RESPONDING TO SOLICITATIONS UNDER DOE WORK FOR OTHERS PROGRAM

Guiding Principles

- Maximize access to DOE facilities and expertise through the Work for Others Program
- Maintain compliance with non-competition laws, regulations and statutes.

PURPOSE:

To provide guidance on the Department's policy related to DOE's laboratories ability to respond to solicitations from non-DOE sponsors under the Work for Others (WFO) program.

SCOPE:

This chapter provides guidance on the effect of laws, regulations, and statutes to DOE/NNSA WFO policy related to the prohibition of DOE Federally Funded Research and Development Centers (FFRDCs) and other facilities from competing directly with the domestic private sector. Particular emphasis is placed on WFO requirements governing how a DOE/NNSA site/facility management contractor operating an FFRDC or other DOE/NNSA facility may respond to Broad Agency Announcements (BAAs), financial assistance solicitations, Program Research and Development Announcements, and similar solicitations from other Federal agencies or non-Federal entities that do not result in head-to-head competition. Additional guidance is provided regarding DOE's WFO policy related to participation in and responding to Requests for Proposals. This guidance does not apply to DOE issued solicitations.

This guidance applies to all DOE sponsored facilities performing WFO activities. Given the complicated nature of this issue and the variety and number of potential sponsors of work, updates to this chapter will occur. DOE recognizes that while alternative terms may be used for agency specific solicitations, based on their characteristics, the solicitations fall into two categories discussed below: RFP-type or BAA-like. The following background and analysis of the

regulations and their effect on DOE policy does not add additional requirements or reviews beyond those contained in DOE Order 481.1C.

Authorities:

Economy Act of 1932, as amended (31 U.S.C. § 1535), which authorizes an agency to place order for goods and services, subject to availability, with another government agency when the head of the ordering agency determines that it is in the best interest of the government to do so.

Atomic Energy Act of 1954,(Pub. L. No. 83-303), sections 31, 32, 33, as amended, (42 U.S.C § 2011 et seq.), which authorizes the conduct of research and development and certain training activities for non-DOE/non-NNSA entities, provided that private facilities or laboratories are inadequate for that purpose.

The Energy Reorganization Act (ERA) of 1974 (Pub.L. No. 93-438), section 205, (42 U.S.C. § 5845), which requires Federal agencies to furnish to the NRC, on a reimbursable basis, such research services as the NRC deems necessary and requests for the performance of its function.

Homeland Security Act of 2002 (HSA) (Pub. L. No. 107-296), section 309(a) (2), (6 U.S.C. § 189), which authorizes any of DOE national laboratories and sites to accept and perform work for the Secretary of Homeland Security, consistent with resources provided, and perform such work on an equal basis to other missions at the laboratory and not on a noninterference basis with other missions of such laboratory or site.

FAR 17.5, "Interagency Acquisitions under the Economy act," which prescribes policies and procedures for a Federal agency to obtain supplies or services from another Federal agency.

FAR 35.016, "Broad Agency Announcement" which prescribes procedures for the use of the broad agency announcement with Peer or Scientific review (see FAR 6.102(d)(2)) for the acquisition of basic or applied research and that part of development not related to the development of a specific system or hardware procurement.

FAR 35.017, "Federally Funded Research and Development Centers (FFRDCs)," which establishes Government-wide policies for the review and termination of FFRDCs and related sponsoring agreements.

Department of Energy Acquisition Regulation (DEAR) 970.1707 and 970.5217-1, "Work for Others," The standard clause at 970.5217-1 authorizes the performance of work for non-DOE entities by DOE management and operating contractors and establishes specific conditions under which this work can be approved and performed, including but not limited to a prohibition against direct competition with the domestic private sector.

DOE Order 481.1C, WORK FOR OTHERS (NON-DEPARTMENT OF ENERGY FUNDED WORK) which establishes policies and procedures for the performance of non-DOE work states, "A contractor may not respond to Requests for Proposals (RFPs) or other solicitations from another Federal agency or non-federal entity that involves head-to-head competition as an offeror team member, or subcontractor to an offeror."

The Work for Others Program:

DOE's National Laboratories and facilities have used their unique scientific and technical expertise to perform research and development (R&D) or applied engineering work for organizations other than DOE since the enactment of the Atomic Energy Act of 1954. A large portion of this work is currently conducted under DOE's Work for Others program (WFO). DOE defines WFO as the performance of work for non-DOE entities by DOE personnel and/or their respective contractor personnel or the use of DOE facilities for work that is not directly funded by DOE appropriations. DOE Order 481 .1C "Work for Others (NON-DEPARTMENT OF ENERGY WORK)" provides DOE policy for the performance of WFO. The intent of the order is to ensure compliance with laws, regulations, and statutes, including restrictions pertaining to DOE facilities competing with the private sector. DOE considers Comptroller General Decisions to inform its interpretation of federal regulations and its development of policy requirements.

Under the WFO program, DOE authorizes use of its contractor and facility resources to non-DOE sources only when such resources do not place the facility in direct competition with the private sector. Reciprocal benefits include providing support for developing and maintaining competencies important to the achievement of DOE's mission work. Although the vast majority of DOE's WFO services are provided in support of Other Federal Agencies (OFAs), DOE also performs work for the private sector, academia, and state, local and foreign governments.

The WFO program is important to the vitality of the DOE, DOE's National Laboratories and DOE's other major Government-Owned Contractor-Operated facilities. To preserve the option of performing WFO, the department must ensure that its policies and procedures ensure compliance with statutory and regulatory guidance. Foremost among these is the requirement to avoid situations where DOE's FFRDCs are engaged in practices that place these facilities in direct competition with the private sector. Below is a summary discussion of the relevant laws, regulations and statutes that demonstrate the intent of authorizing access to DOE facilities for performance of work is predicated on the work not being able to be performed by the private sector.

DOE FFRDCs and other DOE major facility contractors primarily perform work for other Federal agencies under the authority provided in sections 31, 32, and 33 of the Atomic Energy Act (AEA) of 1954, (Pub. L. No. 83-303), as amended, (42 U.S.C. § 2011 *et seq.*) 42 U.S.C. § 2053 states:

> § 2053. Research for others; charges
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> Where the Commission [formerly the Atomic Energy Commission, now DOE] finds

> private facilities or laboratories are inadequate for the purpose, it is authorized to conduct for other persons, through its own facilities, such of those activities and studies of the types specified in section 31 [42 USCS § 2051] as it deems appropriate to the development of energy. To the extent the Commission determines that private facilities or laboratories are inadequate to the purpose, and that the Commission's facilities, or scientific or technical resources have the potential of lending significant assistance to other persons in the fields of protection of public health and safety, the Commission may also assist other persons in these fields by conducting for such persons, through the Commission's own facilities, research and development or training activities and studies. The Commission is authorized to determine and make such charges as in its discretion may be desirable for the conduct of the activities and studies referred to in this section.

Under this authority, the DEAR 970.5217-1 "Work for Others clause authorizes the performance of work for non-DOE entities by DOE management and operating contractors and establishes specific conditions under which this work can be approved and performed, including but not limited to a prohibition against direct competition with the domestic private sector. This clause in the laboratory contract satisfies the condition in FAR 17.503(e) that an FFRDC may only accept work from other federal agencies if the terms of the FFRDC's sponsoring agreement permit it; for DOE FFRDCs, the contract is the document that is the sponsoring agreement. *See also* FAR 35.017-1(a). Although the AEA is the most common authority for DOE to perform work for non-DOE activities, other more agency-specific statutory authorizations have been passed by Congress. The Energy Reorganization Act (ERA) and the Homeland Security Act (HSA) establish similar yet significantly different relationships between DOE and the Nuclear Regulatory Commission (NRC) and the Department of Homeland Security (DHS) respectively. These statutes specifically broaden DOE's authority to engage with specific agencies under DOE's WFO program (but do not relax the FAR prohibition on FFRDCs head to head competition with the private sector). For example, section 309(a)(2) of the HSA states:

> ACCEPTANCE AND PERFORMANCE BY LABS AND SITES.—
> Notwithstanding any other law governing the administration, mission, use or operations of any of the Department of Energy national laboratories and sites, such laboratories and sites are authorized to accept and perform work for the Secretary [of DHS] consistent with resources provided, and perform such work on an equal basis to other missions at the laboratory and not on a noninterference basis with other missions of such laboratory or site.

This provision of the HSA effectively elevates the core mission of DHS, concerning, national security, over any other policy concern including any unfair competitive advantage DOE's labs and sites may have over the private sector when DHS requests and places work directly with DOE . It does not permit DOE to respond to competitive solicitations issued by DHS under an RFP. DOE promulgated DOE O 484.1, "Reimbursable Work for the Department of Homeland Security," to establish DOE policies and procedures for the acceptance, performance, and administration of reimbursable work directly funded by the Department of Homeland Security to specifically address the broader parameters for acceptance and performance of DHS work. This example illustrates, however, that absent such specific statutory to authorize work for a

particular agency under other circumstances, the general authority established by the AEA as implemented by the FAR and the DEAR is controlling.,

The Economy Act of 1932, as amended, (31 U.S.C. § 1535) authorizes agencies to enter into agreements to obtain supplies or services by interagency acquisition. The Economy Act applies when more specific statutory authority does not exist. FAR Part 17.5, "Interagency Acquisitions" prescribes policies and procedures applicable to all interagency acquisitions under any authority except orders of $500k or less issued against Federal Supply Schedules. FAR 17.503(e) requires that "[T]he non-sponsoring agency shall provide to the sponsoring agency necessary documentation that the requested work would not place the FFRDC in direct competition with domestic private industry."

Authorities used by DOE and other federal agencies to enter into Inter-agency Agreeents (IA's) establish specific conditions on the performance of such work. A primary consideration is that the work will not place DOE facilities in direct competition with the domestic private sector. Absent an authorization like that provided to DHS for directly funded work, the FAR competition restrictions (identified below) would apply in all agency to agency agreements. This is because DOE facilities have significant advantages over other potential offerors, concerning the use of government funded facilities and technologies; reimbursement of most if not all operational costs; and indemnification from most operational liabilities. These advantages effectively remove any possibility of fair and open competition with equally qualified offerors on a level playing field. The DOE applies FFRDC competition restrictions to all non-DOE funded work.

Federal Acquisition Regulation:

The use of FFRDCs is governed by FAR Part 17, "Special Contracting Methods" and Part 35 "Research and Development Contracting."

The FAR addresses competition and FFRDCs at FAR 17.503(e), 35.017, 35.016.

> FAR 17.503 (e) provides that … "The non-sponsoring agency shall provide to the sponsoring agency necessary documentation that the requested work would not place the FFRDC in direct competition with the domestic private industry."
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> FAR 35.017 (a)(2) provides that …"It is not the Government's intent that an FFRDC use its privileged information or access to facilities to compete with the private sector. However, an FFRDC may perform work for other than the sponsoring agency under the Economy Act, or other applicable legislation, when the work is not otherwise available from the private sector."
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> FAR 35.017-1 (c)(4), A prohibition against the FFRDC competing with any non-FFRDC concern in response to a Federal agency request for proposal for other

than the operation of an FFRDC. This prohibition is not required to be applied to any parent organization or other subsidiary of the parent organization in its non-FFRDC operations. Requests for information, qualifications or capabilities can be answered unless otherwise restricted by the sponsor.

FAR 35.016 (d) states, "[the primary basis for selecting] proposals received as a result of the BAA shall be evaluated in accordance with evaluation criteria specified therein through a peer or scientific review process. Written evaluation reports on individual proposals will be necessary but proposals need not be evaluated against each other since they are not submitted in accordance with a common work statement."

FAR 35.016 (e) states, "The primary basis for selecting proposals for acceptance shall be technical, importance to agency programs, and fund availability. Cost realism and reasonableness shall also be considered to the extent appropriate."

These FAR provisions further emphasize and in most cases specifically prohibit FFRDCs from directly competing with the private sector. However, it is worth noting that BAA definitions and the procedures by which solicitations are considered and awarded are discussed independently in FAR 35.016. This is consonant with DOE's policy that a DOE/NNSA site/facility management contractor operating an FFRDC or other DOE/NNSA facility may respond to Broad Agency Announcements, financial assistance solicitations, Program Research and Development Announcements, and similar solicitations from other Federal agencies or non-Federal entities that do not result in head-to-head competition, subject to the following requirements:

1) the solicitation must be a general research announcement used for the acquisition of basic or applied research to further advance scientific knowledge or understanding rather than focus on a specific system or hardware solution;
2) evaluation and selection is performed through a merit or peer review process using pre-established general selection criteria;
3) the primary basis for selection is technical approach, importance to the Agency, and funds availability.

DOE Policy/GAO Decisions

The following GAO decisions illustrate positions on both FFRDC prohibition from direct competition with the private sector and the potential for BAA and BAA-like response opportunity.

General Accounting Office (GAO) decision, Logicon RDA, B-27624019, (1997 U.S. Comp. Gen. LEXIS 214), held that the FAR prohibition on FFRDC competition with the private sector applies

equally be it at the prime contractor or subcontractor level. The Comptroller General pointed out that an FFRDC may violate the FAR prohibition of competing with the private sector by responding to an agency RFP because the prohibition in FAR 35.017-1(c) (4) makes no distinction between an FFRDC's role as a prime contractor or subcontractor. The Comptroller General's decision concludes that " the determination [of] whether an FFRDC is competing with a private firm in violation of the regulation depends upon the impact of its participation on the procurement, from both a technical and cost standpoint." Energy Compression Research Corp., B-243650.2, November 18, 1991, 91-2 CPD ¶ 466 at 5 (1991 U.S. Comp. Gen. LEXIS 1325). Thus DOE 's policy aligns with GAO's position that to the extent that proposed FFRDC's participation impacts the outcome of the selection, the FFRDC's participation places it in position of competing head to head with the domestic private sector.

Appropriately used, the BAA process solicits for a variety of diverse responses that present dissimilar "best science solutions" to more broadly defined technical challenges. In contrast, the RFP process establishes government requirements for a specific statement of work that anticipates multiple responses proposing similar solutions within well defined cost parameters. The differences become clearer in the review and award processes. The BAA evaluation process is by peer review, using more broadly defined selection criteria, that does not anticipate proposal comparison and does not place cost as a primary consideration. The opposite is true for the RFP process. The RFP evaluation process anticipates multiple responses from firms capable of performing the work using similar approaches to provide very specific sponsor-defined deliverables. The FAR requires head to head comparisons of offers and, with the exception of Brooks Act architect-engineering contracts, using costs as a significant factor in the award decision. See FAR 15.308; 41 U.S.C. § 3306(c)(1)(B).

Because they are distinct mechanisms with different purposes, responses to a BAA, either directly or as a subcontractor, should not be constrained by the restrictions placed on evaluations of RFPs by the FAR. The characteristics of a BAA and the process for evaluating them are different from RFPs. FAR 35.016 defines these differences. They are: 1) BAAs are general research announcements that are used for the acquisition of basic and applied research ideas to further advance scientific knowledge or understanding rather than focusing on a specific system or hardware solution; 2) evaluations and selections are performed through a peer or scientific review process based on pre-established selection criteria and proposals need not be evaluated against one another (head-to-head competition) because they are not submitted in accordance with a common work statement.; and 3) the primary basis for selection is technical approach, importance to the agency, and funds availability.

Our opinion is supported by the Comptroller General in its decision in Centre Manufacturing Co. Inc., B-255347.2, March 2, 1994, 94-1 CPD ¶ 162 (1994 U.S. Comp. Gen. LEXIS 161). The Comptroller General stated that,

> A BAA is a contracting method by which government agencies can acquire basic and applied research. BAAs may be used by agencies to fulfill requirements for scientific study and experimentation directed toward advancing the state of the art or increasing

> knowledge or understanding rather than focusing on a specific system or hardware solution. Unlike sealed bidding and other negotiated procurement methods, a BAA does not contain a specific statement of work and no formal solicitation is issued. Under a BAA, the agency identifies a broad area of interest within which research may benefit the government, and organizations are then invited to submit their ideas within a specified period of time. The firms that submit proposals are not competing against each other but rather are attempting to demonstrate that their proposed research meets the agency's requirement.
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> Avogadro Energy Sys., B-244106, Sept. 9, 1991, 91-2 CPD ¶ 229 (1991 U.S. Comp. Gen. LEXIS 1017)

DOE's policy permitting responses to BAA and BAA-like solicitations will continue contingent on satisfying WFO policy and procedural requirements set forth in DOE Order 481.1C. Specific requirements include: Federal agencies must provide a written statement that placement of the work with DOE will not place DOE in direct competition with the private sector and a written certification must be made by the approving DOE Contracting Officer or a DOE official to whom such authority has been delegated that the proposed work is not in direct competition with the private sector.

DOE RFP/RFP-type and BAA/BAA-like Solicitation responses under the Work for Others program

The department remains committed to preserving its ability to perform work for non-DOE entities. DOE must strive to comply with both specific requirements and the overall intent of non-competition restrictions placed on FFRDCs. These guidelines are intended to address the FFRDC competition restrictions as they relate to other agency solicitations and DOE's ability to respond to the solicitations under the WFO program. Despite our best efforts the complexities of this issue can be expected to present new challenges from the departmental to the individual agreement level. Implementation of the guidance requires practitioners to use sound business judgment and common sense approaches. For purpose of implementation, the following will apply to responses to solicitations issued by any non-DOE entity. DOE WFO policy and requirements beyond those listed below will continue to apply as well.

- DOE and its contractors may provide facility capability statements or other communication to requesting organizations, at any time however, such information shall not be represented as available or included in a RFP response.

- Following completion of a competitive solicitation process, an awardee may enter into a WFO agreement with the DOE and its contractors. As stated above, the awardee must compete for award absent DOE and contactor participation. Only at the conclusion of the competitive process may an independent agreement under WFO be entered into

between DOE and the sponsor.

- Federal agencies use numerous names for competitive and non-competitive solicitations/announcements including Financial Assistance, Program Research and Development, Funding Opportunities, and Research Funding. Using the FAR, most can be defined as having the characteristics of either a RFP or BAA. Agency specific names for solicitations and inconsistent use of the terms RFP and BAA can raise questions if a response is permissible under current DOE WFO policy. Therefore the agency provided name of the solicitation shall not by itself control if a response by a DOE contractor is appropriate.

- Solicitation characteristics for RFPs and BAAs shall be the first determinant for permissibility of response. Specific attention should be paid to the intent and process by which a solicitation is issued and selections are made. Responses to non-DOE RFPs or other solicitations that involve head-to-head competition as an offeror team member, or subcontractor to an offeror are not permitted.

- Discussions with the issuing agency may be held to determine if the solicitation meets DOE's WFO BAA or RFP requirements and to clarify if FFRDC responses were anticipated and would be considered.

Written certification must be made by the approving DOE Contracting Officer or a DOE official to whom such authority has been delegated that the proposed work is not in direct competition with the domestic private sector.

<u>Broad Agency Announcements (BAA) and BAA-like instruments:</u>

DOE and its contractors may respond to BAA or a BAA-like instrument as defined above as either an offeror, team member or as a proposed subcontractor subject to the following:.

- BAA-like instruments are defined the characteristics above and those described in FAR 35.016.
- Contractors will provide a written notification to the Cognizant Site Office prior to responding to a BAA (Site Offices and the Contractor can mutually agree to alternative notification timing if prior notification inhibits timely responses).
- Response must propose the use of technologies, services, etc., otherwise unavailable in the private sector.
- Responses must include notification that performance of the work is contingent on DOE approval.
- When providing an award to DOE and its contractors, Federal agency BAA sponsors shall provide a written statement that, to the best of the agency's knowledge, the work will not place DOE and their contractors in direct competition with the domestic private sector.

- Non-Federal BAA-like sponsors are not required to provide a non-competition statement under DOE 481.1C however; the DOE and contractor will apply noncompetitive restrictions (including making a non-competition determination) to all BAA and BAA-like responses.

DOE or its contractor may seek clarity if the agency will accept a response from a FFRDC, prior to responding.

Request for Proposals RFP and RFP-type instruments

The DOE and a federal or non-federal sponsor may enter into a WFO agreement prior to the non-DOE sponsor issuing a RFP or RFP-type solicitation. The purpose of the WFO agreement would be to include the scope of work negotiated in the WFO agreement into the subsequently issued non-DOE RFP or RFP-type solicitation as sponsor provided services. The WFO activity must be clearly identified in the RFP as sponsor provided services.

DOE and its contractors may not respond to other federal agency RFPs as offerors, team members, or subcontractors in the RFP submission and selection process.

DOE and its contractors may not respond to RFP-type solicitations by non-Federal sponsors as offerors, team members, or subcontractors where the DOE facility is placed in direct competition with the private sector.

- RFP-type solicitations are defined by RFP characteristics described above.

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