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DIVISION OF CONTRACTS AND
PROPERTY MANAGEMENT



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April 13, 1992

Mr. Timothy F. Hagan, Acting Director
Division of Contracts and Property Management
United States Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Mr. Hagan:

COMMENTS ON NRC STAFF IMPLEMENTATION OF NUCLEAR REGULATORY COMMISSION POLICY
ON ORGANIZATIONAL CONFLICTS OF INTEREST

Battelle Memorial Institute, which does work for the Nuclear Regulatory Commission both in its capacity as operator of the Department of Energy's Pacific Northwest Laboratory, and as a direct contractor to the Commission, attended the March 26, 1992, meeting at which Nuclear Regulatory Commission staff discussed implementation of the Organizational Conflicts of Interest (OCI) policy adopted by the Commission on August 15, 1991. Attendees were informed that interested parties could provide comments, by April 15, 1992, on issues discussed at that meeting. It is our understanding that such comment is to be directed, not at the OCI policy itself (which has been adopted but not codified), but at the staff implementation of that policy. The following comments are submitted against that background.

We understand and support the Commission's need to have and enforce an appropriate OCI policy. While we do not think that it was necessary for the Commission to have defined "contractor" so broadly as to preclude organizational separation as a means of avoiding or mitigating potential organizational conflicts of interest, we accept that this was a legitimate policy course to adopt. We believe, however, that the OCI clause currently being used by the staff to implement that policy goes far beyond the ultimate test proposed in the policy: "Might the contractor [as so broadly defined], if awarded the contract, be placed in a position where its judgment may be biased, or where it may have an unfair competitive advantage?"

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Specifically, our concern relates to paragraph (c)(3) of the December, 1991, OCI clause which provides

(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 at the site or work in the same technical area for that licensee or applicant organization for a period [of one year].

Our understanding of the application of that clause, as elaborated at the March 26, 1992, meeting is that the following conclusion would necessarily follow:

If a contractor for the Commission worked at a particular licensee site on any matter, no matter how narrow in scope, then no organizational component or affiliate of that contractor could do any work, no matter how completely different in scope, for a period of one year after completion of the NRC work.

We believe that many, if not the vast majority, of cases which might be postulated to fit within this prohibition would not present either the appearance or the actuality of a conflict of interest. For example, if one component of Battelle works for the Commission at a licensee site assisting in the operator licensing process or in emergency preparedness projects, in our opinion it would have neither a conflicting role (bias) nor an unfair competitive advantage if another, organizationally separate, component should seek to work for the licensee on a matter of seismic design reanalysis, yet the latter work would be prohibited. Simply put, the clause brings within the umbrella of "organizational conflicts of interest" normal business practices which no reasonable person would interpret as such.

It has been reported in the press (and reaffirmed at the March 26, 1992, meeting) that at least one corporation, Science Applications International Corp., has told the NRC that it will no longer compete for NRC contracts because of the reach of the new clause. Inside N.R.C., February 24, 1992. Many others, including Battelle, will have to carefully weigh whether the needless overreaching of the current OCI clause will require the foregoing of NRC work rather than the sacrifice of work for others in the nuclear industry even though no actual or potential organizational conflict of interest may exist.

In making these comments, we are aware that the Commission's policy does not apply to the acquisition of services through NRC agreements with other government agencies; i.e., it does not apply to the Commission's utilization of the Pacific Northwest Laboratory (PNL), operated by Battelle. It does apply, however, to work performed by Battelle in capacities other than as operator of PNL. Thus the hypothetical example above is of real concern to us.

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As noted, neither the policy nor the clause applies to the Commission's acquisition of the services of PNL, a DOE national laboratory. We understand that to mean that not only is the clause not included in the Interagency Agreement or Request for Services, but also that the PNL work would not be considered as other work of the contractor automatically precluding Battelle from accepting unrelated licensee work, even at the same site. Returning to the previous example, this would mean that PNL could assist the Commission in operator licensing or emergency preparedness work at a site and another Battelle component could assist the licensee in seismic design reanalysis, assuming appropriate organizational separation to prevent any actual conflicting interests. We would appreciate confirmation that this is a correct interpretation of the policy. (This concern is far from abstract; PNL's operator licensing and emergency preparedness activities on behalf of the Commission occur at approximately eighty percent of all Part 50 licensee sites each year.) If our understanding is incorrect, PNL will have to be much more selective in the future in accepting Commission work than it has been in the past.

We strongly urge that paragraph (c)(3) of the OCI clause be more reasonably drawn so as to preclude only the performance of subsequent work at a site or for a licensee which has the potential for creating an OCI, that is, the creation of a conflicting role (bias) or an unfair competitive advantage.

We appreciate the opportunity to make these comments and hope that the suggestions made are helpful in furthering the objective of eliminating actual and potential organizational conflicts of interest while at the same time permitting both the Commission and the nuclear industry to take advantage of the unique technical expertise of Battelle and other organizations.

Sincerely,



Guy H. Cunningham
General Counsel

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SUMMARY OF COMMENTS RECEIVED ON NRC'S REVISED COI POLICY

A. Comments Submitted In Response to the 3/26 Public Meeting Notice

I. SAIC (Trevino/Foster 3/6/92)

(a) Comment:

NRC's overly restrictive interpretation of the COI provisions will, for all intents and purposes preclude SAIC from competing for NRC contracts.

Response:

An assessment is currently being made of the degree of competition experienced in conjunction with all NRC solicitations issued since the revised COI policy became effective in August, 1991.

(b) Comment:

The NRC COI clause interpretation, in our judgement, significantly exceeds the actions necessary to ensure an avoidance of any real conflicts of interest.

Response:

The provisions of the policy attempt to strike a balance between enhanced competition and a paramount need to ensure the NRC is protected from potential COI situations.

(c) Comment:

NRC's interpretation of the COI policy restricts unnecessarily the types of business activities the other segments of the corporation are permitted to pursue.

Response:

NRC's COI policy is directed to the organization.

Thus, if one segment of the Corporation has a conflict than the organization as a whole has a conflict. It is NRC's belief that taking steps to "isolate" one component of an organization from other components that have actual conflicts, at a minimum gives rise to the appearance of a COI situation, and has the potential for an actual COI.

(d) Comment:

The organization within SAIC which was selected for the NRC contract award should not preclude other segments of our corporation from competing for other potential work which poses no actual COI.

Response:

See I (c)

(e) Comment:

SAIC strongly believes that many other contractors and subcontractors working for the NRC are experiencing similar difficulties in accepting the new NRC, COI language and its interpretation of that language.

Response:

See I (a)

(f) Comment:

Change C(2) language from "or task order as appropriate" to "or the scope of individual task orders" if this is a task order contract.

Response:

Agree

(g) Comment:

Change the language in C(3) to add "will not perform work at the site which posed a conflict" as described in Section (a) of the COI policy

Response:

No. This would allow SAIC to revert back to their practice of making the decision of what constitutes a COI.

(h) Comment:

The 15 day disclosure requirement is too express.

Response:

Agree. This language will be changed to allow a degree of flexibility. However, disclosure still will be required before the contractor makes an actual award to a licensee.

(:) Comment:

SAIC accepts on site solicitation prohibitions.

Response:

N/A

II. SCIENTECH

(a) Comment:

Agree with solicitation prohibition.

Response:

N/A

(b) Comment:

Suggest Sciencetech be allowed to perform unrelated off site work for the licensee if the firm is working for NRC at a particular site.

Response:

The current policy permits this.

(c) Comment:

The one year restriction regarding on site work and solicitations should not apply to work unrelated to the task performed for NRC.

Response:

The one year restriction is being assessed relative to its effectiveness.

III. Westinghouse

(a) Comment:

What does "or plans to do so" mean, and how would a multi-divisional company know what plans NRC has for one of its divisions?

Response:

This phrase pertains to future work planned under the contract.

(b) Comment:

How would the contractor be able to gain information regarding NRC plans on one of its divisions without violating integrity in procurement regulations?

Response:

See III (a)

(c) Comment:

What is the definition of a licensee or applicant organization.

Response:

The business organizations which owns the regulated entity.

(d) Comment:

Could DOE be considered a licensee or applicant organization in its M & O role at sites all over the country.

Response:

No. NRC does not regulate any DOE facilities.

(e) Comment:

Could one division of a multi-divisional organization ever be considered a separate entity with respect to questions regarding COI ?

Response:

No. See I (c)

IV. Parameter

(a) Comment:

Supports the solicitation prohibition.

Response:

N/A

(b) Comment:

No NRC contractor should be receiving financial remuneration from a licensee.

Response:

N/A

(c) Comment:

IV. (b) should be made part of NRC's COI policy.

Response:

N/A

V. SEA

(a) Comment:

Supports the existing policy without reservation.

Response:

N/A

(b) Comment:

Made a business decision not to solicit business from the operators of nuclear power plants.

Response:

N/A

(c) Comment:

Would oppose any change to weaken the policy.

Response:

N/A

VI. Comex

(a) Comment:

COI meeting driven by large business.

Response:

N/A

(b) Comment:

Comex performs no work of any nature for commercial reactor licensees, vendors or suppliers.

Response:

N/A

(c) Comment:

NRC should always award to the technically qualified firm with the least conflict.

Response:

N/A

(d) Comment:

Large companies performing broad scope task order work for NRC should be required to award any task order where the potential for a COI exists to subcontractors who do not have a conflict.

Response:

Not possible. See I (c)

(e) Comment:

NRC seems more willing to make awards to large companies with COI problems than to COI free small businesses who can perform 80% - 90% of the scope of work.

Response:

N/A

(f) Comment:

Comex supports tightening rather than relaxing the present COI policy.

Response:

N/A

B. Comments Made During 3/26 Meeting

I. SAIC (Trevino)

(a) Comment:

SAIC should be able to perform unrelated work at the same site they are working for NRC.

Response:

Creates financial tie issue. This provision is under assessment.

(b) Comment:

There should be a threshold (dollar amount) taken into consideration when assessing COI regarding unrelated work performed at the site.

Response:

Point well taken.

II. Sandia (Ortiz)

(a) Comment:

What does the same technical area mean?

Response:

The technical area is defined by the scope of work for the task order or contract.

III. Mitre (Pikel)

(a) Comment:

NRC should seek conflict free advice from firms with organizations where such a determination can be easily made to save the government money.

(b) Response:

N/A

IV. SAIC (Johnson)

(a) Comment:

It is difficult for a diverse firm like SAIC to know if one part of the company is soliciting work from a utility while another part of the company is performing on-site work for NRC.

Response:

N/A

(b) Comment:

Applying COI restrictions to unrelated work at a particular site is overly broad and unnecessary to prohibit unfair competitive advantage.

Response:

See I (a) this section.

V. SAIC (Trevino)

(a) Comment:

Enforcing the unrelated work portion of the COI policy will limit the number of large diversified firms like SAIC from bidding, thus restricting competition.

Response:

The policy's effect on competition is being assessed

(b) Comment:

By restricting competition, NRC is eliminating the best qualified firms and costs will escalate.

Response:

N/A

(c) Comment:

During the period the revised COI policy is being assessed, the old clause should be used in all procurement.

Response: (Norry)

We have a Commission approved policy. There is no going back to the old.

(d) Comment:

The current policy creates a tremendous amount of work for SAIC (disclosure) just so NRC can have a policy that is easy to administer.

Response:

N/A

VI. SAIC (Rodehau)

(a) Comment:

NRC should consider changing the waiver policy to allow firms to submit "avoidance schemes"

Response:

The waiver policy and its interpretation are under assessment.

VII. MITRE (Pikel)

(a) Comment:

NRC restricts competition by specifying technical qualifications (NRC also restricts competition by enforcing COI restrictions thus restricting competition shouldn't be an issue)

Response:

N/A

VIII. PNL (Hickey)

(a) Comment:

Does the COI policy apply to DOE lab work?

Response:

No.

IX. Sandia (Ortiz)

(a) Comment:

Do you have written COI policy for government agency agreements?

Response:

There is an MOU between NRC and DOE.

X. SAIC (Trevino)

(a) Comment:

The 15 day disclosure requirement is too inflexible.

Response:

Consideration is being given to relaxing this requirement.

(b) Comment:

The disclosure clause should be amended to state only work that presents an actual COI as defined by regulation (not on-site unrelated work) will be denied.

Response:

The disclosure clause will not be amended in this regard.

XI. Accident Prevention Group (Orvis)

(a) Comment:

Would work at EPRI be on-site work?

Response:

No.

XII. SAIC (Rodehau)

(a) Comment:

If SAIC does work for a vendor like GE, would that work fall under the COI policy?

Response:

Yes.

(b) Comment:

If we were a subcontractor to Battelle would the COI policy apply to us?

Response:

If SAIC subs for PNL - NO. If the work is for the commercial side of Battelle - Yes.

C. Comments Received After the 3/26 Meeting.

I. SAIC (Trevino/Taylor 4/14/92)

(a) Comment:

Policy must be revised to avoid significant COI's while maximizing competition.

Response:

See Section A, I (a).

(b) Comment:

One of the following alternatives should be used in all solicitations and awards until a final decision is made on possible revisions to the policy:

(i) use the pre 8/15/92 version of the policy

(ii) use the new policy but delete (c) (3)

(iii) modify (c)(3) to in essence allow the contractor to determine if there is conflicting work at the site.

Response:

These alternatives are not currently under consideration for any change to the existing policy.

(c) Comment:

The FAR allows the CO discretion in making judgements and developing contract provisions on COI matters.

Response:

CO discretion is being considered to some degree (e.g. financial ties) to make the policy more flexible.

II. SAIC (Rodehau/Foster 4/22/92)

(a) Comment:

Prohibiting unrelated work at the site is overly restricted and unnecessary.

Response:

See Section B, I (a).

(b) Comment:

Based upon SAIC's decision to decline the \$1M research award and the fact SAIC and other highly qualified firms will be unable to accept the COI provisions in future contracts, appropriate action must be taken by the Commission to approve future changes in this policy.

Response:

N/A

(c) Comment:

Revise (c) (3) to provide some flexibility to the financial tie evaluation. Consideration should be given to the dollar amount of the tie between firms under contract to NRC and a regulation entity. This should be coupled with SAIC's "unrelated work" concern raised in Trevino's letter to Taylor.

Response:

The amount of the financial tie is a good point and is currently being considered in our overall assessment.

(d) Comment:

Relax the waiver provision to allow offerors to submit avoidance techniques as a part of the negotiation process. Waiver relief is currently only open to the awardee. This approach allows CO's to exercise judgement and is consistent with the FAR.

Response:

See Section B, VI (a).

e) Comment:

Small firms doing work almost exclusively for NRC support the policy. This has the effect of eliminating SAIC from the competition. Moreover, this robs NRC of being able to contract with the firms that are best technically equipped to do the job.

Response:

N/A

III. Paul Amico (SAIC employee) 4/13/92

(a) Comment:

Offended by the NRC policy because of inherent implications that SAIC employees can not be trusted.

Response:

N/A

(b) Comment:

Policy should be directed at the individual not the organization. Put the organization employees under oath.

Response:

No.

IV. Jupiter Corporation (4/23/92)

(a) Comment:

Concerned a change in COI policy will adversely impact its ability to function as a subcontractor. Suggests the focus of the policy be changed from the organization to the individual.

Response:

No changes are currently contemplated that would change subcontracting relationships in an adverse manner.

V. Tenera (4/14/92)

(a) Comment:

The firm has been unable to propose on NRC contracts because one of its divisions works for the nuclear industry while another works for government organizations. Since the firm is diversified and does work across the U.S., Tenera could be unknowingly in violation of (c)(3).

Response:

N/A

(b) Comment:

Tenera does not have a communications network in place to ensure absolute compliance with the Disclosure provision. Suggest 15 day requirement be changed to disclosure prior to award.

Response:

This provision is currently under assessment for possible revision.

VI. Link (4/13/92)

(a) Comment:

Firm does training services. Concerned follow-on provision of COI policy would preclude additional training contract work stemming from an initial contract.

Response:

Historically, the follow-on restriction has not been interpreted that tightly except when the firm develops a SOW under a separate contract. This wording, however needs to be looked at. NRC's approach to this concern regarding training services has been Task I - develop course, Task II teach course.

VII. Mitre (4/14/92)

(a) Comment:

Strongly urge the COI policy be revised to require conflict free firms (structured like FFRDC's) be used on contracts involving sensitive technical areas.

Response:

There are no current plans to adopt this requirement.

(d) Comment:

Limiting competition to firms that are technically qualified does not "restrict competition" as was asserted at the 3/26 meeting. This is no different than "restricting competition" through strict COI requirements.

Response:

N/A

(e) Comment:

Enforcing the waiver process is a time consuming and costly process that could be avoided if COI free firms are used.

Response:

N/A

VIII. Battelle (4/13/92)

(a) Comment:

The staff interprets (c)(3) as it pertains to unrelated work too broadly, resulting in the prohibition of work that would pose no conflict. Battelle, like SAIC, may have to forego future work for NRC under this interpretation.

Response:

See response Section, I (a).

(d) Comment:

If the PNL component of Battelle is performing unrelated work at a licensee site this would not constitute "other work" in determining if the commercial side of Battelle had a COI for work in another technical area at the same site.

Response:

A literal interpretation of the policy would preclude Battelle's commercial side from performing work for NRC at a utility site where PNL was working for the

licensee. (This subject needs to be addressed because Cunningham states situations like this currently exist. He also would like conformation of his above interpretation).

D. Other Correspondence

1. SAIC (Straker 10/1/92)

(a) Comment:

How does (c)(2) apply to task order contracts?

Response:

The prohibition contained in paragraph (c)(2) of the "work for others" section applies to the term and scope of the entire contract, except for task order contracts where the restrictions apply to the task order as appropriate.

(b) Comment:

The prohibitions of (c)(3) are overly restrictive.

Response:

The prohibition in paragraph (c)(3) was added to the prior COI language to prevent situations where a contractor may take advantage of its presence on a licensee's site to market the firm's services to the licensee. This provision also recognizes that a contractor's financial ties to a utility at a given site could introduce the potential for technical bias. NRC recognized that this will temporarily limit a

firm's business activity with a licensee. However, on balance, the protection of NRC from potential COI situations of this nature was considered paramount.

(C) Comment:

The new policy is more restrictive than the old.

Response:

In the case of task-order-type contracts, NRC's revised COI policy limits the application of 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. This means, for example, that when the scope of a task is limited to providing technical support in the review of a site-specific licensing action, the contractor is free to perform any other work for any licensee that does not relate to the license review at that particular site. The exception is in the case of task orders involving contractor work at a licensee site where the restriction encompasses all work at that site for that licensee and work on the same technical area for that licensee for one year thereafter. Thus, in most cases, this change significantly reduces both the scope of activities and the time frame under which COI restrictions apply to firms performing technical services for NRC.

II. SAIC (Laird 4/30/92)

(a) Comment:

Expresses concern that a new policy will not be issued until the July/August timeframe SAIC currently has proposals for five procurements under evaluation which they can not accept because of the existing policy and its interpretation.

Response:

See Section A, I (a)

3/26/92
COI Public Meeting

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REGISTER

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NO Thomas Ippolito	SEA	549-8884	No
NO Robert Moffitt	PNL	FTS 444-9513	No
NO Eva Eckert Hickey	PNL	FTS 509-375-402	No
Marilee Reed	NRC/LSS	492-4003	NO
Mary Little	NRC/DCPM	492-4289	No!
NO A. Lisa Mada	SONALYSTS	203-412-4355	No
Leas Solander	OC	492-7027	No
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NO Claude Wablin	AST		NO
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Peter E McGrath	SAIC	703 586 7224	No

REGISTER

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	Donna Umbel	DCPM	NO
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NO	TREVE RITCHARD	OGDEN ENVIRONMENTAL	X
NO	LAVERNE SHIPLEY	(W) STC 412-256-2715	NO
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Charley Hauglin

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No

Hand Kings

SAIC

✓0

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Name

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Not on
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David Stell Pax

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no

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Sherr

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Remarks?
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No

COI

March 26, 1992

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COI

March 26, 1992

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No one will attend from International Programs

Region I will not attend but thinks it is a good idea

Region III will not attend

MAJOR COI POLICY ISSUES

I. ISSUE

NRC'S overly conservative interpretation of the existing COI policy will restrict competition for agency procurements.

RESPONSE

Application of the existing COI policy has not limited competition on NRC technical assistance and research contracts (See attached analysis)

II. ISSUE

NRC'S interpretation of the COI policy unnecessarily restricts the types of business activities the other segments of the corporation are permitted to pursue.

RESPONSE

NRC's COI policy is directed to the organization. Thus, if one segment of the corporation has a conflict, then the organization as a whole has a conflict. It is NRC's position that taking steps to "isolate" one component of an organization from other components that have actual conflicts give rise, at a minimum, to the appearance of a COI situation.

III. ISSUE

Prohibiting a firm from performing work at a site unrelated to work being performed for NRC at the same site is overly restrictive. Such work does not pose an actual COI.

RESPONSE

The decision as to whether a firm's unrelated site work constitutes a COI will be determined by the magnitude of the financial tie to the regulated entity relative to the dollar value of the NRC on-site work. The Contracting Office's judgement will be the determinant, based on a financial analysis of the pertinent work.

IV. ISSUE

The one year restrictive regarding on site work and solicitation should not apply to work unrelated to the task performed for NRC.

RESPONSE

- a) Agree. The one year prohibition will only pertain to on site work or solicitation in the same or similar technical area as the on site work performed for NRC.

OR

- b) The one year restrictive will be eliminated.

V. ISSUE

The disclosure clause should be amended to provide some flexibility in the required timeframe for reporting potential new work after award.

RESPONSE

The requirement for a firm to disclose any proposed new work 15 days prior to award to a utility will be modified. The new provision will allow disclosure up to the actual award date.

VI. ISSUE

NRC should relax the waiver provision to allow offerors to submit avoidance techniques as part of the negotiation process. Waiver relief is currently only open to the awardee.

RESPONSE

In OGC's opinion, award does not have to be made to the highest scored, conflict free offeror within the competitive range. If a significant spread exists between a firm with outstanding technical credentials and some COI problems and a conflict free, marginally qualified firm, the contracting office may exercise judgement in making the award decision based on the overall best interests of the government. OGC's opinion provides the flexibility that should mitigate this concern.