



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

JUL 9 1992

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MEMORANDUM FOR: William Foster, Chief  
Policy Branch  
Division of Contracts and Property Management  
Office of Administration

FROM: David Meyer, Chief  
Rules and Directives Review Branch  
Division of Freedom of Information  
and Publications Services  
Office of Administration

SUBJECT: REVIEW OF DRAFT PROPOSED RULE ON ACQUISITION  
REGULATION (NRCAR): ORGANIZATIONAL CONFLICTS  
OF INTEREST

The Rules and Directives Review Branch has reviewed the draft proposed rule that sets forth the NRC's policy on organizational conflicts of interest. We have attached a marked copy of the proposed rule that presents editorial and format corrections. These changes are necessary to meet the publication requirements of the Office of the Federal Register and should be made before the proposed rule is forwarded for publication.

Because this proposed rule is amending the final rule that will establish NRCAR in its entirety, please ensure that the final rule is published prior to this proposed rule.

We have provided the Information and Records Management Branch of the Office of Information Resources Management a copy of this proposed rule to review for compliance with the Paperwork Reduction Act. You should contact Brenda Shelton on 492-8132 for further guidance concerning this matter.

If you have any questions regarding our review, please contact Micheael Lesar on 492-7758 or Alzonnia Shepard on 492-7651.

*David L. Meyer*  
David L. Meyer, Chief  
Rules and Directives Review Branch  
Division of Freedom of Information  
and Publications Services  
Office of Administration

Attachment: As stated

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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: Proposed rule.

*Proposing to*  
SUMMARY: The Nuclear Regulatory Commission (NRC) is amending the Nuclear Regulatory Acquisition Regulation (NRCAR). ~~Currently, the NRCAR contains only the agency's debarment, suspension and ineligibility procedures. This amendment will~~ <sup>to</sup> set forth the NRC's policy on organizational conflicts of interest (COI). *The proposed amendment is necessary to ensure that NRC contractors are not placed in conflicting roles while performing NRC work.*

EFFECTIVE DATE: (30 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.

*DATE: Comment period expires (Insert 30 days after publication). Comments received after this date will be considered if it is practical to do so, but the Commission is able to assure consideration only for comments received on or before this date.*

*ADDRESSES: Comments may be sent to: The Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch.*

*Deliver comments to: 11555 Rockville Pike, Rockville, Maryland between 7:45 am and 4:15 pm Federal workdays.*

*Comments may be examined at: the NRC Public Document Room at 2120 L Street NW. (Lower Level), Washington, DC.*

#### SUPPLEMENTARY INFORMATION:

##### Background

On August 15, 1991, the Commission approved a revision to its COI policy. The thrust of this revision limited COI restrictions to the relatively narrow scope and shorter duration of individual task orders rather than the entire scope and term of the basic contract. While the staff believed the revised policy 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 <sup>that</sup> NRC contractors do not have divided financial interests while working at a licensee site.

Two of NRC's major technical assistance and research contractors <sup>commented</sup> expressed the view that the Agency's new COI provision 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 their comments on the practicability of complying with the COI provision or provide alternatives that would achieve an equivalent level of COI protection

*February 6, 1992*  
(57 FR 4652).

##### Statement of Considerations

The nature of the comments received in connection with the above 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.

~~The Commission has~~  
~~Giving due consideration of~~  
restriction against performing any work at a NRC licensee site where the contractor performs on-site work for NRC, coupled with the lack of flexibility in applying these restrictions, ~~the Commission~~ <sup>and</sup> agrees that exceptions to the blanket restriction may be permitted in appropriate cases. Thus, the Commission has modified the restriction so as to authorize the NRC contractor to perform work for NRC licensees at the site of work performed for NRC, provided such work is not in the same technical area as the work performed for NRC, and provided the Contracting Officer determines that the specific situation will not pose a potential for technical bias or unfair competitive advantage.

In making <sup>the</sup> such determination, the Contracting Officer will ~~give due~~  
~~consideration to~~ 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; 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 <sup>any</sup> other factors that may indicate financial ties or competitive advantage.

on  
Another section of this clause<sup>on</sup> which the Commission received objections related to the requirement to disclose all other work proposed to be done by the contractor for others falling within the scope of the contract. The specific objection related to the requirement that the NRC be informed of such 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 such work by other divisions 15 days in advance in all cases. <sup>The Commission has</sup> ~~Giving due consideration to these~~ <sup>and</sup> comments, ~~the Commission~~ <sup>the Commission has</sup> 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 to report <sup>this</sup> ~~such~~ information to NRC 15 days in advance of undertaking <sup>the</sup> ~~such~~ 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 justifies the deviation 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.

#### 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. OFPP Policy Letter 83-2 states that an agency must

provide an opportunity for public comment before adopting a procurement regulation(s) if the regulation is "significant." "Significant" is defined generally as something which has an effect beyond the internal operating procedures of the agency or has a cost or administrative impact on contractors. This regulation is issued principally to codify the agency COI policy and procedures.

*9* NRC's COI policy is based statutorily in 42 U.S.C. Sec. 2221, Sec. 170 A of the Atomic Energy Act of <sup>1954</sup>1954, as amended. Thus, since the FAR is only regulatory in this area, NRC's COI policy takes precedence over the corresponding FAR regulation. For a regulatory agency such as NRC, the most frequent source of conflict is between the work the contractor does for NRC and it's commercial work for the regulated industry. Accordingly, NRC's COI regulation focuses on the potential for conflicts between a contractor's work for NRC and its work for the nuclear industry. <sup>Because of</sup> ~~Due to~~ the administrative impact the COI policy and procedures has on potential contractors, it has been determined that this rule is significant within the meaning of OFPP Policy Letter No. 83-2.

#### Environmental Impact: Categorical Exclusion

*ck* 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 <sup>Proposed</sup> final rule.



### Paperwork Reduction Act Statement

This proposed rule contains no additional information collection requirements. The burden associated with this requirement has been approved under OMB Control number 3150-0112.

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### Regulatory Analysis

This proposed 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 <sup>1954</sup> 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 proposed 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 <sup>1954</sup> 1954, as amended. Because the proposed 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 proposed 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 <sup>Proposing to adopt the</sup> amending <sub>following amendments to</sub> Chapter 20 to Title 48 of the Code of Federal Regulations.

Place amendment Number (1) here. See below.   
§ 2052.209-73  
X. In Chapter 20 of Title 48 is amended to read as follows:  
CHAPTER 20 - Nuclear Regulatory Commission  
PART 2052 - SOLICITATIONS PROVISIONS AND CONTRACT CLAUSES  
§2052.209-73 Contractor Organizational Conflicts of Interest

As prescribed at §2009.570-5(a) and 2009-570-8, insert the following clause in all applicable solicitations and contracts:

Contractor Organizational Conflicts of Interest (December 1991)

(a) Purpose. The primary purpose of this clause is to aid in ensuring that the contractor:

- (1) Is not placed in a conflicting role because of current or planned interests (financial, contractual, organizational, or otherwise) which relate to the work under this contract; and

1. The authority citation for 48 CFR Part 2052 continues to read as follows:

Authority: 42 U.S.C. 2201; 42 U.S.C. 5841; and 41 U.S.C. 418(b).



- (2) Does not obtain an unfair competitive advantage over other parties by virtue of its performance of this contract.
- (b) Scope. The restrictions described apply to performance or participation by the contractor, as defined in 48 CFR 2009.570-20 in the activities covered by this clause.
- (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
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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:

- (a) The contractor shall 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.

~~(b)~~ The contractor shall 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.

(5) Notwithstanding the foregoing, the contracting officer may authorize the contractor to solicit or perform such work if the contracting office 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 due diligence to discover and disclose any new work at that licensee or applicant site. <sup>This</sup> Such disclosure must be made before the submission of a bid or proposal to the utility or other regulated entity whenever possible, and must be received by the NRC at least 15 days before the proposed award date in any event, unless a 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 such work violates <sup>Paragraphs</sup> (c)(2), (c)(3) or (c)(4) <sup>of this section</sup> above.

(e) Access to and use of information.

- (1) If the contractor in the performance of this contract obtains access to information, such as NRC plans, policies, reports, studies, financial plans, internal data protected by the Privacy Act of 1974 (5 U.S.C. Section 552a (1988)), or the Freedom of Information Act (5 U.S.C. Section 552 (1986)), the contractor agrees not to:
  - (i) Use this information for any private purpose until the information has been released to the public;
  - (ii) Compete for work for the Commission based on the information for a period of six months after either the completion of this contract or the release of the information to the public, whichever is first;
  - (iii) Submit an unsolicited proposal to the Government based on the information until one year after the release of the information to the public; or
  - (iv) Release the information without prior written approval by the contracting officer unless the information has previously been released to the public by the NRC.
- (2) 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 (5 U.S.C. Section 552a (1988)), or the Freedom of Information Act (5 U.S.C. Section 552 (1986)), or other confidential or privileged technical, business, or financial information under this contract, the contractor shall treat the information in accordance with restrictions placed on use of the information.

(3) Subject to patent and security provisions of this contract, the contractor shall have the right to use technical data it produces under this contract for private purposes provided that all requirements of this contract have been met.

(f) Subcontracts. Except as provided in 48 CFR 2009.570-2(g), the contractor shall include this clause, including this paragraph, in subcontracts of any tier. The terms contract, contractor, and contracting officer, must be appropriately modified to preserve the Government's rights.

(g) Remedies. For breach of any of the above restrictions, or for intentional nondisclosure or misrepresentation of any relevant interest required to be disclosed concerning this contract or for such erroneous representations that necessarily imply bad faith, the Government may terminate the contract for default, disqualify the contractor from subsequent contractual efforts, and pursue other remedies permitted by law or this contract.



- (h) Waiver: A request for waiver under this clause must be directed in writing to the contracting officer in accordance with the procedures outlined in 48 CFR 2009.570-9.
- (i) Follow-on effort. The contractor shall be ineligible to participate in NRC 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 may not perform any technical consulting or management support services work or evaluation activities under this contract on any of its products or services or the products or services of another firm if the contractor has been substantially involved in the development or marketing of the products or services.
- (l) If the contractor, under this contract, prepares a complete or essentially complete statement of work or specifications, the contractor is not eligible to perform or participate in the initial contractual effort which is based on the statement of work or specifications. The contractor may not incorporate its products or services in the statement of work or specifications unless so directed in writing by the contracting officer, in which case the restrictions in this paragraph do not apply.

- (2) Nothing in this paragraph precludes the contractor from offering or selling its standard commercial items to the Government.

(End of Clause)

Dated at Bethesda, Maryland this \_\_\_\_ day of July, 1992

# For the Nuclear Regulatory Commission. →

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Patricia G. Norry, Director,  
Office of Administration.

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