

- They have a long-term relationship with DOE in order to provide the continuity that will attract and retain high-quality personnel at the national laboratories. M&O contracts with a base term of 5 years and a 5-year option are typically used to maintain national laboratory expertise and equipment and facility capabilities, to provide continuity on the national laboratory meeting the needs of DOE, to maintain their objectivity and independence, and to provide a quick response capability.

The FAR specifically states that it is not the intent of the government that an FFRDC use its privileged information or access to facilities to compete with the private sector. It further states that a FFRDC often performs work because the private sector is unable or unwilling to use its own facility for the work. FFRDC competition with the private sector is a sensitive issue. It should also be noted that the DOE Financial Assistance Regulations preclude FFRDCs from being recipients of grants and cooperative agreements (10 CFR 600.101 states: “recipient does not include government-owned, contractor-operated facilities or research centers providing continued support for mission-oriented, large-scale programs that are government-owned or controlled, or are designated as federally funded research and development centers.”).

National laboratory employees are precluded from:

- Performing inherently governmental functions;
- Performing support services; and
- Obtaining support services for a DOE organization through a national laboratory subcontract (prohibition extends to all M&O contractors: national laboratories, Y-12, etc).

B. DOE and Congressional Sensitivities Concerning the Use of the National Laboratories

The primary concerns with the use of the national laboratories—based on Departmental Orders, Inspector General (IG) reports, and report language that has accompanied the Energy and Water Development (E&WD) appropriations)—center on:

- National laboratory employees, particularly those located in the Washington, D.C. area, augmenting DOE staff by performing inherently governmental functions;

- National laboratory employees, particularly those located in the Washington, D.C. area, performing activities that should be performed by support service contractors (issues of national laboratories competing with the private sector and higher costs);
- Insufficient programmatic and cost-effectiveness justifications of national laboratory employees located in the Washington, D.C. area provided by the sponsoring DOE programs;
- Long duration of assignments of national laboratory employees located in the Washington, D.C. area (from the 1997 IG report: “conveys the appearance, if not the reality, that program offices were augmenting federal staff rather than filling short-term needs for unique experience;” DOE O 350.2 states: “DOE facility contractor employees shall not be assigned to the Washington, D.C., area to—(4) perform assignments that exceed 12 months in duration unless the individual’s continued assignment is critical and represents significant mutual benefit to the program sponsor and the facility.”);
- National laboratories providing support services to DOE programs through national laboratory subcontracts (for E&WD-funded programs, the sensitivity is the augmentation of appropriations for support services, since there has been congressional report language that funding for support services is to be only from limited program direction funds, while laboratory subcontracts use less limited program funds); and
- National laboratories competing with the private sector.

C. Local (Washington DC area) National Laboratory Employees

The order DOE O 350.2, “Use of Facility Contractor Employees for Services to DOE in the Washington, D.C. Area,” contains the following provisions that concern the approved use of national laboratory employees located in the Washington DC area:

- On an annual basis in advance of the next fiscal year (by May 1), this Order requires each Assistant Secretary to submit a “DOE Facility Contractor Employee Staffing Plan.” As part of the EERE plan, each EERE office/program has to submit, by their objectives and performance measures for that fiscal year, the key functions and critical skills required of local national laboratory employees along

with the associated number of local national laboratory employees and the estimated costs in program and program direction funds. From these forms, there is a second form that lists the name of each requested national laboratory employee, the national laboratory, their job assignment (which must align with the key functions), their location of work (e.g., Forrestal Building), the EERE program, the start and end dates of their job assignment, the percent of their time charged against program funds, and their total (direct and indirect) costs per month.

- National laboratory employees are precluded from performing either inherently governmental functions or support services.
- A supporting analysis needs to be performed that determines that the most cost-effective method for performing the work is by a local national laboratory employee.
- DOE has a ceiling of local contractor employees located in the Washington, D.C. area (for FY 2007, the ceiling is 38 employees). The Order defines a facility contractor (local M&O employee) as an employee of a DOE M&O contract, a DOE Management and Integration contract, or a DOE Environmental Restoration contract. It includes not only employees under these contracts, but also employees of their subcontractors. If these employees are in the Washington, D.C. area for more than 30 contiguous days, they count. The order does not include exclusions for Intergovernmental Personnel Assignments, use by other agencies, etc. Trying to circumvent the 30 continuous-day requirement through the frequent use of national laboratory employee travel would not be viewed as good faith (Government Accountability Office report performed for House E&WD, “DOE Management, Opportunities for Saving Millions in Contractor Travel Costs,” 1999).
- EERE uses a disproportionately high number of local national laboratory employees. The only way EERE can increase its ceiling is to request a waiver. The Order states: “Any DOE program office facing a critical need to exceed its ceiling may request a waiver from the Deputy Secretary, DOE. All waiver requests must be concurred upon by the Director, Office of Management (formerly Management, Budget and Evaluation) before being submitted to the Deputy Secretary, DOE.” Since EERE has about 25 percent of the

Department’s ceiling, it is improbable that the Assistant Secretary would submit a waiver. It is more likely that other parts of the Department would submit waivers with the offset coming out of EERE’s disproportionately high ceiling.

- All approved local national laboratory employees must be listed in the Department’s database. Use of a local national laboratory employee who is not listed in the Department’s database can have substantive consequences. The Order states: “Failure to list such an employee in the database will cause any costs associated with the employee (e.g., salary and benefits) to be deemed as unallowable under the terms and conditions of the contract.” And, “Payments to a facility contractor employee for any additional tax burden caused by an extended assignment will also be deemed unallowable.” If you are using a local M&O contractor who is not currently listed as approved in the DOE database, the government should not pay for their costs. This carries consequences for both the national laboratory as well as the sponsoring DOE program.
- The EERE coordinator for the annual submission of use of local national laboratory employees and any changes to the use of national laboratory employees is Philip Ammirato (phone: 202-586-6551). EERE must stay within its allotted ceiling of local national laboratory employees. This means that if we are requesting approval of another local M&O contractor employee, an existing local M&O contractor employee is no longer allowed to perform work for us. The Order requires the authorization of the Head of Contracting Authority (HCA) or designee for all assignments of facility contractor employees to the Washington, D.C. area. Requirements for the justification and the approval process are contained in the Order.

References

Department of Energy (2003). *DOE Order O 350.2A – Use of Management and Operating or Other Facility Management Contractor Employees for Services to DOE in the Washington, D.C. Area*. United States Federal Government, USA. Retrieved from:
<http://www.directives.doe.gov/pdfs/doe/doetext/neword/350/o3502a.pdf>

Department of Energy (2005). *DOE Notice N 350.2 – Supplemental Requirements for the Use of Management and Operating or Other Facility Management Contractor Employees for Services to DOE in the Washington, D.C., Area*. United States Federal Government, USA. Retrieved from: <http://www.directives.doe.gov/pdfs/doe/doetext/neword/350/n3502.pdf>

Federal Acquisition Regulations (FAR): Part 17.6–Management and Operating Contracts and Part 35.017–Federally Funded Research and Development Centers. An updated version of the FAR may be found at: <http://www.acqnet.gov/far/>