



The Secretary of Energy
Washington, D.C. 20585

U.S. Department of Energy
Policy Regarding the Competition of Contracts
to Manage and Operate its National Laboratories

Background.

The DOE is responsible for the effective stewardship of seventeen national laboratories.¹ Sixteen of the national laboratories are Federally Funded Research and Development Centers (FFRDCs) operated under sponsoring agreements in the form of management and operating (M&O) contracts with private sector organizations.² The M&O contract model, which dates back to World War II and the Corps of Engineers' Manhattan Engineer District (MED), was specifically designed to ensure the recruitment of world-leading scientific and technical talent, and the successful completion of the mission at hand—the development of atomic weapons and an end to the War.

In recognition of the speed with which MED contractors succeeded in that endeavor, Congress, in passage of the Atomic Energy Act of 1946, signaled its approval of carrying the M&O model forward by granting broad authorities to the Atomic Energy Commission (AEC), which in turn were transferred to the AEC's successor agencies, including the DOE.³ The unique M&O contract relationship thereby enabled the Government to establish objectives for the laboratories' research programs and to exercise controls necessary to assure security, safety, and the prudent use of public funds, while allowing private sector organizations selected for their technical ability and managerial expertise to carry out the laboratories' day-to-day operations.

Today, the DOE national laboratory system represents the most comprehensive research system of its kind in the world and is responsible for performing research and development for which there is a strong public and national purpose. The M&O contract model, central to the laboratories' operation, is a unique form of contract that is needed to further the DOE's ability to

¹ The Energy Policy Act (EPACT) of 2005 designates the following as the DOE national laboratories: Ames Laboratory (Ames), Argonne National Laboratory (ANL), Brookhaven National Laboratory (BNL), Fermi National Accelerator Laboratory (FNAL), Idaho National Laboratory (INL), Lawrence Berkeley National Laboratory (LBNL), Lawrence Livermore National Laboratory (LLNL), Los Alamos National Laboratory (LANL), National Energy Technology Laboratory (NETL), National Renewable Energy Laboratory (NREL), Oak Ridge National Laboratory (ORNL), Pacific Northwest National Laboratory (PNNL), Princeton Plasma Physics Laboratory (PPPL), Sandia National Laboratories (SNL), Savannah River National Laboratory (SRNL), Stanford Linear Accelerator Center (SLAC), and Thomas Jefferson National Accelerator Facility (TJNAF). Pub. Law No. 109058, para 2(c), 42 U.S.C. 15801. SLAC was renamed the SLAC National Accelerator Laboratory by the DOE, in October 2008.

² NETL, owned and operated by the Government, is a DOE national laboratory that is not an FFRDC.

³ The legislative history indicates 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." S. Report 79-1211, at 15 (1946).



deliver the world class research and the innovative technical accomplishments necessary to accomplish its missions.⁴

As testament to the ongoing success of the FFRDC M&O contract model, DOE laboratories have produced sixty-two Nobel Laureates⁵ and hundreds of R&D 100 Awards. The naming of Nobel Laureates and R&D 100 recipients from the ranks of DOE laboratories continues to occur at a relatively constant rate, repeatedly confirming the scientific excellence of the laboratories.

The Unique Characteristics of the M&O Contract and the FFRDC.

The Federal Acquisition Regulation (FAR) and Department of Energy Acquisition Regulation (DEAR) recognize the unique nature of both the M&O contract and FFRDCs. M&O contracts provide for the management of Government-owned, contractor operated, scientific, engineering, and production facilities. FAR Subpart 17.6 specifically recognizes M&O contracts as a unique contracting mechanism, utilization of which requires specific statutory authority. An M&O contract is characterized by its special purpose and the close relationship it creates between DOE and the contractor. The work performed is closely related to DOE's mission and is of a long-term and continuing nature. This work, among other things, includes special requirements for work direction, safety, security, cost controls, and site management. The use and designation of a DOE contract as an M&O contract requires express approval of the Head of the Agency.

The Federal regulations characterize FFRDCs as federally funded, privately operated facilities established to meet a special long-term research or development need of the Federal government which cannot be met effectively by existing in-house or contractor resources. FFRDCs are operated, managed, and/or administered by a university, other nonprofit organization, or an industrial firm.

More specifically, FAR Section 35.017 recognizes a number of distinct characteristics of FFRDCs, including that:

- The relationship between the contractor and the government is expected to be long term in order to provide the continuity that will attract high quality personnel.
- The relationship between the contractor and the government is expected to permit the contractor access to government and industry information, (including sensitive and proprietary data), employees and facilities, beyond that which is typical.
- The contractors are required to operate in the public interest, free from organizational conflicts of interest, and from the competing requirements of commercial or shareholder interests. Furthermore, FFRDC contractors shall not use privileged information nor

⁴ In *United States v. Boyd*, the Court stated: "Because of the extraordinary range and complexity of the work to be performed in the research and development of atomic energy, Congress empowered the AEC to choose between performing these undertakings directly, through its own facilities, personnel and staff, and seeking the assistance of private enterprise by means of grants and contracts." 378 U.S. 39, 47 (1964) The uniqueness of M&O contracts was acknowledged in *United States v. New Mexico* where the Court found that "in several ways DOE agreements are a unique species of contract, designed to facilitate long-term private management of Government-owned research and development facilities." 455 U.S. 720, 722-23 (1982)

⁵ The DOE Office of Scientific and Technical Information (OSTI) maintains the listing of Nobel Laureates who are associated with the DOE laboratory system. The figure is current as of April 24, 2009.

access to facilities to compete with the private sector. They must have full disclosure of their affairs.

Thus, M&O contracts for FFRDCs are appropriate and desirable when an agency wishes an independent perspective on issues of importance to it, desires the ability to attract and retain world-class scientific and engineering talent at a laboratory devoted to government missions, and wishes to make use of the technical ability and managerial expertise available through private or non-governmental institutions.

The Statutory and Regulatory Basis for Competition and Extension of M&O Contracts for the Operation of FFRDCs.

The unique relationship embodied in the M&O contract for an FFRDC has been reflected, over time, in the development of a special statutory and regulatory framework that exists to guide the Secretary of Energy, as the Head of Agency, in making determinations about M&O contract acquisitions.

Under CICA, Government agencies are required to follow competitive procedures using “full and open competition” to solicit and award Government contracts, thus allowing all qualified bidders to participate in the competitive process, unless one of the seven statutory exceptions prescribed in the legislation is met. CICA includes an exception to competition requirements for FFRDCs where “it is necessary to award the contract to a particular source ...in order...to establish or maintain an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center.” 41 U.S.C. § 253(c)(3) (emphasis added) This exception, where properly justified, may provide the statutory basis for non-competitive extension of FFRDC contracts.

The regulatory basis for the decision of whether to extend or to compete an M&O contract is set forth in the FAR 17.605 as follows:

(c) Replacement of an incumbent contractor is usually based largely upon expectation of meaningful improvement in performance or cost. Therefore, when reviewing contractor performance, contracting officers should consider—

- (1) The incumbent contractor’s overall performance, including, specifically, technical, administrative, and cost performance;
- (2) The potential impact of a change in contractors on program needs, including safety, national defense, and mobilization considerations; and
- (3) Whether it is likely that qualified offerors will compete for the contract.

The DOE’s internal policy with respect to the award and administration of M&O contracts is set forth in the DEAR. Specifically, DEAR 917.602 affirms the Government-wide policy, as set forth in statute, for a clear preference for full and open competition, but also implements the regulatory decision-making process set forth in the FAR for the award or extension of M&O contracts, such that M&O contracts may be non-competitively extended when the extension is justified under statutory and regulatory authorities, and only when authorized by the Secretary.

A number of DOE laboratory M&O contracts have been non-competitively extended in the past. For example, both the SLAC National Accelerator Laboratory, established in 1962, and the Pacific Northwest National Laboratory, established in 1964, have been non-competitively extended since their creation. Historically, DOE has relied on the FFRDC exception provided by CICA as the basis for its decisions to non-competitively extend its M&O FFRDC contracts. Noteworthy, also, is that there are an additional twenty-three FFRDCs sponsored by other federal agencies, and that some of these agencies do not routinely compete the contracts for these institutions.

DOE's M&O FFRDC Competition Experience

Prior to 1996 the Department did not regularly conduct competitions for the vast majority of its M&O contracts, and was perceived by some as having a poor record of competition. In the years between 1984 and 1994, only three competitions of management and operating contracts were conducted.

In 1996 DOE established a policy which emphasized the preference for competition for M&O contracts.⁶ Since 1994, DOE has competed fourteen of its sixteen FFRDC laboratories at least once and, more recently (i.e. since 2004) DOE has competed eleven of its FFRDC contracts. They are: Ames, ANL, FNAL, INL, LANL, LBNL, LLNL, NREL, PPPL, SRNL, and TJNAF.⁷ For the most part, DOE chose to compete these laboratory contracts either because the current contractor's performance was judged to be unsatisfactory; the potential for improved cost or technical performance through competition was identified; viable competitive alternatives were determined to exist in the marketplace; and/or the changing focus of the laboratory mission had stimulated interest in considering competitive procurements.

Between fiscal years 1998 and 2009, and by three general formulations, the General Provisions of the annual *Energy & Water Development Appropriations Acts* have mandated the competition of DOE's M&O contracts unless the Secretary granted a waiver to competition and notified the appropriations committees of the detailed reasons for not competing. A similar requirement was not included in the most recent appropriations act. Section 995 of the Energy Policy Act (EPACT) of 2005 limits the use of funds authorized to be appropriated under Title IX of that Act for M&O contracts for non-competitive management and operation of DOE national laboratories unless there is a Secretarial waiver. Pub. Law. No. 109-58, para. 995, 42 U.S.C. 16359.

It has been observed that conducting competitions for laboratory M&O contracts is time-consuming, disruptive, and costly for both the Government and prospective bidders.⁸ In recent years laboratory competitions have involved a minimum of eighteen months of DOE staff time and contractors regularly report that preparing a bid in response to a DOE M&O RFP costs between \$3 million and \$5 million. The magnitude of the effort required and the opportunity

⁶ See Acquisition Regulation; Department of Energy Management and Operating Contracts, 62 Fed. Reg. 34,872 (June 27, 1997) (adopting as final the interim rule published at 61 Fed. Reg. 32,584 (June 24, 1996)).

⁷ While many of these competitions resulted in new M&O contractors organized as limited liability corporations, there is no current policy, legal or statutory requirement that this be the case.

⁸ See, among others, "Competing the Management and Operations Contracts for DOE's National Laboratories" a Report of the Blue Ribbon Commission on the Use of Competitive Procedures for the Department of Energy Labs, U.S. Department of Energy November 24, 2003, Sections 4.5 and 4.6.

cost to the Government should be considered in light of the best interests of the Government and any expected benefits that would accrue from competition.

DOE's recent experiences in competing its M&O contracts suggest that the typical benefits expected of contract competition are not always realized in these types of competitions as they did not necessarily result in either: 1) significant competition or a substantively new contractor; 2) cost savings for the government; or 3) substantially improved contractor performance.

This conclusion is largely based on DOE's experience with the recent M&O contract competitions for its FFRDCs. In each of the eleven national laboratory contract competitions DOE has conducted since 2005, efforts were made to solicit as much competition as possible. These efforts included issuing draft solicitations; holding comment workshops, one-on-one meetings, and pre-proposal conferences; maintaining websites to provide information to interested parties; and significantly increasing the amount of fee offered. For the SC national laboratories, only one competitive proposal was submitted in response to each solicitation, and the offer was from either the incumbent or a new corporate entity that included the incumbent. For non-SC competitions, multiple offers were received; however, in three of the four instances, the awardee entity included substantial representation from the incumbent.

Furthermore, in a number of instances these contract competitions have been criticized for significantly increasing direct costs to the Government as a result of the transition from an educational institution to for-profit entities. Although some efficiencies or improved contractual agreements have been made possible as a result of the new contracts the overall performance of the new contractors has in most cases not surpassed that of the old, and it is arguable that what improvements have been observed could have been achieved even in the absence of competition.

Going Forward – DOE's Policy

DOE's policy is, and will continue to be, to follow the statutory and regulatory framework established for all of its national laboratory M&O contracts. DOE does not default to a posture of determining *a priori* either that the Department will conduct competitions for all its M&O contracts, or that it will extend all these contracts. DOE recognizes a preference for full and open competition, and exercises, on a case-by-case basis, the authorities available to the Secretary under CICA, the FAR, and the DEAR to noncompetitively extend an M&O contract when the extension is justified. The regulatory framework governing M&O contracts for FFRDC's has long recognized the unique nature of these contracts and it provides the necessary criteria for the Agency to make an informed decision as to whether to extend or compete an M&O contract for an FFRDC prior to its expiration.

DOE employs a disciplined decision-making process involving senior Departmental management, including recommendations by Heads of Contracting Activities, review and concurrences by cognizant Secretarial officials, the Procurement Executive for DOE and the DOE Chief Financial Officer, prior to being referred to the Secretary of Energy for a decision. DOE's decisions to compete or extend an M&O FFRDC is based on regular and rigorous evaluations of the incumbent contractor's performance, whether cost and performance improvements are likely to result from competition, the potential impact of a change in contractor, and whether meaningful competition is anticipated. In cases where as a result of that

rigorous analysis DOE's interests will be best served by a non-competitive extension, any such extension will be executed in accordance with applicable statute and regulation.

Before determining whether an M&O contract will be extended or competed, DOE performs a review of the ongoing need for the FFRDC, itself. DOE reviews each of its sponsored FFRDCs at appropriate intervals, and at least once every 5 years to determine whether there is ongoing need for the FFRDC. As required by FAR 35.017-4, DOE includes the following in its FFRDC review:

- an examination of the sponsor's special technical needs and mission requirements that are performed by the FFRDC to determine if and at what level they continue to exist.
- consideration of alternative sources to meet the sponsor's needs.
- an assessment of the efficiency and effectiveness of the FFRDC in meeting the sponsor's needs, including the FFRDC's ability to maintain its objectivity, independence, quick response capability, currency in its field(s) of expertise, and familiarity with the needs of its sponsor.
- an assessment of the adequacy of the FFRDC management in ensuring a cost-effective operation.
- determination that the criteria for establishing the FFRDC continue to be satisfied and that the sponsoring agreement is in compliance with FAR 35.017-1.

Supplementing the established regulatory framework, DOE policy provides the following additional assessments and criteria to be conducted and considered in its decisions related to the extension or competition of FFRDC M&O contracts:

- a detailed description of the incumbent's performance history in areas such as program accomplishment, safety, health, environment, energy conservation, financial and business management and socio-economic programs, including measurable results against established performance measures and criteria;
- significant projects or other objectives planned for assignment under the contract if extended;
- a discussion of principal issues and/or significant changes to be negotiated in the terms and conditions of the extended contract, including the extent to which performance-based management provisions are present, or can be negotiated into, the contract;

- a determination, and its rationale, that the M&O contract remains the appropriate form of contract;
- for non-competitive contract extension, a discussion of the rationale that competition for the period of the extension is not in DOE's best interest;
- any other information pertinent to the decision; and

The decision on any competition or extension of an M&O FFRDC must and shall be made by the Secretary of Energy.



Steven Chu
Secretary of Energy

December 22, 2009

Attachment I

Internal DOE Process

Step 1: The appropriate Program Secretarial Officer (PSO) shall review each of their sponsored FFRDCs at appropriate intervals, and at least once every 5 years to determine 1) whether there is ongoing need for the FFRDC, and if there is, 2) whether competition or an extension is warranted when the existing contract expires. To this end, the PSO will prepare a documented acquisition strategy that, as required by FAR 35.017-4, and FAR 7.105(b)(2), includes:

- an examination of the sponsor's special technical needs and mission requirements that are performed by the FFRDC to determine if and at what level they continue to exist;
- consideration of alternative sources to meet the sponsor's needs;
- an assessment of the efficiency and effectiveness of the FFRDC in meeting the sponsor's needs, including the FFRDC's ability to maintain its objectivity, independence, quick response capability, currency in its field(s) of expertise, and familiarity with the needs of its sponsor;
- an assessment of the adequacy of the FFRDC management in ensuring a cost-effective operation; and,
- a determination that the criteria for establishing the FFRDC continue to be satisfied and that the sponsoring agreement is in compliance with FAR 35.017-1.

In addition, as set forth in Acquisition Letter 2009-03, dated December 23, 2008:

- a detailed description of the incumbent's performance history in areas such as program accomplishment, safety, health, environment, energy conservation, financial and business management and socio-economic programs, including measurable results against established performance measures and criteria;
- significant projects or other objectives planned for assignment under the contract if extended;
- a discussion of principal issues and/or significant changes to be negotiated in the terms and conditions of the extended contract, including the extent to which performance-based management provisions are present, or can be negotiated into, the contract;

- in the case of a Federally Funded Research and Development Center, a review (typically included as an attachment to the acquisition plan) of the use and continued need for FFRDC designation in accordance with FAR 35.017-4; and, as an attachment to the acquisition plan, the authorization for a Federally Funded Research and Development Center, to be signed by the Secretary;
- a determination, and its rationale, that the M&O contract remains the appropriate form of contract; and, as an attachment to the acquisition plan, the authorization to continue to use the M&O form of contract for the requested additional term, to be signed by the Secretary; see Attachment A to this AL;
- a discussion of the potential impact of a change in contractors on program needs;
- a discussion of the rationale that competition for the period of the extension is not in DOE's best interest;
- any other information pertinent to the decision; and,
- a separate certification by the Head of Contracting Activity and cognizant program Assistant Secretary(s) that the use of full and open competition is not in best interests of the Department of Energy.

Step 2: As a result of this review, the PSO should prepare a summary analysis and acquisition strategy recommendation through the Under Secretaries and the CFO to the Deputy Secretary of Energy focused on 1) whether meaningful improvement in performance or cost might reasonably be achieved, 2) the incumbent contractor's overall performance, including, specifically, technical, administrative, and cost performance; 3) the potential impact of a change in contractors on program needs, including safety, national defense, and mobilization considerations, and 4) whether it is likely that qualified offerors will compete for the contract.

Step 3: The decision on any competition or extension of an M&O FFRDC must and shall be made by the Secretary of Energy.