PART 904—ADMINISTRATIVE MATTERS

Authority: 42 U.S.C. 7101 and 50 U.S.C. 2401

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Subpart 904.4—Safeguarding Classified Information Within Industry

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 under the Atomic Energy Act of 1954; Executive Order 12968, Access to Classified Information, dated August 2, 1995; or 10 CFR part 710.

Applicant means an individual who has submitted an expression of interest in employment; who is under consideration by the contractor for employment in a particular position; and who has not removed himself or herself from further consideration or otherwise indicated that he or she is no longer interested in the position.

Classified information or *Classified National Security Information* mean information officially determined to be Restricted Data, Formerly Restricted Data, or Transclassified Foreign Nuclear Information under the Atomic Energy Act of 1954, as amended, or information determined to require protection under Executive Order 13526, Classified National Security Information, dated December 29, 2009.

Counterintelligence means information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted for or on behalf of foreign powers, organizations or persons, or international terrorist activities, but not including personnel, physical, document or communication security programs.

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; production of special nuclear material; or use of special nuclear material in the production of energy, but excluding data declassified or removed from the restricted data category pursuant to Section 142, as amended, of the Atomic Energy Act of 1954 (42 U.S.C. 2162).

Review or background review means a Contractor's assessment of the background of an uncleared applicant or uncleared employee for a position requiring a DOE access authorization prior to selecting that individual for such a position.

904.402 General.

(b) The basis of Department of Energy's (DOE) industrial security requirements is the Atomic Energy Act of 1954, as amended, the DOE Organization Act of 1977, as amended, and Executive Orders 13526 and 12829.

(3) DOE has established a counterintelligence program. All DOE elements and contractors managing DOE-owned or leased facilities that 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.

(4) DOE security regulations concerning restricted data are codified at 10 CFR part 1045.

(5) Section 234B of the Atomic Energy Act (42 U.S.C. 2282b) requires that DOE contracts include a clause providing for appropriate reductions in fees or amounts paid to the contractor under the contract in the event of violations of any rule, regulation, or order relating to the safeguarding or security of Restricted Data or other classified information. The clause is required for all DOE prime contracts that involve any possibility of contractor access to Restricted Data or other classified information. The clause specifies various degrees of violations and the amount of reduction attributable to each degree. The clause at 952.242-71, Conditional Payment of Fee, Profit, or Other Incentives, shall be used to comply with 42 U.S.C. 2282b (unless the clause at 970.5215-3, Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts is used). See 942.71(d) for the clause's prescription.

(e) Part 927 contains policies and procedures for safeguarding classified information in patent applications and patents.

904.404 Solicitation provision and contract clause.

(d) The security clauses to be used in DOE contracts are found at 952.204. They are:

(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, access to special nuclear materials or the provision of protective services. This includes contracts awarded under simplified acquisition procedures, as well as National Security Program contracts, under which access to proscribed information is required. Although DOE utilizes the National Industrial Security Program, 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 and Contracting Officers must incorporate DOE Form 470.1 or equivalent.

(2) *Classification/Declassification, 952.204-70.* This clause is to be used in all contracts which involve classified information.

(3) *Sensitive foreign nation controls, 952.204-71.* This clause is required in unclassified research contracts which may involve sharing unclassified information about nuclear technology with certain sensitive foreign nations. The contractor shall be provided at the time of award the listing of nations referenced in DOE Order 142.3, Unclassified Foreign Visits and Assignments Program, or its successor. (The attachment referred to in the clause shall set forth the applicable requirements of the DOE regulations on dissemination of unclassified published and unpublished technical

information to foreign nations.)

(4) *Disclosure of information, 952.204-72.* This clause may be used in place of the clauses entitled "Security" and "Classification" in contracts with educational institutions for research work performed in their own institute facilities that are not likely to produce classified information.

(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.

(6) *Computer Security, 952.204-77.* This clause is required in contracts in which the contractor may have access to computers owned, leased or operated on behalf of the Department of Energy.

(7) *Counterintelligence.* The Contracting Officer shall include the clause at 952.204-74, Counterintelligence, in all contracts that include the clauses at 952.204-2, Security Requirements, and 952.204-70, Classification/Declassification.

Subpart 904.6 [Reserved]

Subpart 904.7—Contractor Records Retention

904.702 Applicability.

(b) Contracts containing the *Integration of Environment, Safety and Health into Work Planning and Execution* clause at 970.5223-1, as prescribed by 952.223-71, or the *Radiation Protection and Nuclear Criticality* clause at 952.223-72 must also include the *Preservation of Individual Occupational Radiation Exposure Records* clause at 952.223-75, and the *Access to and Ownership of Records* clause at 970.5204-3, which will necessitate retention of records in accordance with the National Archives and Records Administration (NARA)-approved DOE Records Disposition Schedules, rather than those found at FAR Subpart 4.7.

Subpart 904.8—Government Contract Files

904.803 Contents of contract files.

(a) (29) The record copy of the Individual Acquisition Action Report shall be included in the file section containing procurement management reports.

904.804 Closeout of contract files.

904.804-1 Closeout by the office administering the contract.

(a) The Head of the Contracting Activity (HCA) shall ensure that necessary procedures and

milestone schedules are established to meet the requirements of 48 CFR 4.804-1, and that resources are applied to effect the earliest practicable deobligation of excess funds and the timely closeout of all contract files which are physically completed or otherwise eligible for closeout action.

(b) Quick closeout procedures for cost reimbursable and other than firm fixed price type contracts are covered under 48 CFR 42.708.

904.805 Storage, handling, and disposal of contract files.

Contract files shall be disposed of in accordance with applicable DOE Order 243.1. (See current version.)

Subpart 904.70—Facility Clearance

904.7000 Scope of subpart.

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.

904.7001 Applicability.

The provisions of this subpart shall apply to all offeror(s), contractors, and subcontractors who will or do have access to classified information or a significant quantity of special nuclear material.

904.7002 Definitions.

Contract means the prime contract and the subcontract at any tier.

Contracting officer means the DOE contracting officer.

Contractor means the contractor and the subcontractor at any tier.

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

Foreign interest means any of the following—

(1) Foreign government or foreign government agency or instrumentality thereof;

(2) Any form of business enterprise organized under the laws of any country other than the United States or its possessions;

(3) Any form of business enterprise organized or incorporated under the laws of the U.S., or a State or other jurisdiction within the U.S. which is owned, controlled, or influenced by a foreign government, agency, firm, corporation, or person; or

(4) Any person who is not a U.S. citizen.

Foreign ownership, control, or influence means the situation where the degree of ownership, control, or influence over an offeror(s) or 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 possibly result.

Special nuclear material means special nuclear material as defined in 10 CFR 710.5(a).

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.

(c) It is essential for the DOE to obtain information about FOCI which is sufficient to help the Department determine whether award of a contract to a person or firm, or the continued performance of a contract by a person or firm, may pose undue risk to the common defense and security. Therefore, the provision specified at 952.204-73 Facility Clearance, shall be included in solicitations that involve offeror(s) or contractors that are subject to 904.7001.

(d) The contracting officer shall not award or extend any contract subject to this subpart, exercise any options under a contract, modify any contracts subject to this subpart, or approve or consent to a subcontract subject to this subpart unless—

(1) The contractor provides the information required by the solicitation provision at 952.204-73 Facility Clearance, and

(2) The contracting officer has made a positive determination in accordance with 904.7004.

904.7004 Findings, determination, and contract award or termination.

(a) Based on the information disclosed by the offeror(s) or contractor, and after consulting with the DOE Office of Environment, Health, Safety and Security, the contracting officer must determine that award of a contract to an offeror(s) or continued performance of a contract by a contractor will not pose an undue risk to the common defense and security. The contracting officer need not prepare a separate finding and determination addressing FOCI; however, the memorandum of negotiation shall include a discussion of the applicability of this subpart and the resulting determination.

(b) In those cases where FOCI does exist, and the DOE determines that an undue risk to the common defense and security may exist, the offeror(s) or contractor shall be requested to propose within a prescribed period of time a plan of action to avoid or mitigate the foreign influences by isolation of the foreign interest.

(c) The types of plans that a contractor can propose are: measures which provide for physical or organizational separation of the facility or organizational component containing the classified information or special nuclear material; modification or termination of agreements with foreign interests; diversification or reduction of foreign source income; assignment of specific security duties and responsibilities to board members or special executive level committees; or any other actions to negate or reduce FOCI to acceptable levels. The plan of action may vary with the type of foreign interest involved, degree of ownership, and information involved so that each plan must be negotiated on a case by case basis. If the offeror(s) or contractor and the DOE cannot negotiate a plan of action that isolates the offeror(s) or contractor from FOCI satisfactory to the DOE, then the offeror(s) shall not be considered for contract award and affected existing contracts with a contractor shall be terminated.

Subpart 904.71—Prohibition on Contracting (National Security Program Contracts)

Source: 58 FR 59684, Nov. 10, 1993, unless otherwise noted.

904.7100 Scope of subpart.

This subpart implements section 836 of the Fiscal Year 1993 Defense Authorization Act (Pub. L. 102-484) which prohibits the award of a Department of Energy contract under the 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.

904.7101 Definitions.

Effectively owned or controlled means that a foreign government or an entity controlled by a foreign government has the power, either directly or indirectly, whether exercised or exercisable, to control or influence the election or appointment of the Offeror's officers, directors, partners, regents, trustees, or a majority of the Offeror's board of directors by any means, e.g., ownership, contract, or operation of law.

Entity controlled by a foreign government means any domestic or foreign organization or corporation that is effectively owned or controlled by a foreign government or any individual acting on behalf of a foreign government. See subpart 925.7 for a statement of the prohibition on certain foreign purchases.

Foreign government means any governing body organized and existing under the laws of any country other than the United States and its possessions and trust territories and any agent or instrumentality of that government.

Proscribed information means—

(1) Top Secret information;

(2) Communications Security (COMSEC) information, except classified keys used to operate secure telephone units (STU IIIs);

(3) Restricted Data, as defined in the Atomic Energy Act of 1954, as amended;

(4) Special Access Program (SAP) information; or

(5) Sensitive Compartmented Information (SCI).

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 the clause at 952.204-73, Facility Clearance.

904.7103 Solicitation provision and contract clause.

(a) Any solicitation, including those under simplified acquisition procedures, for a contract under the national security program which will require acess to proscribed information shall include the provision at 952.204-73, Facility Clearance.

(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 952.204-2, Security.

Subpart 904.72—Public Affairs

Source: 65 FR 81006, Dec. 22, 2000, unless otherwise noted.

904.7200 Purpose.

It is the policy of the Department of Energy to provide to the public and the news media, accurate and timely unclassified information on Departmental policies, programs, and activities. The Department's contractors share the responsibility for releasing unclassified information related to efforts under their contracts and must coordinate the release of unclassified information with the cognizant contracting officer and appropriate DOE Public Affairs personnel.

904.7201 Contract clause.

The contracting officer shall insert the clause at 952.204-75, Public Affairs, in solicitations and contracts that require the contractor to release unclassified information related to efforts under its contract regarding DOE policies, programs, and activities.

Subpart 904.73—Department of Energy Directives

Source: 89 FR 89748, Nov. 13, 2024, unless otherwise noted.

904.7300 General.

The contractor is required to comply with the requirements of applicable Federal, State, and local laws and regulations, unless relief has been granted by the appropriate authority. Additionally, the Department of Energy (DOE) Directives Program is a system of instructions, including orders, notices, manuals, guides, and standards, for DOE elements. In certain circumstances, DOE will apply requirements contained in these directives to a contract. In these circumstances, program and requirements personnel will be responsible for identifying the requirements that are applicable to the contract and for providing a list of applicable requirements to the Contracting Officer for inclusion in the contract.

904.7301 Contract clause.

The Contracting Officer shall insert the clause at 952.204-78, DOE Directives, in non-management and operating contracts where the work will be performed on a DOE site and the contract will be subject to the requirements of DOE Directives. This includes information technology or cybersecurity work, as well as other work program officials identify as requiring the clause.