

Comment on:

The U.S. Department of Energy's (DOE) Draft Request for Proposals (RFP) for the contract to manage the Los Alamos National Laboratory (LANL)

Submitted to:

Contracting Officer, DOE National Nuclear Security Administration (NNSA) Source Evaluation Board at: LANLRecompeteHelp@doeal.gov

Submitted by:

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Submitted:

January 21, 2005

Tri-Valley CAREs offers its comment and requests the following additions, clarifications and/or changes to the Draft Request for Proposals for the competitive selection of a management and operating (M & O) contractor for LANL.

Overall Organization of the Draft RFP and Website:

There is no "cross-reference" or "crosswalk" between the Draft RFP and the current LANL contract posted on the website where the Draft RFP is located. Further, the website lacks a helpful "roadmap" to the RFP. Our reading of the Draft RFP would have been aided immeasurably by these two items.

On December 16, 2004, John Conway, Chairman of the Defense Nuclear Facilities Safety Board (DNFSB) sent a letter to NNSA Administrator Linton Brooks requesting a "crosswalk" to Section J, Appendix G of the contract within 20 days. Tri-Valley CAREs requests that the "crosswalk" between the current contract and Section J, Appendix G, along with a "crosswalk" between the current contract and all other sections of the Draft RFP, be posted immediately on the DOE website.

In the event there is insufficient time to also create and post a "roadmap" to accompany the Draft RFP, we request that one be posted with the Final RFP.

Award Term - Provision to Extend Contract for up to 15 Years:

This is the first contract to be "let" through an open and competitive process since the University of California began managing the LANL site in 1943. In this context, the provision to permit extension of the first openly bid contract for incremental periods up to 15 years beyond the initial 5-year term is inappropriate. Practically speaking, this provision means twenty years could pass before there would be a second opportunity for an open process.

Tri-Valley CAREs seeks to ensure that workers, communities and the public have an opportunity to comment on and influence the provisions of the contract and the selection of the contractor. Twenty years is too long to wait for a second comment opportunity. Therefore, we ask that this provision be deleted in its entirety.

Improving Health and Safety Provisions for Workers and Communities:

Under present management, there has been extensive soil, groundwater and airborne contamination at LANL. This contamination is a result of years of emissions of radionuclides and toxins into the air, discharges of radioactive liquids into canyon systems and on mesas above the Rio Grande. Workers have been contaminated at LANL; some have become ill or have died as a result of their on-the-job exposures. Clearly, the contract-as-usual has not been sufficient to protect employees, communities or New Mexico's environment. The Draft RFP should be rewritten to include additional provisions that will better "incentivize" health and safety.

In this context, we ask that the RFP be rewritten to disallow the M & O contractor from using a non-profit status to shield itself from paying fines stemming from health and safety violations, including but not limited to paying fines for nuclear safety violations under the Price-Anderson Act. The non-profit contractor should be liable for all fines up to the total dollar amount of the management fee (including bonuses).

The Draft RFP should be rewritten to state that the M & O contractor will allow and facilitate inspections by the federal and state OSHA officials, at least annually (not OSHA-like inspections, OSHA).

The RFP should be rewritten to encourage HAZ WHOPPER training for workers involved in environmental remediation activities. According to reports, workers trained and certified in HAZ WHOPPER have fewer work-related accidents.

Further, the Draft RFP should not encourage any expansion of "force majeure" with respect to compliance issues. Instead, it should be rewritten to explicitly limit the definition of force majeure.

Strengthening "Whistleblower" Protections:

Under present management, employees who "blow the whistle" on safety problems, security lapses, lack of environmental protection, fraud, discrimination and other instances of mismanagement or failure to conform with the law have suffered retaliation. Unlimited amounts of tax-payer money have been spent by the M & O contractor to fight workers' legitimate claims. Often, the underlying problem goes unaddressed. The RFP should be rewritten to include additional whistleblower protections.

Tri-Valley CAREs asks that the Draft RFP be rewritten to place a "cap" on the amount of federal money the M & O contractor can be reimbursed for fighting whistleblower claims. For example, the M & O contractor should not be able to pile appeal upon appeal in instances where there is little likelihood the M & O contractor will prevail on the merits and the intent is to simply wear out the individual -- as happens too often under the current contract.

Ensuring Workers' Right to Organize and Other Employee Rights:

Under current management, the "environment" has not been friendly to unions or to workers' rights more broadly. The Draft RFP should be rewritten to better emphasize employee rights, including the right of workers to organize. Additionally, the RFP should be rewritten to include an alternative complaint resolution process for employees. In this regard, the "Hanford Joint Council" could serve as a reference point. Tri-Valley CAREs received a briefing on the Hanford Joint Council's structure and operation some years back, and, while far from perfect, it appeared to be light years ahead of what exists at LANL today. The RFP is the appropriate vehicle for institutionalizing these types of positive change.

Increasing Unclassified, Civilian Science Initiatives:

Currently, about 76% of the LANL budget is allocated to weapons activities. Energy conservation amounts to less than one percent. The RFP should be rewritten to include mechanisms and incentives for the M & O contractor to increase the unclassified, civilian science programs at LANL.

We ask, for example, that the RFP be rewritten to give extra "points" to bidders whose management proposals contain a detailed plan to attract more unclassified, civilian science to LANL.

The performance bonus section should also contain provisions to reward expanding the civilian science "footprint" at LANL. One method (among many) might be to

explore incentivizing the M & O contractor for the number of scientific articles LANL employees are able to have published in open, peer-reviewed journals each year.

We further ask that the RPF be rewritten to make the M & O contractor responsible for creating a diverse stakeholder committee to offer LANL researchers and the M & O contractor input on LANL program proposals. The group must have broad representation, including "watchdog" organizations, First Nations, community members, independent scientists and others. Participation should be open to all interested parties. In this manner, research proposals could be broadly evaluated to ensure that federal lab science is relevant to the public whose money it uses. This process, spelled out in the Final RFP, would assist the M & O contractor in encouraging, prioritizing and attracting additional high-quality, unclassified, civilian science programs.

Bringing the Mission into Conformance with International Treaty Obligations:

According to the U.S. Constitution, all "treaties made," along with the Constitution itself, comprise the supreme law of the land.

The Non-Proliferation Treaty: The nuclear Non-Proliferation Treaty (NPT), which the U.S. ratified and which entered into force in 1970, states that nuclear weapons states must "pursue negotiations in good faith on effective measures relating to the cessation of the nuclear arms race at an early date and to nuclear disarmament..."

The International Court of Justice has ruled that the NPT compels the nuclear weapons states that are signatories to bring those negotiations to a conclusion, i.e., to achieve disarmament. The New Agenda Coalition, an influential group of signatory nations to the NPT states: "Any plans or intentions to develop new types of nuclear weapons or rationalization for their use stand in marked contradiction to the NPT, and undermine the international community's efforts towards improving the security of all states."

The Draft RFP states that the M & O contractor will "foster and strengthen the Laboratory's role as a lead element in the nuclear weapons complex supply chain." Further, it specifies a long list of nuclear weapons activities the M & O contractor is to undertake. Notwithstanding the budget cuts in fiscal year 2005, LANL has historical and proposed work developing a new "Robust Nuclear Earth Penetrator," researching "more usable" mini-nukes and other advanced weapons concepts, enhancing readiness to conduct a full-scale nuclear test in Nevada, and developing new plutonium pit manufacturing capabilities (both on-site and for the proposed Modern Pit Facility for which LANL is a candidate site). These and other programs currently underway or planned at LANL may very well contradict the NPT and/or weaken or complicate its underlying non-proliferation regime.

The Draft RFP lacks analysis of whether these nuclear weapons activities are in conformance with U.S. treaty obligations. Tri-Valley CAREs asks that the RFP be rewritten to include such an analysis for present operations.

Moreover, the RFP must be rewritten to explicitly emphasize the primacy of U.S. treaty obligations. The RFP should require bidders to outline how they will report activities at LANL that may run afoul of the NPT, or any other treaty to which the U.S. is signatory. The M & O contractor should thereafter be required to undertake a detailed analysis of treaty compliance or lack thereof on an annual basis. The group undertaking the analyses must have incorporated within it an unclassified committee and an agreed upon set of individuals with clearance to ensure that the unclassified briefings given this committee are in conformance with any classified findings. The resulting analyses must also include unclassified, published reports.

We note, too, that the Draft RFP calls on LANL to "prevent and respond to proliferation of weapons of mass destruction" as part of its mission. Tri-Valley CAREs requests that the nuclear weapons activities at LANL, including the "stockpile stewardship" program elements, be analyzed for conformance with the mission to "prevent and respond to proliferation of weapons of mass destruction." We note that many of these programs contribute directly to "vertical" proliferation (that is what they are intended for) and only slightly less directly to horizontal proliferation. The fact that some parts of LANL's mission may contradict, and/or substantially complicate, other parts of LANL's mission should be addressed in the RFP.

Tri-Valley CAREs asks that these contradictions be eliminated by crafting the stockpile stewardship program in the Final RFP so that is limited to a "curatorship" of the existing arsenal as it awaits dismantlement.

In short, a curatorship program at LANL (or throughout DOE) would rely on surveillance and nonnuclear testing to determine when repairs are to be done. Only when there is compelling evidence that key components have degraded, or will soon degrade, would replacing parts be undertaken. All new components would be remanufactured as closely as possible to the original design. "Modernization" and "upgrades" would not take place under the guise of curatorship as they do under the current stockpile stewardship program (indeed, they are the unstated goal of the current program).

While curatorship is not in and of itself disarmament, as is called for under the NPT, it could support disarmament goals and obligations. At a minimum, it would not contradict our disarmament obligations by engaging in the design of new and modified nuclear weapons, as is currently the case.

The Biological Weapons Convention: In addition to ensuring compliance with the NPT, the RFP must emphasize the necessity of the biological sciences mission to conform to the Biological and Toxin Weapons Convention (BWC). The BWC was signed in 1972 and entered into force in 1975. It compels signatories to forgo developing or producing biological agents or delivery vehicles of types or in quantities for other than strictly peaceful purposes.

LANL plans to operate an advanced biowarfare agent facility, or BSL-3, on site. Reportedly, there are plans to use the facility to modify select agents (those historically associated with bioweapons). Genetic modification of potentially deadly bioagents is inherently a "dual use" activity (can be used for defensive or offensive purposes). The RFP is silent about this activity and its potential implications for either contradicting the BWC or weakening efforts to negotiate verification and enforcement protocols for it.

Tri-Valley CAREs asks that the Draft RFP be rewritten to emphasize the primacy of U.S. treaty obligations for biological sciences at LANL and include special provisions for ongoing analyses of treaty obligations, similar to the measures described above for the NPT.

Further, the RFP should contain language that limits the biological sciences mission at LANL to on-site BSL-2 activities that do not conflict with or potentially weaken the BWC. Certain BSL-3 activities for defensive purposes can be carried out at CDC labs, as is currently the practice at LANL. This, too, should be spelled out in more detail in the RFP.

In the biological sciences arena, LANL has an Institutional Biosafety Committee. The RFP should be rewritten to contain a prohibition on the committee meeting in a classified area at LANL in order to exclude public participation (as is the case at Livermore Lab). This prohibition should also be extended to all committees at LANL that are not classified.

Increasing Openness and Accountability:

Tri-Valley CAREs believes that the bidding process and resulting management contract should have an emphasis on involving all stakeholders, in part by incorporating their input into decisions about LANL activities, policies and preventive measures. In that context, we appreciate this opportunity to comment on the Draft RFP and encourage continued openness and transparency in the bidding process.

The Draft RFP should be rewritten to emphasize openness and accountability. For example, it should specify the importance of the Freedom of Information Act (FOIA). The section on "contractor-owned records" in particular should be rewritten to ensure the supremacy of FOIA. LANL is a GoCo (government owned-contractor operated). All

records should be "born" subject to FOIA and should only be withheld in very limited circumstances, as provided for in the FOIA itself. The RFP needs to reflect this. And, bidders should be required to lay out their plan for complying with FOIA.

Further, and in the same vein, the RFP should be rewritten to emphasize the importance of compliance with other applicable laws and regulations, such as the Energy Employees Occupational Illness Compensation Program Act. The RFP should be written so that bidders must explain how they will assist in making records available to sick workers and their families who are seeking compensation under EEOICPA.

In the Community Involvement and Outreach section of the RFP, there should be included specific provisions for ensuring true involvement. To give but one example, the Community Radiation Monitoring Group should be mentioned by name. It meets monthly. The M & O contractor should be required to participate and bidders should explain how they plan to do this.

Incorporating DNFSB comments:

We concur with the December 16, 2004 DNFSB comments on the issues of federal oversight and primacy of safety regulations. Moreover, we are concerned that the way the "standards management" section of the Draft RFP is written could lead to an M & O contractor using the flexibility therein to choose an industry practice over the federal government's safety standard not because it is "better" but, conversely, because it is less stringent and "easier."

Conclusion:

Again, we appreciate this opportunity to comment and we look forward to seeing real improvements and changes incorporated into the RFP based on our comments and those submitted by other groups and individuals. We ask, too, that the selection committee that evaluates the bids be expanded to include New Mexico workers, independent scientists, community stakeholders, First Nations and watchdog organizations (excluding bidders, of course).

Sincerely

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