

referred to in paragraph (g)(1) of this clause is not allowable.

(4) The term "contractor's managerial personnel" is defined in the Property clause in this contract.

(k) The contractor may at its own expense and not as an allowable cost procure for its own protection insurance to compensate the contractor for any unallowable or unreimbursable costs incurred in connection with contract performance.

(l) If any suit or action is filed or any claim is made against the contractor, the cost and expense of which may be reimbursable to the contractor under this contract, and the risk of which is then uninsured or is insured for less than the amount claimed, the contractor shall—

(1) Immediately notify the contracting officer and promptly furnish copies of all pertinent papers received;

(2) Authorize Department representatives to collaborate with: in-house or DOE-approved outside counsel in settling or defending the claim; or counsel for the insurance carrier in settling or defending the claim if the amount of the liability claimed exceeds the amount of coverage, unless precluded by the terms of the insurance contract; and

(3) Authorize Department representatives to settle the claim or to defend or represent the contractor in and/or to take charge of any litigation, if required by the Department, if the liability is not insured or covered by bond. In any action against more than one Department contractor, the Department may require the contractor to be represented by common counsel. Counsel for the contractor may, at the contractor's own expense, be associated with the Department representatives in any such claim or litigation. (End of Clause)

952.236-70 [Removed]

21. Section 952.236-70 is removed.

952.249-70 [Removed]

22. Section 952.249-70 is removed.

PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS

23. The authority citation for part 970 continues to read as follows:

Authority: 42 U.S.C. 2201; 42 U.S.C. 7101 *et seq.*; 50 U.S.C. 2401 *et seq.*

24. 970.3102-05-53 is redesignated as 970.3102-05-70.

25. 970.5228-1 is amended by revising paragraphs (e)(2), (h) introductory language, and (j)(4) to read as follows:

970.5228-1 Insurance-litigation and claims.

* * * * *

(e) * * *

(2) For liabilities (and reasonable expenses incidental to such liabilities, including litigation costs) to third persons not compensated by insurance or otherwise without regard to and as an exception to the clause of this contract entitled, "Obligation of Funds."

* * * * *

(h) In addition to the cost reimbursement limitations contained in 48 CFR part 31, as supplemented by 48 CFR 970.31, and notwithstanding any other provision of this contract, the contractor's liabilities to third persons, including employees but excluding costs incidental to worker's compensation actions, (and any expenses incidental to such liabilities, including litigation costs, counsel fees, judgments and settlements) shall not be reimbursed if such liabilities were caused by contractor managerial personnel's—

* * * * *

(j) * * *

(4) The term "contractor's managerial personnel" is defined in clause paragraph (j) of 48 CFR 970.5245-1.

* * * * *

[FR Doc. 02-7300 Filed 3-27-02; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

48 CFR Parts 904, 952, and 970

RIN 1991-AB42

Acquisition Regulation: Security Amendments to Implement Executive Order 12829, National Industrial Security Program

AGENCY: Department of Energy (DOE).

ACTION: Interim final rule.

SUMMARY: The Department of Energy (DOE) is amending the Department of Energy Acquisition Regulation (DEAR) to implement Executive Order 12829, National Industrial Security Program, dated January 6, 1993, and Section 828 of the National Defense Authorization Act for Fiscal Year 1997, and to bring the DEAR into conformance with existing practices. DOE is making these changes to its security system to ensure a uniform and simplified security system for contractors and others requiring access authorization for classified national security or restricted atomic energy information. The changes also include a provision to allow the Secretary of Energy to waive the prohibition on award of a national security contract to an entity controlled by a foreign government if an environmental restoration requirement is involved.

EFFECTIVE DATE: This interim final rule will be effective May 28, 2002.

Comment date: Comments should be submitted on or before April 29, 2002.

ADDRESSES: Mail comments to Richard Langston, Office of Procurement and Assistance Policy (MA-51), U.S. Department of Energy, 1000 Independence Ave. SW., Washington, DC 20585.

Submit electronic comments to richard.langston@pr.doe.gov.

FOR FURTHER INFORMATION CONTACT:

Richard B. Langston, Office of Procurement and Assistance Policy (MA-51), 202-586-8247 or by electronic mail addressed as above.

SUPPLEMENTARY INFORMATION:

I. Background

II. Explanation of Revisions

III. Procedural Requirements

A. Review Under Executive Order 12866.

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E. Review Under the National Environmental Policy Act.

F. Review Under Executive Order 13132.

G. Review Under the Unfunded Mandates Reform Act of 1995.

H. Review Under the Treasury and General Government Appropriations Act, 1999.

I. Review Under the Small Business Regulatory Enforcement Fairness Act of 1996.

J. Review Under Executive Order 13211.

I. Background

Executive Order 12829, National Industrial Security Program (January 6, 1993), requires a uniform system for classifying, safeguarding, and declassifying national security information. DOE is making these changes to its security system to ensure a uniform and simplified security system for contractors and others requiring access authorization for classified national security or restricted atomic energy information. The Federal agencies are adopting the National Industrial Security Program (NISP) as the uniform Federal industrial security program within the limitations of their separate statutory requirements. Among the more significant features of the new rule is the use of a Standard Form 328, Certificate Pertaining to Foreign Interests, to gather information relative to foreign ownership, control or influence. Previously, DOE used a separate questionnaire of its own with more and somewhat different questions. Now all agencies will collect the same information. This feature will result in the greatest savings for both contractors and Federal agencies because agencies

will accept each others' clearances on a reciprocal basis, in most circumstances. A DOE clearance was not previously valid for a Department of Defense (DOD) contract and vice versa. In most instances, a contractor interested in seeking a contract requiring a DOE clearance will already have either a DOD or a DOE clearance, and there will be no need to submit the detailed information required to establish a Facility Clearance.

Section 2536(a) of 10 U.S.C. prohibits award of a DOD or DOE contract under a national security program to an entity controlled by a foreign government if it is necessary for that entity to be given access to a proscribed category of information to perform the contract. The cognizant Secretary is authorized to waive this prohibition if the Secretary determines that a waiver is essential to the national security interests of the United States. That prohibition is implemented by Subpart 904.7100 of the Department of Energy Acquisition Regulation (DEAR).

Section 2536(b)(1)(B) of 10 U.S.C. provides separate waiver authority for a contract for environmental restoration, remediation, or waste management at a DOD or DOE facility. For such a contract, the prohibition on award of a contract under a national security program to an entity controlled by a foreign government which requires access to a proscribed category of information to perform the contract may be waived only if the Secretary concerned determines that (1) a waiver will advance the environmental restoration, remediation, or waste management objectives of the cognizant Department, (2) a waiver will not harm the national security interests of the United States, and (3) the entity to which the contract is to be awarded is controlled by a foreign government with which the cognizant Secretary has authority to exchange Restricted Data under section 144.c. of the Atomic Energy Act of 1954 (42 U.S.C. 2164(c)). Section 904.7102 of the DEAR is being revised to reflect this waiver authority.

In order to implement 10 U.S.C. 2536 and the National Industrial Security Program in a timely manner, the Department previously issued interim guidance to its personnel in two Acquisition Letters. Acquisition Letter 97-03 was issued February 4, 1997 to implement the requirements of 10 U.S.C. 2536. Acquisition Letter 99-03 was issued April 2, 1999 to implement the National Industrial Security Program. These issuances will be cancelled upon the effective date of this rule.

II. Explanation of Revisions

We have made the following changes to the DEAR:

1. Restated the authority citation.
2. Added definitions of "Access Authorization" and "Facility Clearance," revised the definitions of "Classified Information" and "Restricted Data," and updated the Executive Order reference at 904.401;
3. Added the word "industrial" between "DOE" and "security" to reflect the uniform nature of the DOD and DOE industrial security programs, added references to the applicable Executive Orders, and substituted the words "Restricted Data" for the words "national security information" in the reference to 10 CFR part 1045 at 904.402;
4. At 904.404, the title is changed from "Contract clause" to "Solicitation provision and contract clause," revisions are made in paragraphs (d)(1) and (d)(2), and a new paragraph (d)(5) is added;
5. Changed the title of Subpart 904.70 "Foreign Ownership, Control or Influence Over Contractors" to "Facility Clearance";
6. Revised the text of 904.7000 to substitute terminology better suited to the National Industrial Security Program;
7. Added a definition for "Facility Clearance" at 904.7002;
8. Revised 904.7003 by making minor wording changes at paragraphs (a) and (b) for brevity and clarity;
9. Removed 904.7005, Solicitation provision and contract clause;
10. Removed the words "a company owned by" which precede the words "an entity controlled by a foreign government" and changed "company" to "entity" following the words "for that" in 904.7100, Scope of Subpart.
11. Added an additional waiver authority for projects involving environmental restoration, remediation or waste management at a DOE site from the prohibition for the national security program on contracting with foreign government controlled entities in 904.7102;
12. Revised 904.7103, Solicitation provision and contract clause, by removing the words "with its Alternate I" at the end of paragraph (a) and changing the citation "952.204-74" to read "952.204-2" at the end of paragraph (b).
13. Revised the Security clause at 952.204-2 by removing the existing paragraph (j) and adding a new paragraph (j), Foreign Ownership Control and Influence;
14. Replaced the current "Foreign Ownership, Control or Influence Over

Contractor" with a new provision entitled "Facility Clearance" at 952.204-73;

15. Removed the clause "Foreign Ownership, Control or Influence Over Contractor" at 952.204-74;

16. Restated the authority citation for Part 970.

17. Revised 970.0404-1, Definitions, to add definitions for "Access Authorization" and "Facility Clearance" and to revise the definition of Restricted Data;

18. Revised 970.0404-2, General, to substitute a revised paragraph (a), delete paragraphs (b) through (d) and to redesignate the existing paragraph (e) as paragraph (b);

19. Revised 970.0404-3, Responsibilities of contracting officers, to delete paragraph (a) which is inconsistent with National Industrial Security Program procedures. Paragraphs (b) and (c) will be retained but will be designated paragraphs (a) and (b).

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 rule is 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, this interim final rule meets the relevant standards of Executive Order 12988.

C. Review Under the Regulatory Flexibility Act

This interim final rule has been reviewed under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, which requires preparation of an initial regulatory flexibility analysis for any rule that is likely to have significant economic impact on a substantial number of small entities. This rule, which would implement provisions of Executive Order 13101 concerning use of recycled materials, would not have a significant economic impact on small entities. While rule requirements may flow down to subcontractors in certain circumstances, the costs of compliance are not estimated to be large and, in any event, would be reimbursable expenses under the contract or subcontract.

Accordingly, DOE certifies that this rule would not have a significant economic impact on a substantial number of small entities, and, therefore, no regulatory flexibility analysis has been prepared.

D. Review Under the Paperwork Reduction Act

Information collection or record keeping requirements contained in this rulemaking have been previously cleared under Office of Management and Budget paperwork clearance package Number 1910-0300. There are no new burdens imposed by this rule.

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 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 13132

Executive Order 13132 (64 FR 43255, August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined today's rule and has determined that it does not preempt State law and does not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) requires each agency to assess the effects of Federal regulatory action on State, local and tribal governments, and the private sector. The Department has determined that today's regulatory action does not impose a Federal mandate on State, local or tribal governments or on the private sector.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105-277), requires Federal agencies to issue a Family Policymaking Assessment for any rule or policy that may affect family well-being. This rulemaking will have no impact on family well-being.

I. Review Under the Small Business Regulatory Enforcement Fairness Act of 1996

As required by 5 U.S.C. 801, the Department of Energy will report to Congress promulgation of this rule prior to its effective date. The report will state that it has been determined that the rule is not a "major rule" as defined by 5 U.S.C. 804(3).

J. Review Under Executive Order 13211

Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use, (66 FR 28355, May 22, 2001) requires Federal agencies to

prepare and submit to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, a Statement of Energy Effects for any proposed significant energy action. A "significant energy action" is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

Today's rule is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

List of Subjects in 48 CFR Parts 904, 952 and 970

Government procurement.

Issued in Washington, DC, on March 19, 2002.

Spencer Abraham,
Secretary of Energy.

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.

1. The authority citation for parts 904 and 952 is revised to read as follows:

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

PART 904—ADMINISTRATIVE MATTERS

2. Section 904.401 is revised to read as follows:

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).

3. Section 904.402 is revised to read as follows:

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.

4. Section 904.404 is amended by revising the title and paragraph (d)(1), revising the paragraph (d)(2) heading, revising the phrase "included in DOE 1240.2 (see current version.), Attachment 3, and any subsequent changes" to read "referenced in DOE N 142.1" in the second sentence of paragraph (d)(3), and by adding (d)(5) to read as follows:

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

(d) * * *

(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 * * *

* * * * *

(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.

904.70 [Amended]

5. Subpart 904.70 is amended by revising the title "Foreign Ownership, Control, or Influence Over Contractors" to read "Facility Clearance."

6. Section 904.7000 is revised to read as follows:

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.

7. Section 904.7002 is amended by adding the definition of "Facility Clearance" in alphabetical order to read as follows:

904.7002 Definitions.

* * * * *

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

* * * * *

8. Section 904.7003 is amended by revising paragraphs (a) and (b) as follows:

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.

* * * * *

904.7005 [Removed]

9. Section 904.7005, Solicitation provision and contract clause, is removed.

904.7100 [Amended]

10. In Section 904.7100, remove the words "a company owned by" and revise the word "company" following the words "for that" to read "entity".

11. Section 904.7102 is revised to read as follows:

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

12. Section 904.7103, Solicitation provision and contract clause, is amended by deleting the words "with its Alternate I" at the end of paragraph (a) and by revising paragraph (b) to read as follows:

904.7103 Solicitation Provision and Contract Clause.

(a) * * *

(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.

PART 952—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

13. Section 952.204-2 is amended by revising the clause date and paragraph (j) to read as follows:

952.204-2 Security Requirements.

* * * * *

Security (May 2002)

* * * * *

(j) Foreign Ownership, Control or Influence.

(1) The Contractor shall immediately provide the cognizant security office written notice of any change in the extent and nature of foreign ownership, control or influence over the Contractor which would affect any answer to the questions presented in the Certificate Pertaining to Foreign Interests, Standard Form 328 or the Foreign Ownership, Control or Influence questionnaire executed by the Contractor prior to the award of this contract. In addition, any notice of changes in ownership or control which are required to be reported to the Securities and Exchange Commission,

the Federal Trade Commission, or the Department of Justice shall also be furnished concurrently to the Contracting Officer.

(2) If a Contractor has changes involving foreign ownership, control or influence, DOE must determine whether the changes will pose an undue risk to the common defense and security. In making this determination, DOE will consider proposals made by the Contractor to avoid or mitigate foreign influences.

(3) If the cognizant security office at any time determines that the Contractor is, or is potentially, subject to foreign ownership, control or influence, the Contractor shall comply with such instructions as the Contracting Officer shall provide in writing to safeguard any classified information or special nuclear material.

(4) The Contractor agrees to insert terms that conform substantially to the language of this clause, including this paragraph, in all subcontracts under this contract that will require subcontractor employees to possess access authorizations. Additionally, the Contractor must require subcontractors to have an existing DOD or DOE Facility Clearance or submit a completed Certificate Pertaining to Foreign Interests, Standard Form 328, required in DEAR 952.204-73 prior to award of a subcontract. Information to be provided by a subcontractor pursuant to this clause may be submitted directly to the Contracting Officer. For purposes of this clause, subcontractor means any subcontractor at any tier and the term "Contracting Officer" means the DOE Contracting Officer. When this clause is included in a subcontract, the term "Contractor" shall mean Subcontractor and the term "contract" shall mean subcontract.

(5) The Contracting Officer may terminate this contract for default either if the Contractor fails to meet obligations imposed by this clause or if the Contractor creates a FOCI situation in order to avoid performance or a termination for default. The Contracting Officer may terminate this contract for convenience if the Contractor becomes subject to FOCI and for reasons other than avoidance of performance of the contract, cannot, or chooses not to, avoid or mitigate the FOCI problem.

14. Section 952.204-73 is revised to read as follows:

952.204-73 Facility Clearance.

As prescribed in 904.404(d)(5), insert the following provision in all solicitations which require the use of Standard Form 328, Certificate Pertaining to Foreign Interests for contracts or subcontracts subject to the provisions of 904.70.

Facility Clearance (May 2002)

Notices

Section 2536 of title 10, United States Code, prohibits the award of a contract under a 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

unless a waiver is granted by the Secretary of Energy. In addition, a Facility Clearance and foreign ownership, control and influence (FOCI) information are required when the contract or subcontract to be awarded is expected to require employees to have access authorizations.

Offerors who have either a Department of Defense or a Department of Energy Facility Clearance generally need not resubmit the following foreign ownership information unless specifically requested to do so. Instead, provide your DOE Facility Clearance code or your DOD assigned commercial and government entity (CAGE) code. If uncertain, consult the office which issued this solicitation.

(a) Use of Certificate Pertaining to Foreign Interests, Standard Form 328.

(1) The contract work anticipated by this solicitation will require access to classified information or special nuclear material. Such access will require a Facility Clearance for the Contractor organization and access authorizations (security clearances) for Contractor personnel working with the classified information or special nuclear material. To obtain a Facility Clearance the offeror must submit a Certificate Pertaining to Foreign Interests, Standard Form 328, and all required supporting documents to form a complete Foreign Ownership, Control or Influence (FOCI) Package.

(2) Information submitted by the offeror in response to the Standard Form 328 will be used solely for the purposes of evaluating foreign ownership, control or influence and will be treated by DOE, to the extent permitted by law, as business or financial information submitted in confidence.

(3) Following submission of a Standard Form 328 and prior to contract award, the Contractor shall immediately submit to the Contracting Officer written notification of any changes in the extent and nature of FOCI which could affect the offeror's answers to the questions in Standard Form 328. Following award of a contract, the Contractor must immediately submit to the cognizant security office written notification of any changes in the extent and nature of FOCI which could affect the offeror's answers to the questions in Standard Form 328. Notice of changes in ownership or control which are required to be reported to the Securities and Exchange Commission, the Federal Trade Commission, or the Department of Justice must also be furnished concurrently to the cognizant security office.

(b) Definitions.

(1) *Foreign Interest* means any of the following:

(i) A foreign government, foreign government agency, or representative of a foreign government;

(ii) Any form of business enterprise or legal entity organized, chartered or incorporated under the laws of any country other than the United States or its possessions and trust territories; and

(iii) Any person who is not a citizen or national of the United States.

(2) *Foreign Ownership, Control, or Influence (FOCI)* means the situation where the degree of ownership, control, or influence over 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 result.

(c) *Facility Clearance* means an administrative determination that a facility is eligible to access, produce, use or store classified information, or special nuclear material. A Facility Clearance is based upon a determination that satisfactory safeguards and security measures are carried out for the activities being performed at the facility. It is DOE policy that all Contractors or Subcontractors requiring access authorizations be processed for a Facility Clearance at the level appropriate to the activities being performed under the contract. Approval for a Facility Clearance shall be based upon:

(1) A favorable foreign ownership, control, or influence (FOCI) determination based upon the Contractor's response to the ten questions in Standard Form 328 and any required, supporting data provided by the Contractor;

(2) A contract or proposed contract containing the appropriate security clauses;

(3) Approved safeguards and security plans which describe protective measures appropriate to the activities being performed at the facility;

(4) An established Reporting Identification Symbol code for the Nuclear Materials Management and Safeguards Reporting System if access to nuclear materials is involved;

(5) A survey conducted no more than 6 months before the Facility Clearance date, with a composite facility rating of satisfactory, if the facility is to possess classified matter or special nuclear material at its location;

(6) Appointment of a Facility Security Officer, who must possess or be in the process of obtaining an access authorization equivalent to the Facility Clearance; and, if applicable, appointment of a Materials Control and Accountability Representative; and

(7) Access authorizations for key management personnel who will be determined on a case-by-case basis, and must possess or be in the process of obtaining access authorizations equivalent to the level of the Facility Clearance.

(d) A Facility Clearance is required prior to the award of a contract requiring access to classified information and the granting of any access authorizations under a contract. Prior to award of a contract, the DOE must determine that award of the contract to the offeror will not pose an undue risk to the common defense and security as a result of its access to classified information or special nuclear material in the performance of the contract. The Contracting Officer may require the offeror to submit such additional information as deemed pertinent to this determination.

(e) A Facility Clearance is required even for contracts that do not require the Contractor's corporate offices to receive, process, reproduce, store, transmit, or handle classified information or special nuclear material, but which require DOE access authorizations for the Contractor's employees to perform work at a DOE location. This type

facility is identified as a non-possessing facility.

(f) Except as otherwise authorized in writing by the Contracting Officer, the provisions of any resulting contract must require that the contractor insert provisions similar to the foregoing in all subcontracts and purchase orders. Any Subcontractors requiring access authorizations for access to classified information or special nuclear material shall be directed to provide responses to the questions in Standard Form 328, Certificate Pertaining to Foreign Interests, directly to the prime contractor or the Contracting Officer for the prime contract.

Notice to Offerors—Contents Review (Please Review Before Submitting)

Prior to submitting the Standard Form 328, required by paragraph (a)(1) of this clause, the offeror should review the FOCI submission to ensure that:

(1) The Standard Form 328 has been signed and dated by an authorized official of the company;

(2) If publicly owned, the Contractor's most recent annual report, and its most recent proxy statement for its annual meeting of stockholders have been attached; or, if privately owned, the audited, consolidated financial information for the most recently closed accounting year has been attached;

(3) A copy of the company's articles of incorporation and an attested copy of the company's by-laws, or similar documents filed for the company's existence and management, and all amendments to those documents;

(4) A list identifying the organization's owners, officers, directors, and executive personnel, including their names, social security numbers, citizenship, titles of all positions they hold within the organization, and what clearances, if any, they possess or are in the process of obtaining, and identification of the government agency(ies) that granted or will be granting those clearances; and

(5) A summary FOCI data sheet.

Note: A FOCI submission must be attached for each tier parent organization (*i.e.* ultimate parent and any intervening levels of ownership). If any of these documents are missing, award of the contract cannot be completed.

952.204–74 [Removed]

15. Section 952.204–74 is removed.

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

Authority: 42 U.S.C. 2201; 42 U.S.C. 7101 *et seq.*; 50 U.S.C. 2401 *et seq.*

PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS

17. Section 970.0404–1, Definitions, is amended by adding, in alphabetical order, definitions for “Access Authorization” and “Facility Clearance” and revising the definition of “Restricted Data” to read as follows:

970.0404–1 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.

* * * * *

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 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 shall 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).

18. Section 970.0404–2, General, is revised to read as follows:

970.0404–2 General.

(a) Guidance regarding the National Industrial Security Program as implemented by the Department of Energy may be found at 904.4, Safeguarding Classified Information Within Industry. Additional information concerning contractor ownership when national security or atomic energy information is involved may be found at 904.70. Information regarding contractor ownership involving national security program contracts may be found at 904.71.

(b) Executive Order 12333, United States Intelligence Activities, provides for the organization and control of United States foreign intelligence and counterintelligence activities. DOE has established a counterintelligence program subject to this Executive Order which is described in DOE Order 5670.3 (as amended). All DOE elements, including management and operating contractors and other contractors managing DOE-owned facilities which require access authorizations, should undertake the necessary precautions to ensure that DOE and covered Contractor personnel, programs and resources are properly protected from foreign intelligence threats and activities.

19. Section 970.0404–3, Responsibilities of contracting officers, is amended by removing paragraph (a) and redesignating paragraphs (b) and (c) as paragraphs (a) and (b).

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