

DEPARTMENT OF ENERGY

48 CFR Part 970

RIN 1991-AB-37

Acquisition Regulation; Department of Energy Management and Operating Contracts

AGENCY: Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE) published a final rule amending the Department of Energy Acquisition Regulation (DEAR) to incorporate certain contract reform initiatives on June 27, 1997 (62 FR 34842). Among the initiatives is the implementation of DOE's diversity policy, which requires that contractors take appropriate action to develop and meet diversity performance goals as part of their business operations. DOE is adopting a diversity contract clause to ensure uniform implementation of this policy in its management and operating contracts.

EFFECTIVE DATE: December 29, 1997.

FOR FURTHER INFORMATION CONTACT: Gloria B. Smith, U.S. Department of Energy, Office of Economic Impact and Diversity, 1000 Independence Avenue, S.W., Washington, DC 20585-0901, (202) 586-8383, or Romulo L. Diaz, Jr., Esq., U.S. Department of Energy, Office of General Counsel, 1000 Independence Avenue, S.W., Washington, DC 20585-0103, (202) 586-2902.

SUPPLEMENTARY INFORMATION:**I. Introduction**

In its Strategic Plan for Diversity, which was published in 1994, the Department established goals for enhanced partnerships with small, minority and women-owned businesses; minority educational institutions (i.e., Historically Black Colleges and Universities; Hispanic serving educational initiatives; and Native American Institutions); employees; and communities. The Department's diversity goals were included in amendments to the DEAR published on June 27, 1997 (62 FR 34842, 34864, new § 970.2601(b)). The Department has articulated on numerous occasions its intent to evaluate contractor performance consistent with DOE policies and authorities as they may be interpreted and implemented in light of *Adarand Constructors Inc. v. Peña*, 115 S. Ct. 2097 (1995).

Notice of the Department's proposal to adopt a clause to be added at 48 CFR § 970.5204-81 for inclusion in all management and operating contracts

was published for public comment in the **Federal Register** at 62 FR 44350 on August 20, 1997. Guidance for the preparation of a diversity plan by a for-profit contractor—originally developed for use with DOE's "Sample Contract Provisions for Department of Energy Performance Based Management Contracts (Model Contract) with For-Profit Contractors"—was reproduced for informational purposes as an appendix to the Department's proposal. (62 FR 44351) A public hearing on the proposed rulemaking was scheduled for September 4, 1997, and the public comment period closed on September 19, 1997. No comments were received on the proposal, nor were there any requests to speak at the public hearing. Accordingly, in order to implement the Department's diversity policy found at 48 CFR 970.2601(b), the final rule adopts without modification the clause previously proposed to be added at section 970.5204-81.

II. 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, today's action was not subject to review under the Executive Order by the Office of Information and Regulatory Affairs.

B. Review Under Paperwork Reduction Act

DOE has determined that the clause requiring submission of a diversity plan by DOE contractors is necessary to implement the diversity policy enunciated at 48 CFR 970.2601(b). The information in the diversity plan, to be submitted initially upon award of a new contract and updated annually thereafter, will be used by DOE contracting officers to evaluate contractor performance and determine whether DOE's policy of developing innovative strategies to increase opportunities for small, minority and women-owned businesses and educational institutions is being advanced. Approximately 36 management and operating contractors will be subject to the diversity plan. The Department's best estimate is that the burden will average 40 hours per contractor; the total annual burden is estimated to be approximately 1440 hours.

Comments were solicited on the Department's need for this information in the proposed rule, whether the information would have practical

utility, the accuracy of the provided burden estimates, ways to enhance the quality, utility, and clarity of the information to be collected, and any other suggested methods for minimizing respondents' burden. No comments were received.

The Office of Management and Budget approved the diversity plan information collection on October 23, 1997, and assigned to it OMB Number 1910-4100. OMB approval for the information collection expires April 30, 1998.

An agency may not conduct or sponsor a collection of information unless the collection of information contains a currently valid OMB control number. 5 CFR 1320.5(b).

C. Review Under the National Environmental Policy Act

Pursuant to the Council on Environmental Quality Regulations (40 CFR Parts 1500-1508), the Department of Energy has established regulations for its compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). Pursuant to Appendix A of Subpart D of 10 CFR Part 1021, the Department has determined that today's regulatory action is categorically excluded from the need to prepare an environmental impact statement or an environmental assessment. Today's rule amends an existing rule without changing its environmental effect (Categorical Exemption A5).

D. Review Under Executive Order 12612

Executive Order 12612, 52 FR 41685 (October 30, 1987), requires that rules be reviewed for any substantial direct effect on States, on the relationship between the National 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 rulemaking will not have a substantial direct effect on the institutional interests or traditional functions of States.

E. Review Under Executive Order 12988

With regard to the review required by section 3(a) of Executive Order 12988, DOE has completed the required review and determined that, to the extent permitted by law, the regulations meet the relevant standards of Executive Order 12988.

F. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. §§ 601–612) requires that an agency prepare an initial regulatory flexibility analysis, and publish the analysis or a summary at the time of publication of general notice of proposed rulemaking for the rule. 5 U.S.C. § 603. This requirement does not apply if the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. 5 U.S.C. § 605(b).

DOE certifies that requiring the inclusion of a clause in DOE contracts which requires the contractor to submit a plan that explains its approach and actions to promoting diversity, consistent with Departmental policy, would not have a significant economic impact on a substantial number of small entities. The diversity plan clause would be included in all DOE management and operating contracts, which historically have been cost reimbursement contracts. Thus, DOE believes that this rule will not have an adverse economic impact on any small entity.

G. Review Under the Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each federal agency to prepare a written assessment of the effects of any federal mandate in a proposed or final agency rule that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million in any

one year. The Act also requires a Federal agency to develop an effective process to permit timely input by elected officers of state, local, and tribal governments on a proposed “significant intergovernmental mandate,” and it requires an agency to develop a plan for giving notice and opportunity to timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. The rule published today does not contain any federal mandate, so these requirements do not apply.

H. Congressional Notification

As required by 5 U.S.C. § 801, DOE will report to Congress on the promulgation of the 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(2).

List of Subjects in 48 CFR Part 970

Government procurement.

Issued in Washington, DC, on November 21, 1997.

Federico Peña,

Secretary of Energy.

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

PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS

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

Authority: Sec. 162 of the Atomic Energy Act of 1954 (42 U.S.C. 2201) and Sec. 644 of

the Department of Energy Organization Act, Public Law 95–91 (42 U.S.C. 7254).

2. Subsection 970.2602–2 is amended by redesignating the current paragraph as paragraph (a), and by revising the title and adding a new paragraph (b) to read as follows:

970.2602–2 Contract clauses.

* * * * *

(b) The Contracting Officer shall insert the clause at 48 CFR (DEAR) 970.5204–81 Diversity Plan in management and operating contracts.

3. Subpart 970.52 is amended to add section 970.5204–81 to read as follows:

970.5204–81 Diversity Plan.

As prescribed in 48 CFR (DEAR) 970.2602–2(b), insert the following clause.

Diversity Plan

(December 1997)

The Contractor shall submit a Diversity Plan to the Contracting Officer for approval within 90 days after the effective date of this contract. The contractor shall submit an update to its Plan with its annual fee proposal. Guidance for preparation of a Diversity Plan is provided in Appendix _____. The Plan shall include innovative strategies for increasing opportunities to fully use the talents and capabilities of a diverse work force. The Plan shall address, at a minimum, the Contractor's approach for promoting diversity through (1) the Contractor's work force, (2) educational outreach, (3) community involvement and outreach, (4) subcontracting, and (5) economic development (including technology transfer).

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