

**ENCOURAGING NEW OPPORTUNITIES FOR  
SMALL BUSINESS  
AS PRIME CONTRACTORS THROUGH CHANGES TO DOE's  
MANAGEMENT AND OPERATING AND OTHER MANAGEMENT  
CONTRACTS**

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**A Feasibility Study Jointly Conducted By:**

**Small Business Administration  
Office of Chief Counsel for Advocacy, SBA  
Department of Energy  
National Nuclear Security Administration, DOE  
Defense Nuclear Facilities Safety Board  
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## EXECUTIVE SUMMARY

This report implements Section 6022(c) of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub.L. 109-13. That section requires the conduct of a study regarding the feasibility of possible changes to the Department of Energy's management and operating (M&O) and other management contracts to encourage new opportunities for small businesses to increase their role as prime contractors. The study must consider the impact of possible changes on a number of matters, including sound management practices, safety, and security at Department of Energy (DOE) sites and facilities.

The M&O contract is a critical element of the DOE business model for the conduct of its mission, including its nuclear stewardship, non-proliferation, and energy and other scientific research and development programs. The contracts are large, both in terms of dollar value and scope of responsibility, technically complex, and unique in structure. Because of their nature, DOE's M&O contracts have historically been performed by large industrial companies and academic institutions. Although mission and other changes in recent years have significantly reduced the number of DOE's M&O contracts, those contracts account for approximately 70 percent of DOE's annual contract obligations. That number increases to 85 percent with the inclusion of former M&O and other management contracts.

Because statutory programs for small business goaling are implemented in terms of the percentages of an agency's obligations under small business prime contracts against the agency's total contract obligations, DOE's small business prime contract achievements have been limited on a percentage basis. However, total small business participation in DOE contracting at all levels exceeds \$4 billion annually.

DOE has, in recent years, pursued a number of strategies to increase small business prime contract awards. These efforts have resulted in an 82 percent increase in small business prime contract obligations over four years. However, DOE's overall small business statistical achievement remains under 5 percent because of the significant budget outlay to the M&O and other management contracts.

A study group was convened to conduct this study and prepare a report of its findings. The Study Group reviewed the various segments of the Small Business Act and its implementing and supplementary regulations and guidelines. It also reviewed the nature of DOE's M&O contracts. The Study Group further analyzed DOE's small business program activities and the history of small business goaling within DOE. Finally, the Study Group identified a number of potential changes that could, in theory, be made with respect to DOE's M&O and other management contracts and assessed the implications of these changes, not only for increasing prime contract opportunities but also, for the effects those changes would have on DOE and its missions, programmatically, managerially, and administratively. This report summarizes these study analyses.

This report also summarizes the Study Group's views on the feasibility of possible changes to DOE's M&O and other management contracts that would increase prime contract obligations to small businesses. Specifically, the Study Group assessed changes that would: (1) break out work scope from an M&O for award to small businesses; (2) stimulate M&O contractors to mentor individual small businesses as to their business expertise and capabilities in order to expand prime contract opportunities; (3) award M&O contracts themselves to small businesses; and (4) change the methodology for counting prime contract obligations to small business.

In the opinion of the Study Group, changes to M&O contracts that would break out work for direct award by DOE to small businesses and incentivize the development of small business capabilities are feasible and could result in some increase in DOE's prime obligations to small business. However, the breakout of work from M&O contracts must be accomplished within a given set of DOE decision parameters that reflect the impact of the important considerations identified in Section 6022. Additionally, the Study Group believes that changes to the M&O and other management contracts could be made to incentivize offerors and contractors to provide the experience and to develop the skills small business will need to be successful in obtaining and performing new prime contract opportunities. Further, although an award of an M&O contract itself to a small business remains a theoretical possibility, the Study Group does not believe that this alternate path presents significant prime contract opportunities because the nature of the M&O contracts and their specific performance requirements make the performance of those contracts impractical for most small businesses. Finally, the Study Group does not believe that altering the methodology for counting small business prime contract obligations, absent specific legislative authority, is a feasible change.

In accordance with Section 6022(c) of Pub.L. 109-13, the Defense Nuclear Facilities Safety Board (Board) considered the potential impact of the changes by DOE to its contracting strategies identified by the Study Group to evaluate the extent those changes might affect the safe operation of defense nuclear facilities under the Board's oversight jurisdiction.

In exercising its safety oversight responsibilities, the Board has no predisposition as to form of contracts or size of contractors managing or otherwise involved in defense nuclear facilities or activities. DOE has a limited number of people and resources to manage contracts for defense nuclear work. Increasing the number of prime contractors will challenge DOE's ability to competently and thoroughly oversee safety. The Board's conclusions with respect to these facilities are provided in Section II.E.2.c. of this report.

## I. INTRODUCTION.

### A. STATUTORY MANDATE.

On May 11, 2005, President Bush signed the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief to become Pub.L. 109-13. Section 6022(c)(1) of the Act instructed DOE, Defense Nuclear Facilities Safety Board (Board), National Nuclear Security Administration (NNSA), the Small Business Administration (SBA), and the Small Business Administration Office of Advocacy (SBAOA) to "jointly conduct a study regarding the feasibility of possible changes to management and operating contracts and other management contracts within the Department of Energy to encourage new opportunities for small businesses to increase their role as prime contractors." The Act instructed that the organizations engaged in the study "shall jointly consider the impact of changes studied on--

- A. accountability, competition, and sound management practices at the Department of Energy and its facilities managed by prime contractors;
- B. safety, security, and oversight of Department of Energy facilities; and
- C. the potential oversight and management requirements necessary to implement the findings of the study."

The Supplemental Appropriations Act at Section 6022(a) also instructed DOE and the SBA to enter into a Memorandum of Understanding (MOU) that articulates an appropriate method of measuring the achievement of DOE in awarding prime contracts to small business, as well as the award of subcontracts to small business by M&O and other management contractors. Section 6022 required that designated participants conduct the study and MOU by September 30, 2005.

The SBA and DOE have executed the MOU, and the designated participants have completed the study. What follows is a report of the study conducted by a study group organized in accordance with Section 6022(c), comprised of representatives of the Administrator of the Small Business Administration, the Chief Counsel for Advocacy of the Small Business Administration, the Chairman of the Defense Nuclear Facilities Safety Board, the Secretary of Energy, and the Administrator of the National Nuclear Security Administration of DOE. The report summarizes the Study Group's analysis of background information and materials relevant to the assignment, including events leading to enactment of Section 6022(a) and (b); Congressional and Executive branch small business policies and programs; the history, nature, and role of DOE's M&O contracts; the history of DOE's small business goaling; recent DOE small business initiatives; and information on certain missions or managerial and administrative concerns associated with potential changes to M&O and other management contracts.

The ultimate objective of this study is to identify opportunities for increased small business participation as prime contractors to DOE that are consistent with the safe, secure, and efficient accomplishment of DOE's overall mission responsibilities. This report summarizes the findings of the Study Group.

The Board, in its independent safety oversight role, evaluated the potential impact on safety of the conclusions reached by DOE and the SBA with regard to increasing small business prime contracts and has addressed in Section II.E.2.c. those actions required by DOE to maintain the same level of safety in all circumstances.

## **B. APPROACH.**

In accordance with the mandate of Section 6022(c), the Study Group met several times to establish an analytical framework for the study. The resulting methodology consisted of the following four stages:

- (1) Definition of the issue.
- (2) Collection and review of literature relevant to the study.
- (3) Identification and assessment of possible changes to M&O and other management contracts to increase small business participation in DOE prime contracts.
- (4) Assessment of the feasibility of the possible changes to M&O and other management contracts.

During the collection and review step, the Study Group spent two full days of receiving briefings on various aspects of DOE's management and operation contracts. The briefings also covered the category of contracts classified by Section 6022(c) as "other management contracts." The materials collected and reviewed consisted of past Government Accountability Office (GAO) studies on small business participation in DOE procurement; the Request for Proposal for award of a management and operating contract, Los Alamos National Laboratory; Departmental memoranda; correspondence between DOE, Office of Federal Procurement Policy (OFPP), the SBA, and Congress on the small business goaling process; and relevant legislative histories. The Study Group heard several briefings on such items as the types of research conducted by M&O contractors, organizational structure of the M&O and its contractual relationship to DOE, security and safety issues, and the SBA goaling process. Selected individuals from the Study Group toured DOE's Argonne National Laboratory, to become familiar with the operation of a DOE M&O contract operation first-hand. As a result of the briefings and site visit, those members of the Study Group unfamiliar with DOE's M&O contracting environment gained an understanding of the statutorily mandated "special relationship" between DOE's M&O contractors and DOE.



## II. ANALYSIS.

### **A. BACKGROUND.**

Section 6022(c) of the Energy Supplemental Appropriations Act, 2005, requires DOE, the Board, NNSA, the SBAOA, and the SBA to assess both the feasibility and consequences of possible changes to DOE's M&O and other management contracts in order to "encourage new opportunities for small businesses to increase their role as prime contractors." Section(d) further requires the Secretary of Energy prior to "breaking out" a portion of an M&O contract to consider whether: (1) those services under the contract have previously been provided by small business concerns and (2) whether small businesses would be capable of performing the resulting contract.

Section 6022 reflects a compromise between competing interests and concerns regarding the effective management and accomplishment of DOE missions and the accomplishment of Federal policy to ensure that small business concerns have the maximum practical opportunity to compete for and participate in a fair proportion of executive branch contracts and subcontracts. To understand these interests and concerns, it is important to understand the historical context in which they arose.

The Small Business Act, 15 U.S.C. § 631, provides as a matter of policy that the Government should, among other things, ensure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government be placed with small business enterprises.

In 1988, the Small Business Act was amended by the Business Development Reform Act, Pub.L. 100-656, to require the President to annually establish Government-wide goals for small business and disadvantaged business. The Government-wide goals established by the President for small business must be at least 20 percent of the value of all prime contracts. Additionally, each Federal agency was charged with establishing agency-specific goals jointly with the SBA. The goals so established were required to be consistent with each agency's mission and to realistically reflect the potential of small business concerns to perform such contracts. Cumulative agency prime contract goals were required to meet and exceed the annual Government-wide goals established by the President. In the event that an agency and the SBA were unable to agree on such goals, the Administrator, OFPP, was required to resolve the disagreement and make a final determination of the goal to be established.

On November 2, 1990, the SBA Administrator referred to the OFPP Administrator a disagreement on goaling with three Federal agencies - the Department of Defense, the National Aeronautics and Space Administration, and DOE. The SBA disagreed with the proposed goals of each agency because, when combined with the goals for other agencies, the resulting goal would not meet the statutorily prescribed minimum government-wide goal. The three agencies disagreed with the SBA's recommended goals because the proposed SBA goals for the three agencies were not consistent with the

statutory requirement that the goals realistically reflect the potential of small businesses to perform those agencies' contracts and subcontracts.

On March 5, 1991, the OFPP Administrator issued a final determination resolving each of the disagreements. The determination provided specific goals for each of the agencies. DoD and NASA's goals were premised upon their historical achievement. With respect to DOE, the OFPP Administrator established the agency's goal at a significantly higher level (20.1 percent) than that proposed by the SBA (3.7 percent) and far in excess of DOE's historical achievements.<sup>1</sup> However, the Administrator provided that the prime contract goals for DOE should also include the accomplishments of its M&O contractors in addition to its direct Federal awards. The OFPP Administrator opined that this goal was nonetheless challenging for the Department, because it resulted in goals for both DOE and the M&O contractors which were higher than those previously achieved by DOE and its contractors. The OFPP Administrator further stated that the previous treatment of subcontracts awarded by DOE's M&O contractors for the purpose of goaling did not appear to accurately reflect the Federal government's true achievements in small business awards because: (1) the M&O subcontracts directly benefited the government in the operation of its government-owned, contractor-operated facilities and (2) the similarity of DOE's procurement rules for the M&O contractors and those of Federal agencies. The SBA and DOE complied with the OFPP Administrator's determination from the date of issuance until 1999.

On October 7, 1999, the Administrator of the SBA wrote to the Administrator, OFPP, requesting the resolution of a dispute with DOE over the inclusion of M&O contractor subcontract awards to small business in DOE's small business prime contracting achievements. The SBA Administrator expressed the opinion that those awards should be counted toward DOE's subcontract goal achievements, so that all agencies would be measured on the same basis. DOE disagreed with the SBA's position, based on the previous policy direction provided by the OFPP Administrator in 1991. It also noted that the SBA's position would result in the erroneous perception that the reduced prime contract achievement represented a reduction in opportunities for small business, while, in fact, the total dollar participation of small business in DOE contracting as a whole was unaffected.

On November 3, 1999, the Administrator, OFPP, issued his determination that reversed the direction from 1990, effective in fiscal year (FY) 2000 and for subsequent fiscal years.

DOE and the SBA complied with the OFPP Administrator's November 1999 determination and revised both the prime contract goaling as well as its prime contract achievement practices. Due solely to this change in the methodology for measuring small business goals and achievements, DOE's achievement changed from the 18-20 percent range achieved since the early 1990s to 2.83 percent in FY 2000. The relative representation of DOE's statistical achievement against the statutory Government-wide

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<sup>1</sup> Letter from the Hon. Allan V. Burman, Administrator, Office of Procurement Policy, to the Hon. Susan S. Engleiter, Administrator, Small Business Administration, March 5, 1991, at 1-2.

goal results, in substantial part, from the fact that the vast majority of DOE prime contract obligations were attributable to M&O and other management contracts, which have been awarded to large businesses and educational institutions.<sup>2</sup>

Nonetheless, as a consequence of the change, its impact on goaling and achievements, and the potential for misperception as to what these changes meant in terms of DOE's support to small business, DOE re-emphasized the importance of direct DOE prime contracting with small business and adopted a number of high-profile initiatives to increase those awards. Specifically, DOE: (1) launched a national outreach campaign to identify and attract small business to contracting opportunities at the prime and subcontract level; (2) established small business advisory teams to provide guidance and recommendations; (3) established challenging small business goals for each DOE program office that controlled funds for obligation through contracts; (4) began tracking program office performance against goals on a quarterly basis; (5) reviewed former M&O contracts and components of former M&O contracts to determine potential for small business participation; (6) set-aside for the first time environmental remediation, decommissioning, and facility support contracts for small business; (7) encouraged and facilitated small business teaming efforts to enable small business participation in such contracts; and (8) identified M&O and other management contract work scope for potential breakout for direct DOE award to small business.

On December 13, 2000, the then Chairman of the Senate Committee on Small Business expressed appreciation for DOE's efforts. The Chairman also expressed an understanding of the challenges created by the changes in the goaling/achievement reporting methodology, noting that in light of the fact that the majority of DOE's prime contract obligations were placed against M&O and former M&O contracts, the goal established for the Department in FY 2000 was not achievable. The Chairman further opined that the Committee had anticipated that the change directed by the OFPP Administrator would have a significant impact on DOE's ability to meet its goals and recognized that the new "reporting environment would require time to implement."<sup>3</sup> Finally, the Chairman emphasized the importance of reviewing DOE M&O and other major facility management contracts for small business contracting opportunities as they expire and are re-awarded.

In fulfillment of its commitment and plans, from FY 2000 to FY 2004 DOE increased prime contract dollar obligations to small business by \$400 million or by approximately 83 percent. In terms of contracts awarded, the number of contracts

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<sup>2</sup> Of the total amount of prime contract obligations in FY 2000 (\$17.2 billion), only \$3.1 billion was obligated against other than M&O and other management contracts. Of that \$3.1 billion, only \$340 million was actually obligated under new contracts in FY 2000, and was available in that year for award to small businesses. The remaining \$16.8 billion was obligated against pre-existing multiple-year contracts. Therefore, excluding monies obligated to FMC contracts and the amounts obligated to other existing contracts, of the total DOE contract obligations in FY 2000, only 2% of DOE's contract obligations could realistically be affected by DOE small business strategies.

<sup>3</sup> Letter from Senator Christopher S. Bond, Chairman, Senate Committee on Small Business, and Senator John F. Kerry, Ranking Member, Senate Committee on Small Business to the Hon. Bill Richardson, Secretary of Energy, Dated December 13, 2000, at 1.

(including awards under GSA multiple award schedules) going to small business increased from 42 percent in FY 2000 to 61 percent in FY 2004. In terms of the SBA's goal achievement, DOE obligations against small business contracts as a percentage of total obligations increased from 2.83 percent in FY 2000 to just over 4 percent in FY 2004.<sup>4</sup> This increase in DOE's small business achievement would have been more dramatic were it not for the fact that, during the same period, total contract obligations increased by approximately 28 percent, attributable in large part to increased obligations at DOE laboratories and other M&O contracts with national security-related missions, arising in the post-September 11 environment.<sup>5</sup>

On May 18, 2004, the Chairman of the Senate Committee on Energy and Natural Resources convened a hearing to assess the impact of OFPP's direction to change the methods by which DOE and the SBA established small business prime contract goals and reported achievements. The Chairman stated that "[t]his seemingly simple change in accounting is having a very serious number of effects."<sup>6</sup> Specifically, the Chairman expressed concern that one of the initiatives taken by DOE to increase prime contract awards, breaking out M&O work scope including existing subcontracts for direct award to small business, discouraged M&O contractors from expanding their own small business contracting and would actually decrease subcontract obligations to small business. He also stated that this practice would encourage activities at a DOE site to be run by numerous small businesses under separate DOE contracts, and he questioned the wisdom of relying on the Department's capacity to directly coordinate and integrate all those small activities as well as its ability to ensure that the Department's mission would be accomplished with maximum attention to safety and security.

On October 28, 2004, the Consolidated Appropriations Act, 2005, was enacted, incorporating, among other things, the Energy and Water Development Appropriations Act, 2005, which contained two provisions affecting DOE's initiatives to increase small business participation at the prime contract level. Section 312 of the Act provided that funds otherwise available to DOE to achieve small business contracting goals could not

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<sup>4</sup> As a percentage of non-M&O/FMC prime contract obligations, DOE's small business amounts increased from 15.8% in FY 2000 to 28.7% in FY 2004, almost doubling of the percentage of these obligations to small businesses. DOE increased the number of contract awards to small business from 593 (40% of all contract awards) in FY 2000 to 831 (53% of all contract awards) in FY 2004. This represents a 40% increase from FY2000 to FY 2004.

<sup>5</sup> See Attachment 3 for tables reflecting effects of the application of the statistical methodology. These tables display DOE's small business achievements for FY 2000 through FY 2004. From FY 2002 through FY 2004, DOE's budget increased by \$4.4 billion. Congress appropriated those additional monies for national security activities after September 11 to be performed at DOE's national laboratories. That increase increased DOE's obligations base for the purpose of computing DOE's small business achievement, but those monies were not available for award of prime contracts by DOE to small businesses. Therefore, the increased appropriations offset the impact of the approximately 100% increase in obligations to non-M&O/FMC prime contracts DOE had achieved during the same period. Had these appropriation increases not occurred, DOE's small business achievement for FY 2004, for instance, would have been 4.7%, as opposed to 3.0%.

<sup>6</sup> *DOE Contracting with Small Business: Hearing before the Senate Committee on Energy and Natural Resources*, 108<sup>th</sup> Cong. 2d Sess. 1 (2004) (Opening Statement of Hon. Pete V. Domenici, Chairman, Senate Committee on Small Business).

be used for procurement actions resulting from the breaking out of requirements from current M&O contracts unless the Secretary of Energy formally requests, considers, and renders an appropriate decision on the views of a SBA Breakout Procurement Center Representative (or designee) concerning the cost effectiveness, mission performance, security, safety, small business participations, and other legitimate acquisition objectives of the procurement. Section 313 of the Act prohibited the use of funds appropriated by the Act to perform contract management oversight or other contract administration functions that are inherently governmental as defined and prohibited by the Federal Acquisition Regulation (FAR).

On May 11, 2005, Congress enacted the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub.L. 109-13. The section of the Act that directed this study, Section 6022, was adopted as a substitute for Section 6023 of the Senate version of the Emergency Supplemental Appropriations bill that, among other things, would have amended the Small Business Act to authorize the SBA and DOE to count the small business contracts awarded by DOE's M&O contractors and other facilities management contractors as DOE prime contracts for purposes of reporting small business prime contract results. In conference, Section 6023 of the Senate bill was replaced by Section 6022 of the House bill. Unlike the language it replaced, Section 6022 does not authorize DOE and the SBA to count the small business contracts awarded by M&O and other facility management contractors as Federal prime contracts. Neither does it specify any other methodology for counting contracts or subcontracts for purposes of determining the Department's small business goaling achievements. Rather, the text of Section 6022 directs the DOE and the SBA to "set forth" an "appropriate" methodology for counting both contracts and subcontracts awarded to small businesses in a memorandum of understanding. Additionally, it provides for the study which is the object of this report.

## **B. DOE MISSION AND ROLE OF THE MANAGEMENT AND OPERATING (M&O) CONTRACT.**

### **1. Original Design of M&O Contracts.**

What today are known as DOE's management and operating contracts began during World War II. The Manhattan Engineer District was the governmental entity responsible for the design, development, and production of the first atomic bombs, an undertaking without precedent. This massive effort was achieved, speeding the end of World War II. The achievement resulted through a substantial reliance upon private industry and educational and other nonprofit institutions.

In 1946, following on the success of the Manhattan Project, Congress created the Atomic Energy Commission (AEC) to design and produce nuclear weapons, to develop nuclear energy as a source of electricity, and to research the use of nuclear energy in medicine. The legislative history of the Atomic Energy Act of 1946 indicates the basic principle that underlies M&O contracts was that the AEC, a predecessor of DOE, was to employ highly capable companies and educational institutions to carry out the actual

performance of the agency's mission; that is, these contractors were to perform the agency's mission as opposed to the agency's using civil servants. "Wherever possible, the committee endeavors to reconcile Government monopoly of the production of fissionable material with our traditional free-enterprise system. Thus, the bill permits management contracts for the operation of Government-owned plants so as to gain the full advantage of the skill and experience of American industry."<sup>7</sup>

The Ninth Semiannual Report to Congress by the Atomic Energy Commission stated a more detailed intention of the Commission:

The firms operating large Government-owned production plants, carrying on extensive development projects, and undertaking urgent construction jobs, work in close day-by-day cooperation with the Commission and its staff. They have been selected for their competence, and the Government is contracting with them not only for technical ability but for managerial ability as well. The working relationship between the Commission and its operating contractors resemble in some respects those between industrial companies and their branch offices. The contractor undertakes to carry on an extensive operation; the Commission establishes the objectives and makes the decisions required to fit the operation into the national program, and exercises the controls necessary to assure security, safety, desirable personnel administration, and prudent use of the public funds.<sup>8</sup>

The report also presented four basic principles relating to the operating contractors:

- (a) The contractor recognizes that the AEC is responsible under the law for the conduct of the atomic energy program.
- (b) The AEC recognizes that the contractor is an established industrial, business, or academic organization with proved (sic) capabilities, both technical and administrative.
- (c) The contractor recognizes that the proper discharge of the AEC responsibilities requires that the AEC shall have full access to information concerning the contractor's performance of the contract work and the power to exercise such control and supervision under the contract as the AEC may find necessary.
- (d) Both the AEC and the contractor recognize that the proper discharge of the contractor's responsibilities for management requires that it shall, to the fullest extent compatible with the law, exercise its initiative and ingenuity carrying out the contract work.<sup>9</sup>

<sup>7</sup> S.Rept. 1211, 79<sup>th</sup> Cong. 2d Sess. 15 (1946).

<sup>8</sup> U.S. Atomic Energy Commission, Ninth Semiannual Report 57 (1951).

<sup>9</sup> *Id.* at 61-62.

The special nature of the work performed by the AEC and its operating contractors was reflected in 1949 when Congress enacted the Federal Property and Administrative Services Act establishing, among other things, an outline for defined procurement that included a provision, referred to as "nonimpairment authority," specifying that nothing in the Act "shall impair or affect" the authority of the Atomic Energy Commission to perform its missions.<sup>10</sup>

Subsequently, Congress expanded the mission and authorities of the AEC with its enactment of the Atomic Energy Act of 1954. That Act has provisions that recognize the AEC's potential reliance upon contractors for performing portions of its mission. In 1958 the Act was amended to provide a system of indemnification of AEC contractors and public utilities against liability for nuclear incidents.<sup>11</sup>

As a result of the enactment in 1974 of the Energy Reorganization Act, the AEC no longer exists. Its nuclear regulatory functions were taken over by the Nuclear Regulatory Commission, and its nuclear research, development, and weapons production were taken over by the Energy Research and Development Administration (ERDA). The "operating contracts" continued to play the same role in ERDA that they had performed in the AEC, that is, to perform a substantial portion of the basic mission of the agency. Many pieces of non-nuclear legislation, *e.g.*, the Federal Non-nuclear Energy Research and Development Act of 1974, expanded ERDA's and DOE's missions substantially, resulting in a comparable expansion of the missions of M&O contracts.

M&O contracts continue to serve a necessary function within the Department of Energy, since its organization in 1977, and its security component, the National Nuclear Security Administration.

## **2. Unique Features of DOE's M&O Contracts and Other Management Contracts.**

The Department of Energy has disparate missions, generally involving energy research and development, weapons production and stockpile management, and environmental remediation and restoration. DOE's scientific research and development programs are extensive and include, for example, research in nuclear energy, high energy physics, the human genome, and naval nuclear propulsion, among other demanding and important areas. DOE's budget for carrying out its various missions was approximately \$24 billion for FY 2004. Of that amount, about \$19 billion was dedicated to the Department's major management contracts, with about \$15 billion dedicated specifically to the Department's M&O contracts.

Aside from the size of these M&O and other major management contracts, they differ from stereotypical contracts awarded by Federal agencies in many ways relevant to

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<sup>10</sup> 40 U.S.C. § 474(d)(17), since recodified at 40 U.S.C. § 113(e)(12)(2000).

<sup>11</sup> Pub.L. 85-256. As a result of subsequent amendments, principally the Price Anderson Amendments Act of 1988, Pub.L. 100-408, the Price-Anderson indemnity now applies to DOE contracts under which there is a risk of public liability from a nuclear incident.

small business goaling and achievement. These contractors manage and operate vast sites, consisting of hundreds and often thousands of acres, and they are responsible for all facets of the complex and demanding scientific work DOE assigns to the contractors and for stewardship of the site infrastructure.

Under the statutory contracting model DOE directs the subject matter areas in which the contractors are focused and the overall performance objectives that DOE wants accomplished; however, Congress directed that the contractors be relied upon to apply best management, scientific, and business practices in carrying out that direction. This reliance gave rise to what has become known as a "special relationship," characterized by the use of these contractors to perform major portions of the agency's mission.

DOE's M&O contracts share indicia of that special relationship in their history and in their current operation. Those indicia are evidence of the unique nature of these contracts and, therefore, bear directly on establishing small business goals and recording achievements, and why those processes differ in DOE as opposed to all other Federal agencies.

### **3. Special Features of DOE's M&O Contracts.**

Many of DOE's sites operated and managed by DOE's M&O contracts were placed in locations that at the time were isolated from population centers due to the potential danger and security concerns inherent in the research, design, development, and production of nuclear weapons and other activities. Currently, DOE's M&O contractors have approximately 100,000 employees as compared to DOE's 14,000 employees.

Because of the need to share various types of controlled and sensitive information with its contractors, as well as to ensure that potential conflicts of interest are managed, DOE generally requires that the M&O contractors be subsidiaries of their corporate parents, dedicated to performance at the specific site and supported by performance guarantees from their corporate parents. This limits the ability of the performing contractor to propose on or accept work for other Federal agencies<sup>12</sup> or third parties. The contractors' budget processes are integrated into those of the Department, and, in almost all cases, the budgets for DOE's M&O contracts are line items in the Department's budgets. The contractors operate under special financial institution accounts established by DOE from which, for the Government's benefit, contractors make payments for costs incurred in performance of the contract. Additionally, because the contractors' accounting systems are integrated into DOE's financial system, DOE establishes requirements for the contractors' accounting systems.

These indicia are representative of the "special relationship" the M&O contractors share with DOE.

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<sup>12</sup> Other than that accepted under DOE's Work for Others program, under which it assigns qualifying work to its M&O contractors, special work authorized for the Nuclear Regulatory Commission by § 205 of the Energy Reorganization Act of 1974, Pub.L. 93-438 or work authorized for the Department of Homeland Security under the Homeland Security Act, § 309 of Pub.L. 107-296.



#### 4. External Recognition of the Unique Nature of DOE's M&O Contracts.

Various pieces of legislation enacted by Congress have explicitly dealt with DOE's M&O contracts, recognizing their special relationship with DOE and its predecessor agencies and the special importance of these M&O contracts to the nation. For instance, the Bayh-Dole Act, Pub.L. 96-517, enacted in 1980, reversed the then dominant rule that the Government would take title to inventions first conceived or reduced to practice under Government contracts by granting small businesses, non-profit organizations, and educational institutions the opportunity to elect title to those inventions. The statute recognizes that it would impact title to inventions under DOE's M&O contracts.<sup>13</sup> In doing so, the Act provided authority for DOE to retain title to inventions in DOE's nuclear propulsion and weapons related programs. The Homeland Security Act of 2002, Pub.L. 107-296, provides for Department of Homeland Security (DHS) to have special access in the accomplishment of its mission to DOE's national laboratories and other DOE facilities that are managed and operated by DOE's M&O contractors.

In addition, various other Federal agencies have at times recognized DOE's "special relationship" with its M&O contractors. Prior to enactment of the Competition in Contracting Act and its explicit grant to the General Accounting Office<sup>14</sup> of bid protest authority, the Comptroller General asserted jurisdiction over protests against the award of subcontracts by DOE's M&O contracts, a very limited instance of GAO's assertion of protest jurisdiction over the award of subcontracts under a specific type of contract.<sup>15</sup> Under the Brooks Act, since repealed, governing the acquisition of automatic data processing equipment (ADPE), DOE had a special delegation of procurement authority from the General Services Administration for purchases of ADPE by the M&O contractors. The Department of Labor recognizes the special identity of M&O contracts for the purposes of its administration of the Service Contract Act of 1965, as amended. The U.S. Trade Representative has provided for special treatment for DOE's M&O contractors in its negotiation of the General Agreement on Trade and Tariffs and North American Free Trade Agreement.

M&O contracts have also received special regulatory treatment. The Federal Acquisition Regulation system was adopted in 1984, long after the creation of the contracts that have become known as M&O contracts. The FAR, at Subpart 17.6, recognizes and codifies the special identity that M&O contracts have with an authorizing agency. The FAR coverage recognizes the special extend/compete process, it requires special statutory authority for an agency to establish an M&O contract, requires Secretarial designation of the M&O contracts, and authorizes agency acquisition regulations that deal with the special nature of M&O contracts. Under the authority of Subpart 17.6, the Department of Energy Acquisition Regulation (DEAR) has a Part 970

<sup>13</sup> 35 U.S.C. § 202(a)(2000).

<sup>14</sup> Now the Government Accountability Office.

<sup>15</sup> 54 Comp. Gen. 767, 784 (1975).

that supplements the FAR and governs the solicitation, award, and administration of DOE's M&O contracts.

Finally, the Supreme Court opined that management and operating contracts are a unique type of contract, in that they have a special identity with DOE and indicia of agency without actually causing the contractors to be agents of the Department. The Court stated:

[I]n several ways DOE agreements are a unique species of contract, designed to facilitate long-term private management of Government-owned research and development facilities. As the parties to this case acknowledge, the complex and intricate contractual provisions make it virtually impossible to describe the contractual relationship in standard agency terms. . . . While subject to the general direction of the Government, the contractors are vested with substantial autonomy in their operations and procurement practices. n2

. . . .  
n2 AEC management contracts were developed in an attempt to secure Government control over the production of fissionable materials, while making use of private industry's expertise and resources. . . .<sup>16</sup>

#### **5. Other DOE Management Contracts.**

In recent years, the missions of certain sites historically managed and operated by M&O contractors have dramatically changed, since DOE no longer carries out a nuclear weapons production mission at some sites. DOE must remediate those sites where production left the Department with serious and sometimes undefined environmental issues. The Department's mission objectives at these sites were no longer broadly defined and indefinite in their term. Rather, the Government's new requirement was narrowly focused and of definite duration.

The desire to make expedited progress led predictably to the creation and adoption of contract structures that, while not management and operating contracts, shared some of their characteristics, particularly those related to site and facility stewardship during the conduct of the remediation missions, as well as the overarching importance of safety management and security management. These contracts are referred to in Section 6022(c) as "other management contracts" and have otherwise been described by DOE as major site and facility management contracts. Since these contracts involve the control of the site and involve a large contractor workforce, certain of the provisions appropriate to a management and operating contract were appropriate to the major facilities contracts, including retaining certain portions of the "special relationship" between DOE and its M&O contracts.

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<sup>16</sup> United States v. New Mexico, 455 U.S. 720, 723(1982).

### C. SMALL BUSINESS REQUIREMENTS.

The Federal government purchases billions of dollars in goods and services each year that range from paperclips to complex space vehicles. America's small businesses—some 24 million strong—are the strength of our nation's economy. Small businesses account for half of the country's real, non-farm gross domestic product, create 60 to 80 percent of the net new jobs, and produce 13 to 14 times more patents per employee than large businesses. It is the policy of the United States that small businesses have the maximum practical opportunity to compete for and receive a fair portion of Federal government contracts and subcontracts. To ensure that small businesses get a fair share of Federal business, the SBA negotiates annual procurement small business goals with each Federal agency and reviews each agency's results. The SBA is responsible for ensuring that the statutory government-wide goals are met in the aggregate.

In addition, in 1976, Congress created the Office of Advocacy to protect, strengthen, and effectively represent the nation's small businesses within the Federal government's legislative and rule-making processes. The SBAOA works to reduce the burdens that Federal policies impose on small firms and maximize the benefits small businesses receive from the government. The SBAOA's mission, simply stated, is to encourage policies that support the development and growth of American small business.

In 1988, Congress passed legislation that established a Government-wide small business procurement goal for prime Federal contracts and certain subcontracts awarded by large businesses resulting from those prime contracts. Today, Section 15(g)(1) of the Small Business Act (15 U.S.C. § 644(g)), establishes Government-wide contracting goals for Federal procurement for both prime contracting and subcontracting. As originally enacted, the overall Government-wide prime contracting goal was established at 20 percent. However, in 1997, Pub.L. 105-135 raised the annual overall Government-wide prime contracting goal for small business to 23 percent. An individual agency's procurement goals do not necessarily match the Government-wide goals; rather, an individual agency's goal is to reflect the realistic opportunity for small businesses to receive that agency's awards.

While the statutory goals are Government-wide, that is, the statutory goals are an aggregate of all Federal procurements, each Federal department or agency has different program missions and procurement needs. Section 15(g)(1) of the Small Business Act (15 U.S.C. § 644(g)(1)) states, "Notwithstanding the Government-wide goal, each agency shall have an annual goal that presents, for that agency, the maximum practical opportunity for small business concerns . . ." The SBA works with each agency to establish goals that both provide small businesses the maximum opportunity to receive contracts, given that agency's procurement needs, and meet the Government-wide statutory goals. It is the SBA's internal policy to begin the negotiation by assigning either the statutory level or the average achievement for the past three years—whichever is higher—and agencies must make a compelling case to have goals set lower. The SBA cannot accept proposed goals from an agency until it is sure the cumulative goals will satisfy the statutory Government-wide levels. If the SBA and the agency cannot agree on

the proposed goals, the agency may submit the case to OFPP for resolution. If this process is completed in the month of September, it will be included in the final goals that are distributed to all agencies prior to the beginning of the fiscal year. If the appeal process is prolonged, the SBA will assign either the statutory level or the average achievement for the past 3 years – whichever is higher – so that the goaling process can commence in a timely manner and assure that the statutory government-wide goaling level can be satisfied.

The SBA has established interim Goaling Guidelines for agencies. The guidelines, although not regulatory, were established in accordance with public rule making procedures and accordingly were published for public comment in the *Federal Register*. They are available for viewing on-line at <http://www.sba.gov/GC/goals>.

The SBA and the SBAOA, along with all the designated participants to the Section 6022 study, have examined the feasibility of possible changes to M&O contracts and other management contracts within DOE to increase small business contracting opportunities. The goal of this effort has been to identify: (1) potential changes that will expand procurement opportunities in DOE's Mentor-Protégé Program in both DOE's M&O and other major facilities contracts; (2) potential changes that will increase prime contracting opportunities for small business from work currently performed by DOE's M&O; and (3) potential changes that would increase subcontracting opportunities in DOE's M&O and other major facilities contracts.

#### **D. DOE'S SMALL BUSINESS INITIATIVES.**

DOE complies with the small business policies and procedures delineated in the Federal Acquisition Regulation and expands upon those requirements to facilitate participation of small businesses in the contracting process at both the prime contract and subcontract levels. Acquisition Letter No. 2005-08, dated June 10, 2005, is DOE's most current articulation of department-wide guidance on contracting with small business concerns. The impact of these special efforts has given DOE's Contracting Officers and prime contractors additional tools to increase the participation of small businesses in the contracting process.

##### **1. FAR Policy.**

The FAR automatically reserves for small business concerns acquisitions from the micro-purchase threshold (\$2,500) to the simplified acquisition threshold (\$100,000). For acquisitions over \$100,000, awards are set aside for small business if there are at least two responsible small business concerns and award can be made at fair market prices. The FAR also provides for noncompetitive awards and set-asides for 8(a) firms, Historically Underutilized Business Zones Program (HUBZone) concerns, and service-disabled veteran-owned small business concerns.

## **2. DOE Policy and Procedures.**

The programs described below are available to DOE program offices and M&O contractors, depending on the program, and represent an adaptation of a Federal small business preference program for use by DOE's M&O contractors. Many of these adaptations are designed to enhance the M&O contractors' ability to make subcontract awards in more situations than non-M&O contractors and represent the "special relationship" between DOE's M&O contractors and DOE.

**a. Mentor-Protégé Agreements** – DOE and the SBA operate Mentor-Protégé agreements as a method of increasing the participation of small businesses in government contracting. DOE contracting officers who seek to increase prime contract awards to small businesses can use the SBA Mentor-Protégé Program. DOE prime contractors who seek to increase subcontract awards can use the DOE Mentor-Protégé Program. The SBA's regulations provide for a joint venture that may include a large business and an 8(a) firm that qualify as a Mentor-Protégé arrangement, respectively, under its Mentor-Protégé Program. Such a joint venture will be recognized as small for the size standard corresponding to the North American Industry Classification System (NAICS) code assigned to the procurement. DOE's Mentor-Protégé Program seeks to foster long-term business relationships between small business entities and prime contractors, and to increase the overall number of subcontract awards to small businesses. Mentors and protégés are encouraged to form teams to submit offers that will advance the protégé's competitiveness in the market. The DOE Mentor-Protégé Program regulations are found in DEAR 919.70.

**b. Teaming Arrangements** – Another method of increasing the participation of small businesses in the award of DOE prime contracts is DOE's encouragement of the use of teaming arrangements among small businesses, consistent with applicable law and the SBA's rules on size status and affiliation. Such arrangements supplement the capabilities of small businesses to perform large, complex requirements. Teaming arrangements not only increase business opportunities for small businesses, but also expand the skill mix of the contracting entity.

**c. Use of Federal Supply Schedules (FSS)** – DOE was one of the first agencies to recognize the potential of the General Services Administration's Federal Supply Schedule to expand small business participation. Acquisition Letter No. 2000-02, dated April 20, 2000, was issued specifically to target small business firms in FSS competitions to the maximum extent possible. DOE established a procedure by which contracting officers work with program personnel to identify three or more small business FSS contractors. When appropriate, competitions may be limited to specific socio-economic categories (e.g., woman-owned small businesses). DOE provides that small business firms should be targeted regardless of the dollar amount of the acquisition. As a result of this policy, DOE obligates over 60 percent of the dollars awarded under the schedule contracts with small business firms.

**d. Multiple Award Contracts (MACs)** – Contracting officers work with program officials and the Small Business Program Managers (SBPMs) to identify small business opportunities and encourage business strategies such as teaming arrangements. MACs are set-aside exclusively for small businesses if the contracting officer can identify at least two responsible small business offerors. If a total set-aside is not practicable, contracting officers will identify opportunities for component(s) of statement of work to be set aside for small businesses.

**e. SBA/DOE Partnership Agreement** – A Memorandum of Understanding was executed between DOE and the SBA in 2003 and is effective through September 30, 2006. The SBA delegated to DOE the authority to contract directly with 8(a) firms, thereby streamlining the 8(a) contracting process.

**f. OSDBU Database** – DOE's Office of Small and Disadvantaged Business Utilization (OSDBU) established a DOE Small Business database for use by program offices and prime contractors. Small business profiles are downloaded from the Central Contractor Registration (CCR) database to include those small business concerns having interest in working with DOE. Contractors are cross-referenced by company, contact name, size status, NAICS code, and key words. The database has been developed to be accessed through DOE's Forecast of Prime and Subcontracting Opportunities.

**g. OSDBU Review** – DOE's Contracting Officers must refer all proposed acquisitions over \$3 million (new requirements, exercise of options, or other extension requests of existing acquisitions) which have not been proposed for small business set aside to OSDBU. OSDBU reviews the analysis and conclusions with respect to the proposed action to determine whether the failure to set the requirement aside is justified and, if justified, identifies strategies to maximize small business participation as subcontractors.

**h. Advanced Planning Acquisition Team** – DOE established an "Advanced Planning Acquisition Team" (APAT), comprised of representatives of the Senior Procurement Executive, the OSDBU, the Small Business Administration Procurement Center Representative (SBA-PCR), and, as appropriate, the DOE requesting program element. This team meets regularly to discuss small business policy matters, DOE initiatives, goaling issues, and operational issues including acquisition strategies associated with major procurements in order to facilitate small business participation.

**i. Business Clearance Review** – DOE headquarters operates a business review function that assesses site business plans, acquisition strategies and plans, solicitations, and contract administration plans. As part of its reviews, the activity encourages planning for small business participation at the prime and subcontract levels; works with contracting activities to address roadblocks to small business participation; and assists in the drafting of evaluation factors to promote small business participation. The activity also works with OSDBU and program offices to identify opportunities to break out specific pieces of work under an M&O contract for award to small businesses.

**j. Small Business Program Managers** – Small Business Program Managers, many of whom are designated by Heads of the Contracting Activity (HCAs), participate in the planning of, and make recommendations to set aside, acquisitions over \$100,000. The review process addresses small business categories, which are goal-oriented HUBZone small business, small disadvantaged business, small business, service-disabled veteran-owned small business, and women-owned small business concerns and is conducted before the issuance of the solicitation. The SBPM acts as liaison with the small business community and reviews all subcontracting plans prior to acceptance by the contracting officer.

**k. Small Business Subcontracting Plan** – Contracting officers ensure that all M&O contractors, except small businesses, with contracts over \$500,000 (\$1 million, if construction) have a small business subcontracting plan in place that has aggressive small business goals and that subcontract reports are submitted in a timely and accurate fashion. Every subcontracting plan should, at a minimum, support achievement of the agency-wide goals negotiated with the SBA by the OSDDBU. Subcontracting plans reflecting less than the agency-wide goals must be submitted through the OSDDBU to the HCA for approval/disapproval. OSDDBU monitors compliance with subcontracting plans. Contracting Officers, in consultation with Small Business Program Managers, meet periodically with directors of contractor purchasing to review the status of the contractor's performance against its small business subcontracting plan. Appendix 3 to the report demonstrates that FMC subcontracting as a function of the subcontracting under all its contracts, both FMC and non-FMC, ranged from 30 percent to 37 percent over the period FY 2000 to FY 2003. To enhance subcontracting opportunities for small business, DOE has offered its M&O contractors tools such as a program that allows award of subcontracts to 8(a) certified contractors under the same conditions as the Federal program and the ability to award sole source subcontracts to a mentor-prime contractor's protégé.

**l. 8(a) Pilot Program** – Contractors responsible for the management or operation of sites and facilities are authorized to award subcontracts with a value of \$5 million or less for manufacturing NAICS codes and \$3 million or less for all other acquisitions on a noncompetitive basis to firms certified as participants by the SBA under its 8(a) program. Contractors may also reserve for competition among 8(a) firms requirements in excess of those thresholds. The contractor shall assure that awards are made at fair market prices and are identified as awards to 8(a) firms and Small Disadvantaged Businesses (SDBs) under the reporting provisions of the Small Business Subcontracting Plan clause.

**m. HUBZone Set-Aside** – For procurements under \$3 million (\$5 million for manufacturing NAICS codes) if an 8(a) certified firm can be identified and award can be made at a fair market price, an award may be made noncompetitively to a HUBZone 8(a). If the procurement is valued in excess of \$3 million (\$5 million for manufacturing) and two or more HUBZone 8(a) firms can be identified, the procurement may be set aside for competition among HUBZone 8(a) firms. Contractors responsible for the management and operation of DOE sites and facilities are authorized to use HUBZone set-aside and HUBZone sole source procurement techniques in the award of subcontracts under conditions similar to those applicable to the award of Federal prime contracts.

**n. Service Disabled Veteran-Owned Small Business (SDVOSB) Set-Aside**

– Program offices and contractors responsible for the management or operation of sites and facilities may restrict competition to SDVOSB concerns if there is a reasonable expectation that two or more SDVOSB concerns will submit offers and that the award can be made at a fair market price.

**o. Discretionary Set-Asides** – Contractors responsible for the management

and operation of sites and facilities are authorized to set aside purchases at any dollar value for award to small businesses and to make direct purchases valued up to \$100,000 to small businesses, while ensuring that awards are made at fair market prices.

**p. Anti-Bundling** – DOE policies provide strict controls on the consolidation

of contract requirements that are prohibited under law and regulation as “bundled contracts.” DOE’s policies further demand that when permitted consolidation occurs because of good business judgment, the acquisition strategy for the consolidated requirement must consider the potential for award to a small business.

**E. STATUTORILY SPECIFIED CONSIDERATIONS THAT MAY IMPACT ANY POSSIBLE CHANGES TO DOE’S M&O AND OTHER MANAGEMENT CONTRACTS.**

**1. Introduction.**

Section 6022(c) instructs the designated study participants to “jointly conduct a study regarding the feasibility of possible changes to [DOE’s] management and operating contracts and other management contracts . . . to encourage new opportunities for small businesses to increase their role as prime contractors.” However, the section also requires an assessment of the impact of potential changes on other important considerations. This portion of the report summarizes the Study Group analysis.

**2. Statutory Safety and Security Considerations.**

Specifically, Section 6022(c) requires that the study participants jointly consider the impact of any potential changes in light of these additional considerations.

- (a) accountability, competition, and sound management practices at DOE and its facilities managed by prime contractors;
- (b) safety, security, and oversight of DOE facilities; and
- (c) the potential oversight and management requirements necessary to implement the findings of the study.

These considerations fall into three major categories. The first consists of several interrelated management concepts: accountability of the contractor, exercise of sound business practices by DOE, and the ability of DOE to oversee whatever contractual



relationships that may result from possible changes to DOE's M&O and other management contracts. The second and third considerations are security management and safety management.

**a. Considerations Relating to DOE's Management of Its Sites and Facilities.**

As previously noted, DOE's M&O contracts form the core of its business model for managing and operating its major scientific research, production, and other Government-owned sites and facilities. DOE's performance of its diverse missions depends on the success of these contractors in fulfilling the requirements of their contracts. Under the M&O model, the contractor acts as the integrator for all activities needed for the management and operation of the site or facility. The M&O's integration function is critical to the application of the appropriate contract resources and necessary for the effective and efficient performance of the contract.

These contracts are performance-based and, therefore, set forth the Department's performance standards and performance expectations. DOE administers the contract, performs surveillance of performance, and provides general site oversight functions. DOE holds each contractor accountable for its complete set of management and operating responsibilities consistent with the contract terms and regulatory requirements. DOE addresses contractor performance failures through both contractually based assessments, such as fee determinations, performance evaluations, and assessment of regulatory penalties, when justified.

DOE must carefully assess any changes to its business model to ensure that the contractor's ability to perform its site or facility management and operating responsibilities are not impaired and to ensure that DOE does not reduce its ability to hold the contractor accountable for performance deficiencies. Consideration of any possible change to DOE's M&O business model must also carefully consider the effect of the change on DOE's capacity, both in numbers and skills of its personnel, to effectively administer the resulting combination of work at the site or facility.

In reviewing these matters, the Study Group recognized that safety and security considerations may overlap. For instance, an individual's unauthorized presence on a DOE site would be a security violation. Additionally, that presence presents a safety risk. In order to draw an appropriate distinction and also to reflect the jurisdictional limits of the Board, the Study Group used "safety" to refer to the safe operation of facilities, that is, the protection of workers on site, the public on and off the site, and the environment. The Study Group used "security" to refer to the protection of facilities from both physical threats, for example, external assault or sabotage, and from failures to protect national security information.

### **b. Security Considerations.**

Based on the information reviewed, the Study Group has concluded that a substantive security presence is crucial, particularly in this age of terror threats, to the safe and effective operation of DOE's management and operating and major facilities contractors. These contracts are performed on large and sometimes vast Federal reservations. As a rule, thousands of contractor employees, hundreds of Federal employees, and others, including foreign visitors, work on these sites. At almost all of the sites, there are nuclear materials, associated with nuclear weapons design and production, nuclear stockpile, naval nuclear propulsion, nuclear reactor research, nuclear waste storage, high energy physics research, or other scientific or medical use. Similarly, most DOE sites managed and operated by M&O and other management contractors also have stewardship over classified and other restricted information. Access to these materials and information is critical to our national security. Further, access to these sites and facilities also presents a risk to third parties who may wander on the reservation. Thus, the control of access is important not only to protect those who have a right to be there but also to protect those who do not from exposure to risks.

The security function includes controlling access to DOE sites and facilities, access to specific buildings or facilities within the reservation, the ability to respond to threats, and maintaining order on the reservation, including initial response to civil matters that may be associated with any workplace. All of DOE's facilities maintain some level of security system, most maintaining a high level of security protection.

Section 6022 mandates that any changes to DOE's M&O and other management contracts, must not compromise security under those contracts. The study group has considered security and believes that the analysis of security considerations mirrors the critical elements of the following discussion of safety considerations.

### **c. Safety Considerations.**

Congress has recognized the importance of the safety function at DOE's M&O and other facilities management sites in Section 6022 in two ways: first, in establishing safety as a criterion to be considered in light of any recommended changes to management and operating contracts and, second, in designating the Defense Nuclear Facilities Safety Board as a participant in this study.

The Board made a presentation on its jurisdiction, function, and considerations that raised the Board's concerns about safety at those facilities under their jurisdiction. The Study Group used that information in assessing the potential effects on safety and oversight of increasing the number of prime contracts that may be awarded by DOE.

The scope of the Section 6022 study extends to all DOE facilities. The Board's oversight jurisdiction, however, extends only to DOE's defense nuclear facilities. Examples of defense nuclear facilities include weapons laboratories, weapon assembly plants, defense nuclear waste storage and waste processing facilities, as well as new construction facilities such as the Pit Disassembly and Conversion Facility or the Hanford Waste Treatment Plant.

Accordingly, this portion of the report addresses those DOE efforts required to maintain health and safety of the public, including workers, at DOE's defense nuclear facilities.

The Study Group additionally considered that the Board's discussion reflects the application of the safety considerations identified by the Board to the entirety of the DOE M&O complex, varying only as to degree, though several of the facilities do not fall within the Board's jurisdiction. Facilities not overseen by the Board, throughout the DOE M&O complex, present nuclear and other hazardous risks to the health and safety of persons employed at the site and to persons in surrounding areas.

The following detailed presentation of considerations identified by the Board reflects consideration of the statutory factors at Board-overseen facilities.

#### **i. The Board's Views with Respect to Defense Nuclear Facilities.**

In exercising its safety oversight responsibilities, the Board has no predisposition as to form of contracts or size of contractors managing or otherwise involved in defense nuclear facilities or activities. However, the Board does have specific interest in several aspects of the contracts and contractors utilized in and for defense nuclear facilities and activities, including the:

- Experience and technical competence of contractors;
- Ability of DOE to provide safety oversight of work performed by contractors;
- Ability of contractors to assure, through self-assessment, that work is performed safely;
- Clear identification of applicable safety requirements for which contractors are accountable; and
- Ability of contractors to implement applicable safety requirements.

Safety remains important to the execution of defense nuclear activities, regardless of the size of the business conducting the work. The Board expects defense nuclear work to be conducted safely, ensuring adequate protection of worker and public health and safety. As such, work should be conducted: (1) meeting the same contractual requirements; (2) with the same degree of formality; and (3) with each prime contract subjected to the required level of DOE scrutiny and oversight.

#### **ii. Nature of DOE's Defense Nuclear Facilities.**

Work at defense nuclear facilities principally involves two types of hazards: (1) those unique to defense nuclear activities and (2) those common to other high consequence work. DOE's defense nuclear facilities contain radioactive and toxic materials that present health and safety risks with a range of effects to workers and the public. In some cases, the potential risk is of the utmost significance. Extreme examples include inadvertent detonation of a nuclear weapon or significant spread of contamination affecting the public. Even when consequences are minor, tolerance for incidents or accidents, whether nuclear or non-nuclear, at DOE's defense nuclear facilities is extremely low.

Besides the health and safety risks presented by hazards at DOE's defense nuclear facilities, there are also potential impacts to both national security and safety related missions (including waste processing and stabilization). Defense nuclear work must be conducted safely to minimize potential safety and mission impacts.

Work conducted at defense nuclear facilities is generally subject to a high degree of formality to preserve the integrity of and ensure public confidence in defense nuclear activities. As a result, defense nuclear facility work normally requires the following:

- Safety requirements applicable to the work to be conducted must be clearly identified and approved. DOE has developed acquisition regulations that control the identification of safety requirements from applicable Federal, state, and local laws and regulations (including DOE regulations), as well as from applicable DOE directives and other applicable standards, practices, and controls. DOE's acquisition regulations also control implementation of the principles and functions of Integrated Safety Management for defense nuclear facilities work.
- Identified safety requirements must be effectively implemented by the contractor. Effective implementation is normally ensured through a contractor infrastructure that includes organizational elements such as Quality Assurance, Training, and Environment, Safety, and Health (ES&H).
- Technical competence and experience must be commensurate with the work. In many cases, technical qualifications and worker training must be conducted and demonstrated in a prescribed manner. Such demonstrations may include the use, as appropriate, of certifications, mockups, and simulators to demonstrate acceptable performance.
- DOE must provide safety oversight of work conducted at its sites. In general, this oversight is somewhat broad (for instance, a 100 person DOE site office may oversee the work conducted by 10,000 contractor and subcontractor employees), with only a small cadre of DOE employees, that is, DOE Facility Representatives, conducting daily on-the-job oversight.
- Contractors must provide effective self-assessment. DOE relies heavily on institutionalized processes by which contractors, acting under broad DOE oversight, provide more complete and comprehensive self monitoring and assessment in order to ensure that safety requirements are properly implemented for all work performed at the site.

The current functions carried out by DOE and its prime contractors are outlined in the following table:

<b>Functions</b>	
<b>Prime Contractor</b>	<b>Department of Energy</b>
Submits bid in accordance with DOE Request for Proposal	Identifies contract-level safety requirements
Identifies detailed safety requirements based on contract	Reviews and agrees
Devises implementation methods	Reviews and agrees
Implements requirements	Oversight of implementation
Monitors and assesses the work	Provides broad, and in some cases job specific, oversight
Provides product	Accepts
Requires knowledge of own work plus work of others and controls Integrated Safety Management	Responsible for managing oversight and integrating work, including Integrated Safety Management

Characteristics of the current contracting model and contracting models that may result in more DOE prime contract awards to small business are shown in the next table:

<b>Characteristics</b>	
<b>Currently</b>	<b>Proposed</b>
Few M&Os; self-tending; oversee small contractors	More prime contractors
Small Federal staff (approximately 100 for a large site)	Larger Federal staff
Federal management and oversight performed at a sampling level with detailed oversight by Facility Representatives	Federal management and oversight performed for each contractor; Assume M&O role of manage, integrate, and oversee, including Integrated Safety Management

### **iii. The Potential Safety and Oversight Impacts That Would Result from Increasing the Role of Small Businesses as Prime Contractors.**

Increasing the role of small businesses as prime contractors will have a number of impacts on the conduct of safety oversight at defense nuclear facilities. These impacts, and the adjustments required to maintain the same level of protection of public health and safety, are listed below.

#### **A. Increase in the Number of Prime Contractors for Which DOE Would Provide Oversight.**

Work conducted at defense nuclear facilities requires a high degree of formality. Through contract mechanisms, DOE has used the resources and capabilities of prime contractors to ensure that appropriate safety requirements are identified and implemented for all work performed, including flowing down contractual requirements to subcontractors. By leveraging the resources of its prime contractors, DOE has been able to limit the amount of its direct Federal oversight. This approach obligates prime contractors to identify safety requirements for work to be conducted by subcontractors, to coordinate and assist subcontractors in implementing these safety requirements, and to provide direct oversight of work performed by subcontractors.

DOE provides oversight of the prime contractor to ensure work at both the prime and subcontractor level is done safely. Through functions such as the Facility Representative program, DOE samples work done at the detail level to verify that both prime and subcontractors are in fact performing work safely and according to requirements. If the number of prime contractors is increased, DOE's current level of oversight would not be sufficient to manage the increased requirements for oversight.

#### **B. Increase in the Variety of Systems and Processes Utilized to Perform Work at DOE Sites.**

In providing oversight of multiple work activities, the simplest model requires all work to be done using identical requirements, work controls, and procedures. This is not the case for defense nuclear work at DOE. The closest example would have work done at a single DOE site where a single prime contractor manages all work using a single set of processes and procedures. In this example, requirements are generally well known, implementation of requirements has been exercised and refined, and lessons learned and corrective actions are readily applied to all work. All subcontractors are likewise managed by the prime contractor and use the same processes for ensuring safety requirements are properly implemented. This model is usually the simplest to monitor and oversee.

DOE currently establishes requirements and mandates that its prime contractors remain within boundaries and perform work according to the established requirements. How requirements are met is the responsibility of the prime contractor. DOE qualifies the

contractor and measures its performance by sampling at certain detail levels to provide verification of the process.

Each time work is subdivided to additional prime contractors, even when work processes and controls remain the same, oversight efforts generally have to be similarly increased. However, work processes and controls normally do not remain the same, further complicating the oversight function and requiring increased oversight effort.

**C. Increase in the Efforts Required of DOE to Manage Interfaces Affecting Safety between the Prime Contractors.**

Work done by separate prime contractors at a site will rarely be completely independent, and will normally create interfaces between the work done by the different contractors. Such interfaces are a source of safety vulnerabilities and must be controlled. The integration of prime contractors, and the management of the interface between these contractors, will require additional oversight effort by DOE.

**D. Increase in the Number of Prime Contractors with Less Depth and Breadth of Capability.**

The rigor of nuclear work at defense nuclear facilities requires the contractor to have or subcontract for a substantial amount of support infrastructure and expertise in addition to the requirements for technical and project management expertise. Examples include internal oversight resources; quality assurance capability; environment, safety and health programs; health physics expertise; functioning safety culture; and incident investigative capability. The nature of the defense nuclear work also requires the contractor to have or subcontract for properly trained and skilled workers.

Small businesses are less likely to have this substantial breadth of capabilities and would likely require assistance to augment their capabilities. This approach will likely give rise to specialty contractors who provide expertise in areas such as safety and identification/application of required competencies. DOE will either have to provide this expertise that replaces the integrating M&O contractor or oversee the contractors providing the necessary expertise.

**iv. Conclusions to be Drawn with Regard to the Impact of Increasing the Number of Contracts Subject to Oversight.**

The formality, oversight, and safety requirement compliance demanded by defense nuclear work pose challenges. Necessary changes would include internal DOE oversight, controlling the manner and processes by which work is conducted, coordinating interfaces with multiple contractors, and providing an acceptable level of expertise and infrastructure. Small businesses may have to consider subcontracting portions of the work to meet these challenges.

The potential oversight and management requirements necessary to implement a substantial increase in small business contracts by DOE are:

1. A substantial increase in the numbers of skilled, competent DOE personnel will be required to manage the increased number of contracting processes and resulting prime contracts at each site.
2. Contract performance interfaces, a source of safety vulnerabilities, will increase dramatically and must be managed by DOE on a far more detailed basis than current practice.
3. Not only will the number of prime contracts increase, so, too, will the type and subject matter of the contracts. Thus, small prime contractors will most likely require the help of other subject matter specific contractors in areas such as quality assurance, safety, technical specialties, and Integrated Safety Management. This again will require an increase in DOE personnel who are qualified and competent to manage and oversee the cross-cutting specialty firms, which themselves may well be small businesses.
4. DOE will need to develop a credible plan to identify and satisfy resource requirements necessary to meet its expanded oversight and competency roles to address any significant increase in the number of prime contractors.

Increasing the role of small businesses as prime contractors for defense nuclear work has the effect of multiplying the burden on DOE to competently and thoroughly oversee the safety of meeting these challenges. New DOE processes and procedures, or significantly strengthened processes and procedures, would be required to implement such a change. A corresponding increase in DOE contract management and oversight resources, such as Federal project directors, subject matter experts, and Facility Representatives, would be required. In effect, DOE would have to function as a management contractor, managing, coordinating, and providing technical services – missions for which DOE does not currently maintain resources.

#### **d. Statistical Analysis.<sup>17</sup>**

DOE has prepared a comparison of the cost-to-spend ratio for FY 2004 of purchasing by DOE's M&O and other management contractors and by DOE's professional procurement staff. The comparison reflects a largely, though not exactly, comparable representation of the costs. The cost per dollar of subcontract obligation by DOE's M&O and other management contractors for FY 2004 was 2.32 cents. The cost per dollar of contract obligation by DOE's professional procurement staff was 0.9 cents.<sup>18</sup>

<sup>17</sup> This section of the report presents economic considerations relevant to the study; however, this analysis is independent of the preceding Section c., discussing safety considerations, specifically those within the jurisdiction of the Board.

<sup>18</sup> This representation of cost per transaction by the purchasing functions of DOE's M&O and other management contractors versus the cost per transaction in the award by DOE of non-M&O and other



One could take the view that, since DOE's procurement cost-to-spend ratio is less, DOE should take over more transactions. Both Alternatives 1 and 2, discussed in the next section of this report, consider that view. As noted earlier in this report, DOE's assuming responsibility for large numbers of subcontracts poses many obstacles, not the least of which is a need to significantly expand DOE's professional acquisition workforce, including technical personnel. The decision-making filter associated with the first alternative discussed takes those obstacles into account and allows a judicious assumption by DOE of former subcontracts from M&O and other management contracts, minimizing the impact on DOE's professional procurement workforce.

A review of procurement professionals in DOE procurement organizations reveals that over the period FY 2000 through FY 2005, the number of contracting professionals **decreased** by 7.9 percent and the number of DOE employees, in general, **decreased** 10 percent.

These workforce reductions occurred in the face of DOE's procurement obligations' having **increased** 34 percent. The portion of DOE's obligations to management and operating or other management contractors reflects almost the entire budgetary increase and **increased** by 40 percent. DOE's obligations to and number of transactions involving non-M&O and other management contracts remained essentially the same over the same period.

DOE's experience in this regard is consistent with the trend in reducing the number of Federal employees as a result of the renewed emphasis on subjecting existing Federal organizations to a market competition. The result of such competitions is that, if retained within the Federal agency, staffing is reduced or, if contracted out, the Federal workforce is replaced. This emphasis on market competition indicates there is no expectation that DOE could acquire an increase its professional procurement workforce and the associated technical workforce.

### **III. POTENTIAL CHANGES TO DOE'S MANAGEMENT AND OPERATING CONTRACTS AND AN EVALUATION OF THEIR FEASIBILITY.**

#### **A. WHAT IS FEASIBLE?**

In attempting to arrive at consensus conclusions as to what changes to M&O and former M&O contracts are feasible, the Study Group identified a "universe" of possible changes to, or with respect to, M&O and other management contracts that could result in an increase in Federal prime contract awards or obligations to small business. The group then identified issues, concerns, impediments, and other factors that could affect the feasibility of implementing these actions as well as the likely results of the actions.

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management contracts is approximate. The cost base used in computing the DOE cost per transaction was defined and applied consistently. The costs used in computing the M&O and other management costs in some cases may have included additional costs when the contractor had its own method of computing cost per transaction.

The group's conclusions are as follows:

### **1. Breaking Out Work Scope for Award to Small Business.**

One alternative considered for increasing prime contract awards to small business is to identify additional opportunities for removing work scope from the M&O contracts and to have DOE contract for it directly with small business.

M&O contracts are not "bundled" contracts.<sup>1</sup> Accordingly, neither the statutory provisions nor their implementing regulations apply. Nonetheless, M&O contracts, as previously described, contain many different work elements associated with program and site management responsibilities. Further, many of these activities, on an individual level may be successfully contracted to small business, as evidenced by the robust small business subcontracting efforts engaged in by DOE's M&O contractors. These work scope activities, therefore, represent a theoretical opportunity for increasing DOE's prime contract awards by removing the work scope from the DOE M&O contracts and subjecting them to direct DOE contracting.

DOE has broken out a number of opportunities in recent years as a product of its ongoing strategies to increase Federal prime contract awards and obligations. For example, certain construction activities were broken out of DOE's contract for the management and operation of the Strategic Petroleum Reserve in Louisiana. The decommissioning of the Fast Flux Test Facility (FFTF) was awarded as a small business set-aside,<sup>2</sup> and the operation of the 222S analysis laboratory was broken out for award as a small business set-aside from the contract for management of the Hanford reservation. Further, DOE's National Nuclear Security Administration has proposed the breakout of a significant number of subcontracts currently subcontracted by its national security laboratories as part of its strategic sourcing initiative.

There are a number of considerations that must be taken into account in identifying breakout opportunities to maximize the expectations for successful performance of the work:

First, DOE's business model for the conduct of its national security and laboratory research program is largely based on the use of M&O contracts under which DOE brings in the skills of private sector management to fulfill DOE's programmatic responsibilities with the physical sites which support their accomplishment. This is provided for in DOE's enabling legislation and applicable regulations and is critical to the successful accomplishment of DOE's missions. The M&O model is the basis for DOE's historic

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<sup>1</sup> The term "bundling of contract requirements" means consolidating two or more procurement requirements for goods or services previously provided or performed under separate smaller contracts into a solicitation of offers for a single contract that is likely to be unsuitable for award to a small-business concern due to--

(A) the diversity, size, or specialized nature of the elements of the performance specified;

(B) the aggregate dollar value of the anticipated award;

(C) the geographical dispersion of the contract performance sites; or

(D) any combination of the factors described in subparagraphs (A), (B), and (C). 15 U.S.C. § 632(o)(2).

<sup>2</sup> The FFTF has since been cancelled as a result of competing program priorities.

strategies of maximizing private sector (industrial and academic) performance of its mission responsibilities. It has also resulted in a Federal organization characterized by relatively few Federal employees' overseeing the work of its contractors.

Second, the ability to successfully integrate the various functions associated with the management of a site is a critical feature of an M&O contractor's role. The M&O contractor has the responsibility for integration of all aspects of performance and management and operation of its sites and facilities to assure effective performance of the contract, efficient use of contract resources and facilities, and preservation of critical safety and security functions. The need for properly resourced, disciplined, and uniform managerial attention to such functions has become even more critical in recent years as a result of heightened interest in safeguarding the knowledge, materials, technology, facilities, and personnel located at those sites from threats against the United States' national security. DOE must critically review each opportunity to break out safety and security activities to assure the identification and assessment of any potentially negative effects.

Third, disruption of an M&O and other management contractor's integration responsibilities has the additional effect of potentially disrupting the ability of DOE to hold the contractor accountable for all aspects of its performance. So long as the contractor makes the decisions about use of its forces, use of the facilities, safety compliance, security compliance, and subcontracting for needed goods and services, DOE may hold the contractor accountable. As DOE assumes specific component portions of the work scope of M&O or other management contracts, it likewise assumes the added responsibility for coordinating the activities of the new prime contractors with the M&O or other management contractor and integrating those activities with the contractor's performance activities. These new responsibilities present staffing issues, which are discussed in the next section.

Contractually, breaking out work makes DOE's ability to hold the contractor responsible for a failure to perform more complex, expanding substantially the opportunity for allegations that DOE interfered with the contractor's work. These potential risks to performance put the M&O or other management contractor at risk for being able to maximize its performance and receive the fee associated with that level of performance. These risks are inherent in the breaking out of work scope; however, DOE can consider each opportunity judiciously, choosing those that minimize the risks to accountability and effective and efficient performance of the M&O or other management contract.

Fourth, DOE field organizations were not established to perform the functions of the M&O contractor, including the award and administration of former subcontracts. Indeed, the staffs of the DOE field organizations, including the acquisition organizations upon which DOE would have to rely to accomplish the contract support functions currently performed by M&O contractors, have been reduced significantly over the last fifteen years. Breaking out some of the functions of an M&O contract may require continued attention to the department-wide skill gap in contracting personnel that DOE is already trying to address.

Fifth, to the extent that an increase in DOE small business contract obligations may result from breaking out M&O work scope and contracting directly for that work in a

separate DOE prime contract, it is likely that many of such opportunities will be derived from the targeting of work already subcontracted to small businesses. This may have both positive and negative consequences. For example, although increasing Federal small business obligations is desirable from the standpoint of DOE's achieving prime contract achievement goals, a decision to break out a subcontract then being performed by a small business subcontractor could disrupt the performance of the subcontract unless DOE and the M&O contractor coordinate the breakout in a manner that allows the subcontract to run its entire performance period. Further, some small business may find contracting directly with a Federal agency more desirable or beneficial. However, reducing subcontract opportunities will result in an offset in the achievement of subcontract goals and potentially reduce the success of contractor small business programs. It may also unnecessarily disturb existing contractual/business relationships between the parties.

In its review of these factors, the study team is of the opinion that it may be feasible for DOE to break out work from its M&O contracts and award that work under direct Federal prime contracts to small business. The pursuit of this alternative should be conducted in accordance with certain parameters, reflecting these factors. Specifically, the team finds that the "breaking out" of work from M&O and other facilities contracts is feasible where DOE concludes that:

- (1) it makes good business sense to break the work out from the prime contract, independent of DOE's desire to increase direct Federal small business obligations;
- (2) the work may be broken out without significantly affecting the prime contractor's ability to meet its overall contractual obligations or otherwise impeding the accomplishment of DOE mission objectives;
- (3) the work to be broken out does not adversely impact the effective, safe, and secure management of the site or facility and its workers and visitors;
- (4) the Department has, or can reasonably obtain, sufficient administrative and technical resources to competently carry out its inherently governmental function of contract formulation and obligation; and
- (5) the breakout may be accomplished without adversely disrupting existing subcontracts with small businesses by the Department's actions.

These criteria substantially coincide with the statutory criteria, expressed in Section 6022(c)(2).

The Study Group believes that any pursuit of this alternative should be approached cautiously, on a pilot basis, because of the potential risks to small businesses' successfully carrying out the work and to performance of the M&O contracts without disruption. In pursuing this alternative, the study team further believes that DOE's Office of Small and Disadvantaged Business Utilization and its affected program and contracting offices should

work cooperatively with the SBA's procurement center representatives and breakout officials to identify opportunities for small business consistent with the foregoing parameters during the acquisition planning phase of M&O and other major management contract procurements and at such other times as may be appropriate. Organizations such as the Defense Nuclear Facilities Safety Board may participate, as appropriate, consistent with its statutory oversight responsibility under the Atomic Energy Act, to ensure that safety concerns are adequately addressed.

## **2. Stimulating M&O Contractors to Develop the Business Expertise of Small Business Concerns.**

It is often noted in government that small business concerns most frequently find business opportunities in the more routine administrative requirements of Federal agencies with few opportunities available for more advanced, mission-critical functions.

In this regard, one of the barriers to further exposing prime contract awards to small businesses is the lack of available small enterprises with the requisite skills and experience to perform contracts with work scopes that are technically, managerially, or administratively complex. That complexity may be the product of the relative sophistication of the issues encountered in performing the work. For example, few small businesses have identified capability in particle physics research or in performing comprehensive radioactive waste management services. It may also be a product of the breadth of the requirement. For example, although many small businesses are experienced in human capital management on a limited scale, few have experience with the broader set of responsibilities associated with the management of thousands of employees covering hundreds of white and blue collar labor categories, with varying retirement compensation, and fringe benefits packages, and with multiple union representation.

Nonetheless, in the past several years, DOE has provided an increased number of high dollar value contract opportunities for small businesses in non-traditional contracting areas ranging from decontamination and demolition, to small facility operations, to legacy reactor decommissioning. Most of these opportunities were afforded by the change of mission responsibilities formerly accomplished through management and operating contracts and the restructuring of remaining needs through the use of alternative contract forms more appropriate to the Department's specific requirements.

DOE has supported small business migration to these contracts by facilitating teaming arrangements with other small businesses as well as appropriate levels of subcontracting with niche specialty providers. The SBA has assisted in this effort by providing expert services at DOE sponsored seminars for interested small business concerns. Successful performance of newly awarded contracts in these areas will spur even greater confidence in the capabilities of small businesses with some of the more complex and demanding requirements encountered in DOE's M&O and other management contracts.

In addition to continuing the foregoing efforts, the study team also believes it is feasible for DOE to explore ways in which its M&O (and other major contractors) may assist

in the development of small businesses' technical, managerial, and administrative capabilities so that they are ready to meet the challenges of contract performance as these opportunities arise. For example, DOE may facilitate offerors on an M&O contract to:

- (1) Provide subcontracting opportunities to small business that involve these companies in more meaningful work activities that will advance their technical or managerial skills, as well as provide a potential past performance record of successful accomplishments;
- (2) Establish mentor-protégé relationships which are focused on preparing small businesses for more technically or managerially advanced site and facilities management work; and
- (3) Involve small business in prime contract teaming arrangements where the small business may directly participate in more complex managerial responsibilities.

In furtherance of the specific effort to involve small businesses in prime contract teaming arrangements, item 3 above, the SBA and DOE have begun discussions of the feasibility of the a pilot program under which DOE would receive credit for award to a team or joint venture that includes a small business to the extent of the participation of the small business.

### **3. Awarding M&O Contracts to Small Business.**

Another approach to increasing the annual dollar obligations going to small business through prime contracts is to award the M&O prime contracts themselves to small businesses. Although representing less than 1 percent of the total number of contracts awarded by DOE, the obligations against these contracts account for approximately 75 percent of total DOE obligations against all prime contracts. Currently, all DOE M&O contracts are placed with large business or with academic institutions or other nonprofit organizations (which by virtue of their nonprofit status do not qualify as small businesses). Thus, the award of some or all of these contracts to small business could significantly increase contract obligations to small business.

A small business concern or a team of small business concerns may currently compete for an M&O contract under applicable government-wide and DOE-specific rules. None have. Theoretically, DOE could set-aside an M&O contract for small business if DOE believed that two or more capable small businesses (or Section 8(a) qualified, or disabled veteran-owned small business) were both capable and creditworthy to perform the contract at a fair market price. Neither the marketplace, DOE, nor the SBA has, to date, identified such small businesses. There are a number of likely reasons for this.

The performance responsibilities for many M&O contracts are broad and fairly specialized. DOE research and industrial sites can range in size up to thousands of square miles, with hundreds of facilities, many of which have specialized scientific or technical

purposes, and many others of which are contaminated by toxic substances or radioactivity. DOE sites also typically have extensive infrastructure systems such as roadways, railways, power generation systems, water treatment systems, waste management systems, and wildlife management programs. Mission responsibilities at these sites may include: (1) the manufacture of specialized nuclear weapons components; (2) weapons assembly transportation and storage; (3) scientific research and development in areas such as nuclear physics, particle physics; (4) bio-physics, chemistry, nanotechnology, laser technology, supercomputing; and (5) environmental engineering and remediation. The capacity to deal with these extensive, technically complex and specialized matters is generally beyond that of the small business enterprise. Further, the magnitude and complexity of the work effort at the DOE sites is typically paralleled by the dollars it takes to accomplish the work. Most M&O contracts have contract dollar values in excess of \$500 million, and many are valued in multiples of billions of dollars. Few small businesses have undertaken work of this magnitude. As a consequence of these factors it is unrealistic, in the Study Group's estimation, to believe that M&O contracts can or will be awarded to small business with any regularity.

Nonetheless, DOE and the SBA believe they should continue to explore the future potential that an M&O contract with a relatively small or focused scope of mission activities could present an opportunity for small business. DOE, in recent years, has encouraged the small business community to assess this potential. Further, the Department has set aside smaller and more focused facilities operations contracts for small business. DOE has also worked with the SBA to explore the application of certain specialized SBA regulations for the development of new small and disadvantaged business organizations with the appropriate set of administrative and other specialized capabilities, supported by a qualified mentor to bring about such a relationship.

#### **4. Changing the Methodology for Recording Achievements.**

The most direct and immediate change related to an M&O or other management contract that theoretically could be implemented to increase the obligations going to small business through prime contracts would be to define the contract obligations of M&O contracts as Federal prime contracts and count those obligations going to small business as the equivalent of an obligation against a Federal prime contract. Indeed, this was the approach pursued by the Office of Federal Procurement Policy in 1991, but reversed in 1999.

The information relating to the M&O form of contract reviewed by the study team supports recognition of the distinct and unique aspects of the contractual vehicle and the relationship between the contracting parties. As noted earlier in this report, the special nature of the management contract has been reflected in many ways including its treatment in the Federal Acquisition Regulation, as well as in the Department of Energy Acquisition Regulation. Clearly, the M&O contractor in its management of DOE's specialized research and industrial missions operates as a contract surrogate for the Department in stewarding Federal assets and accomplishing mission performance. Indeed, the statutory authorization of this form of contracting specifically intended a blending of Federal, industrial, and academic skills to effect a desired result.

Nonetheless, it is equally clear that the relationship between the Department and its industry/academic partners is fundamentally a contract relationship as defined by the vehicle that creates it. The M&O contract is, with some exceptions, generally subject to the same over-arching set of laws, regulations, and principles which govern most other Federal contracts. Further, the Department, by the terms of its contract, treats the contracts entered into by its M&O contractors as subcontracts for the purposes of applying those laws, regulations, and principles.

It is also noteworthy that the Small Business Act, which provides the general statement of Congressional and Executive branch policy with respect to small business, does not treat the M&O contract uniquely with respect to its requirements. Furthermore, that law does make a clear distinction, in terms of its procurement requirements, between Federal prime contracts and the related subcontracts entered into by the prime contractors.

On the other hand, it is noted that the Act: (1) defines neither term; (2) does not provide parallel treatment of prime and subcontracts for purposes of small business participation goaling and achievement; (3) authorizes the OFPP Administrator to decide disagreements on goaling; (4) authorizes the SBA to implement the Act; and (5) does not specifically prohibit either the SBA or OFPP, acting within the scopes of their respective authorities, from providing further definition and application instructions.

Nonetheless, it does not appear feasible to now apply the approach directed by OFPP in 1991. In 1999, the OFPP Administrator reconsidered the merits of its earlier decision and clearly determined not to continue its guidance to count the subcontract achievements by M&O contractors as the equivalent of the prime contract achievements of the Department. By its terms, the decision of the Administrator was based on the objective of making DOE's "reporting of goal achievements consistent with that of other Federal agencies, thus making more meaningful any review of Federal agency achievements." Both DOE and the SBA are bound by this determination, and OFPP has given no indication of its willingness to change it. Of course, Congress is not so bound in the exercise of its prerogatives in this matter. The debate which accompanied consideration of Section 6022 and the earlier text which it replaced gave Congress the opportunity to consider this option and enact the 1991 OFPP decision, but it did not do so at this time. Accordingly, the parties to this study do not believe this option presents a feasible administrative route to increasing small business participation in prime contracts.

#### **IV. CONCLUSION.**

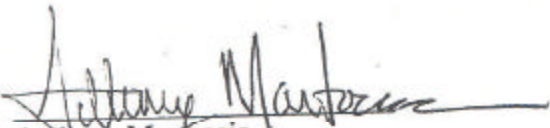
The Study Group has carried out a comprehensive study of DOE's and NNSA's history and business model, the history and roles played by DOE's M&O and other management contractors and the responsibilities of the SBA, the SBA Office of Advocacy, and the Defense Nuclear Facilities Safety Board. This study included consideration of actions taken by DOE and NNSA to enhance the opportunities for small businesses to receive DOE and NNSA prime contracts. The study has also evaluated the implications of the statutorily designated areas of special concern, including security, safety, and contract




management. The Study Group has identified and evaluated four potential modifications to DOE's M&O contracts to enhance the opportunity for small businesses to receive DOE and NNSA prime contract awards. Of those four potential modifications, three are feasible and provide substantive paths to increase prime contract awards to small business.

In pursuit of the three feasible paths to increase prime contract awards to small business, the SBA and DOE have committed themselves to cooperate and facilitate, where reasonably possible, the steps necessary. First, DOE will further institutionalize the breaking out of work from DOE's M&O and other management contracts for award as a small business set-aside. The report provides the logic filter that will work to ensure that work so identified will allow the M&O contractor and the small business to succeed in performance of their respective contracts and to ensure that DOE has the resources necessary to fulfill its responsibilities for performance of the work, including security and safety. Secondly, DOE will further institutionalize its process for stimulating its M&O and other management contractors to develop the business expertise of small businesses to enhance the prospects of those businesses to compete for larger and more complex contracts. In this regard, the SBA will study on a pilot basis offering DOE credit for M&O awards to a team or joint venture that includes a small business in the management team to the extent of the involvement of the small business. Finally, DOE and the SBA will continue to investigate processes that may enhance the opportunities of small business to successfully compete for the award of an M&O contract. As small businesses successfully compete for and perform contracts and are involved in the management team of DOE M&O contracts, the number of experienced small businesses will increase, making the ability of such small business ventures more likely.


This report represents the results of the study carried out in accordance with Section 6022(c) of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub.L. 109-13.


  
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## ATTACHMENT 1

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## ATTACHMENT 2

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Congressional Record, April 18, 2005, Amendment to H.R. 1268 Proffered by Sen. Domenici, S3844.

Congressional Record, April 21, 2005, Statement of Senator Kerry on Small Business, S4086-90.

Congressional Record, April 27, 2005, Statement of Senator Kerry on Small Business, S4384.

Congressional Record, April 27, 2005, Statement of Rep. Manzullo on Small Business, H2580.

Congressional Record, April 27, 2005, Expressing Sense of the House that American Small Businesses Are Entitled to a Small Business Bill of Rights, H2580.

Congressional Record, May 5, 2005, Statement by Rep. Manzullo on H.R. 1268, H2997.

Congressional Record, May 10, 2005, Statements by Sen. Snowe on Section 6022 of H.R. 1268, S4816 and S4843.

Congressional Record, May 26, 2005, Introduction of H.R. 2741 and H.R. 2742 on Small Business, H4138.

GAO Report GAO-01-551 (August 2001) – *Small Business, More Transparency Needed in Prime Contract Goal Program.*

GAO Report GAO-05-459 (May 2005) – *Department of Energy, Improved Oversight Could Better Ensure Opportunities for Small Business Subcontracting.*

### **Regulations/Directives**

Federal Acquisition Regulation, 48 C.F.R. Chapter 1, Part 19.

Department of Energy Acquisition Regulation, 48 C.F.R. Chapter 9, Part 919 and Subpart 970.19.

Small Business Regulations, 13 C.F.R. §§ 121 and 124.

*Goaling Guidelines for the Small Business Preference Programs for Prime and Subcontract Federal Procurement Goals & Achievements*, SBA Office of Government Contracting, July 3, 2003.

SBA Standard Operating Procedure 60 03 5, *Subcontracting Assistance Program*, effective January 26, 1998.

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*Goaling Process*, document of the SBA, available at: <http://www.sba.gov/businessop/basics/procurement.html>.

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DOE Acquisition Letter No. 2005-06, *Small Business Procurement Goals*, March 11, 2005.

DOE Acquisition Letter No. 2005-08, *Small Business Programs*, June 10, 2005.

OFPP Policy Letter 99-1, *Small Business Procurement Goals*, November 8, 1999.

Executive Order 12928, *Promoting Procurement With Small Businesses Owned and Controlled by Socially and Economically Disadvantaged Individuals, Historically Black Colleges and Universities, and Minority Institutions*, September 16, 1994.

Executive Order 13170, *Increasing Opportunities and Access for Disadvantaged Businesses*, October 6, 2000.

### Correspondence

Letter to the Hon. Allan Burman, Administrator, Office of Federal Procurement Policy, from the Hon. Susan S. Engeleiter, Administrator, Small Business Administration, on the subject of small business goaling, dated November 2, 1990.

Letter to the Hon. Susan S. Engeleiter, Administrator, Small Business Administration from the Hon. Allan Burman, Administrator, Office of Procurement Policy, on the subject of small business goals for Fiscal Year 1991, dated March 5, 1991.

Letter to the Hon. Deidre Lee, Administrator, Office of Procurement Policy, from Richard H. Hopf, Director, DOE Office of Procurement and Assistance Management, on the subject of confirmation of socio-economic goaling change, dated September 29, 1999.

Letter to the Hon. Deidre Lee, Administrator, Office of Procurement Policy, from the Hon. Christopher S. Bond, Chairman, Senate Committee on Small Business, and the Hon. John F. Kerry, Ranking Member, Senate Committee on Small Business, on the subject request for resolution of dispute between the and DOE over small business goals and achievements, dated September 15, 1999.

Letter to the Hon. Deidre Lee, Administrator, Office of Federal Procurement Policy, from the Hon. Aida Alvarez, Administrator, Small Business Administration, on the subject of resolution of disagreement between the SBA and DOE on small business goal achievements, dated October 7, 1999.

Letter to the Hon. Bill Richardson, Secretary of Energy, from the Hon. Aida Alvarez, Administrator, Small Business Administration, on the subject of baseline for determining DOE's small business prime contract goal achievements dated October 7, 1999.

Letters to the Hon. Christopher S. Bond, Chairman, Senate Committee on Small Business, and to the Hon. John F. Kerry, Ranking Member, Senate Committee on Small Business, from the Hon. Deidre Lee, Administrator, Office of Federal Procurement Policy, on the decision on DOE's reporting of small business goals and achievements dated November 3, 1999.

Letter to the Hon. Aida Alvarez, Administrator, Small Business Administration, from the Hon. Deidre Lee, Administrator, Office of Federal Procurement Policy, on the subject of DOE's prime contracting and subcontracting goals, dated November 3, 1999.

Letter to Richard H. Hopf, Director, DOE Office of Procurement and Assistance Management, from the Hon. Deidre Lee, Administrator, Office of Federal Procurement Policy, on the subject of DOE's prime contracting and subcontracting goals dated November 3, 1999.

Letter to the Hon. Aida Alvarez, Administrator, Small Business Administration, from the Hon. Bill Richardson, Secretary of Energy, on the subject of DOE's small business FY 2000 goals, dated January 10, 2000.

Memorandum for Directors of Small and Disadvantaged Business Utilization from James C. Ballentine, Associate Deputy Administrator, SBA, Subject: Assigned Small Business Goals for Fiscal Year 2000, dated February 4, 2000.

Memorandum for Heads of All Departmental Elements and Major DOE Contractors from the Hon. Bill Richardson, Secretary of Energy, Subject: Maximizing Small Business Utilization, dated February 11, 2000.

Letters to the Hon. Christopher S. Bond, Chairman, Senate Committee on Small Business, and to the Hon. John F. Kerry, Ranking Member, Senate Committee on Small Business, from the Hon. Bill Richardson, Secretary of Energy, on the subject of DOE commitment to increasing small business prime contracting, dated April 4, 2000.

Memorandum for DOE Heads of Departmental Elements, from T. J. Glauthier, Deputy Secretary of Energy, Subject: Guidance on Fiscal Year (FY) 2000 Small Business Contracting Goals, dated April 20, 2000.

Memorandum for Susan Beard, DOE Deputy Assistant General Counsel for General Law, from Esther Aguilera, Director, DOE Office of Small Disadvantaged Business Utilization, Subject: Proposed Executive Order Entitled "Increasing Opportunities and Access for Small and Disadvantaged Business," dated August 29, 2000.

Memorandum for Directors of Small and Disadvantaged Business Utilization from Kerry L. Kirkland, Associate Deputy Administrator (Acting), SBA Office of Government Contracting and Minority Enterprise Development, Subject: Fiscal Year 2001 Small Business Goals, dated September 16, 2000.

Letter to Luz Hopewell, Associate Administrator for Government Contracts, Small Business Administration, from Esther Aguilera, Director, DOE Office of Small Disadvantaged Business Utilization, on the subject of DOE initiatives to maximize small business utilization, dated October 12, 2000.

Memorandum for DOE Heads of Departmental Elements from T. J. Glauthier, Deputy Secretary of Energy, Subject: Review of Small Business Participation in Bundled Contract Requirements, dated October 27, 2000.

Memorandum for Heads of Departments and Agencies, from Jacob J. Lew, Director, Office of Management and Budget, and the Hon. Aida Alvarez, Administrator, Small Business Administration, Subject: Executive Order on Increasing Opportunities and Access for Disadvantaged Businesses, dated November 16, 2000.



Letter to the Hon. Bill Richardson, Secretary of Energy, from the Hon. Christopher S. Bond, Chairman, Senate Committee on Small Business, and the Hon. John F. Kerry, Ranking Member, Senate Committee on Small Business, on the subject of appreciation for DOE efforts to improve small business access to prime contracts at DOE, dated December 13, 2000.

Letters to the Hon. Christopher S. Bond, Chairman, Senate Committee on Small Business, and to the Hon. John F. Kerry, Ranking Member, Senate Committee on Small Business, from the Hon. Spencer Abraham, Secretary of Energy, on the subject of DOE commitment to increasing small business prime contracting, dated March 14, 2001.

Letter to the Hon. Clay Sell, Deputy Secretary of Energy, from the Hon. David L. Hobson, Chairman, Appropriations Subcommittee on Energy and Water Development of the House of Representatives, and the Hon. Donald A. Manzullo, Chairman, Committee on Small Business of the House of Representatives on the subject of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, dated May 26, 2005.

Memorandum for Distribution, from Richard H. Hopf, Director, DOE Office of Procurement and Assistance Management, Robert C. Braden, Jr., NNSA Office of Acquisition and Supply Management, and Theresa Alviljar Speake, Director, DOE Office of Small Disadvantaged Business Utilization, Subject: Ensuring Accurate Reporting of Small Business Subcontracting Data, dated June 1, 2005.

Letter to the Hon. Olympia J. Snowe, Chairwoman, Senate Committee on Small Business and Entrepreneurship, from the Hon. Clay Sell, Deputy Secretary of Energy, on the subject of DOE small business activities, dated June 13, 2005.

News Release by the Hon. Olympia J. Snowe, Chairwoman, Senate Committee on Small Business and Entrepreneurship, on the subject of DOE small business activities, dated June 14, 2005.

### **Presentation Materials**

Presentation: Small Business Toolbox, NNSA Office of Acquisition and Supply Chain Management.

Presentation: Statutory and Regulatory Recognition of DOE's M&O Contracts, DOE Office of Procurement and Assistance Management.

Presentation: Security Needs for Managing (sic) and Operating Contractors of Facilities with Special Nuclear Material, Office of Security and Safety Performance Assurance.

Presentation: Overview, Defense Nuclear Facilities Safety Board.

Presentation: Increasing the Role of Small Businesses as Prime Contractors at DOE Nuclear Facilities-Safety and Oversight Impacts, Defense Nuclear Facilities Safety Board.

Presentation: History and Overview of Small Business Goaling at DOE, DOE Office of Procurement and Assistance Management.

Presentation: DOE Small Business Policies & Initiatives, DOE Office of Procurement and Assistance Management.

Presentation: Presentation to the Small Business Administration, DOE Argonne Site Office.

**Miscellaneous**

FY 1999 & FY 2000 Small Business Year End Achievements.

FY 2000 Annual Small Business Achievements.

FY 2001 Annual Small Business Achievements.

DOE Obligations FY 2000-FY 2004. (2 charts)

Subcontracting Goals by Agency - FY 2005.

**ATTACHMENT 3**

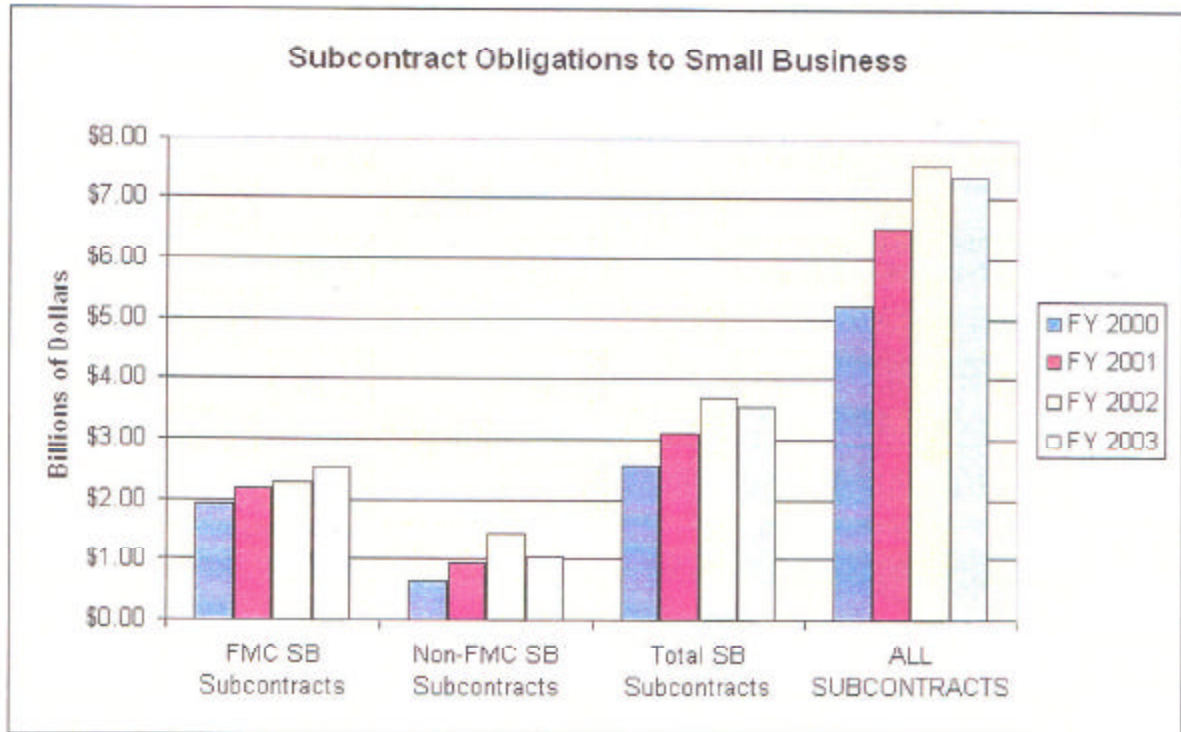
**GRAPHIC PRESENTATION OF DOE AND DOE'S FMC CONTRACTORS' SMALL BUSINESS ACHIEVEMENTS FOR FY 2000 THROUGH 2004**

**Subcontract Obligations to Small Businesses**  
Billions of Dollars

	<u>FY 2000</u>	<u>FY 2001</u>	<u>FY 2002</u>	<u>FY 2003</u>
FMC SB Subcontracts	\$1.92	\$2.16	\$2.27	\$2.51
Non-FMC SB Subcontracts	<u>\$0.61</u>	<u>\$0.93</u>	<u>\$1.42</u>	<u>\$1.02</u>
Total SB Subcontracts	\$2.53	\$3.09	\$3.69	\$3.53
ALL SUBCONTRACTS	\$5.20	\$6.51	\$7.55	\$7.35

	<u>FY 2000</u>	<u>FY 2001</u>	<u>FY 2002</u>	<u>FY 2003</u>
FMC SB Subcontracts	\$1.92	\$2.16	\$2.27	\$2.51
PRIME SB Contracts	<u>\$0.49</u>	<u>\$0.51</u>	<u>\$0.56</u>	<u>\$0.85</u>
TOTAL	\$2.41	\$2.67	\$2.83	\$3.36

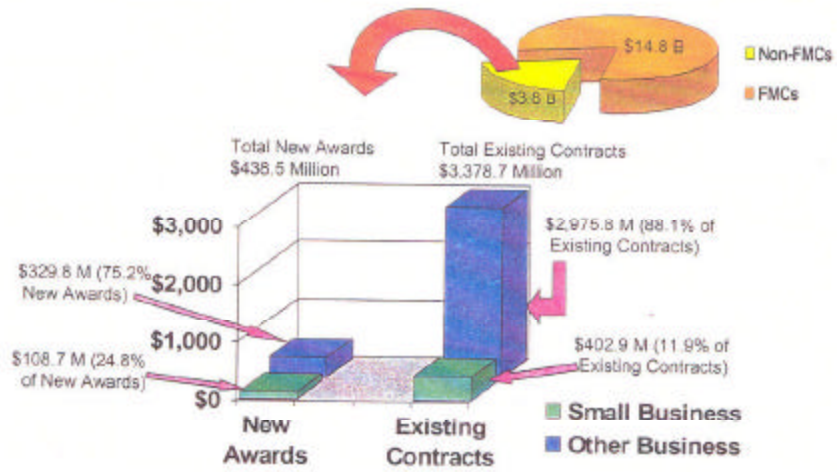
Total SB Subcontracts				
As a Percent of ALL SUBK's	48.68%	47.48%	48.87%	48.05%
FMC SB Subcontracts				
As a Percent of ALL SUBK's	36.94%	33.19%	30.07%	34.16%



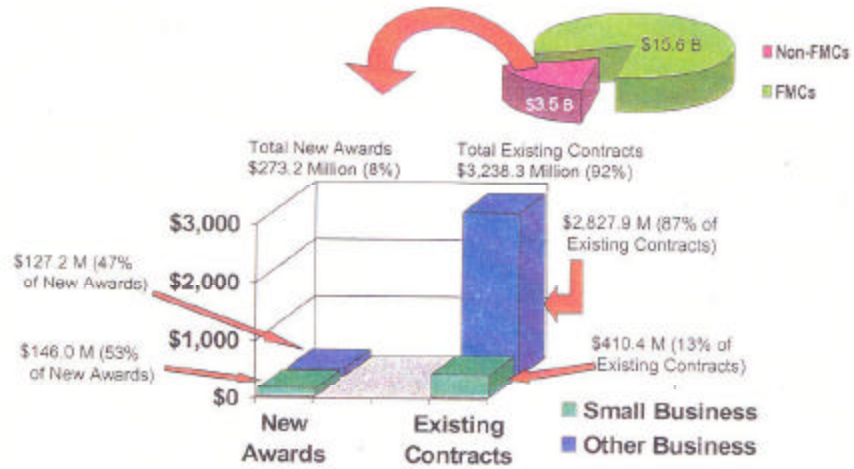
Prime & FMC SubK Obligations to Small Business



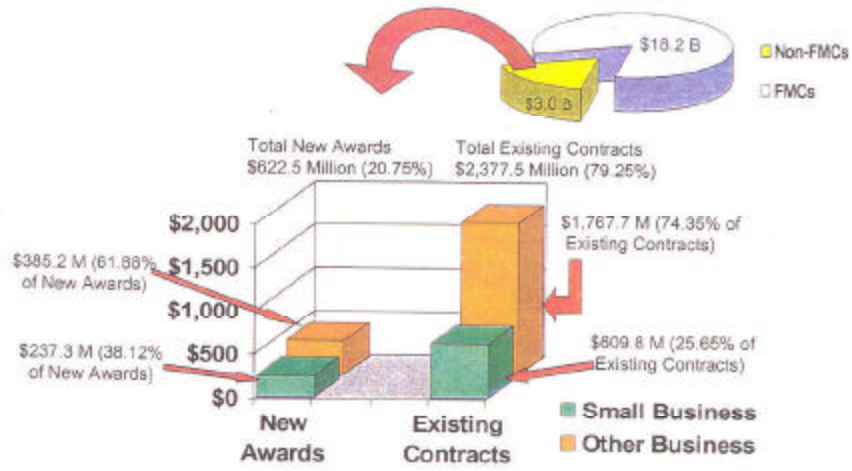
### FY 2001 Non-FMC Obligations: \$3.8 Billion



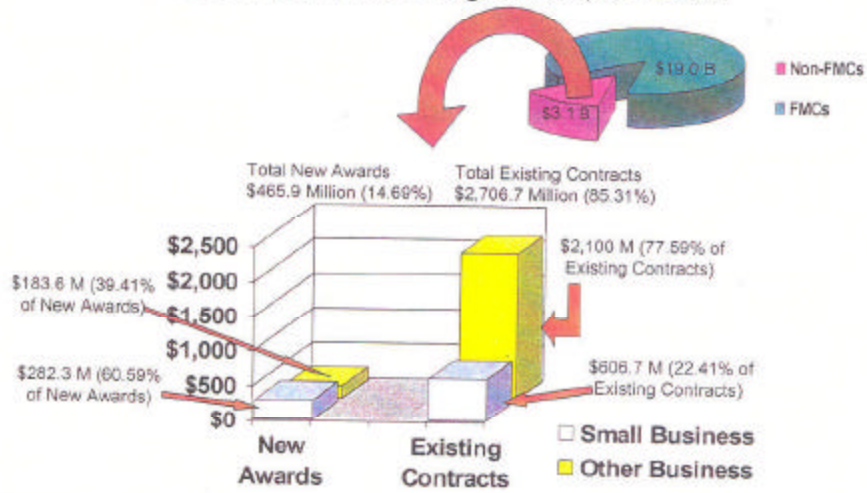
### FY 2002 Non-FMC Obligations: \$3.5 Billion



FY 2003 Non-FMC Obligations: \$3.0 Billion



### FY 2004 Non-FMC Obligations: \$3.1 Billion





## ATTACHMENT 4

### ACRONYMS

ADPE -	Automatic Data Processing Equipment.
AEC -	Atomic Energy Commission.
APAT -	Advanced Planning Acquisition Team.
Board -	Defense Nuclear Facilities Safety Board.
CCR -	Central Contractor Registration.
DEAR -	Department of Energy Acquisition Regulation.
DHS -	Department of Homeland Security.
DOE -	Department of Energy.
ERDA -	Energy Research and Development Administration.
FAR -	Federal Acquisition Regulation.
FFTF -	Fast Flux Test Facility.
FSS -	Federal Supply Schedules.
GAO -	Government Accountability Office.
HCA's -	Heads of the Contracting Activity.
HUBZone -	Historically Underutilized Business Zones Program.
MAC -	Multiple Award Contracts.
<b>M&amp;O CONTRACT OR CONTRACTOR-</b>	<b>DOE management and operating contract or contractor.</b>
MOU -	Memorandum of Understanding.
NAICS -	North American Industry Classification System.
NNSA -	National Nuclear Security Administration.
OFPP -	Office of Federal Procurement Policy.
OSDBU -	Office of Small and Disadvantaged Business Utilization.
SBA -	Small Business Administration.
SBAOA -	SBA Office of Advocacy.
SBA-PCR -	Small Business Administration Procurement Center Representative.
SBPMs -	Small Business Program Managers.
SDBs -	Small Disadvantaged Businesses.
SDVOSB -	Service Disabled Veteran-Owned Small Business.