

## SUBCHAPTER A—GENERAL

### PART 901—FEDERAL ACQUISITION REGULATIONS SYSTEM

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AUTHORITY: 42 U.S.C. 7254; 40 U.S.C. 486(c).

SOURCE: 61 FR 41704, Aug. 9, 1996, unless otherwise noted.

#### Subpart 901.1—Purpose, Authority, Issuance

##### 901.101 Purpose.

The Department of Energy Acquisition Regulation (DEAR) in this chapter establishes uniform acquisition policies which implement and supplement the Federal Acquisition Regulation (FAR).

##### 901.102 Authority.

The DEAR and amendments thereto are issued by the Procurement Executive pursuant to a delegation from the Secretary in accordance with the authority of section 644 of the Department of Energy Organization Act (42 U.S.C. 7254), section 205(c) of the Federal Property and Administrative Services Act of 1949, as amended, (40 U.S.C. 486(c)), and other applicable law.

##### 901.103 Applicability.

The FAR and DEAR apply to all DOE acquisitions of supplies and services which obligate appropriated funds unless otherwise specified in this chapter.

##### 901.104 Issuance.

##### 901.104-1 Publication and code arrangement.

(a) The DEAR and its subsequent changes are published in the FEDERAL REGISTER, cumulative form in the Code of Federal Regulations, and a separate loose-leaf edition.

(b) The DEAR is issued as chapter 9 of Title 48 of the Code of Federal Regulations.

##### 901.104-2 Arrangement of regulations.

(a) General. The DEAR is divided into the same parts, subparts, sections, subsections and paragraphs as is the FAR.

(b) Numbering. The numbering illustrations at (FAR) 48 CFR 1.104-2(b) apply to the DEAR, but the DEAR numbering will be preceded with a 9 or a 90. Material which supplements the FAR will be assigned the numbers 70 and up.

##### 901.104-3 Copies.

Copies of the DEAR published in the FEDERAL REGISTER or Code of Federal Regulations may be purchased from the Superintendent of Documents, Government Printing Office, Washington, DC 20402.

##### 901.105 OMB control numbers.

The Paperwork Reduction Act of 1980, Public Law 98-511, and the Office of Management and Budget's implementing regulations at 5 CFR part 1320, require that reporting and record keeping requirements affecting 10 or more members of the public be cleared by that Office. The OMB control number for the collection of information under 48 CFR chapter 9 is 1910-4100, except for the following: Reporting and Record-keeping requirements for Make-or-Buy Plans (see 48 CFR 970.5215-2)—OMB

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number 1910-5102; Reporting and Recordkeeping Requirements for Safety Management (see 48 CFR 970.5223-1)—OMB number 1910-5103.

[61 FR 41704, Aug. 9, 1996, as amended at 62 FR 34861, June 27, 1997; 65 FR 81005, Dec. 22, 2000]

### Subpart 901.3—Agency Acquisition Regulations

#### 901.301-70 Other issuances related to acquisition.

In addition to the FAR and DEAR, there are other issuances which deal with acquisition. Among these are the Federal Property Management Regulations, the DOE Property Management Regulations, and DOE Directives.

### Subpart 901.6—Contracting Authority and Responsibilities

#### 901.601 General.

(a) Contracting authority vests in the Secretary of Energy. The Secretary has delegated this authority to the Procurement Executive. The Procurement Executive has re-delegated this authority to the Heads of Contracting Activities (HCA). These delegations are formal written delegations containing dollar limitations and conditions. Each HCA in turn makes formal contracting officer appointments within the contracting activity.

(b) The Procurement Executive has been authorized, without power of re-delegation, to perform the functions set forth at 48 CFR 1.601(b) regarding the assignment of contracting functions and responsibilities to another agency, and the creation of joint or combined offices with another agency to exercise acquisition functions and responsibilities.

[61 FR 41704, Aug. 9, 1996, as amended at 62 FR 53756, Oct. 16, 1997]

#### 901.602-3 Ratification of unauthorized commitments. (DOE coverage—paragraph (b))

(b) (2) The Procurement Executive is authorized to ratify an unauthorized commitment.

(3) The ratification authority of the Procurement Executive in paragraph (b)(2) of this section is delegated to the

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Head of the Contracting Activity (HCA) for individual unauthorized commitments of \$25,000 or under. The ratification authority of the HCA is non-delegable.

### PART 902—DEFINITIONS OF WORDS AND TERMS

AUTHORITY: 42 U.S.C. 7101 *et seq.*; 41 U.S.C. 418(b); and 50 U.S.C. 2401 *et seq.*

#### Subpart 902.2—Definitions Clause

##### 902.200 Definitions clause.

As prescribed by FAR subpart 2.2, insert the clause at FAR 52.202-1, Definitions, but modify it to limit the definition at paragraph (a) of the clause, to encompass only the Secretary, Deputy Secretary, or the Under Secretaries of the Department of Energy, and the Chairman, Federal Energy Regulatory Commission. The contracting officer shall also add paragraphs (h) and (i) or (g) and (h) if Alternate I of the FAR clause is used. Paragraph (h) defines “DOE” as meaning the United States Department of Energy, “FERC” as meaning the Federal Energy Regulatory Commission, and “NNSA” as meaning the National Nuclear Security Administration. Paragraph (i) identifies the Senior Procurement Executive, DOE, as the Director, Office of Procurement and Assistance Management; the Senior Procurement Executive, NNSA, as the Administrator for Nuclear Security, NNSA; and the Senior Procurement Executive, FERC, as the Chairman, Federal Energy Regulatory Commission.

[67 FR 14870, Mar. 28, 2002]

### PART 903—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

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AUTHORITY: 42 U.S.C. 7254; 40 U.S.C. 486(c).

SOURCE: 49 FR 11940, Mar. 28, 1984, unless otherwise noted.

### Subpart 903.1—Safeguards

#### 903.101 Standards of conduct.

##### 903.101-3 Agency regulations.

Detailed rules applicable to the conduct of DOE employees are set forth in 10 CFR part 1010.

[49 FR 11940, Mar. 28, 1984, as amended at 60 FR 47307, Sept. 12, 1995]

##### 903.104-3 Definitions.

As used in this section and for the purposes of the post-employment restrictions at 48 CFR (FAR) 3.104-4(d)—

*Deputy program manager* means the individual within DOE who normally acts as the program manager in the absence of the program manager, and does not mean an individual who occasionally acts for the program manager or the deputy program manager.

*Program manager* means the individual within DOE who:

(1) Exercises authority on a day-to-day basis to manage an acquisition program—

(i) For a system attained through the acquisition process; and

(ii) With one or more contracts, at least one of which has a value exceeding \$10,000,000; and

(2) Is generally the person at the lowest organizational level who has authority to make technical and budgetary decisions on behalf of DOE.

*System* means a combination of elements that function together to produce the capabilities required to fulfill a mission need, including, but not limited to hardware, equipment, software, or any combination thereof.

[63 FR 56851, Oct. 23, 1998]

### 903.104-10 Violations or possible violations (DOE coverage—paragraph (a)).

(a) Except for Headquarters activities, the individual within DOE responsible for fulfilling the requirements of 48 CFR 3.104-10(a) (1) and (2) relative to contracting officer conclusions on the impact of a violation or possible violation of subsections 27 (a), (b), (c) or (d) of the Office of Federal Procurement Policy Act shall be the legal counsel assigned direct responsibility for providing legal advice to the contracting office making the award or selecting the source. The legal counsel is the Chief Counsel for the Operations Offices or the Federal Energy Technology Center; the Counsel, or the Chief Counsel, for the Support Offices or the Naval Reactors Offices; and the General Counsel for the Power Administrations. For Headquarters activities, the individual designated to perform the responsibilities in 48 CFR 3.104-10(a) (1) and (2) regarding questions of disclosure of proprietary or source selection information is the Assistant General Counsel for Procurement and Financial Assistance. The designated individual for other questions regarding 48 CFR 3.104-10(a) (1) and (2) for Headquarters activities is the Agency Ethics Official (Designated Agency Ethics Official).

[62 FR 53756, Oct. 16, 1997]

### Subpart 903.2—Contractor Gratuities to Government Personnel

#### 903.203 Reporting suspected violations of the Gratuities clause.

(a) Suspected violations of the Gratuities clause shall be reported to the Head of the Contracting Activity (HCA) in writing detailing the circumstances. The HCA will evaluate the report and, if the report appears to substantiate the allegations, the matter will be referred to the Procurement Executive for disposition.

[49 FR 11940, Mar. 28, 1984, as amended at 59 FR 9104, Feb. 25, 1994]

#### 903.204 Treatment of violations.

Apparent violations will be processed in accordance with the debarment and suspension rules set forth at Title 10, part 1035, of the Code of Federal Regulations.

### Subpart 903.3—Reports of Suspected Antitrust Violations

#### 903.303 Reporting suspected antitrust violations.

(a) Potential anti-competitive practices, such as described in FAR 3.301, and antitrust law violations as described in FAR 3.303, evidenced in bids or proposals, shall be reported to the Office of General Counsel through the Head of the Contracting Activity with a copy to the Procurement Executive. The Office of General Counsel will provide reports to the Attorney General, as appropriate.

[50 FR 12183, Mar. 27, 1985, as amended at 59 FR 9104, Feb. 25, 1994]

### Subpart 903.4—Contingent Fees

#### 903.408-1 Responsibilities.

(b) Each Standard Form 119 completed in connection with a DOE contract, together with other relevant information, shall be reviewed by Counsel prior to the initiation of appropriate action.

### Subpart 903.5—Other Improper Business Practices

#### 903.502 Subcontractor kickbacks.

(b) Contracting officers shall report suspected violations of the Anti-Kickback Act through the Head of the Contracting Activity, or designee, to the Office of General Counsel.

### Subpart 903.6—Contracts With Government Employees or Organizations Owned or Controlled by Them

#### 903.603 Responsibilities of the contracting officer.

(a) When the needs of the Government cannot be reasonably supplied by sources other than employees of the Government or sources which are substantially owned or controlled by Government employees, the contracting officer, in accordance with FAR 48 CFR 3.602, may submit, through the HCA, a request to the Procurement Executive, with appropriate justification, for approval of an exception to the prohibitions contained in FAR 3.601.

[49 FR 11940, Mar. 28, 1984, as amended at 59 FR 9104, Feb. 25, 1994]

### Subpart 903.9—Whistleblower Protection for Contractor Employees

SOURCE: 81005, Dec. 22, 2000, unless otherwise noted.

#### 903.901 Scope.

This subpart implements the DOE Contractor Employee Protection Program as set forth at 10 CFR part 708. Part 708 establishes criteria and procedures for the investigation, hearing, and review of allegations from DOE contractor employees of employer reprisal resulting from employee disclosure of information to DOE, to Members of Congress, or to the contractor; employee participation in proceedings before Congress or pursuant to this subpart; or employee refusal to engage in illegal or dangerous activities, when such disclosure, participation, or refusal pertains to employer practices

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which the employee believes to be unsafe; to violate laws, rules, or regulations; or to involve fraud, mismanagement, waste, or abuse.

### 903.902 Definition.

Contractor, as used in this subpart, has the meaning contained in 10 CFR 708.2.

### 903.903 Applicability.

10 CFR part 708 is applicable to complaints of retaliation filed by employees of contractors, and subcontractors, performing work on behalf of DOE directly related to DOE-owned or leased facilities, if the complaint stems from a disclosure, participation, or refusal described in 10 CFR 708.5.

### 903.970 Remedies.

(a) Contractors found to have retaliated against an employee in reprisal for such disclosure, participation or refusal are required to provide relief in accordance with decisions issued under 10 CFR part 708.

(b) 10 CFR part 708 provides that for the purposes of the Contract Disputes Act (41 U.S.C. 605 and 606), a final decision issued pursuant to 10 CFR part 708 shall not be considered to be a claim by the Government against a contractor or a decision by the contracting officer subject to appeal. However, a contractor's disagreement and refusal to comply with a final decision could result in a contracting officer's decision to disallow certain costs or to terminate the contract for default. In such case, the contractor could file a claim under the Disputes clause of the contract regarding the disallowance of cost or the termination of the contract.

### 903.971 Contract clause.

The contracting officer shall insert the clause at 952.203-70, Whistleblower Protection for Contractor Employees, in contracts that involve work to be done on behalf of DOE directly related to activities at DOE-owned or leased sites.

## PART 904—ADMINISTRATIVE MATTERS

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904.7200 Purpose.

904.7201 Contract clause.

AUTHORITY: 42 U.S.C. 7101 *et seq.*; 41 U.S.C. 418b; 50 U.S.C. 2401 *et seq.*

SOURCE: 49 FR 11941, Mar. 28, 1984, unless otherwise noted.

### Subpart 904.4—Safeguarding Classified Information Within Industry

#### 904.401 Definitions.

*Access Authorization* means an administrative determination that an individual is eligible for access to classified information or is eligible for access to,

or control over, special nuclear material.

*Classified Information* means information that is classified as Restricted Data or Formerly Restricted Data under the Atomic Energy Act of 1954, as amended, or information determined to require protection against unauthorized disclosure under Executive Order 12958, or prior Executive Orders, which is identified as National Security Information.

*Facility Clearance* means an administrative determination that a facility is eligible to access, produce, use or store classified information, or special nuclear material.

*Restricted Data* means all data concerning the design, manufacture, or utilization of atomic weapons; the production of special nuclear material; or the use of special nuclear material in the production of energy, but does not include data declassified or removed from the Restricted Data category pursuant to section 142 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2162).

[67 FR 14875, Mar. 28, 2002]

#### **904.402 General.**

(a) The basis of DOE's industrial security requirements is the Atomic Energy Act of 1954, as amended, and Executive Orders 12958 and 12829.

(b) DOE security regulations concerning restricted data are codified at 10 CFR part 1045.

(c)(1) Section 234B of the Atomic Energy Act (42 U.S.C. 2282b) requires that DOE contracts include a clause that provides for an appropriate reduction in the fees or amounts paid to the contractor under the contract in the event of a violation by the contractor or any contractor employee of any rule, regulation, or order relating to the safeguarding or security of Restricted Data or other classified information. The clause is required for all DOE prime contracts that involve any possibility of contractor access to Restricted Data or other classified information. The clause is required to specify various degrees of violations and the amount of the reduction attributable to each degree of violation. The clause prescribed at 48 CFR 904.404(d)(6) (Conditional Payment of Fee or Profit—Safe-

guarding Restricted Data and Other Classified Information) or the clause prescribed at 48 CFR 923.7002(f) (Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information and Protection of Worker Safety and Health) shall be used for this purpose unless the clause prescribed at 48 CFR 970.1504-5(c) (Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts) is used.

(2) The clause entitled "Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information" and the clause entitled "Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information and Protection of Worker Safety and Health" provide for reductions of fee or profit that is earned by the contractor depending upon the severity of the contractor's failure to comply with contract terms or conditions relating to the safeguarding of Restricted Data or other classified information. When reviewing performance failures that would otherwise warrant a reduction of earned fee, the contracting officer must consider mitigating factors that may warrant a reduction below the applicable range specified in the clause. Some of the mitigating factors that must be considered are specified in the clause.

(3) The contracting officer must obtain the concurrence of the Head of the Contracting Activity:

(i) Prior to effecting any reduction of fee or amounts otherwise payable to the contractor in accordance with the terms and conditions of the clause entitled "Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information" or of the clause entitled "Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information and Protection of Worker Safety and Health;" and

(ii) For determinations that no reduction of fee is warranted for a particular performance failure(s) that would otherwise warrant a reduction.

[67 FR 14876, Mar. 28, 2002, as amended at 68 FR 68776, Dec. 10, 2003]

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### 904.404 Solicitation provision and contract clause. [DOE Coverage—Paragraph (d)]

(d) The security clauses to be used in DOE contracts are found at 952.204. They are:

(1) Security, 952.204-2. This clause is required in contracts and subcontracts, the performance of which involves or is likely to involve classified information. DOE utilizes the National Industrial Security Program but DOE's security authority is derived from the Atomic Energy Act which contains specific language not found in other agencies' authorities. For this reason, DOE contracts must contain the clause at 952.204-2 rather than the clause at FAR 52.204-2.

(2) Classification/Declassification, 952.204-70. This clause is to be used in all contracts which involve classified information.

(3) *Sensitive foreign nation controls, 952.204-71.* This clause is required in unclassified research contracts which may involve making unclassified information about nuclear technology available to certain sensitive foreign nations. The contractor shall be provided at the time of award the listing of nations referenced in DOE N 142.1. (The attachment referred to in the clause shall set forth the applicable requirements of the DOE regulations on dissemination of unclassified published and unpublished technical information to foreign nations.)

(4) *Disclosure of information, 952.204-72.* This clause may be used in place of the clauses entitled "Security" and "Classification" in contracts with educational institutions for research work performed in their own institute facilities that are not likely to produce classified information.

(5) Facility Clearance, 952.204-73. This solicitation provision should be used in solicitations expected to result in contracts and subcontracts that require employees to possess access authorizations.

(6) Except as prescribed in 48 CFR 970.1504-5(c), the contracting officer shall insert the clause at 48 CFR 952.204-76, Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information, in all contracts that contain the clause

at 48 CFR 952.204-2, Security, but that do not contain the clause at 48 CFR 952.250-70, Nuclear hazards indemnity agreement.

[49 FR 11941, Mar. 28, 1984; 49 FR 38949, Oct. 2, 1984, as amended at 54 FR 27646, June 30, 1989; 59 FR 24358, May 11, 1994; 67 FR 14871, Mar. 28, 2002; 67 FR 14876, Mar. 28, 2002; 68 FR 68777, Dec. 10, 2003]

### Subpart 904.6 [Reserved]

### Subpart 904.7—Contractor Records Retention

#### 904.702 Applicability.

(b) Contracts containing the Safety and Health clause at 952.223-71, the Radiation Protection and Nuclear Criticality clause at 952.223-72, or the Nuclear Safety clause at 952.223-74 must also include the Preservation of Individual Occupational Radiation Exposure Records clause at 952.223-75 which will necessitate retention of records in accordance with schedules contained in applicable DOE Directives in the records management series, rather than those found at FAR 4.7.

[49 FR 11941, Mar. 28, 1984, as amended at 59 FR 9104, Feb. 25, 1994; 60 FR 47307, Sept. 12, 1995; 62 FR 2312, Jan. 16, 1997]

### Subpart 904.8—Contract Files

#### 904.803 Contents of contract files.

(a) (29) The record copy of the Individual Procurement Action Report shall be included in the file section containing procurement management reports.

#### 904.804-1 Closeout by the office administering the contract (DOE Coverage—paragraphs (a) and (b)).

(a) The Head of the Contracting Activity shall ensure that necessary procedures and milestone schedules are established to meet the requirements of FAR 4.804-1, and that resources are applied to effect the earliest practicable deobligation of excess funds and the timely closeout of all contract files which are physically completed or otherwise eligible for closeout action.

(b) Quick closeout procedures for cost reimbursable and other than firm fixed

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price type contracts are covered under 48 CFR 42.708.

[49 FR 11941, Mar. 28, 1984, as amended at 62 FR 53757, Oct. 16, 1997]

### 904.805 Disposal of contract files.

Contract files shall be disposed of in accordance with applicable DOE Order 1324.2. (See current version.)

[49 FR 11941, Mar. 28, 1984, as amended at 59 FR 9104, Feb. 25, 1994]

## Subpart 904.70—Facility Clearance

### 904.7000 Purpose.

This subpart sets forth the Department of Energy policies and procedures regarding Facility Clearances for contractors and subcontractors that require access to classified information or special nuclear material. A Facility Clearance is based upon a determination that satisfactory safeguards and security measures are carried out for classified activities being performed at the facility and upon a favorable foreign ownership, control, or influence (FOCI) determination.

[67 FR 14876, Mar. 28, 2002]

### 904.7001 Applicability.

The provisions of this subpart shall apply to all offeror(s), contractors, and subcontractors who will or do have access to classified information or a significant quantity of special nuclear material as defined in 10 CFR part 710. In this subpart, the term “contractor” shall also mean subcontractor at any tier, the term “contract” shall also mean subcontract at any tier, and the term “special nuclear material” shall also mean significant quantity of special nuclear material as defined in 10 CFR part 710.

[49 FR 11941, Mar. 28, 1984, as amended at 59 FR 9104, Feb. 25, 1994]

### 904.7002 Definitions.

*Contracting officer* means the DOE contracting officer.

*Facility Clearance* means an administrative determination that a facility is eligible to access, produce, use, or store classified information, or special nuclear material.

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*Foreign interest* means any of the following:

(1) Foreign government or foreign government agency or instrumentality thereof;

(2) Any form of business enterprise organized under the laws of any country other than the United States or its possessions;

(3) Any form of business enterprise organized or incorporated under the laws of the U.S., or a State or other jurisdiction within the U.S. which is owned, controlled, or influenced by a foreign government, agency, firm, corporation, or person, or

(4) Any person who is not a U.S. citizen.

*Foreign ownership, control, or influence* means the situation where the degree of ownership, control, or influence over an offeror(s) or a contractor by a foreign interest is such that a reasonable basis exists for concluding that compromise of classified information or special nuclear material may possibly result.

[49 FR 11941, Mar. 28, 1984, as amended at 59 FR 9104, Feb. 25, 1994; 67 FR 14876, Mar. 28, 2002]

### 904.7003 Disclosure of foreign ownership, control, or influence.

(a) If a contract requires a contractor to have a Facility Clearance, DOE must determine whether the contractor is or may be subject to foreign ownership, control or influence before a contract can be awarded.

(b) If, during the performance of a contract, the contractor comes under FOCI, then the DOE must determine whether a continuation of the Facility Clearance may pose an undue risk to the common defense and security through the possible compromise of that information or material. If the DOE determines that such a threat or potential threat exists, the contracting officer shall consider the alternatives of negotiating an acceptable method of isolating the foreign interest which owns, controls, or influences the contractor or terminating the contract.

(c) It is essential for the DOE to obtain information about FOCI which is sufficient to help the Department determine whether award of a contract to

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a person or firm, or the continued performance of a contract by a person or firm, may pose undue risk to the common defense and security. Therefore, the provision specified at 952.204-73 shall be included in solicitations that involve offeror(s) or contractors that are subject to 904.7001.

(d) The contracting officer shall not award or extend any contract subject to this subpart, exercise any options under a contract, modify any contracts subject to this subpart, or approve or consent to a subcontract subject to this subpart unless:

(1) The contractor provides the information required by the solicitation provision at 48 CFR 952.204-73, and

(2) The contracting officer has made a positive determination in accordance with 48 CFR 904.7004.

[49 FR 11941, Mar. 28, 1984, as amended at 59 FR 9104, Feb. 25, 1994; 62 FR 42073, Aug. 5, 1997; 67 FR 14876, Mar. 28, 2002]

### 904.7004 Findings, determination, and contract award or termination.

(a) Based on the information disclosed by the offeror(s) or contractor, and after consulting with the DOE Office of Safeguards and Security, the contracting officer must determine that award of a contract to an offeror(s) or continued performance of a contract by a contractor will not pose an undue risk to the common defense and security. The contracting officer need not prepare a separate finding and determination addressing FOCI; however, the memorandum of negotiation shall include a discussion of the applicability of this subpart and the resulting determination.

(b) In those cases where FOCI does exist, and the DOE determines that an undue risk to the common defense and security may exist, the offeror(s) or contractor shall be requested to propose within a prescribed period of time a plan of action to avoid or mitigate the foreign influences by isolation of the foreign interest.

(c) The types of plans that a contractor can propose are: measures which provide for physical or organizational separation of the facility or organizational component containing the classified information or special nuclear material; modification or termi-

nation of agreements with foreign interests; diversification or reduction of foreign source income; assignment of specific security duties and responsibilities to board members or special executive level committees; or any other actions to negate or reduce FOCI to acceptable levels. The plan of action may vary with the type of foreign interest involved, degree of ownership, and information involved so that each plan must be negotiated on a case by case basis. If the offeror(s) or contractor and the DOE cannot negotiate a plan of action that isolates the offeror(s) or contractor from FOCI satisfactory to the DOE, then the offeror(s) shall not be considered for contract award and affected existing contracts with a contractor shall be terminated.

[49 FR 11941, Mar. 28, 1984, as amended at 59 FR 9104, Feb. 25, 1994]

### Subpart 904.71—Prohibition on Contracting (National Security Program Contracts)

SOURCE: 58 FR 59684, Nov. 10, 1993, unless otherwise noted.

#### 904.7100 Scope of subpart.

This subpart implements section 836 of the Fiscal Year 1993 Defense Authorization Act (Pub. L. 102-484) which prohibits the award of a Department of Energy contract under the national security program to an entity controlled by a foreign government if it is necessary for that entity to be given access to information in a proscribed category of information in order to perform the contract.

[58 FR 59684, Nov. 10, 1993, as amended at 67 FR 14876, Mar. 28, 2002]

#### 904.7101 Definitions.

*Effectively owned or controlled* means that a foreign government or an entity controlled by a foreign government has the power, either directly or indirectly, whether exercised or exercisable, to control or influence the election or appointment of the Offeror's officers, directors, partners, regents, trustees, or a majority of the Offeror's board of directors by any means, e.g., ownership, contract, or operation of law.

*Entity controlled by a foreign government* means any domestic or foreign organization or corporation that is effectively owned or controlled by a foreign government or any individual acting on behalf of a foreign government. See 925.7 for a statement of the prohibition.

*Foreign government* means any governing body organized and existing under the laws of any country other than the United States and its possessions and trust territories and any agent or instrumentality of that government.

*Proscribed information* means—

- (1) Top Secret information;
- (2) Communications Security (COMSEC) information, except classified keys used to operate secure telephone units (STU IIIs);
- (3) Restricted Data, as defined in the Atomic Energy Act of 1954, as amended;
- (4) Special Access Program (SAP) information; or,
- (5) Sensitive Compartmented Information (SCI).

**904.7102 Waiver by the Secretary.**

(a) 10 U.S.C. 2536(b)(1)(A) allows the Secretary of Energy to waive the prohibition on the award of contracts set forth in 10 U.S.C. 2536(a) if the Secretary determines that a waiver is essential to the national security interests of the United States. Any request for a waiver regarding award of a contract or execution of a novation agreement shall address:

- (1) Identification of the proposed awardee and description of the control by a foreign government;
- (2) Description of the procurement and performance requirements;
- (3) Description of why a waiver is essential to the national security interests of the United States;
- (4) The availability of other entities to perform the work; and
- (5) A description of alternate means available to satisfy the requirement.

(b) 10 U.S.C. 2536(b)(1)(B) allows the Secretary of Energy to waive the prohibition on the award of contracts set forth in 10 U.S.C. 2536(a) for environmental restoration, remediation or waste management contracts at a DOE facility if the Secretary determines that a waiver will advance the environ-

mental restoration, remediation or waste management objectives of DOE; will not harm the national security interests of the United States; and may be authorized because the entity to which the contract is to be awarded is controlled by a foreign government with which the Secretary is authorized to exchange Restricted Data under Section 144.c. of the Atomic Energy Act of 1954 (42 U.S.C. 2164(c)). Any request for such a waiver regarding award of a contract or execution of a novation agreement shall address:

- (1) Identification of the proposed awardee and description of the control by a foreign government;
- (2) Description of the procurement and performance requirements;
- (3) A description of how the Department's environmental restoration, remediation, or waste management objectives will be advanced;
- (4) A description of why a waiver will not harm the national security interests of the United States;
- (5) The availability of other entities to perform the work;
- (6) A description of alternate means available to satisfy the requirement; and
- (7) Evidence that the entity to which a contract is to be awarded is controlled by a foreign government with which the Secretary is authorized to exchange Restricted Data under Section 144.c. of the Atomic Energy Act of 1954 (42 U.S.C. 2164(c)).

(c) Any request for a waiver under paragraph (a) or (b) of this section shall be forwarded by the Head of the Contracting Activity to the Office of Contract Management within the Headquarters procurement organization.

(d) If the Secretary decides to grant a waiver for an environmental restoration, remediation, or waste management contract, the Secretary shall notify Congress of this decision. The contract may be awarded or the novation agreement executed only after the end of the 45-day period beginning on the date notification is received by the Senate Committee on Armed Services and the House Committee on National Security.

(e) Any request for a waiver under this subpart shall be accompanied by

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the information required by DEAR 952.204-73 that has been developed by the Safeguards and Security Lead Responsible Office at the contracting activity.

[67 FR 14876, Mar. 28, 2002]

### **904.7103 Solicitation provision and contract clause.**

(a) Any solicitation, including those under simplified acquisition procedures, for a contract under the national security program which will require access to proscribed information shall include the provision at 48 CFR 952.204-73.

(b) Any contract, including those awarded under simplified acquisition procedures, under the national security program which require access to proscribed information to enable performance, shall include the clause at 48 CFR 952.204-2.

[58 FR 59684, Nov. 10, 1993, as amended at 61 FR 21976, May 13, 1996; 62 FR 42074, Aug. 5, 1997; 67 FR 14877, Mar. 28, 2002]

## **Subpart 904.72—Public Affairs**

SOURCE: 65 FR 81006, Dec. 22, 2000, unless otherwise noted.

### **904.7200 Purpose.**

It is the policy of the Department of Energy to provide to the public and the news media, accurate and timely unclassified information on Departmental policies, programs, and activities. The Department's contractors share the responsibility for releasing unclassified information related to efforts under their contracts and must coordinate the release of unclassified information with the cognizant contracting officer and appropriate DOE Public Affairs personnel.

### **904.7201 Contract clause.**

The contracting officer shall insert the clause at 952.204-75 in solicitations and contracts that require the contractor to release unclassified information related to efforts under its contract regarding DOE policies, programs, and activities.