

Final Regulatory Flexibility Analysis

24. In the Order, we conducted a Final Regulatory Flexibility Analysis, as required by section 603 of the Regulatory Flexibility Act, as amended by the Contract With America Advancement Act of 1996, Public Law 104-121, 110 Stat. 847 (1996). The changes we adopt in this Order do not affect that analysis.

List of Subjects**47 CFR Part 36**

Communications common carriers, Reporting and recordkeeping requirements, Telephone.

47 CFR Part 54

Libraries, Schools, Telecommunications, Telephone.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

Rule Changes

Parts 36 and 54 of title 47 of the Code of Federal Regulations are amended as follows:

PART 36—JURISDICTIONAL SEPARATIONS PROCEDURES: STANDARD PROCEDURES FOR SEPARATING TELECOMMUNICATIONS PROPERTY COSTS, REVENUES, EXPENSES, TAXES AND RESERVES FOR TELECOMMUNICATIONS COMPANIES

1. The authority citation for part 36 continues to read as follows:

Authority: 47 USC Secs. 151, 154 (i) and (j), and 205, 221(c), 254, 403, and 410.

2. Section 36.601 is amended by adding a last sentence to paragraph (a) to read as follows:

§ 36.601 General.

(a) * * * Beginning January 1, 1998, the expense adjustment calculated pursuant to this subpart will be administered and funded through the new universal service system discussed in part 54 of this chapter.

3. Section 36.621 is amended by revising paragraph (a)(4) introductory text, the first sentence of paragraph (a)(4)(ii), paragraph (a)(4)(ii)(A) and (a)(4)(ii)(B) and adding new paragraph (a)(4)(ii)(C) to read as follows:

§ 36.621 Study area total unseparated loop cost.

(a) * * *
(4) Corporate Operations Expenses, Operating Taxes and the benefits and rent portions of operating expenses, as reported in § 36.611(a)(5) attributable to

investment in C&WF Category 1.3 and COE Category 4.13. This amount is calculated by multiplying the total amount of these expenses and taxes by the ratio of the unseparated gross exchange plant investment in C&WF Category 1.3 and COE Category 4.13, as reported in § 36.611(a)(1), to the unseparated gross telecommunications plant investment, as reported in § 36.611(a)(6). Total Corporate Operations Expense, for purposes of calculating universal service support payments beginning January 1, 1998, shall be limited to the lesser of:

(i) * * *
(ii) A per-line amount computed according to paragraphs (a)(4)(ii)(A), (a)(4)(ii)(B), and (a)(4)(ii)(C) of this section. * * *

(A) For study areas with 6,000 or fewer working loops; [(\$27.12 minus (0.002 times the number of working loops)) times 1.15] or [1.15 × \$8,266 divided by the number of working loops], whichever is greater.

(B) For study areas with more than 6,000 but fewer than 17,988 working loops; [(\$72,024 divided by the number of working loops) + \$3.12] times 1.15.

(C) For study areas with 17,988 or more working loops; \$7.12 times 1.15, which equals \$8.19.

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PART 54—UNIVERSAL SERVICE

4. The authority citation for part 54 continues to read as follows:

Authority: 47 U.S.C. Secs. 1, 4(i), 201, 205, 214, and 254 unless otherwise noted.

5. Section 54.500 is amended by redesignating paragraphs (b) through (h) as paragraphs (c) through (i) and adding new paragraph (b) to read as follows:

§ 54.500 Terms and definitions.

* * * * *

(b) *Existing contract.* For the purpose of § 54.511(c), an "existing contract" is any signed contract for services eligible for discounts pursuant to this subpart between an eligible school or library as defined under § 54.501 and a service provider that either:

(1) Was signed prior to November 8, 1996; or

(2) Is limited to services provided before December 31, 1998 and was signed on or after November 8, 1996 but before the first date that the universal service competitive bidding system described in § 54.504 is operational. The competitive bidding system will be deemed to be operational when both the universal service administrator is ready to accept and post requests for service from schools and libraries on a website

and that website may be used by potential service providers.

* * * * *

6. Section 54.507 is amended by redesignating paragraph (f) as paragraph (g), and adding new paragraph (f) to read as follows:

§ 54.507 Cap.

* * * * *

(f) *Date services must be supplied.*

The administrator shall not approve funding for service received by a school or library before January 1, 1998.

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DEPARTMENT OF ENERGY**48 CFR Parts 909, 952, and 970**

RIN 1991-AB26

Acquisition Regulation; Revisions to Organizational Conflicts of Interest

AGENCY: Office of Procurement and Assistance Management, Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE) publishes today amendments to its Acquisition Regulation that effect changes to its Organizational Conflicts of Interest policies as a result of the repeal of the two statutory provisions upon which DOE's system for treating organizational conflicts of interest was based.

DATES: These regulations will be effective on August 29, 1997.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

I. Background

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C. Review Under the Regulatory Flexibility Act

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- F. Review Under Executive Order 12612
- G. Review Under Unfunded Mandate Reform Act of 1995
- H. Review Under Small Business Regulatory Enforcement Fairness Act of 1996

I. Background

Subsections (b) (2) and (5) of section 4304 of the Federal Acquisition Reform Act of 1996 (FARA), Public Law 104-106, repealed section 33 of the Federal Energy Administration Act of 1974 (15 U.S.C. 789) and section 19 of the Federal Nonnuclear Energy Research and Development Act of 1974 (42 U.S.C. 5918). These two statutory provisions provided the basis for the Department of Energy organizational conflict of interest (OCI) regulation that is codified at 48 CFR Subpart 909.5. As a result of the repeal of the underlying statutes, the Department has re-examined the OCI systems established in the Department of Energy Acquisition Regulation (DEAR) and the Federal Acquisition Regulation (FAR) and is amending the DEAR to implement and supplement the current FAR provisions in the manner described below. The objective of the revision is to streamline the Department's OCI procedure and reduce the burdens on contractors, but also to preserve the necessary protections provided by an OCI control system.

A proposed rule to accomplish this purpose was published for public comment on August 6, 1996, at 61 FR 40775.

II. Discussion of Public Comments

The Department received five sets of comments in response to the publication of the proposed rule. Three sets of those comments were from entities that manage and operate DOE facilities, one of which is a university and two of which are large businesses. Two sets of comments were received from trade associations. The comments fall into four areas and are discussed below.

A. Scope of Coverage

One commenter suggested that it be made clear that "advisory and assistance services" do not include research contracts with universities. The Department believes that the FAR definition is clear. See FAR 37.201. The definition of advisory and assistance services provides that such services may be used in support of research and development; however, it does not include research and development itself. Therefore, the Department sees no need for clarification in the text of the rule, and intends that each procurement

request for support services be evaluated against that definition to determine whether the services to be procured are advisory and assistance services and, therefore, should be covered by the organizational conflicts of interest process.

Another commenter questioned the use of the clause at 952.209-72 in "all contracts, rather than limiting its application to the contractor's performance of technical consulting and management support services." The basis of this comment is unclear. The proposed rule and the final rule provide for the use of the organizational conflicts of interest clause only in those contracts that provide advisory and assistance services and that are valued in excess of the simplified acquisition threshold. The Department does not intend that the clause be used routinely in other contracts. It should be noted, however, that FAR 9.502(b) provides that the applicability of Subpart 9.5 is not limited to any particular kind of acquisition and thus allows for the possibility that the contracting officer will determine that it is appropriate in rare instances to include the organizational conflicts of interest clause in individual contracts involving other types of work.

B. Disclosure Requirement

Two commenters suggested that the Department ought to limit the disclosure requirement to that of the FAR. In the time since publication of the proposed rule, the FAR solicitation provision has been deleted. See 62 FR 224 (1997). However, Subsection 9.507-1 still provides for including a solicitation provision in affected solicitations. The revised FAR requires that this solicitation provision, among other things, state the nature of any potential conflicts identified by the contracting officer, but is not explicit about how the contracting officer is to make this judgment.

The Department's substantial experience in the area of organizational conflicts of interest has demonstrated that specificity in defining disclosure requirements facilitates the entire process by providing the contracting officer with the best information available. The quality of the ultimate decision as to whether an organizational conflict of interest may exist is only as good as the information that the decision-maker has at hand. The ability to craft meaningful remedies to situations that may present an organizational conflict of interest is as well dependent upon having complete and accurate information before the decision-maker.

One commenter suggested that "[i]n many cases, agency personnel are aware of the issues and activities that would impair the objectivity of their actual or potential contractors or that would impact the fairness of a procurement." The Department disagrees. One type of conflict of interest consists of conflicting financial, contractual, or organizational interests of the individual contractor that might reasonably be expected to impair the objectivity of the contractor or its ability to render impartial analysis or advice. The potential for conflicting financial interests can be meaningfully identified only by a disclosure of relevant interests, and there is no meaningful way to address this facet of organizational conflicts of interest without disclosure by the proposer.

The final rule supplements the FAR disclosure requirements to ensure that the apparent successful offeror discloses all information relevant to the OCI determination. The Department has limited the disclosure period nominally to 12 months. Also, the Department has limited the requirement to the apparent successful offeror and does not require disclosure from subcontractors, except under management and operating contracts and other contracts for the operation or remediation of a DOE site or facility, or affiliates.

C. The Organizational Conflicts of Interest Clause

Other commenters questioned various portions of the clause.

1. Affiliates

Three commenters argued that affiliates of the contractor should not be covered by the organizational conflicts of interest clause at 952.209-72. The Department believes this provision is necessary because an organizational conflict of interest may arise where the interests of an affiliate may affect the objectivity of a contractor, or an affiliate may benefit from an unfair competitive advantage. A detailed discussion of this point was contained in the proposed rule at 61 FR 40777 (Aug. 6, 1996). Affiliates are unaffected by this clause unless they attempt to propose in situations described in the clause that present the potential for an organizational conflict of interest. The FAR provides for the drafting of a clause to deal with organizational conflicts of interest. The clause in this final rule has been drafted to deal systematically with the potential sources of organizational conflicts of interest relating to the performance of the contractor.

In this regard, the clause has been drafted to protect the integrity of the

procurement process as it relates to future procurements and to protect the integrity of any advice or recommendations produced by the contractor in the performance of its contract, which advice or recommendations then may be used in Departmental decision-making and policy setting processes.

2. Contracting Officer Discretion

Another commenter believed that the clause limits the discretion of the contracting officer to deal with identified organizational conflicts of interest. The Department disagrees. The clause provides a generic remedy to almost every type of post-contract award organizational conflict of interest. In addition, section 909.507-2 of this rule provides that "[c]ontracting officers may make appropriate modifications where necessary to address the potential for organizational conflicts of interest in individual contracts." This language provides adequate authority for contracting officers to consider and adopt appropriate changes to the clause. The contracting officer is, of course, required by 909.507-2 to determine the duration of the bar in paragraph (b)(1)(i) against a contractor's or its affiliate's proposing on work "stemming directly from" work performed under the contract.

3. Five Year Prohibition

Two other commenters believed that the prohibitions against the contractor or its affiliates proposing for five years on work stemming "directly from the contractor's performance of work under this contract" or where the contractor prepares a statement of work or specifications for future competitive solicitations is excessive. The Department has made a change to allow the contracting officer more discretion in using the clause at 952.209-72. As a preliminary matter, one should recognize that the prohibitions of the clause do not prevent the contractor or its affiliates from proposing on the follow-on support services contract.

The clause has been revised to provide the contracting officer the discretion to determine the term of the bar in paragraph (b)(1)(i) against a contractor's or its affiliate's proposing on work "stemming directly from" work performed under the contract. That term should be between three and five years in the normal contract for advisory and assistance services, but the contracting officer may select a period of greater or lesser duration.

E. Subcontracts

Comments were received questioning the flowdown of the organizational conflicts of interest concerns to subcontracts for advisory and assistance services valued in excess of the simplified acquisition threshold, particularly in light of the general Government-wide practice of not applying organizational conflicts of interest to subcontracts. The Department has chosen to limit the mandatory flowdown of organizational conflicts of interest coverage to subcontracts under management and operating contracts and other contracts for the operation or management of a DOE facility or environmental remediation of a specific DOE site or sites. To achieve this result, the organizational conflict of interest in those contracts will contain Alternate I to the organizational conflicts of interest clause at 952.209-72.

Contractors under other contracts awarded by DOE generally will not be required to acquire disclosure from prospective subcontractors and will not be required to flowdown the clause at 952.209-72 in subcontracts for advisory and assistance services valued in excess of the simplified acquisition threshold. However, there is provision for the contracting officer to use Alternate I in other contracts where he or she believes there will be sufficient subcontracting for advisory and assistance services awarded to warrant its use. It is believed that this change will limit the burden of organizational conflicts of interest requirements, but permit discretionary application where the nature and extent of anticipated subcontracting warrant additional protection for the Government.

III. Procedural Requirements

A. Review Under Executive Order 12866

Today's 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, these final regulations meet the relevant standards of Executive Order 12988.

C. Review Under the Regulatory Flexibility Act

This final rule has been reviewed under the Regulatory Flexibility Act of 1980, 5 U.S.C. 601 *et seq.*, that requires preparation of an initial regulatory flexibility analysis for any proposed rule which is likely to have significant economic impact on a substantial number of small entities. In the proposed rule, DOE certified that these regulations will not have a significant economic impact on a substantial number of small entities, and, therefore, no initial regulatory flexibility analysis was prepared. The Department received no comments on this certification.

D. Review Under the Paperwork Reduction Act

No additional information or record keeping requirements are imposed by this rulemaking. Accordingly, no OMB clearance is required under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

E. Review Under the National Environmental Policy Act

DOE has concluded that promulgation of this rule falls into a class of actions which would not individually or cumulatively have significant impact on the human environment, as determined by DOE's regulations (10 CFR Part 1021,

Subpart D) implementing the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*). Specifically, this rule is categorically excluded from NEPA review because the amendments made to the DEAR would be strictly procedural (categorical exclusion A6). Therefore, this rule does not require an environmental impact statement or environmental assessment pursuant to NEPA.

F. Review Under Executive Order 12612

Executive Order 12612, (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 the various levels of Government. If there are sufficient substantial direct effects, then the Executive Order requires the preparation of a federalism assessment to be used in all decisions involved in promulgating and implementing a policy action. This rule revises certain policy and procedural requirements. States which contract with DOE will be subject to this rule. However, DOE has determined that this rule will not have a substantial direct effect on the institutional interests or traditional functions of the States.

G. Review Under Unfunded Mandate Reform Act of 1995

The Unfunded Mandate Reform Act of 1995 requires preparation of a budgetary impact statement for rules that may result in estimated costs to state, local, or tribal governments in the aggregate, or in the private sector, of \$100 million or more. It also requires a plan for informing and advising any small governments that may be uniquely impacted by the rule.

DOE has determined that the rule will not impose estimated costs of \$100 million or more and that it will not significantly or uniquely affect small government. Accordingly, there are no actions required to comply with the Unfunded Mandate Reform Act of 1995.

H. Review Under Small Business Regulatory Enforcement Fairness Act of 1996

Prior to the effective date of this regulatory action, set forth above, DOE will submit a report to Congress containing the rule and other information, as required by 5 U.S.C. 801(a)(1)(A). The report will state that the rule is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 48 CFR Parts 909, 952, and 970

Government Procurement.

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 909—CONTRACTOR QUALIFICATIONS

1. The authority citation for Part 909 continues to read as follows:

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

2. Subpart 909.5 is revised to read as set forth below:

Subpart 909.5—Organizational and Consultant Conflicts of Interest

909.503 Waiver.

909.504 Contracting Officer's Responsibility.

909.507 Solicitation provisions and contract clause.

909.507-1 Solicitation provisions.

909.507-2 Contract Clause.

§ 909.503 Waiver.

Heads of Contracting Activities are delegated the authorities in 48 CFR (FAR) 9.503 regarding waiver of OCI requirements.

§ 909.504 Contracting Officer's Responsibility. (DOE coverage-paragraphs (d) and (e)).

(d) The contracting officer shall evaluate the statement by the apparent successful offeror or, where individual contracts are negotiated with all firms in the competitive range, all such firms for interests relating to a potential organizational conflict of interest in the performance of the proposed contract. Using that information and any other credible information, the contracting officer shall make written determination of whether those interests create an actual or significant potential organizational conflict of interest and identify any actions that may be taken to avoid, neutralize, or mitigate such conflict. In fulfilling their responsibilities for identifying and resolving potential conflicts, contracting officers should avoid creating unnecessary delays, burdensome information requirements, and excessive documentation.

(e) The contracting officer shall award the contract to the apparent successful offeror unless a conflict of interest is determined to exist that cannot be avoided, neutralized, or mitigated. Before determining to withhold award

based on organizational conflict of interest considerations, the contracting officer shall notify the offeror, provide the reasons therefor, and allow the offeror a reasonable opportunity to respond. If the conflict cannot be avoided, neutralized, or mitigated to the contracting officer's satisfaction, the contracting officer may disqualify the offeror from award and undertake the disclosure, evaluation, and determination process with the firm next in line for award. If the contracting officer finds that it is in the best interest of the United States to award the contract notwithstanding a conflict of interest, a request for waiver shall be submitted in accordance with 48 CFR 909.503. The waiver request and decisions shall be included in the contract file.

§ 909.507 Solicitation provisions and contract clause.

§ 909.507-1 Solicitation provisions. (DOE coverage-paragraph (e)).

(e) The contracting officer shall insert the provision at 48 CFR 952.209-8, Organizational Conflicts of Interest Disclosure-Advisory and Assistance Services, in solicitations for advisory and assistance services expected to exceed the simplified acquisition threshold. In individual procurements, the Head of the Contracting Activity may increase the period subject to disclosure in 952.209-8 (c)(1) up to 36 months.

§ 909.507-2 Contract Clause.

(a) (1) The contracting officer shall insert the clause at 48 CFR 952.209-72, Organizational Conflicts of Interest, in each solicitation and contract for advisory and assistance services expected to exceed the simplified acquisition threshold.

(2) Contracting officers may make appropriate modifications where necessary to address the potential for organizational conflicts of interest in individual contracts. Contracting officers shall determine the appropriate term of the bar of paragraph (b)(1)(i) of the clause at 48 CFR 952.209-72 and enter that term in the blank provided. In the usual case of a contract for advisory and assistance services a period of three, four, or five years is appropriate; however, in individual cases the contracting officer may insert a term of greater or lesser duration.

(3) The contracting officer shall include Alternate I with the clause in instances in which a meaningful amount of subcontracting for advisory and assistance services is expected.

(b) Contracts, which are not subject to part 970 but provide for the operation of

a DOE site or facility or environmental remediation of a specific DOE site or sites, shall contain the organizational conflict of interest clause at 48 CFR 952.209-72. The organizational conflicts of interest clause in such contracts shall include Alternate I to that clause.

PART 952—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. The authority citation for Part 952 continues to read as follows:

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

4. Subsection 952.209-8 is added as follows:

§ 952.209-8 Organizational Conflicts of Interest-Disclosure.

As prescribed in 48 CFR 909.507-1(e), insert the following provision:

Organizational Conflicts of Interest Disclosure-Advisory and Assistance Services (June 1997)

(a) Organizational conflict of interest means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.

(b) An offeror notified that it is the apparent successful offeror shall provide the statement described in paragraph (c) of this provision. For purposes of this provision, "apparent successful offeror" means the proposer selected for final negotiations or, where individual contracts are negotiated with all firms in the competitive range, it means all such firms.

(c) The statement must contain the following:

(1) A statement of any past (within the past twelve months), present, or currently planned financial, contractual, organizational, or other interests relating to the performance of the statement of work. For contractual interests, such statement must include the name, address, telephone number of the client or client(s), a description of the services rendered to the previous client(s), and the name of a responsible officer or employee of the offeror who is knowledgeable about the services rendered to each client, if, in the 12 months preceding the date of the statement, services were rendered to the Government or any other client (including a foreign government or person) respecting the same subject matter of the instant solicitation, or directly relating to such subject matter. The agency and contract number under which the services were rendered must also be included, if applicable. For financial interests, the statement must include the nature and extent of the interest and any entity or entities involved in the financial relationship. For these and any other interests enough such information must be provided to allow a

meaningful evaluation of the potential effect of the interest on the performance of the statement of work.

(2) A statement that no actual or potential conflict of interest or unfair competitive advantage exists with respect to the advisory and assistance services to be provided in connection with the instant contract or that any actual or potential conflict of interest or unfair competitive advantage that does or may exist with respect to the contract in question has been communicated as part of the statement required by (b) of this provision.

(d) Failure of the offeror to provide the required statement may result in the offeror being determined ineligible for award. Misrepresentation or failure to report any fact may result in the assessment of penalties associated with false statements or such other provisions provided for by law or regulation. (End of provision)

§ 952.209-70 [Removed]

5. Subsection 952.209-70 is removed.

6. Subsection 952.209-72 is revised to read as follows:

§ 952.209-72 Organizational conflicts of interest.

As prescribed at 48 CFR 909.507-2, insert the following clause:

Organizational Conflicts of Interest (June 1997)

(a) Purpose. The purpose of this clause is to ensure that the contractor (1) is not biased because of its financial, contractual, organizational, or other interests which relate to the work under this contract, and (2) does not obtain any unfair competitive advantage over other parties by virtue of its performance of this contract.

(b) Scope. The restrictions described herein shall apply to performance or participation by the contractor and any of its affiliates or their successors in interest (hereinafter collectively referred to as "contractor") in the activities covered by this clause as a prime contractor, subcontractor, cosponsor, joint venturer, consultant, or in any similar capacity. For the purpose of this clause, affiliation occurs when a business concern is controlled by or has the power to control another or when a third party has the power to control both.

(1) Use of Contractor's Work Product. (i) The contractor shall be ineligible to participate in any capacity in Department contracts, subcontracts, or proposals therefor (solicited and unsolicited) which stem directly from the contractor's performance of work under this contract for a period of (Contracting Officer see DEAR 9.507-2 and enter specific term) years after the completion of this contract. Furthermore, unless so directed in writing by the contracting officer, the Contractor shall not perform any advisory and assistance services work under this contract on any of its products or services or the products or services of another firm if the contractor is or has been substantially involved in their development or marketing. Nothing in this subparagraph shall preclude the contractor from competing for follow-on contracts for advisory and assistance services.

(ii) If, under this contract, the contractor prepares a complete or essentially complete statement of work or specifications to be used in competitive acquisitions, the contractor shall be ineligible to perform or participate in any capacity in any contractual effort which is based on such statement of work or specifications. The contractor shall not incorporate its products or services in such statement of work or specifications unless so directed in writing by the contracting officer, in which case the restriction in this subparagraph shall not apply.

(iii) Nothing in this paragraph shall preclude the contractor from offering or selling its standard and commercial items to the Government.

(2) Access to and use of information. (i) If the contractor, in the performance of this contract, obtains access to information, such as Department plans, policies, reports, studies, financial plans, internal data protected by the Privacy Act of 1974 (5 U.S.C. 552a), or data which has not been released or otherwise made available to the public, the contractor agrees that without prior written approval of the contracting officer it shall not:

(A) use such information for any private purpose unless the information has been released or otherwise made available to the public;

(B) compete for work for the Department based on such information for a period of six (6) months after either the completion of this contract or until such information is released or otherwise made available to the public, whichever is first;

(C) submit an unsolicited proposal to the Government which is based on such information until one year after such information is released or otherwise made available to the public; and

(D) release such information unless such information has previously been released or otherwise made available to the public by the Department.

(ii) In addition, the contractor agrees that to the extent it receives or is given access to proprietary data, data protected by the Privacy Act of 1974 (5 U.S.C. 552a), or other confidential or privileged technical, business, or financial information under this contract, it shall treat such information in accordance with any restrictions imposed on such information.

(iii) The contractor may use technical data it first produces under this contract for its private purposes consistent with paragraphs (b)(2)(i) (A) and (D) of this clause and the patent, rights in data, and security provisions of this contract.

(c) Disclosure after award. (1) The contractor agrees that, if changes, including additions, to the facts disclosed by it prior to award of this contract, occur during the performance of this contract, it shall make an immediate and full disclosure of such changes in writing to the contracting officer. Such disclosure may include a description of any action which the contractor has taken or proposes to take to avoid, neutralize, or mitigate any resulting conflict of interest. The Department may, however, terminate the contract for convenience if it deems such termination to be in the best interest of the Government.

(2) In the event that the contractor was aware of facts required to be disclosed or the existence of an actual or potential organizational conflict of interest and did not disclose such facts or such conflict of interest to the contracting officer, DOE may terminate this contract for default.

(d) Remedies. For breach of any of the above restrictions or for nondisclosure or misrepresentation of any facts required to be disclosed concerning this contract, including the existence of an actual or potential organizational conflict of interest at the time of or after award, the Government may terminate the contract for default, disqualify the contractor from subsequent related contractual efforts, and pursue such other remedies as may be permitted by law or this contract.

(e) Waiver. Requests for waiver under this clause shall be directed in writing to the contracting officer and shall include a full description of the requested waiver and the reasons in support thereof. If it is determined to be in the best interests of the Government, the contracting officer may grant such a waiver in writing.

(End of clause)

ALTERNATE I: In accordance with 909.507-2 and 970.0905, include the following alternate in the specified types of contracts.

(f) Subcontracts. (1) The contractor shall include a clause, substantially similar to this clause, including this paragraph (f), in subcontracts expected to exceed the simplified acquisition threshold determined in accordance with FAR Part 13 and involving the performance of advisory and assistance services as that term is defined at FAR 37.201. The terms "contract," "contractor," and "contracting officer" shall be appropriately modified to preserve the Government's rights.

(2) Prior to the award under this contract of any such subcontracts for advisory and assistance services, the contractor shall obtain from the proposed subcontractor or consultant the disclosure required by DEAR 909.507-1, and shall determine in writing whether the interests disclosed present an actual or significant potential for an organizational conflict of interest. Where an actual or significant potential organizational conflict of interest is identified, the contractor shall take actions to avoid, neutralize, or mitigate the organizational conflict to the satisfaction of the contractor. If the conflict cannot be avoided or neutralized, the contractor must obtain the approval of the DOE contracting officer prior to entering into the subcontract.

(End of alternate)

PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS

7. 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).

8. Section 970.0905 is revised to read as follows:

§ 970.0905 Organizational conflicts of interest.

Management and operating contracts shall contain an organizational conflict of interest clause substantially similar to the clause at 48 CFR 952.209-72 and appropriate to the statement of work of the individual contract. In addition, the contracting officer shall assure that the clause contains appropriate restraints on intra-corporate relations between the contractor's organization and personnel operating the Department's facility and its parent corporate body and affiliates, including personnel access to the facility, technical transfer of information from the facility, and the availability flowing from performance of the contract. The Contracting Officer is responsible for ensuring that M&O contractors adopt policies and procedures in the award of subcontracts that will meet the Department's need to safeguard against a biased work product and an unfair competitive advantage. To this end, the organizational conflicts of interest clause in the management and operating contract shall include Alternate I.

9. Subsection 970.5204-44 is amended by revising clause paragraph (b)(15) to read as follows:

§ 970.5204-44 Flowdown of contract requirements to subcontracts.

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(b) * * *

(15) Organizational Conflicts of Interest. Clause at 48 CFR (DEAR) 952.209-72 in accordance with 48 CFR (DEAR) 970.0905.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

(Docket No. ; I.D. 021197C)

International Code of Conduct for Responsible Fisheries; Implementation Plan

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of final implementation plan.

SUMMARY: On July 25, 1996, NMFS announced the availability of a Draft Implementation Plan for the Code of

Conduct for Responsible Fisheries (Implementation Plan) in the **Federal Register** and requested comments by September 23, 1996. At the close of this period, it became clear that several of the public comments raised substantive issues. During the same period, two other relevant developments took place. First, in October 1996, the Congress passed the Sustainable Fisheries Act (SFA) which contained numerous and significant amendments to the Magnuson-Stevens Fishery Conservation and Management Act; and, second, NOAA/NMFS moved into the final and substantive phase of its long-term program planning exercise, the NOAA Fisheries Strategic Plan (Strategic Plan).

The requirements of the SFA and the Strategic Plan point in the same directions as the Code of Conduct. In effect, NMFS will implement the Code of Conduct domestically as it carries out its Congressionally mandated responsibilities and the objectives of the Strategic Plan. Accordingly, NMFS redrafted the Implementation Plan, taking into account (1) the comments received on the first draft; (2) the guidance provided by Congress in the SFA; and (3) the long-term program planning that was being developed through the Strategic Plan.

The revised Implementation Plan was made available for public comment in a **Federal Register** notice on March 12, 1997 (62 FR 11410), and comments were requested by April 28, 1997. The public may request a copy of the final plan (see **ADDRESSES**) or access it on the NMFS home page at <http://www.nmfs.gov>.

ADDRESSES: Questions regarding this document may be directed to Matteo Milazzo, International Fisheries Division, Office of Sustainable Fisheries, NMFS, 1315 East-West Highway, Silver Spring, MD 20910. **FOR FURTHER INFORMATION CONTACT:** Matteo Milazzo, 301-713-2276.

SUPPLEMENTARY INFORMATION: For background and rationale for the Implementation Plan, please refer to the notices of availability published on July 25, 1996 (61 FR 38703) and March 12, 1997 (62 FR 11410).

Comments and Responses

Five written comments were received regarding the proposed Implementation Plan. All were generally supportive of the Implementation Plan but made specific suggestions about various of its provisions. Specific comments and responses are given below:

Comment: One response urged that the Implementation Plan should be