

DEPARTMENT OF ENERGY**48 CFR Parts 919 and 952**

RIN: 1991-AB45

Acquisition Regulations: Mentor-Protege Program

AGENCY: Department of Energy.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Department of Energy (DOE) is proposing to amend its acquisition regulations to formally encourage DOE prime contractors to assist small disadvantaged firms certified by the Small Business Administration under Section 8(a) of the Small Business Act, other small disadvantaged businesses, Historically Black Colleges and Universities and other minority institutions of higher learning, and women-owned small businesses in enhancing their capabilities to perform contracts and subcontracts for DOE and other Federal agencies. The program seeks to foster long-term business relationships between DOE prime contractors and these small business entities and minority institutions of higher learning and to increase the overall number of these small business entities and minority institutions that receive DOE contract and subcontract awards.

DATES: Written comments on the proposed rulemaking must be received on or before January 5, 2000.

ADDRESSES: Comments (3 copies) should be addressed to, Eugene Tates at U.S. Department of Energy, Attn. Mentor-Protege Rulemaking, Office of Small and Disadvantaged Business Utilization, 1000 Independence Avenue, SW, Washington, DC 20585.

With respect to proposed reporting requirements and the Paperwork Reduction Act, comments should be addressed to Eugene Tates and to Erik Godwin, Office of Information and Regulatory Affairs, NEOB-Rm. 10202, 725 17th Street, N.W., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Eugene Tates, Mentor-Protege Program, U.S. Department of Energy, Office of Small and Disadvantaged Business Utilization, 1000 Independence Avenue, SW, Washington, DC 20585, (202) 586-4556; or Robert M. Webb, U.S. Department of Energy, Office of Procurement and Assistance Management, 1000 Independence Avenue, SW, Washington, DC 20585, (202) 586-8264.

SUPPLEMENTARY INFORMATION:

I. Background.

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F. Review Under Executive Order 12612.

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

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I. Background

On June 9, 1995 (60 FR 30529), DOE published final guidelines for its Mentor-Protege Pilot Initiative. The purpose of the Initiative was to develop a program that encouraged DOE prime contractors to help energy-related small disadvantaged, 8(a), and women-owned small businesses in enhancing their business and technical capabilities to ensure full participation in the mission of DOE. In addition, the Initiative sought to foster the establishment of long term business relationships between these small business entities and DOE prime contractors and to increase the overall number of these small business entities eligible to receive DOE contract and subcontract awards.

In order to achieve the goal of the Initiative, DOE prime contractors entered into formal agreements with qualified small businesses to provide developmental assistance. In many cases, this assistance has enabled small businesses to benefit from the vast wealth of knowledge acquired by large, successful firms doing business with DOE.

The success of the DOE business mentoring relationships and the continuing need to develop small disadvantaged business, 8(a) firms and women-owned small businesses capabilities to perform contracts and subcontracts for DOE has led to the determination to create a permanent DOE Mentor-Protege Program. The Program will have the same goals and objectives as the DOE Mentor-Protege Pilot Initiative. Some refinements have been added to provide additional incentives for prime contractor participation in the Mentor-Protege Program.

II. Section-by-Section Analysis

This rulemaking proposes to add a new Subpart 919.70 and amend Part 952 of the DEAR to provide a Mentor-Protege Program that assists qualified small businesses to receive developmental assistance from DOE

prime contractors in order to increase the base of small businesses eligible to perform DOE contracts and subcontracts.

Proposed section 919.7002 defines which types of entities are eligible to participate as Protege in the Program. Those entities would include Historically Black Colleges and Universities and other minority institutions of higher learning in addition to 8(a) firms, other small disadvantaged businesses, and women-owned small businesses. Proposed section 919.7003 provides the DOE's Mentor-Protege Program policy. It also states that developmental assistance is reimbursable to the Mentor under DOE cost reimbursement contracts only to the extent that the costs are otherwise allowable in the performance of identified DOE contracts. This is an exception to the general rule that DOE will not reimburse Mentors for providing developmental assistance to Protege, which is set out in proposed section 919.7004. Proposed section 919.7005 outlines requirements for Mentor eligibility.

Proposed section 919.7006 states the incentives for mentoring firms under cost-plus award fee contracts. Proposed section 919.7007 outlines Protege eligibility requirements. Proposed section 919.7008 provides that selection of a protege is solely at the discretion of the proposed mentor. Section 919.7009 describes the process by which DOE contractors may seek to participate in this program as Mentors.

Proposed section 919.7010 provides the minimum requirements of a proposed Mentor-Protege agreement. Proposed section 919.7011 describes forms of developmental assistance.

Proposed section 919.7012 describes the review process leading to the DOE's approval of a proposed Mentor-Protege agreement. Proposed section 919.7013 describes the various reports that this program requires. Proposed section 919.7014 provides for the inclusion of a provision discussing the Mentor-Protege program in all solicitations with an estimated value in excess of the simplified acquisition threshold. Proposed section 952.219-XX provides for the inclusion of a provision discussing the establishment of the Mentor-Protege Program.

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 was 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 subject law's 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 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 of 1980, Public Law 96-354, that 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 entities to which this rulemaking would apply are large business and small business firms that receive a form of incentive for assuming the role of mentor to 8(a) firms, other small disadvantaged businesses, small women-owned

businesses, Historically Black Universities and Colleges, and other minority institutions of higher learning. It is the expectation that at such time as this rule is finalized, those protegee entities would directly benefit from the forms of mentoring described in this proposed rule. There would not be an adverse economic impact on contractors or subcontractors. 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 require DOE contractors serving as mentors to submit semi-annual progress reports to the DOE Mentor-Protege Program Manager at DOE Headquarters (see proposed § 919.7013). The information in the progress reports is necessary to determine if the schedules and developmental assistance levels contained in Mentor-Protege Agreements are being met. Performance under the Agreements is the basis for awarding incentive fees to mentor firms. 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 number of respondent mentor firms to be 30 and the number of hours required for recordkeeping and preparation of the reports to be approximately 12 hours per respondent annually. The total annual burden hour from compliance is expected to be 360 hours (30 × 12 hours per year). The collection of information contained in this proposed rule is considered the least burdensome for meeting the requirements and objectives of the DOE Mentor-Protege Program.

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 persons named in the address section of this notice.

E. Review Under the National Environmental Policy Act

DOE has concluded that 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 merely describes a DOE Mentor-Protege program. States would not be directly subject to this rule, since they are not among the class of entities described as mentors or proteges. 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.

H. Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriation, 1999 (Public Law 105-277) requires Federal Agencies to issue a Family Policymaking Assessment for any proposed rule that may affect family well being. Today's proposal would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE concluded that it is

not necessary to prepare a Family Policymaking Assessment.

IV. Opportunity for Public Comment

At the beginning of this notice, DOE provided for a 30-day comment period and set forth the address for submitting written comments. DOE is not scheduling a public hearing because there are no significant issues of fact or law that would warrant such a hearing.

List of Subjects in 48 CFR Parts 919 and 952

Government procurement.

Issued in Washington, D.C. on November 29, 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 919—SMALL BUSINESS PROGRAMS

1. The authority citation for Part 919 is revised to read as follows:

Authority: 42 U.S.C. 7254, 40 U.S.C. 486 (c), 42 U.S.C. 2201.

2. A new subpart 919.70 is added as follows:

Subpart 919.70—The Department of Energy Mentor-Protege Program

Sec.

- 919.7001 Scope of subpart.
- 919.7002 Definitions.
- 919.7003 General policy.
- 919.7004 General prohibitions.
- 919.7005 Eligibility acceptance to be a mentor firm.
- 919.7006 Incentives for DOE contractor participation.
- 919.7007 Eligibility to be a Protege firm.
- 919.7008 Selection of Protege firms.
- 919.7009 Process for participation in the program.
- 919.7010 Contents of Mentor-Protege Agreement.
- 919.7011 Developmental assistance.
- 919.7012 Review and approval process of agreement by OSDDBU.
- 919.7013 Reports.
- 919.7014 Solicitation provision.

Subpart 919.70—The Department of Energy Mentor-Protege Program

919.7001 Scope of subpart.

The Department of Energy (DOE) Mentor-Protege Program is designed to encourage DOE prime contractors to assist small disadvantaged firms certified by the Small Business Administration (SBA) under Section 8(a) of the Small Business Act, other small disadvantaged businesses, women-owned small businesses,

Historically Black Colleges and Universities, and other minority institutions of higher learning in enhancing their capabilities to perform contracts and subcontracts for DOE and other Federal agencies. The program seeks to foster long-term business relationships between these small business entities and DOE prime contractors, and to increase the overall number of these small business entities that receive DOE contract and subcontract awards.

919.7002 Definitions.

Historically Black Colleges and Universities (HBCUs), as used in this subpart, means an institution determined by the Secretary of Education to meet the requirements of 34 CFR 608.2.

Other Minority Institutions of Higher Learning, as used in this subpart, means an institution determined by the Secretary of Education to meet the requirements of 20 U.S.C. 1067k.

Small Disadvantaged Business Concern, as used in this subpart, means a small business concern owned and controlled by socially and economically disadvantaged individuals that meets the requirements of 13 CFR part 124, subpart B.

Women-Owned Small Business, as used in this subpart, means a small business concern that meets the requirements of 15 U.S.C. 637(d)(3)(D).

919.7003 General policy.

(a) DOE contractors eligible under 48 CFR 919.7005 may enter into agreements with businesses certified by the SBA in the 8(a) Program, other Small Disadvantaged Businesses, Women-Owned Small Businesses, HBCUs, and other Minority Institutions of higher learning to provide those firms appropriate developmental assistance to enhance the capabilities of Proteges.

(b) Costs incurred by a Mentor to provide developmental assistance, as described in section 919.7011, are allowable only to the extent that they are incurred in performance of a contract identified in the Mentor-Protege Agreement and are otherwise allowable in accordance with the cost principles applicable to that contract.

(c) Headquarters Office of Small and Disadvantaged Business Utilization (OSDBU) is the DOE Program Manager for the Mentor-Protege Program.

919.7004 General prohibitions.

DOE may not reimburse the costs of a Mentor in providing any form of developmental assistance to a Protege except as provided in Section 919.7003(b).

919.7005 Eligibility acceptance to be a Mentor firm.

To be eligible for recognition by DOE as a Mentor, an entity must be a DOE contractor performing contracts with at least one negotiated subcontracting plan as required by FAR 19.7.

919.7006 Incentives for DOE contractor participation

(a) Under cost-plus-award fee contracts, approved Mentor firms may earn award fees associated with their performance as a Mentor. The award fee plan may include provision for the evaluation of the contractor's utilization of 8(a) firms, other small disadvantaged businesses, women-owned small businesses, HBCUs, and other minority institutions of higher learning. DOE may evaluate the Mentor's performance in the DOE Mentor-Protege Program under any Mentor-Protege Agreement(s) as a separate element of the award fee plan.

(b) Mentor firms shall receive credit for subcontracts awarded pursuant to their Mentor-Protege Agreements toward subcontracting goals contained in their subcontracting plan.

919.7007 Eligibility to be a Protege firm.

(a) To be eligible for selection as a Protege, a firm must:

(1) Be a small business certified under Section 8(a) of the Small Business Act by SBA, other certified small disadvantaged business, a women-owned small business, HBCU, or any other minority institution of higher learning;

(2) Be eligible for receipt of government contracts;

(3) Have been in business for at least two (2) years prior to application for enrollment into the Mentor-Protege Program; and

(4) Be able to certify as a small business according to the Standard Industrial Code for the services or supplies to be provided by the Protege under its subcontract with the Mentor.

(b) A prospective Mentor may rely in good faith on written representations by a prospective Protege that the Protege meets the requirements in paragraph (a) of this section.

919.7008 Selection of Protege firms.

(a) A Mentor firm is solely responsible for selecting one or more Protege entities from firms eligible under 48 CFR 919.7007.

(b) A Mentor may have more than one Protege; however, a Protege may have only one Mentor.

(c) The selection of Protege firms by Mentor firms may not be protested, except as provided in paragraph (d) of this section.

(d) Only protests regarding the small business size status of a firm to be a Protege will be considered and shall be submitted to the DOE Office of Small and Disadvantaged Business Utilization for resolution. When that Office is unable to resolve a protest, it will refer the matter to the Small Business Administration for resolution in accordance with 13 CFR. part 121.

919.7009 Process for participation in the program.

A prospective Mentor firm must submit the following to the DOE Mentor-Protege Program Manager.

(a) A statement that it is eligible, as of the date of application, for the award of Federal contracts;

(b) A statement that it is currently performing at least one contract for DOE;

(c) The DOE contract number, type of contract, period of performance (including options), title of technical program effort, name of DOE Program Manager (including contact information) and the DOE contracting activity; and

(d) An original and two copies of the Mentor-Protege Agreement signed by the chief executive officers of the Mentor and Protege firms.

919.7010 Contents of Mentor-Protege Agreement.

The proposed Mentor-Protege Agreement must contain:

(a) Names, addresses and telephone numbers of Mentor and Protege firms and a point of contact within each firm who will oversee the Agreement;

(b) Requirements for the Mentor firm or the Protege entity to notify the other entity, DOE Headquarters OSDBU, and the contracting officer in writing at least 30 days in advance of the Mentor firm's or the Protege entity's intent to voluntarily terminate or withdraw from the Mentor-Protege Agreement (Such termination would not terminate any existing subcontract between the Mentor and the Protege);

(c) A description of the form of developmental assistance program that will be provided by the Mentor to the Protege firm, including a description of any subcontract work, and a schedule for providing the assistance and the criteria for evaluation of the Protege's developmental success (48 CFR 919.7011);

(d) A listing of the number and types and estimated amount of subcontracts to be awarded to the Protege firm;

(e) Term of the Agreement;

(f) Procedures for completing performance under the Agreement in the case of a termination of, or withdrawal from, the Agreement by either party;

(g) Procedures to be invoked should DOE terminate its recognition of the Agreement for good cause (such termination of DOE recognition would not constitute a termination of the subcontract between the Mentor and the Protege.);

(h) Provision for the Mentor firm to submit to the DOE Mentor-Protege Program Manager a "lessons learned" evaluation developed by the Mentor at the conclusion of the contract Mentor-Protege Agreement;

(i) Provision for the submission by the Protege firm of a "lessons learned" evaluation to the DOE Mentor-Protege Program Manager at the conclusion of the Mentor-Protege Agreement;

(j) Description of how the development assistance will potentially increase subcontracting opportunities for the Protege firm;

(k) Provision for the Mentor firm to brief the DOE Mentor-Protege Program Manager, the field technical program manager(s), and the contracting officer at the conclusion of each year in the Mentor-Protege Program regarding program accomplishments as pertains to the approved Agreement (where possible, this review may be incorporated into the normal program review for the Mentor's contract);

(l) Recognition that costs incurred by a Mentor to provide developmental assistance, as described in 48 CFR 919.7011, are allowable only to the extent that they are incurred in performance of a contract identified in the Mentor-Protege Agreement and are otherwise allowable in accordance with the cost principles applicable to that contract (the DOE Mentor-Protege Program has no appropriation for paying for developmental assistance); and.

(m) Other terms and conditions, as appropriate.

919.7011 Developmental assistance.

(a) The forms of developmental assistance a Mentor may provide to a Protege include, but are not limited to:

(1) Management guidance relating to:

(i) Financial management;

(ii) Organizational management;

(iii) Overall business management planning;

(iv) Business development;

(v) Marketing assistance;

(2) Engineering and other technical assistance;

(3) Noncompetitive award of subcontracts under DOE or other Federal contracts where otherwise authorized;

(4) Award of subcontracts in the Mentor's commercial activities;

(5) Progress payments based on costs;

(6) Rent-free use of facilities and/or equipment owned or leased by Mentor; and

(7) Temporary assignment of Mentor personnel to the Protege for purposes of training.

(b) Costs incurred by a Mentor to provide developmental assistance, as described in paragraph (a) of this section, are allowable only to the extent provided at 48 CFR 919.7003(b).

919.7012 Review and approval process of agreement by OSDBU.

(a) OSDBU will review the proposed Mentor-Protege Agreement under 48 CFR 919.7010 and will complete its review and assessment no later than 30 days after receipt. OSDBU will provide a copy of its assessment to the cognizant DOE technical program manager and contracting officer for review and concurrence.

(b) If OSDBU approves the Agreement, the Mentor may implement the developmental assistance program.

(c) Upon finding deficiencies that DOE considers correctable, the OSDBU will notify the Mentor and request information to be provided within 30 days that may correct the deficiencies. The Mentor may then provide additional information for reconsideration. The review of any supplemental material will be completed within 30 days after receipt by the OSDBU and the Agreement either approved or disapproved.

919.7013 Reports.

(a) Prior to performing an evaluation of a Mentor's performance under its Mentor-Protege Agreement for use in award fee evaluations, the Mentor-Protege Program Manager must consult with the cognizant DOE field technical program manager and must provide a copy of the performance evaluation comments regarding the technical effort and Mentor-Protege development to the contracting officer.

(b) The DOE Mentor-Protege Program manager must submit semi-annual reports to the cognizant contracting officer regarding the participating Mentor's performance in the Program for use in the award fee determination process.

(c) The DOE contractor must submit progress reports to the DOE Mentor-Protege Program Manager semi-annually.

919.7014 Solicitation provision.

The contracting officer must insert the provision at 952.219-XX, DOE Mentor-Protege Program, in all solicitations with an estimated value in excess of the simplified acquisition threshold.

**PART 952—SOLICITATION
PROVISIONS AND CONTRACT
CLAUSES**

3. The authority citation for Part 952 continues to read as follows:

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

4. A new subsection 952.219-XX, DOE Mentor-Protege Program is added as follows:

§ 952.219-XX, DOE Mentor-Protege program.

In accordance with 919.7014 insert the following provision in applicable solicitations.

DOE Mentor-Protege Program

(xxx xx)

The Department of Energy has established a Mentor-Protege Program to encourage its prime contractors to assist firms certified under 8(a) of the Small Business Act by SBA, other certified Small Disadvantaged Businesses, Women-Owned Small Businesses, Historically Black Colleges and Universities and Minority Institutions and other Minority Institutions of higher learning

in enhancing their business abilities. If the contract resulting from this solicitation is awarded on a cost-plus-award fee basis, the contractor's performance as a Mentor may be evaluated as part of the award fee plan. Mentor and Protege firms will develop and submit "lessons learned" evaluations to DOE at the conclusion of the contract. Any DOE contractor that is interested in becoming a Mentor should refer to the applicable regulations at 48 CFR 919.70 and should contact the Department of Energy's Office of Small and Disadvantaged Business Utilization.

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