

- (ii) Total cost of straight time;
- (iii) Overtime cost as a percentage of straight-time cost;
- (iv) Total overtime hours;
- (v) Total straight-time hours; and
- (vi) Overtime hours as a percentage of straight-time hours.

[FR Doc. 97-16635 Filed 6-26-97; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

48 CFR Parts 917 and 970

[1991-AB-09]

Acquisition Regulation; Department of Energy Management and Operating Contracts

AGENCY: Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE) is adopting as final an interim rule amending its Acquisition Regulation to set forth its policy regarding the competition and extension of the Department's management and operating contracts. Under its policy, the Department affirms its commitment to provide for full and open competition in the award of its management and operating contracts, except where the Department determines that competitive procedures should not be used pursuant to one of the circumstances authorized by the Competition in Contracting Act of 1984 (41 U.S.C. 254), as implemented in Part 6 of the Federal Acquisition Regulation. This rulemaking implements one of the key recommendations of the Department's contract reform initiative to improve its acquisition system.

DATES: This final rule is effective June 27, 1997.

FOR FURTHER INFORMATION CONTACT: Connie P. Fournier, Office of Policy (HR-51), Department of Energy, 1000 Independence Avenue, SW, Washington, D.C. 20585; (202) 586-8245; (202) 586-0545 (facsimile); connie.fournier@hq.doe.gov (Internet).

SUPPLEMENTARY INFORMATION:

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I. Background

The Department of Energy published an interim final rule in the **Federal Register** on June 24, 1996 (61 FR 32584). The public comment period closed August 23, 1996. The Department received comments from three companies. Copies of all written comments are available for public inspection at the Department's Freedom of Information Reading Room, Room 1E-190, Forrestal Building, 1000 Independence Avenue, SW, Washington, DC 20585, (202) 586-6020.

Today's final rule adopts as final the amendments in the interim final rulemaking.

II. Disposition of Comments

The Department has considered and evaluated the comments received during the public comment period. The following discussion describes the comments received and provides the Department's responses to the comments.

A. Comment: One commenter believes that the policy statement in 917.602 is inconsistent with the remainder of DEAR 917 and FAR Part 17. The commenter believes that the concept of a noncompetitive "extension" apparently synonymous with a contract "option" and concludes that our policy goes beyond intent of CICA and FAR. Specific inconsistency is between 970.1702-1(b) and FAR 17.605.(b).

Response: As explained in the preamble of the interim rule, the Department's intent in adopting its new policy on competition for its management and operating contracts is to move away from past policies which established noncompetitive extensions as the preferential norm to a new policy which establishes competition as the preferential norm. The key component of this change in policy is to adopt the Government wide standards for competition as statutorily provided under the Competition in Contracting Act (CICA) and implemented in FAR Part 6. Accordingly, the Department will seek competition for its management and operating contracts unless a noncompetitive extension can be justified in accordance with one of the permissible authorities under CICA. The regulatory language of 917.602 and 970.1702 is consistent with both FAR Part 6 and Part 17.

Regarding the distinction between an "option to extend" and an "noncompetitive extension" under one of the seven authorities of CICA, DEAR 970.1702-1(a) provides clear language that distinguishes the two mechanisms. In addition, the clear language of this

section directs that any extension, other than an option included in the basic contract, can only be accomplished when justified under CICA and when authorized by the Head of the Agency.

B. Comment: Two commenters believe that the Department's adoption of a policy that mandates competition after a 10 year contract term detracts from the Department's flexibility in making management decisions regarding retaining an incumbent contractor particularly where the contractor's performance has been excellent or the contractor operates a Federally Funded Research and Development Center. One of the commenters recommends that DOE, instead, rely on annual performance appraisal results and criteria for "options" to determine whether competition should be sought.

Response: The Department believes that the new policy provides adequate management flexibility in determining whether competing a management and operating contract is in the best interests of the Department. The Competition in Contracting Act provides 7 circumstances under which an agency may seek other than full and open competition in the award of a contract. The Department intends to rely on these Governmentwide authorities in cases where the Department intends to extend a contract with an incumbent contractor or otherwise intends to limit competition.

A detailed list of changes in this final rule follows.

1. 917.602, Policy. This section is added to prescribe the Department's policy to provide for full and open competition and the use of competitive procedures in the award of management and operating contracts, except as authorized by law and the Head of the Agency.

2. 917.605, Award, renewal, and extension. This section is amended to remove the existing coverage at 917.605(b) that prescribes the Department's internal processing and documentation requirements for extend/compete decisions. This nonregulatory subject matter will be reflected in internal Department guidance. A new section 917.605(d) is added to provide for the conditional approval of any noncompetitive extension (other than an extension accomplished by the exercise of an option) subject to the successful achievement of the Government's negotiation objectives. This section also permits adequate time to compete the contract in the event that the negotiations cannot be successfully concluded.

3. *970.0001*, Renewal of management and operating contracts. This section is amended to delete the Department's previous policy that competition generally would be used only when it appeared likely that the Government's position might be meaningfully improved in terms of cost or performance, unless it was determined that to change a contractor would be contrary to the best interest of the Government. This section is removed and reserved for future use.

4. *970.17*, Special Contracting Methods. This subpart is added to provide for coverage concerning contract term and options to extend management and operating contracts.

5. *970.1702-1*, Contract term and option to extend. This section is added to provide policy guidance on (1) the total period of performance permitted under a management and operating contract and (2) the requirements governing the exercise of an option to extend the term of an existing contract. Paragraph (a) of the section states that management and operating contracts may provide for a base period of up to 5 years and may include an option to extend the period of performance for up to an additional total of 5 years. The purpose of permitting the inclusion of an option to extend the term of the contract is to facilitate long-term contractual relationships where the mission of the Department is best served by such an extension and to reward contractors for superior performance under the contract.

Regarding the exercise of options under paragraph (b), the contracting officer may exercise an option to extend a competitively awarded contract only after assessing certain factors, including the contractor's past performance. The decision of the contracting officer must be approved by the Head of the Contracting Activity and the cognizant Assistant Secretary(s).

6. *970.1701-2*, Solicitation provision and contract clause. This section is added to provide instruction to the contracting officer on the application of the solicitation provision and contract clause pertaining to the use of options in management and operating contracts.

7. *970.5204-73*, Notice regarding option. This section is added to subpart 970.52, Contract clauses for management and operating contracts, to provide a solicitation provision for options to extend the term of the contract.

8. *970.5204-74*, Option to extend the term of the contract. This section is added to subpart 970.52, Contract clauses for management and operating contracts, to provide a contract clause

for options to extend the term of the contract.

III. Procedural Requirements

A. Review Under Executive Order 12866

This regulatory action has been determined not to be a "significant regulatory action" under Executive Order 12866, "Regulatory Planning and Review," (58 FR 51735, October 4, 1993). Accordingly, this action was not subject to review, under that Executive Order, by the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB).

B. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the interim final regulations meet the relevant standards of Executive Order 12988.

C. Review Under the Regulatory Flexibility Act

This rule is not subject to review under the Regulatory Flexibility Act of 1980, 5 U.S.C. 601, *et seq.*, because it is not subject to a legal requirement to publish a general notice of proposed rulemaking.

D. Review Under the Paperwork Reduction Act

No new information collection or record keeping requirements are imposed by this rule. Accordingly, no Office of Management and Budget clearance is required under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501, *et seq.*).

E. Review Under Executive Order 12612

Executive Order 12612, entitled "Federalism," 52 FR 41685 (October 30, 1987), requires that regulations, rules, legislation, and any other policy actions be reviewed for any substantial direct effects on States, on the relationship between the Federal Government and the States, or in the distribution of power and responsibilities among various levels of government. If there are sufficient substantial direct effects, then the Executive Order requires preparation of a federalism assessment to be used in all decisions involved in promulgating and implementing a policy action. The Department has determined that this rule will not have a substantial direct effect on the institutional interests or traditional functions of States.

F. Review Under the National Environmental Policy Act

Pursuant to the Council on Environmental Quality Regulations (40 CFR 1500-1508), the Department has established guidelines for its compliance with the provisions of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321, *et seq.*). Pursuant to Appendix A of Subpart D of 10 CFR 1021, National Environmental Policy Act Implementing Procedures (Categorical Exclusion A6), the Department has determined that this rule is categorically excluded from the need to prepare an environmental impact statement or environmental assessment.

List of Subjects in 48 CFR Parts 917 and 970

Government procurement.

Issued in Washington, D.C., on June 13, 1997.

Richard H. Hopf,

Deputy Assistant Secretary for Procurement and Assistance Management.

Accordingly, the interim rule amending Chapter 9 of Title 48 of the Code of Federal Regulations which was published at 61 FR 32584 on June 24, 1996, is adopted as a final rule without change.

[FR Doc. 97-16636 Filed 6-26-97; 8:45 am]

BILLING CODE 6450-01-P