

The New UC Contract and LLNL Employees

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Most SPSE members will remember that on January 18, 2001, just before Inauguration Day, the University of California Board of Regents approved modification of contracts under which it manages Lawrence Livermore and Los Alamos national laboratories for DOE. At the same time the modified contracts have been extended to provide for operation of the laboratories through September 30, 2005.

Last March SPSE issued an E-Bulletin, Number Nine, which contained more information on the new (modified) contract and URL's for websites which would allow members to explore for themselves what was in the contract. At the time the editor stated that a longer article was planned about the contract and implications for LLNL employees. For those interested, this article is a review of some new features of the UC contract. Contract details are in the Appendix to this paper

The official name of the University's contract to run LLNL is "W-7405-Eng-48," often called "Contract 48" for short. The main focus of this article is the addition of two clauses to Contract 48 giving the DOE the right in certain cases to direct the "removal of an employee from work under the contract, if such an action is consistent with state law and regulations." Some readers of this article may have heard that the DOE could order the University to fire a Lab employee. That's not quite true—but being "removed" could be almost as bad. This modification to the contract is an important change, with a number of implications for LLNL employees. The paragraphs below discuss the changes in the UC contract, with emphasis on the removal clauses.

As a result of the negotiations with DOE, UC did get several improvements to the contract. For example, there is a clause guaranteeing access to LLNL facilities for foreign scientists, graduates and post doctoral students. (See Appendix for details.) There is also a clause reiterating the commitment of all parties to "intellectual and scientific freedom." Finally there is a clause allowing the University to terminate the contract with eighteen months notice "whenever, for any reason, the Contractor [UC] determines any such termination is in the best interests of the Contractor."

There is a multi-page clause on the LLNL "Pension Plan" including a discussion of what happens if UC stops running the Lab. There is also a clause acknowledging that "under California law" the University is required in many cases to defend its employees if they are defendants in a lawsuit. There is a new clause on protection for whistleblowers, but it doesn't say much. It refers to certain Federal laws and items in the Code of Federal Regulations (CFRs.) The clause is dated December 2000. Does this mean there was a problem with protection of whistleblowers before that date?

Removal of LLNL Employees from Work Under Contract 48

As stated above the newly modified Contract 48 now has a clause, dated December 2000, which provides that "the NNSA administrator, with approval of the Energy secretary, may direct the removal of an employee from work under the contract, if such an action is consistent with state law and regulations." This important clause is I.064 DEAR 970.5203-3 *Contractor's Organization (Dec 2000)*; the key phrases are in Section (c) *Control of Employees*. (See section on Sources and the Appendix of this paper for exact wording.) As noted in the NewsOnLine message, "The clause does not authorize DOE to discipline or fire a University employee."

Before plunging into a discussion of the ramifications of these new clauses in Contract 48, a simple point needs to be made. Most of the personal troubles we have come from conflicts with

our boss, our project leader, or our division or department. Trouble like that is what really could get us fired (or lead to filing a grievance.) Local difficulties of that sort don't involve NNSA or DOE, except, of course, when they involve racial or sexual discrimination or similar matters of federal law.

Clause I.064 is paired with clause H.011, the *Implementation of Contractor's Organization Clause*. H.011 adds some modifying language to clause I.064. The nature of Contract 48 is that the H-series clauses are overriding modifiers to the I-series clauses. The I-series clauses are more or less standard, boiler plate clauses found in many contracts with the Federal Government. (That is what the reference DEAR 970.5203-3 means. For more information see the website of the LLNL Office of Contract Management.)

Apparently at other Federal facilities such as a Navy shipyard a clause like this is routine. As explained by the Office of Contract Management,

As stipulated under Clause I.064, DOE has a national policy of giving discretion to the government regarding whether a particular contractor employee can be removed from contract work. As the site owner, DOE is extending its control to include access to the facility itself. This right is not new, but had not previously been included in the DOE/UC Prime Contracts.

All work at LLNL is done under Contract 48, even work paid for by state or other Federal agencies. So if someone is *removed* from work under the LLNL contract (a) they no longer have any funding *and* (b) they are kicked out of the Lab. It sounds a lot like being fired!

However someone who has been *removed* hasn't actually terminated employment at the University of California, and theoretically could transfer to a job on a campus somewhere. In this narrow sense they aren't really fired.

Clause H.011 promises that NNSA (acting for DOE)

shall not direct the Contractor to take any action in violation of state law or regulation applicable to the Contractor.

Advance notice is required, and DOE is to give UC "a reasonable opportunity to take appropriate disciplinary or other action." As explained on the OCM website, DOE "will allow the University to conduct its own independent review and consider alternative approaches where the underlying concerns can be effectively dealt with by the University without removal." Once DOE has made an official request for *removal*, then after the University has reviewed the situation, UC may decide UC to intercede on behalf of the individual to be removed.

Someone who is faced with a removal order cannot expect help from Washington and is looking to the University (and Lab Management) for defense and support. In contrast, a whistleblower is someone who reports problems locally, at LLNL for example, and has to look to Washington for protection.

As far as I am aware there does not seem to be any formal process within DOE for appealing the decision.

A critical part of Clause H.011 is the following:

Nothing in the "Contractor's Organization" clause or this implementation clause is intended to conflict with 42 U.S.C. § 7274p, or otherwise affect the scientific integrity of the advice of the persons required to provide the President and the Congress assurances on the safety, security, and effectiveness of the nuclear weapons force.

I don't understand the reference to Federal law, but I think this sentence is important. My interpretation is that if there were voices expressing concerns about a problem in the nuclear stockpile, for example, this sentence would prevent them from being stifled by threats of removal. The clause (H.005) on Intellectual and Scientific Freedom might be applicable.

Spies, Computer Disks and the NIF Debacle

It is not hard to see what events of the past few years inspired making the removal clauses part of the contract to run LLNL. The situations in which DOE can require removal fall into two categories. Referring to I.064 (c), the Department can require removal of anyone whom

DOE deems incompetent, careless, or insubordinate ... [or someone] ... whose continued employment on the work is deemed by DOE to be inimical to the Department's mission

...

So someone who is "deemed" to be a Spy (inimical!)—or just sloppy about handling classified computer hard drives (incompetent?)—can be removed. (Note: DOE is and always has been in complete control of security including our clearances. So DOE could always revoke someone's clearance—for cause, presumably.)

So that takes care of the next alleged spy. The other situation is pretty clearly suggested by the NIF debacle. The clause states that the right to remove someone

includes the right to direct the Contractor to remove its most senior key person from work under the contract for serious contract performance deficiencies.

Scenario

What sort of a scenario would lead to an order for removal under clause I.064? It seems likely to me that the events surrounding the removal would be part of a highly charged political atmosphere. A specific scenario leading to a *removal* might come from LLNL work on a component of a proposed ballistic missile defense (BMD) system. (Or a new energy source ... or a cure for cancer...) If certain people in Washington develop strong ties to the project, so that they believe their careers depend on its success, then difficulties at LLNL could lead to angry calls for removal of the leader(s) of the project. Perhaps the research is not successful, as sometimes happens, or perhaps the LLNL scientists discover a reason why the proposed system won't work. Then the sponsors in Washington might threaten removal as a way to shut up or discredit critics of the proposed system. (This situation isn't entirely hypothetical. The Pentagon was recently accused of trying to suppress a report showing that "potentially profound problems exist with the National Missile Defense System." See the website maintained by the Federation of American Scientists at <http://www.fas.org/sgp/congress/2001/h061201.html> and the recent attacks on MIT scientist Ted Postol.)

Curiously, it is difficult to think of a project at LLNL, except for NIF, where there was more energy behind a project at DOE HQ than there was here. (Maybe that's a good thing?)

What was special about the NIF situation? First of all, it was very expensive. Secondly, NIF was said to be essential to the government's effort to develop understanding of nuclear weapons from first principles ("science based stockpile stewardship"). Thus NIF was no longer just a big laser for LLNL research; it was now a *Vital Ingredient in Our Nation's Defense*.

Besides the above, it is alleged that the NIF managers lied to Secretary Richardson about how well the project was going. (Did that constitute serious contract performance deficiencies? Certainly not a way to make DOE HQ happy.)

Under what circumstances would the University support and defend an employee who was in such trouble with DOE that they asked for their removal? Let us assume that the UC internal investigation shows that the scientist (or manager) is innocent or that the request for removal is politically motivated. Then the key factor in this situation, I believe, is the character and determination of the University leadership, advised by LLNL Management, to stand up to the DOE publicly and demand a retraction of the charges and withdrawal of the request. If DOE insists on the removal, then according to the logic of this contract, the University should take care of the employee by finding them a job on one of the campuses. If someone at LLNL was removed from LLNL on orders from DOE, it would be very unusual for UC to transfer them to the Davis campus (for example), giving them an appointment as an adjunct professor, but it could happen. Support for the first year doesn't involve a lot of money—perhaps \$100–150K,—and the University should be able to find such money—if it's really thinks taking care of its employee is important enough.

If, despite being cleared by an internal investigation, the employee is not given a job (because of some excuse like “financial exigencies”) then being *removed* really is the same as being fired. Another worrisome possibility is that the University might cave in and fire the employee to avoid a confrontation with DOE. But if the University (and Lab Management) are unwilling to stand up to DOE and defend and support their employees, then we have a big problem anyway. One may also speculate that how far the University was willing to go might depend on whether the individual threatened is a top official or manager instead of a low-level scientist, engineer or administrator.

Micromanagement Issue

It is hard to feel completely comfortable about the addition of the *removal* clauses to Contract 48. In the simplest form the question is, did the University do serious damage to the UC-DOE relationship and the effective management of the Lab when it accepted a contract with the *removal* clauses in it? In defense of UC, It appears that the University had no choice about this matter, and the negotiators did ask for, and get, several improvements to the contract, such as in H.011 and the clauses on scientific freedom (H.005) and access to LLNL facilities (H.017).

There remains what might be called the *micromanagement issue*. What is there to prevent people at DOE from demanding removal of anyone who made troubles for them on anything? Officials at Headquarters could demand the work be done in an exact way. People who didn't move quickly to obey might be threatened with *removal* for incompetence (or worse.)

A lot will depend on the character and integrity of the top DOE and NNSA leadership. LLNL will avoid this type of “retaliatory” micromanagement if General Gordon at NNSA and the DOE Secretary are unwilling to pay the political price for a removal unless it is absolutely necessary. (Of course, that means *necessary* as viewed from Washington D.C.)

The character and integrity of the contractor matters a great deal also. The contractor should be unwilling to be ordered around just because DOE HQ is upset about something. Besides standing up for employees who are unjustly accused, the contractor should demand to be allowed to follow their own internal procedures in managing their employees. Unfortunately we at SPSE know of cases where the internal procedures at LLNL did not lead to a good situation (or to justice) for employees involved in controversy.

The general tendency is for a contractor (as UC is) to be cooperative with their “customer,” But there needs to be a balance. The contractor needs to know when to say “Yes Sir!” and when to say “If you insist on giving those orders, you can find another contractor.” So the clause on termination of the contract turns out to be important after all.

With this contract UC and LLNL have been put on notice that mismanagement and problems in certain areas could lead to ... *removals*. My own opinion is that the removals will be rare, no more than one or two at both laboratories in the next three years. Lets hope I'm right and we don't wind up reading about people being threatened with removal any time soon. My conclusion, shared by others in SPSE, is that the addition of the removal clauses to the UC Contract is a serious loss for Lab employees. As a result of the negotiations, UC did get several improvements to the contract, such as the clauses on scientific freedom and access to LLNL facilities. However, if it ever happens that UC receives an order to *remove* one of us from work under Contract 48, we are dependent on getting help from the University; otherwise removal really is just like being fired.

Sources

There are two sources of information about the contract, whose official name is “W-7405-Eng-48” but is often called “Contract 48” for short. At LLNL the Office of Contract Management has a useful website, with links to other sources and a section on Frequently Asked Questions (FAQs). The URL for their site is <http://www-r.llnl.gov/OCM/>

Contract 48 and the other UC contracts are maintained electronically in the UC Office of the President. The URL for the UC Contracts is <http://labs.ucop.edu/internet/comix/>

The most significant items of Contract 48 are in the so-called “clauses.” (The rest is in a variety of long Appendices.) If you are interested in reading some of the contract, I recommend downloading the pdf file containing the contract clauses. The download is about 700 kilobytes for a document with over 230 pages.)

On the website, select LLNL contract
and then Clauses, pdf.

APPENDIX

**Date: Mon, 22 Jan 2001 LLNL NewsOnLine
CONCLUSION OF UC-DOE CONTRACT EXTENSION LAUDED**

This press release/News OnLine article informed LLNL employees that the Department of Energy demanded new contractual provisions, including:

-- Inclusion of a contract clause under which the NNSA administrator, with approval of the Energy secretary, may direct the removal of an employee from work under the contract, if such an action is consistent with state law and regulations. The clause does not authorize DOE to discipline or fire a University employee.

For more information about or to view the new contract, visit the Office of Contract Management Web page:
http://www.llnl.gov/OCM/OCM_home.html

“Removal” Clauses

I.064 DEAR 970.5203-3 CONTRACTOR’S ORGANIZATION (DEC 2000)

(c) Control of employees.

The Contractor shall be responsible for maintaining satisfactory standards of employee competency, conduct, and integrity and shall be responsible for taking such disciplinary action with respect to its employees as may be necessary. In the event the Contractor fails to remove any employee from the contract work whom DOE deems incompetent, careless, or insubordinate, or whose continued employment on the work is deemed by DOE to be inimical to the Department’s mission, the Contracting Officer may require, with the approval of the Secretary of Energy, the Contractor to remove the employee from work under the Contract. This includes the right to direct the Contractor to remove its most senior key person from work under the contract for serious contract performance deficiencies.

H.11 IMPLEMENTATION OF CONTRACTOR’S ORGANIZATION CLAUSE

In the exercise of any rights the Government may have under the Section I clause entitled “Contractor’s Organization,” the Contracting Officer shall not direct the Contractor to take any action in violation of state law or regulation applicable to the Contractor. Further, prior to the exercise of any rights under the “Contractor’s Organization” clause, the Contracting Officer shall provide notice to the Contractor and a reasonable opportunity to take appropriate disciplinary or other action. The Contractor shall inform DOE of the appropriate disciplinary or other action within 60-days of the Contracting Officer’s notice, unless the Contracting Officer concurs in an extension of time. Nothing in the “Contractor’s Organization” clause or this implementation clause is intended to conflict with 42 U.S.C. § 7274p., or otherwise affect the scientific integrity of the advice of the persons required to provide the President and the Congress assurances on the safety, security, and effectiveness of the nuclear weapons force.

From LLNL Office of Contract Management Page of FAQ’s

<http://www-r.llnl.gov/OCM/FAQs/AppA.html>

As stipulated under Clause I.064, DOE has a national policy of giving discretion to the government regarding whether a particular contractor employee can be removed from contract work. As the site owner, DOE is extending its control to include access to the facility itself. This right is not new, but had not previously been included in the DOE/UC Prime Contracts. It should be noted that such control is not to be exerted

lightly -- to deny such access to an employee requires a specific determination by the highest DOE official, the Secretary of Energy. In addition, DOE has agreed in the Contract, under the special implementation Clause H.011 that augments I.064, that it will not direct the University to remove an employee under circumstances that would violate state law governing the University (this includes University employment policies when relevant to the question of law and regulation) and will allow the University to conduct its own independent review and consider alternative approaches where the underlying concerns can be effectively dealt with by the University without removal. Two other provisions in the Contract, in addition to the special implementation Clause H.011, provide added protections to the University: Clause H.005 on intellectual and scientific freedom and Clause H.028 covering the University's right to terminate the Contract.

Other Important Clauses in Contract 48

H.005 INTELLECTUAL AND SCIENTIFIC FREEDOM

(a) The Parties recognize the importance of fostering an atmosphere at the Laboratory conducive to scientific inquiry and the development of new knowledge and creative and innovative ideas related to important national interests.

(b) The Parties further recognize that the free exchange of ideas among scientists and engineers at the Laboratory and colleagues at universities, colleges, and other laboratories or scientific facilities is vital to the success of the scientific, engineering, and technical work performed by Laboratory personnel.

(c) In order to further the goals of the Laboratory and the national interest, it is agreed by the Parties that the scientific and engineering personnel at the Laboratory shall be accorded the rights of publication or other dissemination of research, and participation in open debate and in scientific, educational, or professional meetings or conferences, subject to the limitations included in technology transfer agreements and such other limitations as may be required by the terms of this Contract. Nothing in this clause is intended to alter the obligations of the Parties to protect classified or unclassified controlled nuclear information as provided by law.

(d) Nothing in the Section I clause entitled "Public Affairs" or the Section H clause entitled "Lobbying Restriction (Department of Interior and Related Agencies Appropriation Act, 2001)" is intended to limit the rights of the Contractor or its employees to publicize and to accurately state the results of its scientific research.

H.017 ACCESS OF FOREIGN SCIENTISTS, GRADUATES AND POST DOCTORAL STUDENTS TO LABORATORY FACILITIES

(a) The Contractor and DOE recognize that the Contractor in its performance of the work under this Contract brings a Contractor culture of freedom of inquiry and a quest for new knowledge of the highest order which has resulted in significant advances in science. An important facet of this culture is the role of the graduate student, post-doctoral student, faculty member, and visiting scientist.

(b) The Contractor promotes the advancement of science and technology in the United States by utilizing, among other things, the talents, capabilities and ideas of foreign graduate and post-doctoral students, faculty, and visiting scientists. The Contractor, in furtherance of the Contract work, involves these individuals in unclassified research activities of the Laboratory. DOE

acknowledges the importance of these assignments to promote intellectual freedom, to provide access to the talent of foreign scientists to further Laboratory programmatic objectives, and to enhance United States' scientific and technical capabilities to compete internationally. Therefore, for purposes of engaging in collaborative research and education, the Contractor may assign foreign faculty, graduate and post-doctoral students and visiting scientists to the Laboratory and give access to Laboratory locations freely, subject to certain security and export control laws and applicable DOE Directives.

Lawsuits

H.010 DEFENSE AND INDEMNIFICATION OF EMPLOYEES

—See also Section clause entitled **Insurance -Litigation and Claims**

(a) The Parties recognize that, under California law, 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 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 Section I clause entitled Insurance - Litigation and Claims.

(b) Costs and expenses, including judgments, resulting from the defense and indemnification of employees from civil fraud actions filed in federal court by the Government will be unallowable where the employee pleads nolo contendere or the action results in a judgment against the defendant.

(c) Where in accordance with California law, the Contractor determines to defend an employee in a criminal action, DOE will consider in good faith, on a case-by-case basis, making the costs and expenses, including judgments, resulting from the defense and indemnification of employees allowable.

(d) The Contractor shall immediately furnish the Contracting Officer written notice of any such claim or civil action filed against any employee of the Contractor arising out of the work under this contract together with copies of all pleadings filed. The Contractor shall furnish to the Contracting Officer a written determination by the Contractor's counsel that the defense or indemnity of the employee is required by the provisions of the California Government Code, that the employee was acting within the course and scope of employment at the time of the acts or omissions which gave rise to the claim or civil action, and that the exclusion set forth under California law for fraud, corruption, or malice on the part of the employee does not apply. A copy of any letter asserting a reservation of rights under California law with respect to the defense or indemnification of such employee shall also be provided to the Contracting Officer. The costs associated with the settlement of any such claim or civil action shall not be treated as an allowable cost unless approved in writing by the Contracting Officer.

H.028 CONTRACTOR'S RIGHT TO TERMINATE;

This contract may be terminated for convenience by the Contractor in whole, upon delivery to the Government of a written notice 18 months prior to the effective date of such termination whenever, for any reason, the Contractor determines any such termination is in the best interests of the Contractor. * * *

Clause on Retirement System

H.008 (Pension Plan)

This clause includes, among other things, provisions for what happens if UC stops being the contractor for LLNL (several pages altogether)

Whistleblowers

I.068 DEAR 952.203-70 WHISTLEBLOWER PROTECTION FOR CONTRACTOR EMPLOYEES (DEC 2000)

(a) The Contractor shall comply with the requirements of “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.

(b) The Contractor shall insert or have inserted the substance of this clause including this paragraph (b), in subcontracts at all tiers, for subcontracts involving work performed on behalf of DOE directly related to activities at DOE-owned or leased sites.