The Secretary of Energy
Washington, D.C. 20585

May 5, 2011

MEMORANDUM FOR THOMAS P. D'AGOSTINO
UNDER SECRETARY FOR NUCLEAR SECURITY AND
ADMINISTRATOR OF THE NATIONAL SECURITY
ADMINISTRATION

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SENIOR ADVISOR/DIRECTOR ARPA-E

FROM: STEVEN CHU Steven Chu

SUBJECT: Authorize Changes to Workforce Restructuring Policy

This memorandum provides revised and consolidated policy and models intended to facilitate and expedite any necessary contractor workforce restructuring activities. Specifically, this memorandum addresses 1) policies applicable only to workforce restructuring at the Department's defense nuclear facilities and 2) the policies applicable to workforce restructuring at all Departmental facilities. This memorandum supersedes any prior policy and guidance that is inconsistent with this document. Sites that follow the policy and guidance below should be able to avoid delays in the approval process.

Work force restructuring actions will be managed in accordance with the Department's Collaborative Action Process. Accountability will be with the Under Secretaries unless otherwise delegated. Collaboration is expected with the Offices of General Counsel, Management, Congressional and Intergovernmental Affairs, and Public Affairs. It remains critical to ensure complete legal reviews of all workforce restructuring actions.

I. REQUIREMENTS APPLICABLE ONLY TO DOE/NNSA DEFENSE NUCLEAR FACILITIES

Upon a determination that a change in the work force at a defense nuclear facility is necessary, the Department is obligated under section 3161 of the National Defense Authorization Act for Fiscal Year 1993, Public Law 102-484 (section 3161) to prepare a workforce restructuring plan (herein referred to as the general plan) for submission to

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Congress. A list of those facilities is provided in Attachment 1. The Department has interpreted section 3161 to trigger the requirement to develop a plan only where the change anticipated will affect at least 100 employees within a 12-month period. Section 3161(c)(1) requires that changes in the work force at a Department of Energy defense nuclear facility should be made only 120 days or more after the provision of notice of those changes to affected employees and communities.

General plans developed in accordance with section 3161 provide a framework for workforce restructuring actions at a particular DOE or NNSA site; these plans are not limited to a specific workforce restructuring action. Departmental policy on matters such as use of incentives and employee waivers has changed over time, and, accordingly, it is crucial to periodically review and update general plans.

The Department has developed a template for general plans to ensure consistency and accurate application of section 3161 and Departmental policy, as well as to expedite Departmental review. The template for the plan and the accompanying notice of intent to develop a plan for workforce restructuring is provided in Attachment 2. The template should be carefully reviewed and adapted to fit the circumstances of the particular site.

II. REQUIREMENTS APPLICABLE TO DEFENSE NUCLEAR FACILITIES AND NON-DEFENSE FACILITIES

I encourage all DOE/NNSA organizations to consult with communities, contractor employees, unions, and other affected stakeholders in developing plans to restructure the contractor work forces at all their facilities.

Each contractor that intends to reduce its workforce by 50 or more employees through involuntary separation or 100 or more employees through a voluntary/involuntary separation action must prepare a specific workforce restructuring plan (contractor's plan). The appropriate Under Secretary is charged with responsibility for approving workforce restructuring actions by its contractors. This approval authority may be delegated as determined by the Under Secretary. If, by the terms of the contractor's contract, it must obtain contracting officer approval to expend funds associated with a work force restructuring action, the approval thresholds stated above shall in no way be construed to abrogate the contracting officer's authority.

The contractor's plan provides detailed information regarding the contractor's proposed workforce restructuring activities and sets forth its business case for why the restructuring is required, e.g., the contractor's need to realign the workforce to ensure an appropriate employee skill mix and/or budget concerns. The contractor's plan should set forth the projected number of affected employees and the occupational classifications of the affected employees, the criteria it will use to select employees for termination, and the projected cost of the separation benefits, including severance and Displaced Worker Medical Benefits, and the anticipated cost savings that will result from the separation program. As set out in Attachment 3, contractors are encouraged to consider use of employee releases

and waivers, participation applications, or other such documents as appropriate in the circumstances, and to discuss use of these documents in their plans.

As you know, the contractor should carefully evaluate its personnel needs before commencing the workforce restructuring action. In particular, the contractor should avoid departures of employees with critical skills whose positions must then be "backfilled," which would be inappropriate. Models for contractor's plans have been developed for guidance and to facilitate accurate application of Departmental policy, as well as to expedite review, and are provided in Attachments 4 (voluntary program) and 5 (involuntary program).

Contractors are encouraged to implement a self-select program prior to conducting an involuntary separation program. Also, Congress has prohibited DOE/NNSA from reimbursing contractors for enhanced benefits, i.e., benefits in excess of those provided for under the parties' contract, including those under any benefit plans approved by the Department unless the Department submits a reprogramming request to the relevant Congressional committees. Early retirement incentives that are funded through contractor pension plans will continue to be unallowable in order to avoid increasing the Department's long term pension liabilities.

Where involuntary separations are to be conducted, the contractor's plan should address the efforts the contractor will make to mitigate the impact of those separations on the individuals involved and their communities, while maintaining a workforce necessary to carry out the continuing missions and strategic objectives of DOE or NNSA. Such efforts often include providing internal transfers to open jobs for which an employee is qualified, providing retraining where funding is available, and providing affected employees the opportunity to self-select for termination.

Government contractors are prohibited from engaging in discrimination in the workplace and a diversity analysis may assist the contractor in ensuring compliance with Executive Order 11246, implemented through FAR clause 52.222.26. My predecessors required contractors to submit diversity analyses to the Office of General Counsel prior to the approval of a work force restructuring action impacting 50 or more employees in a rolling 12-month period.

It is my determination that contractors may choose not to submit their diversity analysis to the Office of General Counsel for approval. Contractors, however, must continue to perform a diversity analysis when the involuntary separation action affects 50 or more contractor employees within a rolling 12-month period. A copy of the analysis shall be provided to the DOE/NNSA site counsel (to protect Attorney-Client privilege) upon its completion to assist in determinations regarding cost allowability. Guidance on how to conduct a reliable and informative diversity analysis is Attachment 6.

The Office of the Assistant General Counsel for Labor and Pensions (GC-63) and NNSA GC have deep expertise in this arena and continue to be available to the Under Secretaries to consult on specific actions in order to avoid litigation. In this regard, contractors should

be aware of a recent development that significantly restricts the allowability of costs involved in settling legal claims. In *Geren v. Tecom, Inc.*, 566 F.3d 1037 (Fed. Cir. 2009), the Federal Circuit held that a government contractor's costs for settling an EEO case were not allowable contract costs unless the contracting officer determined that there was "very little likelihood of success on the merits." In analyzing contractor requests for reimbursement of costs associated with settlement of employment discrimination litigation, DOE will take into account the results of any Office of General Counsel review of the contractor's diversity analysis.

Contractors are strongly encouraged to start their workforce planning well in advance of submitting their plans for specific workforce restructuring actions for approval. In order to provide substantive and helpful comments and to work with the contractors on approaches to reduce risk, Under Secretaries or designees, in consultation with applicable staff offices, as appropriate, will review any work force restructuring action within 10 business days after submission of the plan unless the contractors are notified of issues necessitating an extension of time. In addition, DOE/NNSA notifications to Congress of the upcoming work force restructuring actions will occur with 48 hours (two business days) of approval of the contractor plan, or contractors will be provided with an estimate for completing notification, to allow appropriate planning to occur. This notification must occur prior to any public announcement by DOE/NNSA or the contractor.

Contractors are encouraged to provide as much advance notice to employees as possible of future workforce actions. The Worker Adjustment and Retraining Notice (WARN) Act requires 60-days notice of workforce restructuring actions that constitute mass layoffs and plant closings under the WARN Act, and provides for financial and other penalties for noncompliance. The DOE Office of General Counsel or NNSA Office of General Counsel, as appropriate, is available to support the Under Secretaries by reviewing a contractor's WARN Act notice, if such a notice is required, along with employee communications, to assist in avoiding liabilities that would generally not be allowable costs.

CONCURRENCES:

National Nuclear Security Administration (NNSA)/	**T. D'Agostino**	**4/12/11**
Office of Environmental Management/	**K. Wnukoski f/Triay**	**4/4/11**
Office of Management/	**L. Morman f/Kolb**	**4/8/11**
Office of Nuclear Energy/	**D. Miotla f/Lyons**	**4/1/11**
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Office of General Counsel/	**S. Lev**	**4/4/11**
Office of Congressional & Intergovernmental Affairs/		

Attachments

1) Listing of Defense Nuclear Facilities
2) 3161 Announcement and General Plan Template
3) Waivers and Releases
4) Model Contractor Plan for Self-Select Programs
5) Model Contractor Plan for Involuntary Separation Programs
6) Guidance on Conducting Diversity Analysis