

DEPARTMENT OF ENERGY

48 CFR Part 970

RIN 1991-AB-37

Acquisition Regulation; Department of Energy Management and Operating Contracts

AGENCY: Department of Energy.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Energy (DOE) published a final rule amending the Department of Energy Acquisition Regulation (DEAR) to incorporate certain contract reform initiatives on June 27, 1997. (62 FR 34842) Among the initiatives is the implementation of DOE's diversity policy, which requires that contractors take appropriate action to develop and meet diversity performance goals as part of their business operations. DOE proposes to adopt a diversity contract clause to ensure uniform implementation of this policy in its management and operating contracts.

DATES: Written comments (1 copy) on this proposal must be submitted by September 19, 1997. A public hearing will be held on September 4, 1997, beginning at 2:00 p.m. local time at the address listed below. Requests to speak at the hearing should be received by 4:30 p.m. local time on September 2, 1997. Later requests will be accommodated to the extent practicable.

ADDRESSES: All comments, as well as requests to speak at the public hearing, are to be submitted to the Office of Executive Secretariat, Department of Energy, 1000 Independence Avenue, S.W., Washington, DC 20585-0101, or (202) 586-4403 (facsimile).

The public hearing will be held at the U.S. Department of Energy, Small Auditorium (Room GJ-015), Forrestal Building, 1000 Independence Avenue, SW, Washington, DC.

The administrative record regarding this rulemaking that is on file for public inspection, including a copy of the transcript of the public hearing and any written public comments received, is located in the Department of Energy Freedom of Information Reading Room, Forrestal Building, Room 1E-190, 1000 Independence Avenue, SW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Gloria B. Smith, U.S. Department of Energy, Office of Economic Impact and Diversity, 1000 Independence Avenue, SW, Washington, DC 20585-0901, (202) 586-8383, or Romulo L. Diaz, Jr., Esq., U.S. Department of Energy, Office of General Counsel, 1000 Independence

Avenue, SW, Washington, DC 20585-0103, (202) 586-2902.

SUPPLEMENTARY INFORMATION: In its Strategic Plan for Diversity, which was published in 1994, the Department established goals for enhanced partnerships with small, minority and women-owned businesses; minority educational institutions (i.e., Historically Black Colleges and Universities; Hispanic serving educational initiatives; and Native American Institutions); employees; and communities. The Department has articulated on numerous occasions its intent to evaluate contractor performance consistent with DOE policies and authorities as they may be interpreted and implemented in light of *Adarand Constructors Inc. v. Peña*, 115 S. Ct. 2097 (1995). A contract clause is proposed to be added at 970.5204-xx for inclusion in all management and operating contracts, which would implement the Department's diversity policy found at 48 CFR 970.2601(b).

Guidance for the preparation of a diversity plan by a for-profit contractor—originally developed for use with DOE's "Sample Contract Provisions for Department of Energy Performance Based Management Contracts (Model Contract) with For-Profit Contractors" and subsequently revised—is reproduced for informational purposes as an appendix to this preamble. Notice of the availability of the Model Contract was published in the *Commerce Business Daily* on February 13, 1995.

Procedural Requirements**A. Review Under Executive Order 12866**

Today's 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, today's action was not subject to review under the Executive Order by the Office of Information and Regulatory Affairs.

B. Review Under Paperwork Reduction Act

DOE has determined that the proposed clause requiring submission of a diversity plan by DOE contractors is necessary to implement the diversity policy enunciated at 48 CFR § 970.2601(b). The information in the diversity plan, to be submitted initially upon award of a new contract and updated annually thereafter, will be used by DOE contracting officers to evaluate contractor performance and determine whether DOE's policy of developing innovative strategies to

increase opportunities for small, minority and women-owned businesses and educational institutions is being advanced. Approximately 36 management and operating contractors will be subject to the diversity plan. The Department's best estimate is that the burden will average 40 hours per contractor; the total annual burden is estimated to be approximately 1440 hours.

The requirement that DOE contractors submit a diversity plan, which would be established by this DEAR amendment, has been submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the Paperwork Reduction Act (PRA), 44 U.S.C. § 3507(d). Under the PRA, the Department must obtain OMB approval of an information collection, and no person is required to respond to an information collection request unless the form or regulation requesting the information has a currently valid OMB control number.

Comments are solicited on the Department's need for this information, whether the information would have practical utility, the accuracy of the provided burden estimates, ways to enhance the quality, utility, and clarity of the information to be collected, and any other suggested methods for minimizing respondents' burden. To ensure consideration by OMB, comments on any aspect of the information collection should be sent within 30 days after publication of this notice to the contact listed at the beginning of this notice and to the Office of Management and Budget, Office of Information and Regulatory Affairs, Room 3019, Washington, DC 20503, Attn: Desk Officer for the Department of Energy.

C. Review Under the National Environmental Policy Act

Pursuant to the Council on Environmental Quality Regulations (40 CFR Parts 1500-1508), the Department of Energy has established regulations for its compliance with the National Environmental Policy Act of 1969 (42 U.S.C. § 4321 *et seq.*). Pursuant to Appendix A of Subpart D of 10 CFR Part 1021, the Department has determined that today's regulatory action is categorically excluded from the need to prepare an environmental impact statement or an environmental assessment.

D. Review Under Executive Order 12612

Executive Order 12612, 52 FR 41685 (October 30, 1987), requires that rules be reviewed for any substantial direct effect on States, on the relationship

between the National 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 rulemaking will not have a substantial direct effect on the institutional interests or traditional functions of States.

E. Review Under Executive Order 12988

With regard to the review required by section 3(a) of Executive Order 12988, DOE has completed the required review and determined that, to the extent permitted by law, the proposed regulations meet the relevant standards of Executive Order 12988.

F. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. §§ 601–612) requires that an agency prepare an initial regulatory flexibility analysis, and publish the analysis or a summary at the time of publication of general notice of proposed rulemaking for the rule. 5 U.S.C. § 603. This requirement does not apply if the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. 5 U.S.C. § 605(b).

DOE certifies that requiring the inclusion of a clause in DOE contracts which requires the contractor to submit a plan that explains its approach and actions to promoting diversity, consistent with Departmental policy, would not have a significant economic impact on a substantial number of small entities. The diversity plan clause would be included in all DOE management and operating contracts, which historically have been cost reimbursement contracts. Thus, DOE believes that this proposed rule, if promulgated, would not have an adverse economic impact on any small entity.

G. Review Under the Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written assessment of the effects of any Federal mandate in a proposed or final agency rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million in any one year. The Act also requires a

Federal agency to develop an effective process to permit timely input by elected officers of State, local, and tribal governments on a proposed “significant intergovernmental mandate,” and it requires an agency to develop a plan for giving notice and opportunity to timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. The proposed rule published today does not contain any Federal mandate, so these requirements do not apply.

Appendix—Model Contract Guidance for Preparation of Diversity Plan

This Guidance is to assist the contractor in understanding the information being sought by the Department for each of the Diversity elements and where these issues may already be addressed in the contract. To the extent these issues are already addressed in a contract, the Contractor need only cross reference the location.

Work Force

This contract includes clauses on Equal Opportunity and Affirmative Action. The Contractor should discuss its policies and plans for implementation of these clauses in its operations. If the Contractor already has procedures in place, these should be discussed and copies provided.

Educational Outreach

The Contractor should outline or discuss any programs already provided, or which it intends to provide, which will provide employees an opportunity to improve their employment skills and opportunities. These programs may already be discussed in the proposal submitted for this contract or in the contract itself and could include: educational assistance allowances, provision for outside training programs either during or outside regular work hours, and executive training programs for non-executive employees. The Contractor should also discuss any plans to participate in any programs supporting Historically Black Colleges and Universities, Hispanic Serving Institutions and Native American Institutions.

Community Involvement and Outreach

An offeror’s proposal or this contract may include a section dealing with community involvement and outreach activities. In that event, those sections may be cross referenced and do not need to be repeated. Contractor community relations activities could include support for the following activities: support for science, mathematics and engineering education; support for community service organizations; assistance to governmental and community service organizations and for equal opportunity activities; and community assistance in connection with work force reduction plans. The Contractor may provide support to these activities through direct sponsorship or making individual employees available to work with the specific community activity. The Contractor’s Diversity Plan should discuss the Contractor’s existing and planned activities

promoting community involvement of its employees as well as the corporation.

Subcontracting

If appropriate to the contractor, the contract will contain FAR 52.219–9, “Small, Small Disadvantaged, and Woman-owned Small Business Subcontracting Plan” (Aug. 1996) and other small business related clauses. Additionally, the RFP may have contained additional guidance on small business subcontracting. The Contractor should briefly summarize its subcontracting plan. If the Contractor is participating, or plans to participate, in the Department’s Mentor-Protégé Program, this involvement, or planned involvement, should be summarized. Information concerning its subcontracting plans already submitted and approved do not need to be redeveloped or renegotiated.

Economic Development (Including Technology Transfer)

Many of the Department’s contracts include clauses dealing with technology transfer. Planning or activities developed under such clauses may apply to this element of the Contractor’s Diversity Plan. Additionally, some of the subcontracting activities planned by the Contractor with small business, small disadvantaged businesses, or woman-owned small businesses may be entered into for the purpose of assisting the economic development of or transferring technology to such a business. The Contractor’s Diversity Plan should outline and discuss its planned activities promoting economic diversification of the local community.

List of Subjects in 48 CFR Part 970

Government procurement.

Issued in Washington, DC, on August 13, 1997.

Stephen D. Mournighan,

Director, Office of Management Systems, Procurement and Assistance Management.

For the reasons set forth in the preamble, Chapter 9 of Title 48 of the Code of Federal Regulations is proposed to be amended as set forth below:

PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS

1. The authority citation for Part 970 continues to read as follows:

Authority: Sec. 162 of the Atomic Energy Act of 1954 (42 U.S.C. 2201) and Sec. 644 of the Department of Energy Organization Act, Public Law 95–91 (42 U.S.C. 7254).

2. Subsection 970.2602–2 is amended by redesignating the current paragraph as paragraph (a), and by revising the title and adding a new paragraph (b) to read as follows:

970.2602–2 Contract clauses.

* * * * *

(b) The Contracting Officer shall insert the clause at 48 CFR (DEAR)

970.5204-xx Diversity Plan in management and operating contracts.

3. Subpart 970.52 is amended to add section 970.5204-xx to read as follows:

970.5204-xx Diversity Plan.

As prescribed in 48 CFR (DEAR) 970.2602-2(b), insert the following clause.

Diversity Plan

(Month and Year TBE)

The Contractor shall submit a Diversity Plan to the Contracting Officer for approval within 90 days after the effective date of this contract. The contractor shall submit an update to its Plan with its annual fee proposal. Guidance for preparation of a Diversity Plan is provided in Appendix _____. The Plan shall include innovative strategies for increasing opportunities to fully use the talents and capabilities of a diverse work force. The Plan shall address, at a minimum, the Contractor's approach for promoting diversity through (1) the Contractor's work force, (2) educational outreach, (3) community involvement and outreach, (4) subcontracting, and (5) economic development (including technology transfer).

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