the applicable patent rights clause (see FAR Subpart 27.305-3(c)). This subpart adds no additional reporting requirements beyond

what is in the applicable patent rights clause. Nevertheless, NRCAR Subpart 2027.305-3, Follow-up by Government, is proposed to read:

> (a) The contracting officer shall ... require each contractor to report on any patents, copyrights, or royalties attained using any portion of the contract funds. The contractor shall, if no activity is to be reported, certify that in connection with the performance of the contract:
>
> (1) No inventions or discoveries were made,
>
> (2) No copyrights were secured, produced, or composed,
>
> (3) No notices or claims of patent or copyright infringement have been received . . .
>
> (4) No royalty payments were directly involved . . .

These additional reporting requirements are inconsistent with the FAR and should be deleted.

Debarment

The FAR debarment and suspension rules, we understand, are currently under review and will soon be merged into a government-wide debarment system that covers both contracts and grants. Until that happens, the agencies' contract rules for debarment should be consistent with current FAR coverage. Currently, the FAR has a $25,000 threshold for using the clause at 52.209-5, and that clause contains standard language used by virtually every agency.

Unaccountably, the NRCAR would require its own debarment certification in all solicitations, regardless of dollar amount. The certification language would be unique to NRC and inconsistent with the FAR.

Rights in Data

Pursuant to FAR 27.409(e), the clause at 52.227-14, Rights in Data - General, is to be used with Alternate IV in contracts for basic or applied research performed solely by universities and colleges. This Alternate IV provides that:

> . . . Except as otherwise specifically provided in this contract, the Contractor may establish claim to copyright subsisting in any data first produced in the performance of this contract. . . .

In contrast, the proposed NRCAR at 2052.210-71 would state:

> All drawings, sketches, designs, design data, specifications, notebooks, technical and scientific data, and all photographs, negatives, reports, findings, recommendations and other data and memoranda of every description relating thereto .... are the property of the Government for any purpose whatsoever without any claim on the part of the contractor and its subcontractors . . . [the remainder of this clause is somewhat garbled]

This language is unacceptable in contracts supporting research at colleges and universities. The NRCAR needs to allow for a comparable Alternate IV to be used.

Technical Reporting

Although there is no comparable FAR coverage on technical reporting on research contracts, most agencies adhere to the standards in OMB Circular A-110, Attachment H, Monitoring and Reporting Program Performance, which state in part:

> 4. ... Except [when events occur that have significant impact on the project], performance reports shall not be required more frequently than quarterly . . .
>
> 8. Federal sponsoring agencies shall submit proposed technical and performance reports to OMB for approval in accordance with the report clearance requirements of OMB Circular No. A-40 as revised.

Comparing this with the proposed NRCAR clause at 2052.212-71, Technical Progress Report [to be use when contract deliverables include a technical report, pursuant to 2012.104-70(a)], we find the following language:

> The contractor shall provide a monthly Technical Progress Report to the project officer and the contracting officer. The report is due within 15 calendar days after the end of the report period . . .

Not only are these time intervals unreasonably short, but there is no indication that NRC will clear the format used with OMB.

Financial Reporting

Attachment G of OMB Circular A-110 contains financial reporting requirements for grants as follows:

> 3.a. Financial Status Report
>
> (3) ... the report shall not be required more frequently than quarterly . . .
>
> (4) Federal sponsoring agencies shall require recipients to submit the Financial Status Report (original and no more than two copies) no later than 30 days after the end of each specified reporting period ... and 90 days for annual and final reports. Extensions to reporting due dates may be granted upon request of the recipient.

Again the NRCAR is much more restrictive in its time limits, where the proposed 2052.212-72, Financial Status Report [to be used when detailed assessment of costs is warranted, pursuant to 2012.104-70(c)], states:

> The contractor shall provide a monthly Financial Status Report to the project officer and the contracting officer. The report is due within 15 calendar days after the end of the report period . . .

These impossibly strict time limits should be brought into line with requirements that OMB feels are reasonable.

Travel

Pub. L. 100-679, at Section 24, exempts universities from having to comply with Pub. L. 99-234 if they follow their own travel policies in accordance with OMB Circular A-21. NRCAR 2052.215-75, Travel Reimbursement, makes no provision for exempting universities from having to comply with the Federal Travel Regulations and federal per diem limits.

In addition, OMB Circular A-21, Section J.43.(f), states:

> Domestic travel costs are allowable when permitted by the sponsored agreement. Expenditures for such travel will not be allowed if they exceed the amount specified by more than 25% or $500,

whichever is greater, except with an advanced approval of the sponsoring agency.

The proposed clause at NRCAR 2052.215-76, Travel Approvals, is inconsistent with A-21 when it says that:

(a) All domestic travel requires the prior approval of the project officer.

The clauses at 2052.215-75 and 2052.215-76 should be clarified so that they will not be inconsistent with Federal Statute nor with OMB Circular A-21. It would be best if these clauses were not used at all in contracts with colleges and universities, since A-21 already contains sufficient coverage for these kinds of costs.

Thank you very much for the opportunity to comment on the proposed NRC Supplement. If you have any questions, or would like to discuss this letter further, please contact Bill Sellers in my office at 415-642-1638.

Sincerely,

David F. Mears

David F. Mears
Director, Research
Administration Office

cc: Nicolas B. Garcia/OMB
Brenda Jo. Shelton/NRC
Kate Phillips/COGR
Bob Coakley
Sue Spitz
Allan Burman/OFPP