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DEFENSE NUCLEAR FACILITIES SAFETY BOARD

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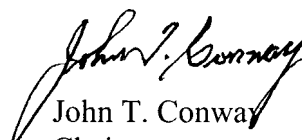
The Honorable Linton Brooks
Administrator
National Nuclear Security Administration
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585-0701

Dear Ambassador Brooks:

On December 1, 2004, the National Nuclear Security Administration issued a draft Request for Proposal (RFP) for the Los Alamos National Laboratory (LANL) management and operating contract. Pursuant to its statutory mandate to review the content and implementation of standards (42 U.S.C. 2286a), the Defense Nuclear Facilities Safety Board (Board) has reviewed the RFP with respect to provisions that affect safety at LANL's defense nuclear facilities. As a result of this review, the Board concludes that the draft RFP places unnecessary and ill-advised limitations on the Department of Energy's (DOE) right to inspect and oversee the activities of the contractor, undermines DOE's system for identifying and implementing safety requirements, and omits relevant safety requirements. These observations are described in the enclosure to this letter.

The Board requests, pursuant to 42 U.S.C. § 2286b(d), a report within 20 days of the date of this letter that responds to the enclosed comments and includes a crosswalk of the requirements in Section J, Appendix G of the RFP with the requirements in the current LANL contract. The Board believes that it would be preferable to resolve these issues before the final RFP is issued.

Sincerely,


John T. Conway
Chairman

c: Mr. Mark B. Whitaker, Jr.

Enclosure

Enclosure

Observations Concerning the Draft Request for Proposal for the Los Alamos National Laboratory Management and Operating Contract

Federal Oversight of Contractor Activities

The Request for Proposal (RFP) places unnecessary and ill-advised contractual limitations on the Federal government's right to inspect and oversee the activities of contractors. Clauses H.1 and H.5 of the RFP are particularly problematic in this regard. Paragraph H.1(b), entitled "Clarifying the Contract Relationship," provides:

Generally, the Contractor shall determine how the programs are executed and shall be accountable for performance in accordance with the terms and conditions of this contract.

The government should never place itself in a position subsidiary to its own contractors. At least with respect to contracts executed under the Atomic Energy Act, the Defense Nuclear Facilities Safety Board (Board) has taken the position that the government remains the responsible party in all respects:

The United States owns the defense nuclear facilities at which its programs are carried out by a government agency—DOE. Each such facility is operated by a contractor that was selected by DOE on the basis of being best suited to conduct the work for DOE at that site. Under the original Atomic Energy Act of 1946 and continuing to date in the Atomic Energy Act of 1954, as amended, the government officials in charge (i.e., the Secretary of Energy and other line officers) have a statutory responsibility to protect health and minimize danger to life or property. In any delegation of responsibility or authority to lower echelons of DOE or to contractors, the highest levels of DOE continue to retain safety responsibility. While this responsibility can be delegated, it is never ceded by the person or organization making the delegation. *Contractors are responsible to DOE for safety of their operations, while DOE is itself responsible to the President, Congress, and the public.* (Recommendation 2004-1, emphasis added)

All language in the RFP suggesting that the contractor determines in the first instance how nuclear activities are to be carried out should be deleted.

Clause H.5 of the RFP, "NNSA Oversight," is intended to set out how National Nuclear Security Administration (NNSA) will (and will not) conduct oversight of the contractor. This provision attempts to create two classes of facilities and activities, one defined by "Nuclear Facility Operations, Projects, Safeguards and Security, and Other High Hazard Activities," the other by "Non-Nuclear Facilities." The former class, along with undefined "support functions related to these areas," is to be managed by NNSA on the "transaction" level as well as the "systems" level, the latter only on a "systems" level.

There are several obvious difficulties with these provisions. First, in order to apply them NNSA would have to compile a list of facilities and activities falling under one or the other oversight regime. There are many facilities and activities that would fall partly in one category and partly in another. For example, how would this bifurcation affect the Emergency Operations Center, or the Los Alamos Fire Station? Likewise, there are many contractual activities not necessarily associated with any facility or project, such as training and qualification. Speaking more generally, it is not clear what governmental interest is served by placing limits on its ability to oversee the contractor's work, and worse, limits that are ill-defined.

Application of DOE Standards to Contractor Work

Clause H.9 of the RFP, entitled "Standards Management," appears to be an addition to, or modification of, Department of Energy Acquisition Regulation (DEAR) 970.52-4-2, *Laws, Regulations, and DOE Directives*, which has been incorporated into the RFP in Clause I.93. Paragraph (a) of Clause H.9 sensibly directs the contractor to "benchmark with industry to incorporate best commercial standards and best business practices." But Paragraph (b) directs the contractor to use this benchmarking as follows:

Where best commercial standards and best business practices are identified that conflict with a DOE Directive or DOE/NNSA requirement, the *Contractor will submit a proposal to NNSA* in accordance with the Section H Clause entitled "Application of DOE Directives." (emphasis added)

Clause H.9 as a whole directs the contractor to search out commercial standards and practices to replace those now prescribed in the DOE Directives System. The Board supports the DOE Directives System and opposes initiatives that could undermine the effectiveness of the Directives System:

DOE has a long and successful history of nuclear operations, during which it has established a structure of requirements directed to achieving nuclear safety. That structure is based on such methods as defense in depth, redundancy of protective measures, robust technical competence in operations and oversight, extensive research and testing, a Directives System embodying nuclear safety requirements, Integrated Safety Management, and processes to ensure safe performance. (Recommendation 2004-1, *Oversight of Complex, High-Hazard Nuclear Operations*)

There is no inherent reason to believe that when a "conflict" is identified, the commercial practice is superior to the practice required in a DOE directive. Improvements to the Directives System should be made, not in individual contracts, but according to the procedures set forth in DOE Order 251.1A, "Directives System."

Clause H.10, "Application of DOE Directives," envisions a contract-specific method by which the contractor may propose, and the Contracting Officer may approve:

. . . an alternative procedure, standard, system of oversight, or assessment mechanism . . . to the requirements in a Directive by submitting to the Contracting Officer a signed proposal

The Contracting Officer is granted sole discretion to grant such requests in whole or in part, without any requirement to consult with subject matter experts or program management at the site or in DOE headquarters. This provision, which is another *de facto* amendment of the *Laws, Regulations, and DOE Directives* clause, opens a “back door” by which safety requirements stated in the RFP (Section J, Appendix G in this case) can be eroded after the contract is awarded. The Board objected to this identical provision when it was included in the draft RFP for the Idaho Cleanup Project; it was removed in the final RFP. It should be removed from this RFP as well, because its use could lead to a fragmentation of requirements throughout the DOE complex that would prove highly detrimental to safety.

The Board calls to your attention the fact that the clauses discussed above are drawn from NNSA’s *Model for Improving Management and Performance*, published March 2004. The Board has not formally reviewed this document, but notes that for the most part the oversight philosophy it espouses runs directly counter to the Board’s Recommendation 2004-1, which the Secretary accepted on July 21, 2004.

Section J, Appendix G Requirements

The requirements listed in this portion of the contract differ substantially from the requirements in the existing Los Alamos National Laboratory contract. It is difficult to assess the adequacy of the RFP directives list without an understanding of how it evolved from the requirements in the existing contract. When the Board’s staff requested a crosswalk of the RFP requirements as compared to the existing contract, the response was that no such crosswalk has been performed. Our review to date discloses that DOE-STD-3013-94, *Criteria for the Safe Storage of Plutonium Metals and Oxides*, has been deleted, and more omissions may be found upon further review. As stated in the cover letter, the Board expects that a crosswalk comparing existing contract requirements with those listed in Appendix G will be prepared and provided to the Board for its review and comment.