

DEPARTMENT OF ENERGY**48 CFR Parts 917 and 970**

[1991-AB-09]

Acquisition Regulation; Department of Energy Management and Operating Contracts**AGENCY:** Department of Energy.**ACTION:** Interim final rule with request for comment.

SUMMARY: The Department of Energy (DOE) today publishes an interim rulemaking to set forth its policy regarding the competition and extension of the Department's management and operating contracts. Under its policy, the Department affirms its commitment to provide for full and open competition in the award of its management and operating contracts, except where the Department determines that competitive procedures should not be used pursuant to one of the circumstances authorized by the Competition in Contracting Act of 1984 (41 U.S.C. 254), as implemented in Part 6 of the Federal Acquisition Regulation. This rulemaking implements one of the key recommendations of the Department's contract reform initiative to improve its acquisition system.

DATES: This interim rule is effective August 23, 1996. Written comments should be forwarded no later than August 23, 1996.

ADDRESSES: Comments should be submitted to Connie P. Fournier, Office of Policy (HR-51), Department of Energy, 1000 Independence Avenue, SW, Washington, D.C. 20585; (202) 586-0545 (facsimile); connie.fournier@hq.doe.gov (Internet).

The administrative record regarding this rulemaking that is on file for public inspection is located in the Department's Freedom of Information Reading Room, Room 1E-190, 1000 Independence Avenue, SW, Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: Connie P. Fournier at (202) 586-8245.

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I. Background

The Department's contracts for the management and operation of its facilities have historically been subject to specialized rules pertaining to their periodic extension. Under these rules, contained at Department of Energy Acquisition Regulation (DEAR) 970.0001 and 917.6, existing policy favored non-competitive extensions of incumbent contractors. Competition was permitted only when it appeared likely that the Government's position might be meaningfully improved in terms of cost or performance and only then when it was determined that to change a contractor would not be contrary to the best interest of the Government. This resulted in noncompetition as the preferential norm.

The Department's Contract Reform Report, *Making Contracting Work Better and Cost Less* (February 1994), in recommending a number of changes, called for a reversal of this policy. Accordingly, the Department published Acquisition Letter 94-14 in the Federal Register (59 FR 50733), October 5, 1994, as an interim policy setting forth guidelines for the competition or extension of the Department's management and operating contracts. The interim policy established competition as the preferential norm. Exceptions to competition were to be made on a case-by-case basis, only in exceptional circumstances, and only when authorized by the Head of the Agency. The intent was to balance the positive effects of a competitive environment with the recognition that long-term contractual relationships can facilitate superior contractor performance, especially given the highly complex and multi-faceted work performed under management and operating contracts. The Department has competed, or is competing, a number of management and operating contracts in accordance with this interim policy.

After considering the comments received in response to the interim policy, as set forth in Acquisition Letter 94-14, and its experience under that policy, the Department has concluded that certain aspects of the Acquisition Letter are appropriate for regulation, as modified for consistency with applicable law. Other aspects of the Acquisition Letter will be incorporated into nonregulatory internal Department guidance. Under the rulemaking published today, the Department affirms its commitment to full and open competition as the norm for its management and operating contracts. Exceptions to the use of full and open competition will be made on a case-by-

case basis: (1) only in accordance with the circumstances authorized by the Competition in Contracting Act of 1984 (CICA) and Part 6 of the Federal Acquisition Regulation (FAR), and (2) only when authorized by the Head of the Agency. Adherence to the existing statutory requirements of CICA, as implemented in FAR Part 6, preserves a preference for competition; conforms the Department's decisionmaking process to noncompetitively award contracts with Federal-wide standards found in statute and regulation; and eliminates unnecessary, agency-specific regulations. Today's interim rule supersedes both the Department's regulation that created a noncompetitive norm and Acquisition Letter 94-14.

A notice of proposed rulemaking published elsewhere in this issue of the Federal Register discusses changes proposed to the Department of Energy Acquisition Regulation to implement other contract reform recommendations. A third rulemaking that discusses the Department's fee policies for profit making and nonprofit management and operating contractors will be promulgated as a separate proposal. Together, these three rulemakings constitute the Department's regulatory implementation of certain key contract reform initiatives in its acquisition regulation.

II. Section-by-Section Analysis

A detailed list of changes in the interim rule follows.

1. **917.602, Policy.** This section is added to prescribe the Department's policy to provide for full and open competition and the use of competitive procedures in the award of management and operating contracts, except as authorized by law and the Head of the Agency.

2. **917.605, Award, renewal, and extension.** This section is amended to remove the existing coverage at 917.605(b) that prescribes the Department's internal processing and documentation requirements for extend/compete decisions. This nonregulatory subject matter will be reflected in internal Department guidance. A new section 917.605(d) is added to provide for the conditional approval of any noncompetitive extension (other than an extension accomplished by the exercise of an option) subject to the successful achievement of the Government's negotiation objectives. This section also permits adequate time to compete the contract in the event that the negotiations cannot be successfully concluded.

3. **970.0001, Renewal of management and operating contracts.** This section is

amended to delete the Department's previous policy that competition generally would be used only when it appeared likely that the Government's position might be meaningfully improved in terms of cost or performance, unless it was determined that to change a contractor would be contrary to the best interest of the Government. This section is removed and reserved for future use.

4. *970.17, Special Contracting Methods.* This subpart is added to provide for coverage concerning contract term and options to extend management and operating contracts.

5. *970.1702-1, Contract term and option to extend.* This section is added to provide policy guidance on (1) the total period of performance permitted under a management and operating contract and (2) the requirements governing the exercise of an option to extend the term of an existing contract. Paragraph (a) of the section states that management and operating contracts may provide for a base period of up to 5 years and may include an option to extend the period of performance for up to an additional total of 5 years. The purpose of permitting the inclusion of an option to extend the term of the contract is to facilitate long-term contractual relationships where the mission of the Department is best served by such an extension and to reward contractors for superior performance under the contract.

Regarding the exercise of options under paragraph (b), the contracting officer may exercise an option to extend a competitively awarded contract only after assessing certain factors, including the contractor's past performance. The decision of the contracting officer must be approved by the Head of the Contracting Activity and the cognizant Assistant Secretary(s).

6. *970.1701-2, Solicitation provision and contract clause.* This section is added to provide instruction to the contracting officer on the application of the solicitation provision and contract clause pertaining to the use of options in management and operating contracts.

7. *970.5204-73, Notice regarding option.* This section is added to subpart 970.52, Contract clauses for management and operating contracts, to provide a solicitation provision for options to extend the term of the contract.

8. *970.5204-74, Option to extend the term of the contract.* This section is added to subpart 970.52, Contract clauses for management and operating contracts, to provide a contract clause for options to extend the term of the contract.

III. Procedural Requirements

A. Review Under Executive Order 12866

This regulatory action has been determined not to be a "significant regulatory action" under Executive Order 12866, "Regulatory Planning and Review," (58 FR 51735, October 4, 1993). Accordingly, this action was not subject to review, under that Executive Order, by the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB).

B. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the interim final regulations meet the relevant standards of Executive Order 12988.

C. Review Under the Regulatory Flexibility Act

This rule is not subject to review under the Regulatory Flexibility Act of 1980, 5 U.S.C. 601, *et seq.*, because it is not subject to a legal requirement to publish a general notice of proposed rulemaking.

D. Review Under the Paperwork Reduction Act

No new information collection or recordkeeping requirements are imposed by this rule. Accordingly, no Office of Management and Budget clearance is required under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501, *et seq.*).

E. Review Under Executive Order 12612

Executive Order 12612, entitled "Federalism," 52 FR 41685 (October 30, 1987), requires that regulations, rules, legislation, and any other policy actions be reviewed for any substantial direct effects on States, on the relationship between the Federal Government and the States, or in the distribution of power and responsibilities among various levels of government. If there are sufficient substantial direct effects, then the Executive Order requires preparation of a federalism assessment to be used in all decisions involved in promulgating and implementing a policy action. The Department has determined that this rule will not have a substantial direct effect on the institutional interests or traditional functions of States.

F. Review Under the National Environmental Policy Act

Pursuant to the Council on Environmental Quality Regulations (40 CFR 1500-1508), the Department has established guidelines for its compliance with the provisions of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321, *et seq.*). Pursuant to Appendix A of Subpart D of 10 CFR 1021, National Environmental Policy Act Implementing Procedures (Categorical Exclusion A6), the Department has determined that this rule is categorically excluded from the need to prepare an environmental impact statement or environmental assessment.

IV. Public Comments

A. Written Comments

Although the interim regulations published in this rule are not substantive regulations with the kind of impact that warrants prior notice, the Department is nevertheless providing an opportunity for public comment. Interested persons are invited to participate by submitting data, views, or arguments with respect to the DEAR amendments set forth in this rule. Three copies of written comments should be submitted to the address indicated in the ADDRESSES section of this rule. In addition, it is requested that you provide a copy of your comments on a

WordPerfect 6.1 or ASCII diskette. Comments may be sent to the Internet address in the **ADDRESSES** section of this rule instead of the written copies and diskette, provided they are transmitted in a WordPerfect 6.1 compatible format and include the name, title, organization, postal address, and Internet address with the text of the comments. All comments received will be available for public inspection in the Department of Energy Reading Room, 1E-190, Forrestal Building, 1000 Independence Avenue, SW., Washington, D.C. 20585, between the hours of 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. All written comments received on or before the date specified in the beginning of this rule and all other relevant information will be considered by the Department before taking final action. Comments received after that date will be considered to the extent that time allows. Any person submitting information which that person believes to be confidential and which may be exempt from public disclosure should submit one complete copy, as well as an additional copy from which the information claimed to be confidential has been deleted. The Department reserves the right to determine the confidential status of the information or data and to treat it according to its determination. The Department's generally applicable procedures for handling information which has been submitted in a document and may be exempt from public disclosure are set forth in 10 CFR 1004.11.

B. Public Hearing Determination

The Department has concluded that this rule does not involve any significant issues of law or fact. Therefore, consistent with 5 U.S.C. 553, the Department has not scheduled a public hearing. However, a public hearing will be held on the notice of proposed rulemaking published elsewhere in this issue of the Federal Register on other contract reform changes proposed to the Department of Energy Acquisition Regulation. Any person who has an interest in those proposed contract reform changes may request an opportunity to make an oral presentation in accordance with the procedures described in that rulemaking.

List of Subjects in 48 CFR Parts 917 and 970

Government procurement.

Issued in Washington, D.C., on June 7, 1996.

Richard H. Hopf,
Deputy Assistant Secretary for Procurement and Assistance Management.

For the reasons set out in the preamble, Chapter 9 of Title 48 of the Code of Federal Regulations is amended as set forth below:

PART 917—SPECIAL CONTRACTING METHODS

1. The authority citation for Part 917 continues to read as follows:

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

2. Subpart 917.6, Management and Operating Contracts, is amended to add new section 917.602, Policy, to read as follows:

917.602 Policy.

(a) It is the policy of the Department of Energy to provide for full and open competition in the award of management and operating contracts, including performance-based management contracts.

(b) A management and operating contract may be awarded or extended at the completion of its term without providing for full and open competition only when such award or extension is justified under one of the statutory authorities identified in FAR 6.302 and only when authorized by the Head of the Agency. Documentation and processing requirements for justifications for the use of other than full and open competition shall be accomplished in accordance with internal agency procedures.

3. Section 917.605 is revised to read as follows:

917.605 Award, renewal, and extension.

Conditional Authorization of Non-competitive Extension Made Pursuant to Authority Under CICA. Authorization to extend by the Head of the Agency shall be considered conditional upon the successful negotiation of the contract to be extended in accordance with the Department's negotiation objectives. The Head of the Contracting Activity shall advise the Procurement Executive no later than 6 months after receipt of the conditional authorization as to whether the Department's objectives will be met and, if not, the contracting activity's plans for competing the requirement.

PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS

4. The authority citation for Part 970 continues to read as follows:

Authority: Sec. 161 of the Atomic Energy Act of 1954 (42 U.S.C. 2201), sec. 644 of the Department of Energy Organization Act, Public Law 95-91 (42 U.S.C. 7254).

970.0001 [Removed and reserved]

5. Section 970.0001 is removed and reserved.

6. Subpart 970.17, Special contracting methods, is added to read as follows:

970.17 Special contracting methods.

970.1702-1 Term of contract and option to extend.

970.1702-2 Solicitation provision and contract clause.

970.1702-1 Term of contract and option to extend.

(a) *Contract term.* Effective work performance under a management and operating contract is facilitated by the use of a relatively long contract term of up to ten (10) years. Accordingly, management and operating contracts shall provide for a basic contract term not to exceed five (5) years and may include an option(s) to extend the term for additional periods; provided, that no one option period exceeds five (5) years in duration and the total term of the contract, including any options exercised, does not exceed ten (10) years. The specific term of the base period and of any options periods shall be determined at the time of the authorization to compete or extend the contract. The term "option" as used herein means a unilateral right in the contract by which the Government can extend the term of the contract. Accordingly, except as may be provided for through the inclusion of an option(s) in the contract to extend the term, any extension to continue the contract with the incumbent contractor beyond its term shall only occur when such extension can be justified under one of the statutory authorities identified in FAR 6.302 and when authorized by the Head of the Agency.

(b) *Exercise of option.* As part of the review required by FAR 17.605(b), the contracting officer shall assess whether competing the contract will produce a more advantageous offer than exercising the option. The incumbent contractor's past performance under the contract, the extent to which performance-based management contract provisions are present, or can be negotiated into, the contract, and the impact of a change in a contractor on the Department's discharge of its programs are considerations that shall be addressed in the contracting officer's decision that the exercise of the option is in the Government's best interest. The contracting officer's decision shall be approved by the Procurement Executive and the cognizant Assistant Secretary(s).

970.1702-2 Solicitation provision and contract clause.

(a) The contracting officer shall insert a provision substantially the same as the provision at 48 CFR (DEAR) 970.5204-73, Notice Regarding Options, in solicitations when the inclusion of an option to extend the term of the contract has been authorized.

(b) The contracting officer shall insert the clause at 48 CFR (DEAR) 970.5204-74, Option to extend the term of the contract, when the inclusion of an option to extend the term of the contract has been authorized.

7. Subpart 970.52 is amended by adding sections 970.5204-73, Notice regarding options, and 970.5204-74, Option to extend the term of the contract, to read as follows:

970.5204-73 Notice regarding options.

As prescribed in 48 CFR (DEAR) 970.1702-2(a), insert the following provision:

Notice Regarding Options (June 1996)

The contract resulting from this solicitation is expected to include one or more options to extend the term of the contract. Exercise of any option to extend the term of contract will be at the unilateral right of the Department of Energy. The contractor's performance under the basic contract, including any previously exercised options, will be among the significant considerations in the Department's decision to exercise any option.

970.5204-74 Option to extend the term of the contract.

As prescribed in 48 CFR (DEAR) 970.1702-2(b), insert the following clause:

Option to Extend the Term of The Contract (June 1996)

(a) The Department of Energy may unilaterally extend the term of this performance-based management contract by written notice to the contractor within [Insert the period of time in which the contracting officer has to exercise the option]; provided, that the Department of Energy shall give the contractor a preliminary written notice of its intent to extend at least twelve (12) months before the basic term of the contract expires. The preliminary notice does not commit the Department of Energy to an extension.

(b) The option(s) to extend the contract is identified in [Specify section of contract and clause number and name] of the contract. The Department of Energy may exercise any, or all, of the options identified in the contract. The total duration of this contract, including the exercise of any option(s) under this clause, shall not exceed 120 months.

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