



**Department of Energy**  
Carlsbad Field Office  
P. O. Box 3090  
Carlsbad, New Mexico 88221  
June 5, 2008

JUN 9 2008

Ms. Pam O. Inmann, Executive Director  
Western Governors' Association  
1600 Broadway, Suite 1700  
Denver, CO 80202

Dear Ms. Inmann:

Thank you for your letter of January 24, 2008 expressing your concerns regarding the award of the two latest TRU waste transportation services (carrier) contracts.

First, my response to your letter has taken longer than expected due, primarily, because I wanted the staff personnel of your office and mine to try to resolve your stated concerns before I provided this formal response to you. Unfortunately, they were not able to reach a verbal agreement prior to this formal response addressing some of your concerns. Despite the lack of agreement, their interchange has been professional and courteous. The Department of Energy (DOE) fully intends to honor the pledge you referred to in your letter to "work cooperatively [with the Western Governor's Association (WGA) Technical Advisory Group (TAG)] to implement the elements of the WGA Waste Isolation Pilot Plant Transportation Safety Program Implementation Guide" (WIPP Guide).

As to the process that was followed in the latest carrier contract awards (CAST awarded in March 2007 and Visionary Solutions awarded in September 2007), the DOE Environmental Management Headquarters office authorized the Environmental Management Consolidated Business Center (CBC) Contracting Officer and Legal Counsel to manage the acquisition of new carrier service contracts, including posting the solicitations and making the awards for the new carrier contracts. During that process, it was determined that there was not adequate justification to allow the TAG to participate in the carrier contracts solicitation process in compliance with federal acquisition regulations. In hind sight, a better justification should have been provided to the CBC Contracting Officer and Legal Counsel. However, since that justification did not permit the TAG to participate in the latest carrier solicitations, the CBFO staff involved in the carrier acquisition process ensured that the elements that were driven by the WIPP Guide were also incorporated in those solicitations without changes and the technical proposals were evaluated using those elements, in addition to the required TRU program requirements. This letter proposes some recommended action items to remedy the nonparticipation from the acquisition of the latest carrier contracts and to establish a better process within the federal acquisition regulations to allow TAG participation in future carrier contract awards.

The first recommended action item addresses the past concern by providing you the enclosed copies of the statements of work from the contracts previously awarded in 2000 and the latest contracts awarded in 2007. The TAG will be able to verify that the elements from the WIPP Guide were incorporated in both without changes, and I believe that your staff and the TAG will find that those elements from the WIPP Guide were appropriately carried over from the previous statement of work to the latest one.

However, if your staff or the TAG have questions or comments associated with the WIPP Guide elements in those statements of work, please provide those to the CBFO Director of the National TRU Program, Mr. Casey Gadbury, by letter, e-mail, or phone so that we may resolve them.

As to your request to have select TAG members review the carrier transportation management plans, and as previously discussed with your staff and select TAG members, the carrier transportation management plans are considered to be proprietary information by the carriers and CBFO has agreed to not share the content of those plans with non-governmental personnel without express permission by the carriers. To that end, we feel that by providing the TAG with a forum to review the contract requirements that the carrier transportation management plans must implement, CBFO will be providing adequate assurance to the TAG that the carriers are complying with WIPP Guide elements.

The second recommended action item addresses the concern of future TAG participation in the carrier acquisition process. After several discussions with the cognizant contracting and legal staff within DOE, it has been determined that there is an appropriate process within applicable procurement regulations to allow participation of non-government personnel in the acquisition of carrier services. As a result, the following change in the language in Section 1 of the WIPP Guide is proposed, for concurrence by select members of the TAG, to establish the path forward for allowing TAG participation in future carrier services acquisitions.

It is proposed to change the following sentence from Section 1 of the WIPP Guide:

*"The Technical Advisory Group participates in the carrier selection process (i.e., through solicitation review and technical evaluation of responses), the development of contract requirements, and development of the carrier's transportation management plan."*

to:

*"The Technical Advisory Group will participate in the carrier acquisition process through (1) the development of technical contract requirements (those requirements will drive the development and implementation of the carriers' transportation management plans as directed by DOE and concurred with by the TAG) and (2) the technical evaluation of proposals. This participation will occur in accordance with applicable procurement regulations."*

Subsequently, this is the last item that WGA and DOE must resolve to complete the revision of the WIPP guide that has been in process for quite some time. Although it has been suggested by your staff that the WIPP Guide revision be completed without resolution of this item, I feel that this item must be resolved before DOE can reach full concurrence of the revision of the WIPP Guide to set the basis for allowing TAG participation in the carrier acquisition process in the future.

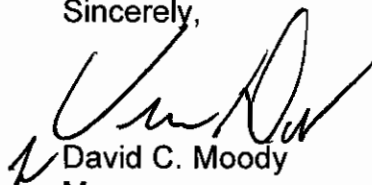
In addition, Alex Schroeder of your staff has requested that DOE provide a list of the applicable procurement regulations so that the TAG can better understand the extent of participation allowed for non-government personnel. That list is also enclosed.

I feel that these actions, in addition to my staff's discussions with cognizant legal and contracting staff within DOE, will ensure TAG participation in future carrier services acquisitions as allowed by the applicable procurement regulations.

I completely concur that the cooperative relationship that exists between DOE and WGA regarding the WIPP transportation safety program is exemplary and we also look forward to continuing that relationship.

Thank you for your interest in this matter and for WGA's commitment to the WIPP transportation system. Hopefully, this letter answers any outstanding questions you had, and we can work out this issue together, as we have successfully done so in the past. Should you wish to discuss this matter further, please do not hesitate to contact the Director of the National TRU Program, Mr. Casey Gadbury, at (575) 234-7372.

Sincerely,



David C. Moody  
Manager

Enclosure(s)

- Statement of Work For Transportation of CH & RH TRU Waste, awarded 08/27/2000
- Section C Statement of Work For Transportation Services for WIPP, DE-AM30-07CC20007
- List of Applicable Procurement Regulations

## List of Applicable Procurement Regulations

**Key Points in the procurement regulations regarding participation of the TAG in the carrier acquisition process.** DOE will need to document the need for technical expertise that the DOE does not have per FAR Subpart 37.203(c)(5) and section 37.204 determination requirements. TAG activities should not be viewed as decision making per FAR Subpart 37.203(c)(1). It is expected that a formal acquisition will be required to obtain the technical expertise of the TAG. The FAR Subpart 7.503 Policy section is really, really critical. It clearly sets the boundaries. TAG participants can't be voting members on the Source Evaluation Board (SEB). They can't approve contractual documents. They can only provide their technical expertise to the SEB to enable the SEB to establish requirements, approve the contractual documents, make final evaluations of the proposals, and award the carrier contracts.

**The following list is not all inclusive. A listing of criminal statutes applicable to Federal Acquisitions, including disclosure of information, is also not provided. The statutes and regulations are subject to change.**

41 USC § 419. Contracting functions performed by Federal personnel

- 48 CFR 37.2<sup>1</sup> Advisory and Assistance Services
- 48 CFR 37.203 Policy
- 48 CFR 37.204 Guidelines for Determining availability of Personnel
- 48 CFR Subpart 7.5 INHERENTLY GOVERNMENTAL FUNCTIONS
- 48 CFR 7.503 Policy

41 USC § 405b Conflict of interest standards for individuals providing consulting services. *Numerous statutes and regulations pertaining to conflict of interest and participation in, including evaluation of proposals, in federal acquisitions.*

41 USC § 423 Restrictions on disclosing and obtaining contractor bid or proposal information or source selection information.

- 48 CFR 3.104 Procurement Integrity
- 48 CFR 3.104-4 Disclosure, protection, and marking of contractor bid or proposal information and source selection information

### Federal Acquisition Regulations (FAR) Subpart 7

#### 7.503 Policy.

- (a) Contracts shall not be used for the performance of inherently governmental functions.
- (b) Agency decisions which determine whether a function is or is not an inherently governmental function may be reviewed and modified by appropriate Office of Management and Budget officials.
- (c) The following is a list of examples of functions considered to be inherently governmental functions or which shall be treated as such. This list is not all inclusive:
  - (1) The direct conduct of criminal investigations.
  - (2) The control of prosecutions and performance of adjudicatory functions other than those relating to arbitration or other methods of alternative dispute resolution.
  - (3) The command of military forces, especially the leadership of military personnel who are members of the combat, combat support, or combat service support role.
  - (4) The conduct of foreign relations and the determination of foreign policy.

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<sup>1</sup> 48 CFR Chapter 1 contains the Federal Acquisition Regulations System.

- (5) The determination of agency policy, such as determining the content and application of regulations, among other things.
- (6) The determination of Federal program priorities for budget requests.
- (7) The direction and control of Federal employees.
- (8) The direction and control of intelligence and counter-intelligence operations.
- (9) The selection or non-selection of individuals for Federal Government employment, including the interviewing of individuals for employment.
- (10) The approval of position descriptions and performance standards for Federal employees.
- (11) The determination of what Government property is to be disposed of and on what terms (although an agency may give contractors authority to dispose of property at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency).
- (12) In Federal procurement activities with respect to prime contracts—
- (i) Determining what supplies or services are to be acquired by the Government (although an agency may give contractors authority to acquire supplies at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency);
  - (ii) Participating as a voting member on any source selection boards;
  - (iii) Approving any contractual documents, to include documents defining requirements, incentive plans, and evaluation criteria;
  - (iv) Awarding contracts;
  - (v) Administering contracts (including ordering changes in contract performance or contract quantities, taking action based on evaluations of contractor performance, and accepting or rejecting contractor products or services);
  - (vi) Terminating contracts;
  - (vii) Determining whether contract costs are reasonable, allocable, and allowable; and
  - (viii) Participating as a voting member on performance evaluation boards.
- (13) The approval of agency responses to Freedom of Information Act requests (other than routine responses that, because of statute, regulation, or agency policy, do not require the exercise of judgment in determining whether documents are to be released or withheld), and the approval of agency responses to the administrative appeals of denials of Freedom of Information Act requests.
- (14) The conduct of administrative hearings to determine the eligibility of any person for a security clearance, or involving actions that affect matters of personal reputation or eligibility to participate in Government programs.
- (15) The approval of Federal licensing actions and inspections.
- (16) The determination of budget policy, guidance, and strategy.
- (17) The collection, control, and disbursement of fees, royalties, duties, fines, taxes, and other public funds, unless authorized by statute, such as 31 U.S.C. 952 (relating to private collection contractors) and 31 U.S.C. 3718 (relating to private attorney collection services), but not including—
- (i) Collection of fees, fines, penalties, costs, or other charges from visitors to or patrons of mess halls, post or base exchange concessions, national parks, and similar entities or activities, or from other persons, where the amount to be collected is easily calculated or predetermined and the funds collected can be easily controlled using standard case management techniques; and
  - (ii) Routine voucher and invoice examination.
- (18) The control of the treasury accounts.

(19) The administration of public trusts.

(20) The drafting of Congressional testimony, responses to Congressional correspondence, or agency responses to audit reports from the Inspector General, the Government Accountability Office, or other Federal audit entity.

(d) The following is a list of examples of functions generally not considered to be inherently governmental functions. However, certain services and actions that are not considered to be inherently governmental functions may approach being in that category because of the nature of the function, the manner in which the contractor performs the contract, or the manner in which the Government administers contractor performance. This list is not all inclusive:

(1) Services that involve or relate to budget preparation, including workload modeling, fact finding, efficiency studies, and should-cost analyses, etc.

(2) Services that involve or relate to reorganization and planning activities.

(3) Services that involve or relate to analyses, feasibility studies, and strategy options to be used by agency personnel in developing policy.

(4) Services that involve or relate to the development of regulations.

(5) Services that involve or relate to the evaluation of another contractor's performance.

(6) Services in support of acquisition planning.

(7) Contractors providing assistance in contract management (such as where the contractor might influence official evaluations of other contractors).

(8) Contractors providing technical evaluation of contract proposals.

(9) Contractors providing assistance in the development of statements of work.

(10) Contractors providing support in preparing responses to Freedom of Information Act requests.

(11) Contractors working in any situation that permits or might permit them to gain access to confidential business information and/or any other sensitive information (other than situations covered by the National Industrial Security Program described in 4.402(b)).

(12) Contractors providing information regarding agency policies or regulations, such as attending conferences on behalf of an agency, conducting community relations campaigns, or conducting agency training courses.

(13) Contractors participating in any situation where it might be assumed that they are agency employees or representatives.

(14) Contractors participating as technical advisors to a source selection board or participating as voting or nonvoting members of a source evaluation board.

(15) Contractors serving as arbitrators or providing alternative methods of dispute resolution.

(16) Contractors constructing buildings or structures intended to be secure from electronic eavesdropping or other penetration by foreign governments.

(17) Contractors providing inspection services.

(18) Contractors providing legal advice and interpretations of regulations and statutes to Government officials.

(19) Contractors providing special non-law enforcement, security activities that do not directly involve criminal investigations, such as prisoner detention or transport and non-military national security details.

(e) Agency implementation shall include procedures requiring the agency head or designated requirements official to provide the contracting officer, concurrent with transmittal of the statement of work (or any modification thereof), a written determination that none of the functions to be performed are inherently governmental. This assessment should place emphasis on the degree

to which conditions and facts restrict the discretionary authority, decision-making responsibility, or accountability of Government officials using contractor services or work products. Disagreements regarding the determination will be resolved in accordance with agency procedures before issuance of a solicitation.

## **Federal Acquisition Regulation (FAR) Subpart 37**

### **37.203 Policy.**

(a) The acquisition of advisory and assistance services is a legitimate way to improve Government services and operations. Accordingly, advisory and assistance services may be used at all organizational levels to help managers achieve maximum effectiveness or economy in their operations.

(b) Subject to 37.205, agencies may contract for advisory and assistance services, when essential to the agency's mission, to—

- (1) Obtain outside points of view to avoid too limited judgment on critical issues;
- (2) Obtain advice regarding developments in industry, university, or foundation research;
- (3) Obtain the opinions, special knowledge, or skills of noted experts;
- (4) Enhance the understanding of, and develop alternative solutions to, complex issues;
- (5) Support and improve the operation of organizations; or
- (6) Ensure the more efficient or effective operation of managerial or hardware systems.

(c) Advisory and assistance services shall not be—

- (1) Used in performing work of a policy, decision-making, or managerial nature which is the direct responsibility of agency officials;
- (2) Used to bypass or undermine personnel ceilings, pay limitations, or competitive employment procedures;
- (3) Contracted for on a preferential basis to former Government employees;
- (4) Used under any circumstances specifically to aid in influencing or enacting legislation; or
- (5) Used to obtain professional or technical advice which is readily available within the agency or another Federal agency.

(d) *Limitation on payment for advisory and assistance services.* Contractors may not be paid for services to conduct evaluations or analyses of any aspect of a proposal submitted for an initial contract award unless—

(1) Neither covered personnel from the requesting agency, nor from another agency, with adequate training and capabilities to perform the required proposal evaluation, are readily available and a written determination is made in accordance with 37.204;

(2) The contractor is a Federally-Funded Research and Development Center (FFRDC) as authorized in Section 23 of the Office of Federal Procurement Policy (OFPP) Act as amended (41 U.S.C. 419) and the work placed under the FFRDC's contract meets the criteria of 35.017-3; or

(3) Such functions are otherwise authorized by law.

### **37.204 Guidelines for determining availability of personnel.**

(a) The head of an agency shall determine, for each evaluation or analysis of proposals, if sufficient personnel with the requisite training and capabilities are available within the agency to perform the evaluation or analysis of proposals submitted for the acquisition.

(b) If, for a specific evaluation or analysis, such personnel are not available within the agency, the head of the agency shall—

(1) Determine which Federal agencies may have personnel with the required training and capabilities; and

(2) Consider the administrative cost and time associated with conducting the search, the dollar value of the procurement, other costs, such as travel costs involved in the use of such personnel, and the needs of the Federal agencies to make management decisions on the best use of available personnel in performing the agency's mission.

(c) If the supporting agency agrees to make the required personnel available, the agencies shall execute an agreement for the detail of the supporting agency's personnel to the requesting agency.

(d) If the requesting agency, after reasonable attempts to obtain personnel with the required training and capabilities, is unable to identify such personnel, the head of the agency may make the determination required by 37.203.

(e) An agency may make a determination regarding the availability of covered personnel for a class of proposals for which evaluation and analysis would require expertise so unique or specialized that it is not reasonable to expect such personnel to be available.

**37.205 Contracting officer responsibilities.**

The contracting officer shall ensure that the determination required in accordance with the guidelines at 37.204 has been made prior to issuing a solicitation.