FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 99–2000; MM Docket No. 99–121; RM–9552]

Radio Broadcasting Services; Eagle Nest, New Mexico

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; denial of.

SUMMARY: The Commission denies the request of Mountain West Broadcasting to allot Channel 284C2 to Eagle Nest, New Mexico, finding that it is not a community for allotment purposes. *See* 64 FR 18872, April 16, 1999. With this action, this proceeding is terminated.

FOR FURTHER INFORMATION CONTACT: Leslie K. Shapiro, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 99–121, adopted September 22, 1999, and released October 1, 1999. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 445 12th Street, SW, Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Services, Inc., (202) 857–3800, 1231 20th Street, NW, Washington, DC 20036.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 99–26417 Filed 10–12–99; 8:45 am]

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DEPARTMENT OF ENERGY

48 CFR Parts 909 and 970

RIN 1991–AB52

Acquisition Regulations; Purchasing by DOE Management and Operating Contractors From Contractor Affiliated Sources

AGENCY: Department of Energy.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Energy (DOE) is proposing to amend its acquisition regulations by altering its coverage on organizational conflicts of interest and purchases by DOE's management and operating contractors from affiliated entities to protect the Department when DOE's management and operating contractors are involved in teaming arrangements or mergers or acquisitions and with respect to the award and administration of affiliated transactions.

DATES: Written comments on the proposed rulemaking must be received on or before close of business November 12, 1999.

ADDRESSES: Comments (3 copies) should be addressed to: Robert M. Webb, U.S. Department of Energy, Office of Procurement and Assistance Management, 1000 Independence Avenue, SW., Washington, D.C. 20585.

FOR FURTHER INFORMATION CONTACT: Robert M. Webb at (202) 586–8264.

SUPPLEMENTARY INFORMATION:

I. Background.
II. Section by Section Analysis.
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B. Review Under Executive Order 12988.
C. Review Under the Regulatory Flexibility Act.
D. Review Under the Paperwork Reduction Act.
E. Review Under the National Environmental Policy Act.
F. Review Under Executive Order 12612.
G. Review Under the Unfunded Mandates Reform Act of 1995.

I. Background

The purpose of this proposed rulemaking is to provide additional guidance to DOE contracting officers with respect to organizational conflicts of interest considerations in the award and administration of DOE's management and operating contracts. Specifically, this proposed rule would: (1) require contracting officers to acquire an organizational conflicts of interest disclosure from all members of a proposing ''team;'' (2) require the identification and treatment of organizational conflicts of interest issues prior to the contracting officer's consent to merger, sale or novation involving a management and operating contractor or its parent; and (3) clarify existing rules with respect to transactions between management and operating contractors and affiliated entities.

DOE regulations already recognize the risks associated with management and operating contractors doing business with affiliates. It is specifically discussed at 970.7105. The necessity of providing notice of a proposed transaction with an affiliate is covered at 970.7109. The clause at 970.5204–22 requires that the M&O contractor comply with 970.7105.

However, in recent years the matter has become complex as a result of increased incidence of corporate mergers and acquisitions and the teaming of organizations as offerors under a DOE contract. For example, as a result of a management and operating contractor's merger with the corporate parent of an existing subcontractor, the new prime contractor could be put in the position of administering a preexisting subcontract with its affiliate. Similarly, if award of a management and operating contractor were to go to a ''team,'' one participant, not the contractor of record, could be an affiliate of a pre-existing subcontractor. In both of these situations, the subcontract would exist before the merger or contract award that would give rise to the potential conflict of interest in the administration of the subcontract.

Without the changes proposed in this rulemaking, the cognizant operations office involved would not have the necessary information to assure that these two situations are recognized and treated. As a result, DOE's interests may not be protected by the management and operating contractor's administration of such subcontracts. This rule is intended to provide the contracting officer with complete information on potential organizational conflicts with respect to mergers and acquisitions and teaming arrangements to allow their identification and mitigation.

Further, the proposed rule would modify existing coverage which governs the transacting of business by management and operating contractors with affiliated entities. The Department recognizes that M&O contractors may appropriately acquire specialized services or purchase goods from affiliated organizations. This rulemaking proposes to revise the Department's acquisition regulation to identify and clarify these situations.

The first situation involves an affiliate with special or unique scientific expertise or facilities (e.g., test facilities) of use to the M&O in the performance of some portion of the contract. In this case, the affiliate transaction would be accomplished through an intercompany transaction at cost with no fee. The second situation arises when the affiliate sells goods in the commercial market for which the M&O contractor has a need. In this second case, the affiliate may receive the award only after competition and under terms and conditions that are consistent with arms length negotiations.

The organizational conflict of interest clause at 952.209–72 prevents entities affiliated with the prime from proposing on subcontracts. This prohibition was established to address the potential for

unfair competitive advantage. This risk is avoided by prohibiting affiliate transactions, except for the purchase of commercial items in accordance with 970.7105 and gaining access to special or unique scientific expertise or test equipment on a cost, no fee basis.

II. Section-by-Section Analysis

The Department of Energy proposes to change the organizational conflicts of interest (OCI) regulations at subsection 909.507–1 and section 970.0905 to require an OCI disclosure from the proposer and all other members of the team when a proposer ''teams,'' either formally or informally, with other entities in responding to a solicitation and to require a special OCI review of existing subcontracts if an M&O contractor or its parent proposes to merge with another corporation.

This proposed rule would also amend section 970.7105 to make clear that there are only two situations in which a management and operating contractor may do business with an affiliated entity. The first involves an affiliate's selling commercial items, not commercial services, following a competitive selection and under enforceable, arms length terms and conditions. The second situation involves an affiliate with special or unique scientific facilities to be made available on a cost, no fee basis.

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 proposed 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, these proposed regulations meet the relevant standards of Executive Order 12988.

C. Review Under the Regulatory Flexibility Act

This proposed 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 must be proposed for public comment and that is likely to have significant economic impact on a substantial number of small entities. The proposed rule establishes restrictions that would avoid organizational conflicts of interest in the performance of management and operating contracts. DOE management and operating contracts have not been awarded to small entities. The proposed constraints on the subcontracting of an M&O contractor with its affiliates may lead to more subcontracting opportunities for small businesses. There would not be an adverse economic impact on small entities.

Accordingly, DOE certifies that this proposed 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

This proposed rule would amend 48 CFR §§ 909.507–1 and 970.0905 to require an organizational conflicts of interest disclosure from team members of the apparent successful offeror. This disclosure is necessary to provide the contracting officer with complete information on potential organizational conflicts involved in teaming arrangements. This proposed collection of information has been submitted to the Office of Management and Budget for review and approval under the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*

DOE estimates the maximum number of respondents subject to the disclosure requirement, in any one year, to be 20 and the number of hours required for record-keeping and preparation of the disclosure reports to be approximately 5 hours per respondent. The total annual burden hours from compliance is expected to be 100 hours (20×5 hours per year). The collection of information contained in this proposed rule is considered the least burdensome for obtaining the needed organizational conflict of interest information.

DOE invites public comments concerning: (1) The need for the reporting requirement; (2) the accuracy of DOE's estimate of the reporting burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents. Send comments regarding this proposed collection of information to the contact person named in this notice.

E. Review Under the National Environmental Policy Act

DOE has concluded that promulgation of this proposed 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 proposed rule is categorically excluded from NEPA review because the amendments to the DEAR would be strictly procedural (categorical exclusion A6). Therefore, this proposed rule does not require an environmental impact statement or environmental assessment pursuant to NEPA.

F. Review Under Executive Order 12612

Executive Order 12612, (52 FR 41685, October 30, 1987), requires that regulations, rules, legislation, and any other policy actions be reviewed for any substantial direct effects on States, on the relationship between the Federal Government and the States, or in the distribution of power and responsibilities among the various levels of Government. If there are sufficient substantial direct effects, then the Executive Order requires the preparation of a federalism assessment to be used in all decisions involved in promulgating and implementing a

policy action. This proposed rule would merely govern organizational conflicts of interest in merger and joint venture or teaming arrangements and the awarding of subcontracts by DOE management and operating contractors. States which contract with DOE will be subject to this rule. However, DOE has determined that this proposed rule would not have a substantial direct effect on the institutional interests or traditional functions of the States.

G. Review Under the Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) generally requires a Federal agency to perform a detailed assessment of costs and benefits of any rule imposing a Federal Mandate with costs to State, local or tribal governments, or to the private sector, of $100 million or more. This proposed rulemaking would only affect private sector entities, and the impact is less than $100 million.

List of Subjects in 48 CFR Parts 909 and 970

Government procurement.

Issued in Washington, D.C. on September 22, 1999.

Richard H. Hopf,

Director, Office of Procurement and Assistance Management.

For the reasons set out in the preamble, Chapter 9 of Title 48 of the Code of Federal Regulations is proposed to be amended as set forth below.

PART 909—[AMENDED]

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

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

2. Subsection 909.507–1 is amended by revising paragraph (e) as follows:

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

(e) The contracting officer shall insert the provision at 48 CFR 952.209–8, Organizational Conflicts of Interest-Disclosure, in solicitations for advisory and assistance services expected to exceed the simplified acquisition threshold. The disclosure requirement applies to all entities that join, either formally (e.g., through a joint venture or similar legal arrangement) or informally, with the offeror in responding to a solicitation. In individual procurements, the Head of the Contracting Activity may increase the period subject to disclosure in 952.209–8(c)(1) up to 36 months.

PART 970—[AMENDED]

3. The authority citation for Part 970 continues to read:

Authority: Sec. 161 of the Atomic Energy Act of 1954 (42 U.S.C. 2201), sec. 644 of the Department of Energy Organization Act, Pub. L. 95–91 (42 U.S.C. 7254).

4. At 970.0905 the existing paragraph is designated as paragraph (a) and paragraphs (b) and (c) are added as follows:

970.0905 Organizational conflicts of interest.

(a) * * *

(b) The contracting officer shall insert the provision at 48 CFR 952.209–8, Organizational Conflicts of Interest-Disclosure, in solicitations for management and operating contracts. The disclosure requirements applies to all entities that join, either formally (e.g., through a joint venture or similar legal arrangement) or informally, with the offeror in responding to the solicitation. In individual procurements, the Head of the Contracting Activity may increase the period subject to disclosure in 952.209–8(c)(1) up to 36 months.

(c) Before approving a proposed sale of assets, merger, or other action that would result in the assignment to another entity of contractual obligations of the management and operating contractor, the contracting officer shall review existing subcontracts to ascertain whether any improper relationships would result and, if so, to ensure that those situations are appropriately resolved.

5. Section 970.7105 is revised to read as follows:

970.7105 Purchasing from contractor-affiliated sources.

(a) A management and operating contractor may purchase commercial items, but not commercial services, from sources affiliated with the contractor (any division, subsidiary, or affiliate of the contractor or its parent company) in the same manner as from other sources, provided:

(1) The management and operating contractor's purchasing function is independent of the proposed contractor-affiliated source;

(2) The same terms and conditions would apply if the purchase were from an unaffiliated third party;

(3) Award is made in accordance with policies and procedures designed to permit effective competition which have been approved by the contracting officer; and

(4) The award is legally enforceable if the entities are separately incorporated.

(b) A management and operating contractor may acquire technical services from an affiliated source only if that source has special or unique scientific facilities, the need for their use is documented, and the services are provided on a cost, no fee basis.

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