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October 9, 1992

RULEMAKING ISSUE (Affirmation)

SECY-92-344

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For: The Commissioners

From: James M. Taylor
Executive Director for Operations

Subject: FINAL RULE ON ORGANIZATIONAL CONFLICTS OF INTEREST

Purpose: To obtain approval to publish a final rule modifying the Agency's organizational conflicts of interest (COI) policy. This rule relaxes certain restrictions regarding the work an NRC contractor can perform for a licensee on site while working for the NRC at that same site. This rule also provides the contractor with additional flexibility with respect to the time frame for reporting potential COI situations after award of the contract.

Background: On August 15, 1991, the Commission approved a revision to the Agency's policy on organizational conflicts of interest (COI). This revision prohibited contractors from performing work for NRC licensees at the same licensee site where the contractor is performing work for the NRC. Two of NRC's major technical assistance and research contractors commented that the revised policy was overly restrictive. These firms also felt these restrictions would impede rather than enhance NRC's ability to increase competition in the technical assistance marketplace. Therefore, the NRC held a public meeting on March 26, 1992, in order that all interested parties could provide further comments on the policy or provide alternatives that would achieve an equivalent level of COI protection (57 FR 4652; February 6, 1992).

NOTE: TO BE MADE PUBLICLY AVAILABLE
WHEN THE FINAL SRM IS MADE
AVAILABLE

Contact:
William Foster, DCPM
492-7348

9210160299

XA

The nature of the comments received in connection with the March 26, 1992, meeting varied with respect to how the commenters viewed the restrictiveness of the policy. While a number of commenters found the existing COI language adequate, others stated the policy was overly restrictive and lacking in flexibility.

Discussion:

The staff has modified the restriction to authorize NRC contractors to perform work for NRC licensees at a licensee site where the contractor is also performing work for NRC if the Contracting Officer determines that the specific situation will not pose a potential for technical bias or unfair competitive advantage.

In making the determination, the Contracting Officer will consider factors such as: the relative value of the work for NRC; whether there has been an on-going contractual or financial relationship between the NRC contractor and the NRC licensee that predates the NRC contract; whether the NRC contractor gained information about the availability of work for the NRC licensee as a result of contractor access to the site under the NRC contract; the relative amount of time spent at the site by the NRC contractor's personnel; whether the work for NRC at the site is specific or is a part of a generic task or contract; and any other factors that may indicate financial ties or competitive advantage.

Contractors also objected to the requirement that the NRC be informed of proposed work for others at least 15 days in advance of undertaking the work. Some companies complained that it is difficult for diversified firms to ensure that the division performing the work for NRC would be aware of the work by other divisions 15 days in advance in all cases. As a result, the staff has modified the provision to require that the contractor use due diligence to report the information to NRC 15 days in advance of undertaking the work. This provision also allows the Contracting Officer to approve exceptions to the 15 day reporting requirement when the contractor justifies the delay.

The modified COI policy was published as a proposed rule for public comment on August 18, 1992 (57 FR 37140). Only one comment was received; the commenter endorsed the revised policy. Accordingly, the draft final rule has not been changed from the proposed rule.

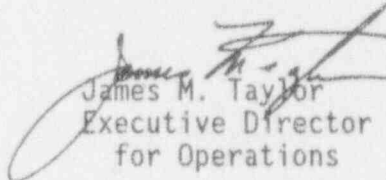
There is no resource impact associated with this rulemaking.

Coordination: The Office of the General Counsel has reviewed this rule and has no legal objection. Cognizant office directors were provided a copy of this rule on July 2, 1992, and no comments were received.

Recommendation: That the Commission

- (1) Approve this final rule on organizational conflicts of interest for publication in the Federal Register (Enclosure 1). This rule will be incorporated into the Nuclear Regulatory Commission Acquisition Regulation (48 CFR Chapter 20), if approved.
- (2) Certify that this rule does not have a significant economic impact on a substantial number of small entities in order to satisfy the requirements of the Regulatory Flexibility Act (5 U.S.C. 605(b)).
- (3) Note:
 - (a) That a summary regulatory analysis is included in the draft final rule.
 - (b) That neither an environmental impact statement nor an environmental assessment and finding of no significant impact has been prepared for this final rule because it meets the criteria for a categorical exclusion under § 51.22(c)(5).
 - (c) That appropriate Congressional committees will be informed of this rulemaking action (Enclosure 2).
 - (d) That the final rule amends information collection requirements subject to the Paperwork Reduction Act. These requirements are under review by the Office of Management and Budget.
 - (e) That the Chief Counsel for Advocacy of the Small Business Administration will be informed of the certification and the reasons for it as required by the Regulatory Flexibility Act.

- (f) That a public announcement will not be issued.
- (g) That a copy of the final rule will be distributed to all affected licensees and other interested persons.


James M. Taylor
Executive Director
for Operations

Enclosures:

- 1. Federal Register Notice
of Final Rulemaking
- 2. Draft Congressional Letters

Commissioners' comments or consent should be provided directly to the Office of the Secretary by COB Tuesday, October 27, 1992.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Tuesday, October 20, 1992, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

This paper is tentatively scheduled for affirmation at an Open Meeting during the Week of October 26, 1992. Please refer to the appropriate Weekly Commission Schedule, when published, for a specific date and time.

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NUCLEAR REGULATORY COMMISSION

48 CFR Chapter 20

RIN 3150-AE34

Acquisition Regulation (NRCAR): Organizational Conflicts of Interest

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is amending its Nuclear Regulatory Commission Acquisition Regulation (NRCAR) concerning organizational conflicts of interest provisions. This final rule modifies a section of the conflicts of interest provision relating to work for others during the period work is being performed for NRC.

EFFECTIVE DATE: Thirty days after publication.

FOR FURTHER INFORMATION CONTACT: Edward L. Halman, Director, Division of Contracts and Property Management, Nuclear Regulatory Commission, Washington, DC 20555. Telephone: (301) 492-4347

SUPPLEMENTARY INFORMATION:

Background

The proposed NRCAR, published for public comment on October 2, 1989 (54 FR 40420), addressed a full range of agency acquisition matters. A portion of the proposed NRCAR, relating to debarment, suspension and ineligibility procedures, has been adopted as a final agency regulation (57 FR 29220; July 1, 1992). The remainder of the NRCAR has recently been published as a final rule (Citation). One aspect of the NRCAR relates to the agency's organizational conflicts of interest (COI) policy. This final rule modifies a section of the conflict of interests rules relating to work for others.

On August 15, 1991, the Commission approved a revision to its proposed NRCAR modifying the Agency's COI rule. The thrust of this revision limited COI restrictions to the relatively narrow scope and shorter duration of individual task orders rather than to the entire scope and term of the basic contract. While the NRC believed that the revised rule would increase competition for NRC technical assistance and research work, additional restrictions were added to (a) avoid the potential for unfair competitive advantage that could result if NRC contractors were permitted to market their services while working for NRC at a licensee site, and (b) ensure that NRC contractors do not have divided financial interests while working at a licensee site.

Two of NRC's major technical assistance and research contractors commented that the COI provision, approved on August 15, 1991, was overly restrictive and would impede rather than enhance NRC's ability to increase

competition in the technical assistance marketplace. Therefore, the NRC held a public meeting on March 26, 1992, in order that all interested parties could provide further comments on the proposed revision of the Commission's COI regulation or provide alternatives that would achieve an equivalent level of COI protection (57 FR 4652; February 6, 1992).

Considerations Concerning Revised COI Policy

The nature of the comments received in connection with the March 26, 1992, meeting varied with respect to how the commenters viewed the restrictiveness reflected in the proposed revision to the COI rule. While a number of commenters found the existing COI language adequate, others stated the policy was overly restrictive and lacking in flexibility.

The Commission has considered the comments concerning the substantial restrictions against performing any work at an NRC licensee site where the contractor performs on-site work for NRC, coupled with the lack of flexibility in applying this restriction, and agrees that exceptions to the blanket restriction may be permitted in appropriate cases. Thus, the Commission has modified the restriction to authorize the NRC contractor to perform work for NRC licensees at the site of work performed for NRC if:

(a) The work is not in the same technical area as the work performed for NRC; and

(b) The contracting officer determines that the specific situation will not pose a potential for technical bias or unfair competitive advantage.

In making the determination, the contracting officer will consider factors such as: the relative value of the work for NRC; whether there has

been an on-going contractual or financial relationship between the NRC contractor and the NRC licensee that predates the NRC contract; whether the NRC contractor gained information about the availability of work for the NRC licensee as a result of contractor access to the site under the NRC contract; the relative amount of time spent at the site by the NRC contractor's personnel; whether the work for NRC at the site is specific or is a part of a generic task or contract; and any other factors that may indicate financial ties or competitive advantage.

Another section of the proposed COI rule on which the Commission received objections related to the requirement to disclose all other work proposed to be done by the contractor for others that may give rise to a COI situation. The specific objection related to the requirement that the NRC be informed of the work at least 15 days in advance of undertaking the work. Some companies complained that it is difficult for diversified firms to ensure that the division performing the work for NRC would be aware of the work by other divisions 15 days in advance in all cases. Giving due consideration to these comments, the Commission has modified the provision to require that the contractor use due diligence to identify and obtain information about work for others that would fall within the scope of the NRC contract, and report the information to NRC 15 days in advance of undertaking the work. The Commission has also added a corresponding provision which indicates that the contracting officer may approve reporting not in accordance with this provision in cases where the contractor justifies the deviation on the grounds of urgency or by showing that despite the exercise of due diligence, the contractor's officials responsible for the NRC contract were not aware of the work for others falling within this provision.

Proposed Rule

The proposed revision to the Commission's COI policy was published as a proposed rule for public comment August 18, 1992 (57 FR 37140). Only one comment was received. It endorsed the proposed rule changes. The final rule has not been changed from the proposed rule.

The commenter also provided certain comments on implementation of the rule change. The commenter indicated that implementation of the rule should permit an NRC contractor to discuss and reach agreement with the NRC contracting officer concerning the application of the proposed restrictions to certain types of work for others which the contractor may wish to solicit in advance of such solicitation. The rule proposed would permit such discussion provided that the contractor can provide the contracting officer with the information, outlined above, to enable the contracting officer to determine that the situation will not pose a potential for technical bias or unfair competitive advantage. The commenter also indicated that it expected that, in instances in which the contractor expresses an interest in pursuing totally unrelated activities, a determination permitting an exception to the work for others restrictions would be a timely and routine matter. Under the proposed rule, exceptions from the work for others restrictions is a matter of discretion of the contracting officer, provided that contracting officer is able to reach a determination, on the basis of the factors discussed above, that the proposed work for others will not pose a potential for technical bias or unfair competitive advantage. The fact that the proposed work is totally unrelated to work being done for NRC would be an important factor in such a

determination, but the other factors outlined above would also need to be considered.

Administrative Procedure Act

Section 553 of the Administrative Procedure Act (5 U.S.C. 551 et seq) exempts rules relating to public contracts from the prior notice and comment procedure normally required for rulemaking. However, the Office of Federal Procurement Policy (OFPP), Office of Management and Budget, has established procedures to be used by all Federal agencies in the promulgation of procurement regulations. The Commission published the proposed NRCAR, including the proposed COI regulations, on October 2, 1989 (54 FR 40420). The NRCAR was published as a final rule on date (cite). Additionally, this further amendment to the proposed COI rule was published for public comment August 18, 1992 (57 FR 37140).

Environmental Impact: Categorical Exclusion

The NRC has determined that this regulation is the type of action described in the categorical exclusion set forth in 10 CFR 51.22 (c)(5) and (6). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this final rule.

Paperwork Reduction Act Statement

This final rule amends information collection requirements that are subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq). This rule has been submitted to the Office of Management and Budget for review and approval of the information collection requirements.

The public reporting burden for this collection of information is estimated to average one hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Regulatory Analysis

This final rule establishes the policy, procedures, and requirements necessary to comply with 42 U.S.C. Sec. 2221, Sec. 170 A of the Atomic Energy Act of 1954, as amended, as it addresses COI. This provision will not have an additional adverse economic impact on any contractor or potential contractor because it merely implements the statute which governs COI in the award of NRC's contracts.

Regulatory Flexibility Certification

As required by the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission certifies that this rule does not have a significant economic impact on a substantial number of small entities. The final rule establishes the agency's COI policy and procedures to comply with 42 U.S.C.

Sec. 221, Section 170 A of the Atomic Energy act of 1954, as amended. Because the final rule establishes procedures applicable only in certain instances, these provisions do not have a significant economic impact on any contractor, including small entities.

Backfit Analysis

The NRC has determined that the backfit rule, 10 CFR 50.109, does not apply to this final rule. Therefore, a backfit analysis is not required because the rule does not involve any provision which would impose backfits as defined in 10 CFR Part 50.109(a)(1).

List of Subjects in 48 CFR Chapter 20

Government procurement, Nuclear Regulatory Commission Acquisition Regulations, Reporting and recordkeeping requirements.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, 5 U.S.C. 552 and 553, and FAR Subpart 1.3, the NRC is adopting the following amendments to 48 CFR Part 2052 (FR).

PART 2052 - SOLICITATION PROVISIONS AND CONTRACT CLAUSES

1. The authority citation for Part 2052 continues to read as follows:
AUTHORITY: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); Sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); Pub. L. 93-400, 88 Stat. 796,

as amended by Pub. L. 96-83, 93 Stat. 648, Pub. L. 98-577, 98 Stat. 3074 (41 U.S.C. 401 et seq.).

2. Section 2052.209-73, is amended by revising paragraphs (c) and (d) to read as follows:

§2052.209-73 Contractor organizational conflicts of interest.

* * * * *

(c) Work for others.

(1) Notwithstanding any other provision of this contract, during the term of this contract, the contractor agrees to forego entering into consulting or other contractual arrangements with any firm or organization, the result of which may give rise to a conflict of interest with respect to the work being performed under this contract. The contractor shall ensure that all employees under this contract abide by the provision of this clause. If the contractor has reason to believe, with respect to itself or any employee, that any proposed consultant or other contractual arrangement with any firm or organization may involve a potential conflict of interest, the contractor shall obtain the written approval of the contracting officer before the execution of such contractual arrangement.

(2) The contractor may not represent, assist, or otherwise support an NRC licensee or applicant undergoing an NRC audit, inspection, or review where the activities that are the subject of the audit, inspection, or review are the same as or substantially similar to the services within the scope of this contract (or task order as appropriate), except where the NRC licensee or applicant requires the contractor's support to explain or defend the contractor's prior work for the utility or other entity which NRC questions.

(3) When the contractor performs work for the NRC under this contract at any NRC licensee or applicant site, the contractor shall neither solicit nor perform work in the same or similar technical area for that licensee or applicant organization for a period commencing with the award of the task order or beginning of work on the site (if not a task order contract) and ending one year after completion of all work under the associated task order, or last time at the site (if not a task order contract).

(4) When the contractor performs work for the NRC under this contract at any NRC licensee or applicant site,

(i) The contractor may not solicit work at that site for that licensee or applicant during the period of performance of the task order or the contract, as appropriate.

(ii) The contractor may not perform work at that site for that licensee or applicant during the period of performance of the task order or the contract, as appropriate, and for one year thereafter.

(iii) Notwithstanding the foregoing, the contracting officer may authorize the contractor to solicit or perform this type of work if the contracting officer determines that the situation will not pose a potential for technical bias or unfair competitive advantage.

(d) Disclosure after award.

(1) The contractor warrants that to the best of its knowledge and belief, and except as otherwise set forth in this contract, it does not have any organizational conflicts of interest as defined in 48 CFR 2009.570-2.

(2) The contractor agrees that, if after award, it discovers organizational conflicts of interest with respect to this contract, it shall make an immediate and full disclosure in writing to the contracting officer. This statement must include a description of the action which the contractor has taken or proposes to take to avoid or mitigate such conflicts. The NRC may, however, terminate the contract if termination is in the best interest of the government.

(3) It is recognized that the scope of work of a task-order-type contract necessarily encompasses a broad spectrum of activities. Consequently, if this is a task-order-type contract, the contractor agrees that it will disclose all proposed new work involving NRC licensees or applicants which comes within the scope of work of the underlying contract. Further, if this contract involves work at a licensee or applicant site, the contractor agrees to exercise diligence to discover and disclose any new work at that licensee or applicant site. This disclosure must be made before the submission of a bid or proposal to the utility or other regulated entity and must be received by the NRC at least 15 days before the proposed award date in any event, unless a written justification demonstrating urgency and due diligence to discover and disclose is provided by the contractor and approved by the contracting officer. The disclosure must include the statement of work, the dollar value of the proposed contract, and any other documents that are needed to fully describe the proposed work for the regulated utility or other regulated entity. NRC may deny approval of the disclosed work only when the NRC has issued a task order which includes the technical area and, if

site-specific, the site, or has plans to issue a task order which includes the technical area and, if site-specific, the site, or when the work violates paragraphs (c)(2), (c)(3) or (c)(4) of this section.

* * * * *

Dated at Rockville, Maryland this ____ day of October, 1992.

For the Nuclear Regulatory Commission.

Samuel J. Chilk
Secretary of the Commission



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

The Honorable Bob Graham, Chairman
Subcommittee on Nuclear Regulation
Committee on Environment and Public Works
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

The NRC has sent to the Office of the Federal Register for publication the enclosed final rule revising the Agency's organizational conflicts of interest policy. The revised policy will be incorporated into the Nuclear Regulatory Acquisition Regulation by amendment.

Sincerely,

Dennis K. Rathbun, Director
Office of Congressional Affairs

Enclosure:
As stated

cc: The Honorable Alan Simpson



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

The Honorable Peter Kostmeyer, Chairman
Subcommittee on Energy and the Environment
Committee on Interior and Insular Affairs
United States House of Representatives
Washington, D.C. 20515

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Dennis K. Rathbun, Director
Office of Congressional Affairs

Enclosure:
As stated

cc: Representative John J. Rhodes



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

The Honorable Philip Sharp, Chairman
Subcommittee on Energy and Power
Committee on Energy and Commerce
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

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Dennis K. Rathbun, Director
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Enclosure:
As stated

cc: Representative Carlos Moorhead