nuclear watch new mexico

Nuclear Watch of New Mexico (NWNM) respectfully submits these comments to the National Nuclear Security Administration (NNSA) on the Los Alamos National Laboratory (LANL) Management and Operations Contract draft Request For Proposal (RFP). NWNM is a public interest nonprofit organization with specific interests in LANL management issues, and is also a potential bidder for the LANL management contract. Concerned Citizens for Nuclear Safety, undersigned below, also made suggestions and edits for these comments. Quotes herein from the draft RFP are italicized.

General comments on the draft RFP

The University of California (UC) is given an inordinate advantage in competing, for the first time, for continuation of its management contract for Los Alamos National Laboratory (LANL). The draft RFP is so replicate of and tied to the existing structure that UC can respond in large part by simply copying and pasting the current contract, along with its already existing supporting documents. Therefore, the UC can respond to this RFP at a lower cost to itself relative to all other potential bidders, inherently giving it a distinct advantage. Further, the DOE modifications to the current management contract allows UC to use "earned fees" to cover its bid costs. Not only is UC advantaged by being able to essentially present the current contract to satisfy the bid requirements, it is further favored by the relatively low weighting score give to "Past Performance" in Section M, EVALUATION FACTORS FOR AWARD, with a relatively low 75 points attached to it. This does not truly account for UC's failed operations at LANL, which have resulted in repeated scandals and ultimately a complete stand down of operations. This has cost taxpayers an estimated half billion dollars in 2004 alone. For what we believe to be obvious reasons, we argue that "Past Performance" should be given far more weight.

At the same time, we note that "BUSINESS OPERATIONS" is also weighted at 75 points. As is nationally well known, business operations at LANL have been another source of scandal. We argue that both past performance and business operations should have higher weights, both at 125 under the general scheme of 1,000 points total. We recommend that the resulting difference of 100 points should be taken out of the 325 points accorded to "Science and Technology."

Much has been made of UC's reputed "Science." "Science" within the University of California system may well be one thing, and "Science" at LANL an entirely different matter, especially given UC's largely laissez-faire management style at the Lab. We believe that UC "Science" at LANL is for the most part synonymous with the nuclear weapons programs, by virtue of the Lab's operating budget and other factors. To have documented and irrefutable proof of repeated delays and cost overruns to, for examples, the first resumed manufactured stockpile plutonium pit, full operation of the Dual Axis Radiographic Hydrodynamic Testing Facility, and a majority of critical Stockpile Evaluation technical areas, raises severe questions over the quality of UC "Science" at LANL. These appear to be questions for which the NNSA seems to lack a full set of backbones by which to effectively evaluate and objectively judge performance and award fees accordingly. In short, we recommend that the final RFP be modified to reflect our concerns, and give less weight to "Science" at LANL that has a reputation with no full basis in fact, and give greater import to other areas in which the Lab has repeatedly failed.

551 West Cordova Road #808 Santa Fe, New Mexico 87505 505.989.7342 Fax 505.989.7352
info@nukewatch.org www.nukewatch.org

The annual NNSA Appraisal of LANL Performance should be made available to the public every year. The LANL Institutional Plan and the Comprehensive Site-Wide Plan should also be made available to the public. The release of all these documents would be beneficial to both the contractor and the public by providing both greater contractor accountability and general programmatic direction.

The final RFP should be provided to potential bidders and the public in both a "Track Changes" version relative to the draft RFP version and a final "clean" version.

To aid bidders, the final RFP, in every instance, should cross-reference all sections and subsections, by number and title, to all other applicable sections and subsections.

While evaluating management bids, the NNSA will have to choose between differing contractor plans and systems. The public and the Defense Nuclear Facilities Safety Board (DNFSB) should be allowed to comment on the final contract before it is put into place.

We recommend that the final RFP include a provision establishing an objective organization for independent review of environmental and safety issues resulting in a monthly report that is releasable to the public.

LANL operations should be more transparent, especially concerning documents pertaining to environmental and safety issues. All documents should be promulgated in an open manner, maintained and kept current, and made available to the general public. As New Mexico Governor Bill Richardson said in a January 14, 2005 press release, "Freedom of information may be the greatest anti-terrorist weapon in the United States' hands, because it allows everyone to think about potential terrorist threats and design anti-terrorism safeguards."

The costs associated with any stand-down of operations should be the responsibility of the contractor and therefore not allowable costs. These should include standdowns for individual Tech Areas. The contractor should pay these, even if the contractor is a non-profit.

Currently there are no fines and penalties for security violations. There should be a new provision in the final RFP for such fines and penalties, and they should be levied against and paid by the contractor, even if the contractor is a non-profit.

The RFP and final contract should include provisions for prompt notification to the public of the invocation of *force majeure* with respect to operations at LANL.

We suggest that the award fee be treated as just that – as an award, and not as a given – it could be a valuable tool in encouraging superior performance. In the past, UC received the award fee every year, despite repeated instances of poor performance. In the future, if the contractor performs poorly, either in its science programs or management, the award fee should be substantially reduced, if awarded at all. If these standards are upheld, it may be appropriate to increase the size of the potential award, more in line with Department of Defense laboratories.

We also suggest that a provision be added to the final RFP that truly independent peers should review the Lab's science. This should include scientists from academia, industry, defense labs, or possibly other DOE labs run by different management and operator M & O contractors. The award fee must be a real award for meeting or exceeding expectations, not an assumption that is rubber stamped by self-interested parties.

For the sake of competition and intellectual independence, the final RFP should dictate that if a contractor is successful in the Los Alamos competition, that contractor is prohibited from bidding on the Lawrence Livermore

National Laboratory (LLNL) contract. This intentional split of the contractors for LANL and LLNL would restore the independence of the two-lab system, which has been lost. It would also enable the competition of ideas coming forth from the two labs without the risk of suppression because a single contractor manages both.

Specific Comments on the Draft RFP

SEC B-1 - ...and otherwise do all things necessary for, or incident to providing its best efforts to effectively and efficiently manage and operate the Los Alamos National Laboratory.

Comment: Add 'safely' manage.

SEC B-2 (c) (2) - The Base Fee shall be .045% of the amount specified in the Laboratory Table in the President's Budget request to Congress.

Comment: Is this a typo, shouldn't it be .45%? This section should also reference the base fee for managing "Work for Others."

SEC B-2 (d) (2) - The fee percentage reflects NNSA's mid-range estimate of the importance of the desired outcomes in the PEP and the Contractor acceptance of risk/difficulty in achieving the desired outcomes in the PEP.

Comment: This should be the high-range estimate.

B-3 AVAILABILITY OF APPROPRIATED FUNDS. Except as may be specifically provided to the contrary in the Contract's Section I Clause entitled "Nuclear Hazards Indemnity Agreement," the duties and obligations of the Government hereunder calling for the expenditure of appropriated funds shall be subject to the Contract's Section I Clause entitled "Obligations of Fund."

In the final RFP this section should state that the contractor's work is limited only to projects and programs specifically authorized and appropriated by Congress. The reference to the Section I Clause "Obligations of Fund" does not fit that bill. This omission, while relevant in general to the contract, becomes specifically relevant in the draft RFP's sections on Contractor Reinvestment of Cost Efficiencies and Contractor Directed Research and Development. In both of those arenas, it is stated that any contractor cost savings will be directed to unfunded priority missions needs determined by the NNSA and the Contractor. To use a concrete example, the draft RFP Statement of Work states that the Contractor shall "[e]xplore advanced nuclear weapons technology and systems concepts", yet Congress recently rejected appropriations for the Advanced Concepts Initiative. Thus we ask for a clear and unambiguous declaration in the final RFP that the Contractor can performed only work that is authorized and appropriated by Congress.

SEC D – Packaging and Marking – reserved.

Comment: Please explain the absence of language.

E-1 - The contractor should pay the costs associated with any stand down.

E-1 (d) - If any of the services performed do not conform with contract requirements, the Government may require the Contractor to perform the services again in conformity with contract requirements, for no additional fee.

Comment: This should include specific time deadlines.

When the defects in services cannot be corrected by reperformance, the Government may-
E-1 (d) (1) Require the Contractor to take necessary action to ensure that future performance conforms to contract requirements.

Comment: This should include specific time deadlines.

F-1 - The work under this Contract is to be carried out at a variety of locations, but the principal place of performance will be at Los Alamos, New Mexico.

Comment: Should read in Los Alamos County.

F-3 (a) The Contracting Officer may, at any time, by written order to the Contractor, require the Contractor to stop all, or any part, of the work called for by this Contract.

A list of possible reasons, or sample reasons, for a Stop-Work Order should be given and be made available to the public.

G-2 - The Contractor's Laboratory Director is responsible for all matters regarding this Contract, except for the Parent Organization's involvement…

The word responsible should be refined. Responsible how? Does this just mean that the Director is the contact person?

H-I REDEFINING THE FEDERAL/CONTRACTOR RELATIONSHIP TO IMPROVE MANAGEMENT AND PERFORMANCE
(a) General - This clause sets forth an overview of NNSA's approach to improving the effectiveness and efficiency of the Nuclear Weapons Complex without compromising Integrated Safety Management (ISM) and Integrated Safeguards and Security Management (ISSM). The principles of ISM and ISSM shall serve as the foundation of the implementing mechanisms at the Laboratory.

NWNM appreciates the clarifications that the NNSA provided on January 5, 2005, in response to the Defense Nuclear Facilities Safety Board's (DNFSB's) expressed concerns that that the RFP places "unnecessary and ill-advised contractual limitations" on the government's ability to inspect and oversee contractor performance. The language quoted in this section is the NNSA's after it had amended the RFP to meet the DNFSB's concerns.

First we note that the NNSA had supplied the DNFSB with a draft crosswalk of the requirements from Section J, Appendix G, "List of Applicable Directives", with the current requirements of the existing contract. First, it is highly unfortunate that that crosswalk is still in draft form as comments are due. Further, this is a serious practical problem in attempting to formulate any kind of bid. We urge the NNSA to finalize that crosswalk as soon as possible so that the bidding process, as difficult as it is already, is not unduly hampered (but, more seriously, see below).

More specifically, we note that perhaps 25% of the entries in the draft crosswalk have an asterisk that denotes "See LANL Work Smart Standards, Sheet 2." These entries generally pertain to environmental, safety, health and waste management issues in which the DNFSB could have specific interests. In the language quoted above the NNSA professes its desire to improve the effectiveness and efficiency of the nuclear weapons complex as a whole without compromising ISM and ISSM. Implicit to this is that LANL should conform with the rest of the

nuclear weapons complex. To cut to the quick, we believe that any future contractor should perform and fulfill its responsibilities as mandated by the relevant DOE directive, order or protocol, and not as they are interpreted by the contractor through LANL's Work Smart Standards. In short, we recommend that that the RFP drop any reference to the Lab's Standards, except possibly a clause to eliminate them. The DNFSB has long complained of a lack of formality and standardization of operations at LANL. We urge the NNSA to require any future contractor to directly follow the DOE requirements, and that they be penalized in the event they don't.

We understand that the NNSA began trying to implement "complex-wide" ISM at LANL's nuclear facilities after August 2004. First, we argue that ISM should be implemented across the board at both the Lab's nuclear and non-nuclear facilities. However, here the draft crosswalk, dated August 4, 2004, is confusing and perhaps causes more harm than good. We have no way of telling whether the draft crosswalk reflects or not the NNSA's professed greater implementation of ISM. Given the stand down, this issue has immediate relevance, using as an example DOE O 4225.1C "Startup and Restart of Nuclear Facilities", to which the reader is again referred to Sheet 2 of the LANL's Work Smart Standards (which should have supplied along with the draft crosswalk). To repeat our two RFP recommendations in this subsection, the NNSA should supply a final crosswalk as soon as possible (with LANL WSS Sheet #2) and, more importantly, eliminate the LANL Work Smart Standards from any middleman role in influencing contractor performance while directly meeting DOE orders.

H-1 (b) - To clarify the contractual relationship, NNSA will provide program and performance direction regarding ***what*** *NNSA wants in each of its programs.*

We draw from this that the NNSA will provide program and performance direction to the contractor after the bid is awarded. This defies logic in that bidders, in order to reduce their future potential liabilities, should have the clearest idea possible of what program and performance direction are before submitting bids. We strongly request that the final RFP address this need to the fullest extent necessary. In addition, the NNSA should fully disclose to what extent, if any, "program and performance direction" would differ from or add to the Section J, Appendix B Statement of Work. This information must be provided in the final RFP and should be included in the contract.

H-1 (c) - NNSA will increase Contractor accountability as a result of implementation of the Contractor's Assurance System. In areas, other than nuclear facility operations, safeguards & security and other high hazard activities, NNSA oversight will focus on evaluating systems and performance rather than transactions. NNSA will transition its oversight of programs, projects, business systems and ongoing operations from a transactional to a performance and systems based approach when the Contractor's Assurance System has demonstrated improved contractor performance.

Achieving a state where operations are driven more by insightful planning and less by events, such as accidents and security losses, is a good idea and will lead to a better contractual relationship and performance. However, the draft RFP is far too vague. The final RFP should offer some precise criteria and performance measures for the transitional period and decision to transition. We believe it not enough to rely upon the Contractor's Assurance System, which could be abused.

H-1 (d) - The Contractor is encouraged to identify and evaluate best commercial standards and best business practices and to continuously pursue improvements in all aspects of Contract performance where cost effective and efficient improvements can be achieved.

Again, the draft RFP is far too vague. The final RFP should offer some precise criteria. Please give ample definition to "appropriate." What is the consequence if the Contractor does not comply with what is being "encouraged?"

H-1 (f) - The Contractor will be awarded for the achievement of cost efficiencies through onsite investment of cost savings and the opportunity to earn additional Contract term.

Where is the other side of the coin? The final RFP should have a corresponding subsection that penalizes the Contractor for cost overruns and inefficiencies. LANL mismanagement leading to the standdown in 2004 has likely cost the taxpayers some $500 million. Without some "down side" for the Contractor, it actually serves the interest of LANL to overrun all its projects, as this serves to maximize the LANL revenue stream under the draft RFP. The final RFP needs some strong language requiring a method of recompense to the government when the Contractor overruns the cost of projects or its performance results in gross inefficiencies.

H-4 (a) (3) - Rigorous, risk based credible self-assessments, feedback and improvement activities…

There are no criteria given here for those rigorous self-assessments, feedback and improvement activities. Arguably, the past lack of rigor in those very things lead to past problems at the Lab and eventually the stand down. We have a special interest in rigorous self-assessments, which we believe were generally performed in the past in a highly self-serving manner. The final RFP needs to provide better definition and adverse consequences for the Contractor who does not provide a realistic and objective self-assessment. Further, the NNSA itself needs to be far more rigorous in its evaluation and ultimate ranking of any self-assessment by the Contractor.

H-5 NNSA OVERSIGHT

We thank the NNSA for better clarifying the RFP in response to the DNFSB's stated concerns that "[t]he Request for Proposal (RFP) places unnecessary and ill-advised contractual limitations on the Federal government's right to inspect and oversee the activities of contractors." In that same December 16, 2004, DNSFB letter the Board observed that

> Clause H.5 of the RFP, "NNSA Oversight," is intended to set out how National Nuclear Security Administration (NNSA) will (and will not) conduct oversight of the contractor. This provision attempts to create two classes of facilities and activities, one defined by "Nuclear Facility Operations, Projects, Safeguards and Security, and Other High Hazard Activities," the other by "Non-Nuclear Facilities." The former class, along with undefined "support functions related to these areas,' is to be managed by NNSA on the "transaction" level as well as the "systems" level, the latter only on a "systems" level.
>
> There are several obvious difficulties with these provisions. First, in order to apply them NNSA would have to compile a list of facilities and activities falling under one or the other oversight regime. There are many facilities and activities that would fall partly in one category and partly in another. For example, how would this bifurcation affect the Emergency Operations Center, or the Los Alamos Fire Station? Likewise, there are many contractual activities not necessarily associated with any facility or project, such as training and qualification. Speaking more generally, it is not clear what governmental interest is served by placing limits on its ability to oversee the contractor's work, and worse, limits that are ill defined.

NWNM believes the amendments made to the RFP by the NNSA in response to the DNFSB are positive changes that will enhance both occupational and public safety and the future relationship between the NNSA and the contractor simply through better definition of that relationship. However, having said that, we believe the amended RFP does not go nearly far enough, and that that omission may cause at a minimum lingering confusion and more seriously possible future contractual problems. We concur with the DNFSB that in order to effectively apply these provisions that the NNSA should "compile a list of facilities and activities falling under one or the

other oversight regime." The final RFP should include such a list. That inclusion would, we believe, greatly aid bidders in better knowing what they are bidding on, in addition to better serving the government's and taxpayers' interests.

H-7 Accountability. The Contractor is also responsible for assessing its operations, programs, projects and business systems, identifying deficiencies and implementing needed improvements in accordance with the Contract's terms and conditions.

Accountability is, of course, at the heart of any contractual relationship. We do not believe that the draft RFP truly infuses accountability into the contract with its current iteration of terms and condition's. There are many examples of this, some of which we address in specific sections and subsections. To mention a few here, we believe that the enforcement of rigor and honesty in self assessments, the incorporation of provisions for recompense to the government for cost overruns and gross inefficiencies, liability by both for-profits and non-profits for Price Anderson violation fines, and the encouragement and strong protection of whistleblowers are measures that would really ensure accountability. The final RFP should demonstrate its commitment to real accountability through the incorporation of those measures and others.

H-10 Standards Management
(d) Laws and Regulations Excepted. The process described in this clause shall not affect the application of otherwise applicable laws and regulations of the United States, including DOE regulations.

NWNM recognizes that in the amended RFP H-10 section as a whole the NNSA has gone a long ways toward addressing the DNFSB's stated opposition to "initiatives that could undermine the effectiveness of [DOE] Directives System." However, we fear that the amended H-10 section stills allows for initiatives that could abuse the Directives System. We ask for further clarification and explanation in the final RFP, including what responsibilities the NNSA itself has in preventing the undermining of DOE Orders. As a specific example, we have already discussed the LANL Work Smart Standards, which we believe are in conflict with H-10(d). In principle, we support the direct application of DOE Orders, and believe that the elimination of LANL's current Work Smart Standards would, in the short term, simplify the bidding process by sticking to clear-cut Orders and Directives, and in the long term better serve the government's and the public's interests.

H-11 CONTRACTOR REINVESTMENT OF COST EFFICIENCIES. …the NNSA and the Contractor will identify and agree upon listings of un-funded priority direct mission work identified by specific appropriation and budget and reporting category.

The final RFP should define "un-funded priority direct mission work identified by specific appropriation and budget and reporting category." As in our comment on B-3 AVAILABILITY OF APPROPRIATED FUNDS there should be a clear and unambiguous declaration in the final RFP that the Contractor can performed only work that is authorized and appropriated by Congress.

H-12 (a) through (h) – the effects of any stand-down should specifically be mentioned.

H-12 (a) - Commencing in Fiscal Year 2006, the Contract's term as set forth in the Contract's Section F Clause entitled "Period of Performance" will be extended. Comment: As clarification, isn't the first year that the contract can be extended in FY 2007?

H-12 (f) - If the Contractor fails 3 times to earn award term, the operation of this Award Term clause will cease.

Please be specific in the final RFP: Is this 3 times in a row, or any 3 times in the 5-year initial contract term? Or any 3 times in the 20 years total possible term?

H-13(b) - Performance Appraisal Process.

With an eye toward the past, in the government's interests the NNSA should heavily modify this section. The current system in use at UC/LANL relies heavily on self-assessment committees appointed by LANL management, which encourages the appointment of members who have a very high or vested opinion of LANL programs. The failure of the current scheme shows up clearly in the inability of UC and LANL to assess some of its programs as deficient, only to have all programs come to a screeching halt with the stand down. The NNSA should now require prospective contractors to propose a self-evaluation plan that is "objective" in some real sense. Further, in the final RFP the NNSA should delineate some criteria toward the formulation of objective self-assessments. Finally, the NNSA should reserve the right to be able to observe and ensure the objectivity of the future contractor's self-assessment process.

H-13 (b) (1) (i) - A Performance Evaluation Plan shall be developed and finalized by the Contracting Officer, with Contractor input, prior to the scheduled start date of the appraisal period.

This plan should include environmental goals, cleanup, and protection of surface and groundwater. The PEP should made available to the public annually.

H-13 (b) (2) - The annual self-assessment shall be submitted within five-working days after the end of the appraisal period.

Comment: The consequences for failing to comply with the deadline should be specified in the final RFP.

H-14 - PERFORMANCE INCENTIVES.

The RFP has incentives for superior performance (which, in our opinion was not rigorously judged to begin with), but no penalties for grossly inferior performance. We recommend that the final RFP have: 1) Some rigorous criteria defined whereby the NNSA determines performance so that prospective contractors know what to expect; and 2) penalties in the contract, which if the infractions or poor performance are severe enough would come out of the Contractor's fixed fee.

H-20 - DOE-35 - Personnel Radiation Exposure Records

These records should be available to the public, in a timely manner, with the individual(s)'s name(s) redacted.

H-22 - On October 1, 2005, the Contractor shall assume responsibility and will continue to perform any existing agreements and regulatory obligations entered into under Contract No. W-7405-ENG-36 by the predecessor contractor. These agreements and regulatory obligations include all (a) subcontracts and purchase orders; (b) agreements with domestic and foreign research organizations; (c) agreements with universities and colleges; (d) agreements with Federal, Tribal, and state regulatory agencies; (e) operating permits and licenses; and (f) any other agreements in effect prior to October 1, 2005.

These need to be listed, identified, and spelled-out in the final RFP.

With respect to funding for the New Mexico Environmental Department (NMED) DOE Oversight Bureau (OB), the contractor must support a baseline OB budget of $2 million per year for LANL activities. These activities

include confirmatory air emission and water discharge sampling, analyses and public reports.

H-26 - (a) The Parties recognize that the Contractor could be required to defend and indemnify its officers and employees from and against civil actions and other claims which arise out of the performance of work under this Contract. Except for defense costs made unallowable by the Contract's Section I Clause entitled "Payments and Advances", or the Major Fraud Act (41 U.S.C. §256(k)), the costs and expenses, including judgments, resulting from the defense and indemnification of employees from and against such civil actions and claims shall be allowable costs under this contract if incurred pursuant to the terms of the Contract's Section I Clause entitled "Insurance–Litigation and Claims".

Please add the following sentence at the end of this section: These costs are not allowable if the contractor loses such civil action or claim.

H-26 (b) - should include state courts as well as federal courts.

H-30 ...ALLOWABLE AND UNALLOWABLE COSTS...

Language should be included in this section concerning the fines related to the Price Anderson Act fines should be included in this section as unallowable costs. In the case of a "non profit" Contractor (currently exempted from these fines within the Act) they should be required to pay an amount equivalent to the fines to the US Treasury. This would create a "level playing field" for all Contractors in the DOE complex. Exempting any contractor from such Price Anderson fines directly contradicts the emphasis given to nuclear safety in the draft RFP. The final RFP should remove that contradiction.

H-33 (a) The Contractor shall accept, in its own name, service of notices of violations or alleged violations (NOVs/NOAVs) issued by Federal or State regulators to the Contractor resulting from the Contractor's performance of work under this contract, without regard to liability. The allowability of the costs associated with fines and penalties shall be subject to the other provisions of this Contract.

Please add the following sentence at the end of this section: The contractor should pay all fines that it is responsible for, in full, and should not be reimbursed. This is one immediate way to really infuse accountability into the contract.

SEC I – 22 (b) - The amount of probable damages attributable to the Contractor's failure to comply shall be an amount equal to the actual dollar amount by which the Contractor failed to achieve each subcontract goal.

Comment: This amount should be non-reimbursable.

SEC I – 68 (a) - Except for defaults of subcontractors at any tier, the Contractor shall not be in default because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of these causes are (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor. "Default" includes failure to make progress in the work so as to endanger performance.

Please insert the following sentence before the last sentence beginning with the definition of "default": "By inference, the contractor is in default if it fails to perform due to any management issues."

SEC I – 69 (b) - Under Public Law 85-804 (50 U.S.C. 1431-1435) and Executive Order 10789, as amended, and regardless of any other provisions of this contract, the Government shall, subject to the limitations contained in the other paragraphs of this clause, indemnify the Contractor against--
(1) Claims (including reasonable expenses of litigation or settlement) by third persons (including employees of the Contract) for death; personal injury; or loss of, damage to, or loss of use of property;

Please add the following sentence at the end of this section: The contractor should pay all claims that it loses and shall not be reimbursed.

SEC I – 69 (b) (2) Loss of, damage to, or loss of use of Contractor property, excluding loss of profit; and
(3) Loss of, damage to, or loss of use of Government property, excluding loss of profit.

Comment: These two lines are the same. Please correct this error.

SEC I – 69 (c) This indemnification applies only to the extent that the claim, loss, or damage
(1) arises out of or results from a risk defined in this contract as unusually hazardous or nuclear.

Comment: If the contractor is found negligent, the contractor should pay all associated fines and should not be reimbursed.

SEC I – 75 - The contractor shall comply with the requirements of the "DOE Contractor Employee Protection Program" at 10 CFR part 708 for work performed on behalf of DOE directly related to activities at DOE-owned or -leased sites.

The final FRP should also consider whistleblower encouragement. The Department of Energy should not reimburse any legal fees incurred by the contractor in whistleblower legal disputes subsequent to an adverse administrative determination by DOE or Department of Labor, or an adverse final judgment by any State or Federal court, unless the determination or judgment is reversed upon further administrative or judicial review.

Congress, U.S. Department of Energy Inspector General's Office, the General Accounting Office, as well as some members of Congress, have continually questioned the policy of the Department of Energy reimbursing UC and the Lab for all litigation expenses. This policy encourages the Lab and UC to spend an endless amount of money on attorneys and costs in litigation that is unnecessary.

Because of the sheer number and poor treatment of whistleblowers at Los Alamos, the RFP should include a provision to set up a council similar to the Hanford Joint Council. We further believe that encouragement and protection of whistleblowers would dramatically increase contractor accountability and result in greatly enhanced contractor performance.

SEC I – 79 (b) - The Contractor is responsible for the development, planning, and coordination of proactive approaches for the timely dissemination of unclassified information regarding DOE activities onsite and offsite, including, but not limited to, operations and programs. Proactive public affairs programs may utilize a variety of communication media, including public workshops, meetings or hearings, open houses, newsletters, press releases, conferences, audio/visual presentations, speeches, forums, tours, and other appropriate stakeholder interactions.

Comment: Existing activities should be listed and added to this section.

The Community Radiation Monitoring Group (CRMG) seeks to understand and communicate public health

issues relating to direct penetrating radiation and radiation from airborne radioactive materials that result from activities at LANL. It has been meeting monthly since 1997. The contractor is required to participate in the monthly meetings of the Community Radiation Monitoring Group (CRMG). Participation includes providing technical staff to review the data and provide analyses, along with providing information about changes to the air monitoring programs at LANL.

The contractor must disclose in all public relations materials that it was funded and produced by the contractor for LANL.

SEC I – 88 (i) - Civil penalties. The Contractor and its subcontractors and suppliers who are indemnified under the provisions of this clause are subject to civil penalties, pursuant to 234A of the Act, for violations of applicable DOE nuclear-safety related rules, regulations, or orders.
(j) Criminal penalties. Any individual director, officer, or employee of the Contractor or of its subcontractors and suppliers who are indemnified under the provisions of this clause are subject to criminal penalties, pursuant to 223c. of the Act, for knowing and willful violation of the Atomic Energy Act of 1954, as amended, and applicable DOE nuclear safety-related rules, regulations or orders which violation results in, or, if undetected, would have resulted in a nuclear incident.
NOTE I:Paragraph (i) of the clause will be replaced with "Reserved" in contracts specifically exempted from civil penalties by section 234 of the Act. That subsection provides that the following DOE contractors are not subject to the assessment of civil penalties:
(2)The University of California (and any subcontractors or suppliers thereto) for activities associated with Los Alamos National Laboratory, Lawrence Livermore National Laboratory, and Lawrence Berkeley National Laboratory;

To promote accountability, any future contractor should voluntarily pay and not be reimbursed for any civil penalties.

SEC I – 90 (a)(1) The contractor shall be responsible for maintaining, as an integral part of its organization, effective systems of management controls for both administrative and programmatic functions. Management controls comprise the plan of organization, methods and procedures adopted by management to reasonably ensure that: the mission and functions assigned to the contractor are properly executed; efficient and effective operations are promoted; resources are safeguarded against waste, loss, mismanagement, unauthorized use, or misappropriation; all encumbrances and costs that are incurred under the contract and fees that are earned in compliance with applicable clauses and other current terms, conditions, and intended purposes; all collections accruing to the contractor in connection with the work under this contract, expenditures, and all other transactions and assets are properly recorded, managed, and reported; and financial, statistical, and other reports necessary to maintain accountability and managerial control are accurate, reliable, and timely.

Change 'reasonably' to 'robustly'. Environmental controls should be mentioned specifically as part of the management controls.

SEC I – 90 - (b) Contractor-owned records. The following records are considered the property of the contractor and are not within the scope of paragraph (a) of this clause.
(1) Employment-related…
(2) Confidential contractor financial information, and correspondence between the contractor and other segments of the contractor located away from the DOE facility (i.e., the contractor's corporate headquarters);
(3) Records relating to any procurement action by the contractor, …
(4) Legal records, including legal opinions, litigation files, and documents covered by the attorney-client and attorney work product privileges; and

(5) The following categories of records maintained pursuant to the technology transfer clause of this contract:…
(c) Contract completion or termination. In the event of completion or termination of this contract, copies of any of the contractor-owned records identified in paragraph (b) of this clause, upon the request of the Government, shall be delivered to DOE or its designees, including successor contractors. Upon delivery, title to such records shall vest in DOE or its designees, and such records shall be protected in accordance with applicable federal laws (including the Privacy Act), as appropriate.

If UC is not the new contractor, DOE must retain copies of all UC/contractor-owned records other that the exceptions listed above. If the contract changes hands, all UC documents must be transferred to the new contractor without destruction, and the NNSA must oversee this transfer. Further, an amendment must be included in the existing contract to ensure that no LANL-related documents are destroyed by UC, again subject to the listed exceptions. Special care must be exercised with respect to exception (4) in order to ensure that there are no abuses to this exception.

SEC I – 113 (b) - ALLOCATION OF PRINCIPAL RIGHTS
(1) Retention of title by the Contractor. Except for exceptional circumstance subject inventions, the contractor may retain the entire right, title, and interest throughout the world to each subject invention subject to the provisions of this clause and 35 U.S.C. 203. With respect to any subject invention in which the Contractor retains title, the Federal government shall have a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States the subject invention throughout the world.

We disagree with this provision and it should be removed from the final RFP. All monies generated by Lab employees using taxpayer's monies should be returned to the taxpayers.

SEC I – 116 - DEAR 970.5231-4 PREEXISTING CONDITIONS (DEC 2000) ALTERNATE I (DEC 2000)
[This Alternate I clause is only applicable if the selected offeror (Contractor) is the predecessor contractor. If this condition is not met, then this clause shall be "Reserved".]
(a)Any liability, obligation, loss, damage, claim (including without limitation, a claim involving strict or absolute liability), action, suit, civil fine or penalty, cost, expense or disbursement, which may be incurred or imposed, or asserted by any party and arising out of any condition, act or failure to act which occurred before October 1, 2005, in conjunction with the management and operation of the Los Alamos National Laboratory, shall be deemed incurred under Contract No. W-7405-ENG-36.
(b)The obligations of the Department of Energy under this clause are subject to the availability of appropriated funds.
SEC I – 117 - DEAR 970.5231-4 PREEXISTING CONDITIONS (DEC 2000) ALTERNATE II (DEC 2000)
[This Alternate II clause is only applicable if the selected offeror (Contractor) has not previously worked at LANL. If this condition is not met, then this clause shall be "Reserved".]
(a)The Department of Energy agrees to reimburse the contractor, and the contractor shall not be held responsible, for any liability (including without limitation, a claim involving strict or absolute liability and any civil fine or penalty), expense, or remediation cost, but limited to those of a civil nature, which may be incurred by, imposed on, or asserted against the contractor arising out of any condition, act, or failure to act which occurred before the contractor assumed responsibility on October 1, 2005. To the extent the acts or omissions of the contractor cause or add to any liability, expense or remediation cost resulting from conditions in existence prior to October 1, 2005, the contractor shall be responsible in accordance with the terms and conditions of this contract.
(b)The obligations of the Department of Energy under this clause are subject to the availability of appropriated funds.
(c)The contractor has the duty to inspect the facilities and sites and timely identify to the contracting officer those conditions which it believes could give rise to a liability, obligation, loss, damage, penalty, fine, claim, action, suit, cost, expense, or disbursement or areas of actual or potential noncompliance with the terms and conditions of this contract or applicable law or regulation. The contractor has the responsibility to take corrective action, as directed by the contracting officer and as required elsewhere in this contract.

Another Alternate clause should be added. It should be clarified what happens if UC partners with another entity for the new contract. UC has no future liability if it does not get a new contract. The new contractor has just a short time to inspect the facilities. Liability for non-compliance with environmental laws and regulations, past and present, should be specifically addressed.

SEC I – 131- DEAR 970.5245-1 PROPERTY (DEC 2000)
[This clause is only applicable if the selected offeror (Contractor) is other than a NonProfit Business entity that also has been granted an advance class waiver. If these conditions are not met, then the clause shall be "Reserved".]
(a)Furnishing of Government property. The Government reserves the right to furnish any property or services required for the performance of the work under this contract.
(b)Title to property. Except as otherwise provided by the contracting officer, title to all materials, equipment, supplies, and tangible personal property of every kind and description purchased by the contractor, for the cost of which the contractor is entitled to be reimbursed as a direct item of cost under this contract, shall pass directly from the vendor to the Government.

In order to be frugal with taxpayer monies, a provision should be added in the final RFP that requires UC, if it does not win the competition, to leave all materials, equipment, supplies and tangible personal property of every kind and description left at LANL so that they may be used by the new contractor.

SEC J – APP A – Section I (e) – The Contractor recognizes that the Contracting Officer or Contracting Officer's Representative may make other data requests from time to time and the Contractor agrees to cooperate in meeting such requests.

The final RFP should include strict timelines for the Contractor to meet the Contracting Officer's requests, along with consequences for non-compliance .

SEC J – APP A – Section IX (a) (1) – To be eligible, an employee must have completed the new employee evaluation period, possess fully satisfactory performance, and have been elected to an office that was not voluntarily sought and for which acceptance cannot be reasonably declined.

The "voluntarily sought" and the "for which acceptance cannot be reasonably declined" parts of this clause should be removed because it is discriminatory. This potentially eliminates paying all tribal leaders.

SEC J – APP B 3.1 – The Contractor shall support the NNSA's Office of Defense Programs (DP) in the development of an overall strategic plan and shall execute those plans as they pertain to the Laboratory.

Add at the end of the sentence: "while ensuring the safety of employees, of the public, and of the environment."

SEC J – APP B 3.1.3 – The Contractor shall support the closure of Technical Area (TA)-18 and transition all remaining missions out of TA-18 in accordance with NNSA Program Plans. NNSA plans to remove all category I/II level special nuclear material out of TA-18 no later than September 30, 2005.

The safe removal of the estimated 20,000 metric tons of natural and depleted uranium and thorium located in the flood plain of TA-18 should be included in this Section. The final RFP should include a provision that the contractor must support remediation efforts at TA-18 after closure, including decommissioning, decontaminating, and demolition.

SEC J – APP B 3.2.3. - The Contractor shall develop and apply the science and technology, and perform appropriate related analytical tasks required to eliminate surplus inventories of weapons-useable materials, including from dismantled weapons and production reactors and facilities, to abet verification of international agreements, and to strengthen foreign and international efforts to respond effectively to nuclear emergencies.

Please add the following to this section: The first priority is to begin in LANL's back yard first with eliminating surplus inventories of weapons-useable materials and stabilizing nuclear materials. The final RFP should include a strict timeline for doing so.

SEC J – APP B 3.2.4. - ...support United States (U.S.) Government negotiations and policy analysis,...

Comment: Increasing transparency would help in this support.

SEC J – APP B 3.4.2 – The Contractor shall maintain and operate the facility infrastructure and sustain the technical capabilities to process and encapsulate the isotope plutonium-238 into fuel forms that will be provided to the DOE/NNSA for use in the development and fabrication of radioisotope power systems that are delivered to other agencies for space exploration and national security missions. Comment: Language in the final RFP should reflect the fact that this mission might be moving to another site.

SEC J – APP B 3.4.4 - The Contractor shall support the Yucca Mountain Project by conducting studies to characterize the site, particularly in the areas of radionuclide migration, volcanic risk assessment, and exploratory studies relating to facility test coordination.

A provision should be included to address U.S. District Court concerns about LANL's finite element heat and mass transfer code (FEHM) groundwater model developed for Yucca Mountain. Mention should be made concerning the need to start work on verifying a 300,000+ year secured storage program.

SEC J – APP B 4.2 – The Contractor shall: (1) support the Defense Nuclear Facilities Safety Board (DNFSB) oversight, (2) review and address DNFSB recommendations, and (3) implement DOE/NNSA approved implementation plans addressing DNFSB recommendations.

We strongly suggest that this should be it's own section. It should include timelines for following the DNFSB's recommendations and the consequences for not following the DNFSB's recommendations. In addition, we support all of the DNFSB's concerns about the draft RFP and believe that the final RFP should incorporate and address those concerns. In a December 16, 2004 letter to The Honorable Linton Brooks, John T. Conway, chairman of the DNFSB, wrote, "the Board concludes that the draft RFP places unnecessary and ill-advised limitations on the Department of Energy's (DOE) right to inspect and oversee the activities of the contractor, undermines DOE'S system for identifying and implementing safety requirements, and omits relevant safety requirements." (http://www.deprep.org/2004/FB04D16A.HTM)

In a post-9 11 world, the DNFSB is one of the public's few chances to get a glimpse into the inner workings of Los Alamos National Laboratory. All efforts should be made to allow the Board to continue its important work. The Board also states, "All language in the RFP suggesting that the contractor determines in the first instance how nuclear activities are to be carried out should be deleted." This recommendation, along with all the Board's recommendations concerning the draft RFP, should be followed.

SEC J APP B 4.4 - The Contractor shall conduct an emergency operations program to include emergency preparedness plans and procedures, an occurrence notification and reporting system, operation of an Emergency Operations Center, and emergency response capabilities for local, regional, and national missions to include

a Radiological Assistance Program, and support to the NNSA Nuclear Emergency Support Team and Accident Response Group in the areas of nuclear weapons expertise, nuclear weapon surety, environment, safety and health, waste management, transportation and other areas requiring specialized planning, training, and responses to nuclear weapon accidents or incidents.

We strongly support the following substitute for Section J: On October 1, 2005, the Contractor shall relinquish control of the Emergency Operations Center to DOE. DOE will conduct an emergency operations program to include emergency preparedness plans and procedures, an occurrence notification and reporting system, operation of an Emergency Operations Center, and emergency response capabilities for local, regional, and national missions to include a Radiological Assistance Program, and support to the NNSA Nuclear Emergency Support Team and Accident Response Group in the areas of nuclear weapons expertise, nuclear weapon surety, environment, safety and health, waste management, transportation and other areas requiring specialized planning, training, and responses to nuclear weapon accidents or incidents.

SEC J – APP B 4.5.1 (1) - conduct compliant environmental restoration activities including characterization and remediation in accordance with Regulatory requirements

The following provision should be incorporated into the final RFP. The contractor shall sample the springs along the Rio Grande located in White Rock Canyon quarterly. Samples shall be analyzed for radionuclides, including low-level tritium, metals, high explosives and the degradates, perchlorates and other inorganics, such as nitrates, and provide reports on this samplings and its associated analysis to the public within four (4) months of taking the samples.

The contractor must support a baseline budget of $2 million per year for the NMED DOE OB for LANL activities. These activities include confirmatory air emission and water discharge sampling, analyses and reporting the results to the public.

SEC J – APP B 4.5.1 (2) - complete legacy waste disposition

Comment: Should include "immediately" after "disposition" or include a timeline, along with consequences for non-compliance.

SEC J – APP B 6.5 – In coordination with and approval of the Contracting Officer, the Contractor shall conduct communications, information, public participation, and public affairs programs including internal and external communications; community involvement and outreach; interactions with the media, businesses, and the scientific and technical community; and liaison and consultation with local, state, Native American, federal agencies and Congressional offices.

Interactions with NGOs should be formally included in this list. Non-profit watchdog groups provide a great informational service to the public and should be considered an important resource concerning public affairs. Also, after 9/11, many LANL documents and sites were placed out of public reach. A fresh look at what the public has access to should be considered.

The Citizen's Radiation Monitoring Group should formally be mentioned. The Community Radiation Monitoring Group (CRMG) seeks to understand and communicate public health issues relating to direct penetrating radiation and radiation from airborne radioactive materials that result from activities at LANL. It has been meeting monthly since 1997. The contractor is required to participate in the monthly meetings of the Community Radiation Monitoring Group (CRMG). Participation includes providing technical staff to review the data and provide analyses, along with providing information about changes to the air monitoring programs at LANL.

SEC J – APP B 6.7 – The Contractor shall maintain training and education services including general training activities, involving individual employee development, educational and professional advancement, required technical and facilities-specific training, environment, safety and health training, safeguards and security training, and other training as approved by the Contracting Officer.

This provision should include the following: All employees should be thoroughly trained before doing any work. With respect to cleanup workers, studies have shown that those with HAZ WHOPPER training have fewer work-related accidents. All cleanup workers must be trained in HAZ WHOPPER before beginning any cleanup activities. The Contractor shall facilitate annual federal and state Occupational Safety and Health Agency inspections. The final RFP should include strong consequences for not complying with this provision.

SEC J – APP C Note:(1) The Section H clause entitled "Continuation of Prior Contractor's Obligations" requires the Offeror to assume the predecessor contractor's banking agreements.
1.The Government shall have a title to the credit balance in said account to secure the repayment of all funds transferred to the Contractor, and said title shall be superior to any lien, title or claim of the Institution or others with respect to such accounts.
2.The Institution shall be bound by the provisions of said Agreement(s) between DOE and the Contractor relating to the transfer of funds into and withdrawal of funds from the above special demand deposit account, which are hereby incorporated into this Agreement by reference, but the Institution shall not be responsible for the application of funds withdrawn from said account.

In order to facilitate economic development in the surrounding communities, the final RFP should include a mandatory provision that all banking must take place in regionally owned banks.

SEC J – APP L The Contractor shall also provide all funding appropriated by statute to support the Los Alamos Public School District for elementary and secondary education of students in the school district.

This refers to the annual $8 million for the Los Alamos Public Schools. Los Alamos Public Schools also receive state funding. The $8 million should be spread around to the other school districts within a 50-mile radius of LANL. Less than 1/2 of LANL employees actually live in Los Alamos County.

SEC J – APP N (c) (3) (i) - NNSA has agreed to allocate as an item of Laboratory overhead $1,000,000 annually, which in addition to any funds from external sponsors, will fund TC Program activities. In the event that such activities generate revenues, such revenues will be added to the annual NNSA allocation or be otherwise used consistent with the terms and purposes of this Contract.
(h) (1) - Retention of Title. The Contractor will assign or retain title to intellectual property generated by Laboratory employees in the course of non-federal work, in accordance with Class Waiver provisions and guidance provided by the NNSA Patent Counsel, and based on the best interests of the technology transfer program of NNSA and the Laboratory.

All monies generated by Lab employees using taxpayer's monies should be returned to the taxpayers.

SEC J – APP P – Ombuds, Institutional Planning & Eval. Office, Policy Office, Communications & External Relations, Center for Homeland Security.

Comment: It should be noted that just the directors of each departments are not required to be re-hired by a new contractor.

SEC K-18 (a) - Organizational conflict of interest means that because of other activities or relationships

with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.

Comment: Links between pension plan investments, subcontractors, board members, and/or regents should be fully investigated for any conflict of interests.

SEC K-20 - (a) Cost or charges for royalties. If the response to this solicitation contains costs or charges for royalties totaling more than $250, the following information shall be included in the response relating to each separate item of royalty or license fee.

Comment: The final RFP should clarify whether the new contractor will be required to pay royalties to the University of California.

SEC L-1 (f) (2) - The Government may reject any or all proposals if such action is in the Government's interest.

Comment: The final RFP should specify what happens if all proposals are rejected. The Government should also be required to fully explain each rejection and its interests in doing so.

SEC L-3 (b) (3) - By signing and submitting the SF 33, the Offeror commits to accept the resulting contract (See Section L provision entitled "Content of Resulting Contract") as written and to comply with the other provisions of the solicitation.

Comment: We hope that the final RFP is sufficiently clear and precise so that offerors are not unreasonably vulnerable in submitting a bid.

SEC L-11 - The minimum offer acceptance period is 210 calendar days after the required date for receipt of Offers.

Comment: What is the maximum?

SEC M-1 (b) - A proposal shall be eliminated from further consideration before the initial ratings if the proposal is so grossly and obviously deficient as to be totally unacceptable on its face.

Comment: The final RFP should specify why this is the case and offer criteria for rejection.

SEC M-2 - The Government is more concerned with obtaining a superior Technical and Management proposal than making an award at the lowest evaluated total cost.

Comment: The final RFP should state that reducing the amount of overhead should be an important consideration.

SEC M-4 (a) (5) - Balancing and integrating the performance of world-class science and technology with laboratory operations, business operations, and laboratory management.

Comment: This provision should include balancing those concerns with safety, security, and environmental issues.

Respectfully submitted,

Jay Coghlan and Scott Kovac
Nuclear Watch New Mexico

Joni Arends and Amy Williams
Concerned Citizens for Nuclear Safety