

May 23, 2000

The Honorable Bill Richardson  
Secretary of Energy  
1000 Independence Avenue, SW  
Washington, DC 20585-1000

Dear Secretary Richardson:

In the past several years, the Department of Energy (DOE) has implemented a number of contract reform measures. A number of these measures have a direct impact on health and safety matters at defense nuclear facilities subject to safety oversight by the Defense Nuclear Facilities Safety Board (Board). Among these are Department of Energy Acquisition Regulations (DEAR) clauses 970.5204-2, *Integration of Environment, Safety, and Health Into Work Planning and Execution*, 970.5204-78, *Laws, Regulations*, and *DOE Directives*, 970.5204-86, *Conditional Payment of Fee, Profit, or Incentives*, and 970.5204-42, *Key Personnel*.

The Board has fully supported DOE's progress in strengthening its contracting process to ensure safety and performance. The DEAR clauses and specific contract terms, along with regulations and statutory requirements, define the processes for establishing activity-specific safety controls and supporting safety programs. Such safety measures mutually agreed upon become the functional equivalent of a license governing health and safety performance at the contract site. These requirements and their enforcement by DOE are extremely important in ensuring that workers and the public are adequately protected from nuclear and other hazards. During the past several years the Board, on numerous occasions, has discussed with DOE officials the need to incorporate these requirements as specific contractual obligations on the part of the contractors.

The Board, in meeting its statutory obligations to ensure health and safety at defense nuclear facilities, has reviewed existing contracts with the above in mind and has found language variations that tend to weaken measures that set forth needed safety obligations. Further, the Board has observed change out of key personnel by the contractor with detrimental impacts on work progress.

The Board is of the opinion that, while DOE must have flexibility in negotiating contracts depending upon the work to be undertaken, safety measures are not to be compromised. There is a need to standardize the wording that encompasses the enforceable measures required of contractors to ensure health and safety of the public and the workers.

Following are generic contract terms and conditions that the Board views as requisite language to be incorporated in upcoming contracts:

- A) Integrated Safety Management implementation provisions, including the following:
- DEAR 970.5204-2, *Integration of Environment, Safety, and Health Into Work Planning and Execution.*
  - DEAR 970.5204-78, *Laws, Regulations, and DOE Directives.*
  - DEAR 970.5204-86, *Conditional Payment of Fee, Profit, or Incentives.*
  - Contractor transition provisions as identified in Section 2.2. of the report of the Safety Management Integration Team, "Integrated Safety Management System Verification Report Analyses for Fiscal Years 1997-1999," Oct. 1999. Examples are: inclusion of Lists A and B from clause 970.5204-78 including S/RIDs and WSS, use of current ISMS description, retention of key ISMS personnel and organizational structures, and execution of authorization agreements with the incoming contractor.
- B) DEAR 970.5204-42, *Key Personnel*, currently sets forth DOE policy with respect to retention of essential contractor personnel. This clause currently reads:

"It having been determined that the employees whose names appear (below or in Appendix \_\_\_), or persons approved by the contracting officer as persons of substantially equal abilities and qualifications, are necessary for the successful performance of this contract, the contractor agrees to assign such employees or persons to the performance of the work under this contract and shall not reassign or remove any of them without the consent of the contracting officer. Whenever, for any reason, one or more of the aforementioned employees is unavailable for assignment for work under the contract, the contractor shall, with the approval of the contracting officer, replace such employee with an employee of substantially equal abilities and qualifications."

The Board suggests that several new concepts should be considered to strengthen this policy:

- The contracting officer's consent should be given in writing, with evidence that the effect on contracted activities has been carefully considered.
- Contract performance fee award provisions should be structured so that key personnel changes which adversely impact contracted activities may lead to a reduction in fee.

- C) Cooperation with the Board pursuant to 42 U.S.C. 2286c(a). Example of an acceptable clause:

The Contractor shall conduct activities in accordance with those DOE commitments to the Defense Nuclear Facilities Safety Board (Board) contained in the Secretary of Energy's implementation plans and other DOE correspondence to the Board. The Contractor shall support preparation of DOE responses to Board issues and recommendations accepted by the Secretary of Energy which effect or can affect contract work. The Contractor shall fully cooperate with the Board and provide access to such work areas, personnel, and information as the Board deems necessary. The Contractor shall maintain a document process consistent with the DOE manual on interfacing with the Board. The Contractor shall be accountable for ensuring that subcontractors adhere to these requirements.

The Board believes that future DOE contracts for defense nuclear facilities, whether competed or sole source, should include the features and clauses identified above. The Board and its staff are available to discuss these matters at any time. If you have any questions, please call me.

Sincerely,

John T. Conway  
Chairman