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Briefing Report to Congressional Requesters

October 1987

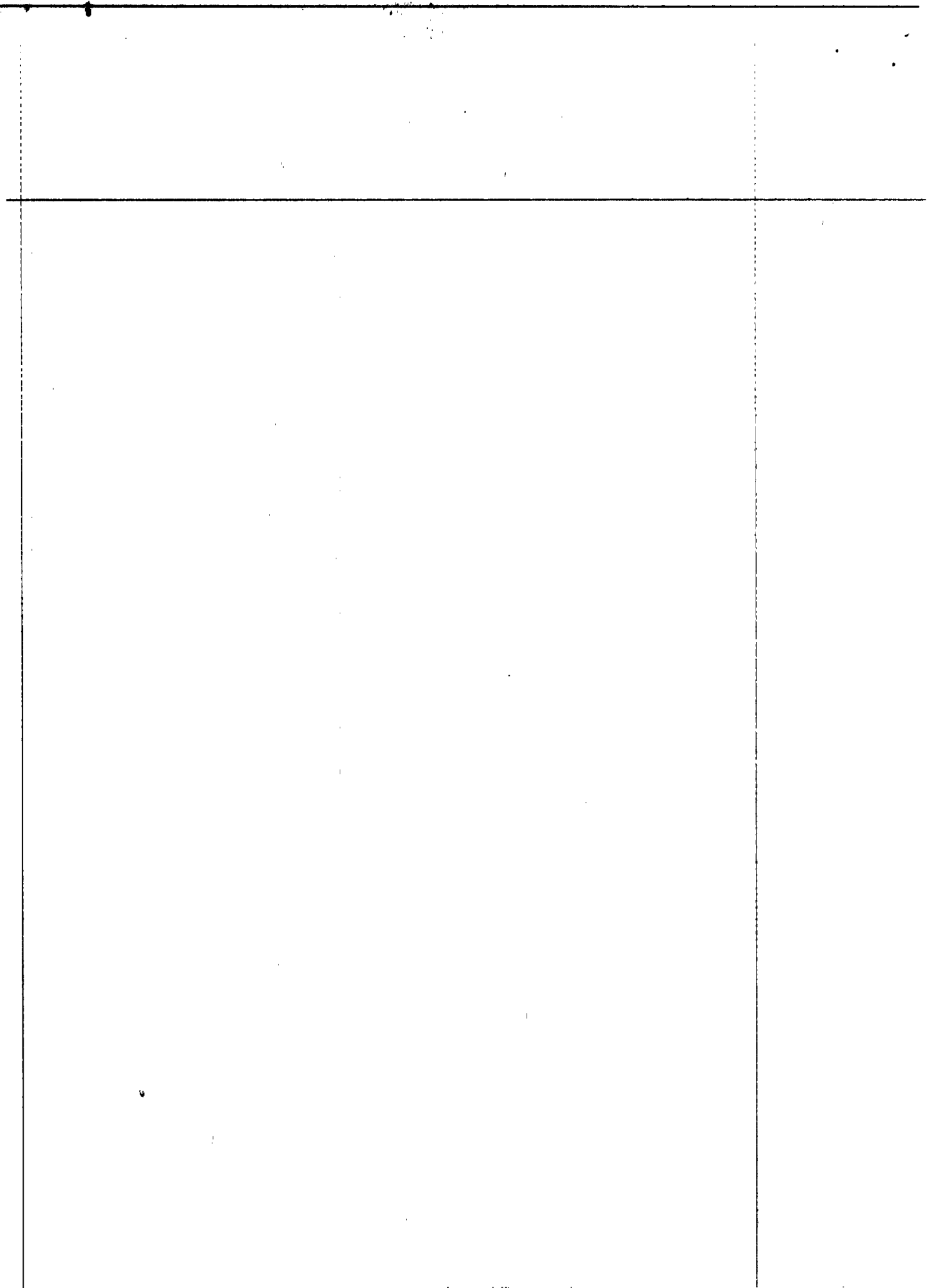
NUCLEAR TEST LOBBYING

DOE Regulations for Contractors Need Reevaluation



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LOBBYING

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Reevaluation



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**Resources, Community, and
Economic Development Division**

B-229072

October 9, 1987

The Honorable Les Aspin
Chairman, Committee on Armed Services

The Honorable Samuel S. Stratton
Chairman, Subcommittee on Procurement
and Military Nuclear Systems
Committee on Armed Services

The Honorable Thomas J. Downey
The Honorable Vic Fazio
The Honorable Richard A. Gephardt
The Honorable Edward J. Markey
The Honorable Patricia Schroeder
The Honorable Barbara Boxer
House of Representatives

This briefing report responds to your May 1987 requests that we review allegations that the Department of Energy (DOE) was improperly employing contractors to assist in lobbying the Congress on nuclear weapons testing issues.

Specifically, your requests concerned allegations that DOE had improperly utilized the services of both a private technical support services contractor, RDA Logicon, and personnel from the government-owned, contractor-operated national nuclear laboratories in an effort to influence legislation which would restrict the U.S. nuclear testing program. On the basis of your requests and meetings with members of your staffs, we agreed to examine the actions by DOE which might be construed as lobbying, and determine whether the support roles provided by the national laboratories and RDA Logicon adhered to relevant contracting and antilobbying requirements.

SUMMARY OF FINDINGS

DOE Briefings Did Not Violate Applicable Law

The antilobbying criminal statute (18 U.S.C. 1913) has been interpreted by the Department of Justice as allowing federal officials to provide information to the Congress and to

state their views on proposed legislation but prohibits "grass-roots" lobbying by federal employees.¹ Thus, DOE's extensive briefings of congressional Members and staff to influence their views on nuclear weapons testing issues did not violate applicable statutory provisions. DOE did, at one point, plan an extensive media effort to oppose pending legislation and contracted with RDA Logicon to support the planned effort. DOE also planned to use pro-defense public interest groups to influence Members of the Congress. However, DOE did not implement this effort. Had it been implemented as planned, we believe it could have constituted grass-roots lobbying and a violation of the statute.

Laws and Regulations
Allow Contractor Reimbursement

Separate laws and regulations apply to government reimbursement of lobbying activities by its contractors. Management and operating contracts, such as those DOE has for the national laboratories, are covered by Public Law 99-145--the "cost principle legislation"--and DOE regulations implementing it. The cost principle states that contractor costs incurred to influence legislative action on any matter pending before the Congress are not reimbursable. However, the law provided DOE with discretion to establish appropriate limitations and qualifications in its implementing regulations. DOE has interpreted the antilobbying cost principle legislation as not covering situations where it has ordered or approved contractors to assist it in attempting to influence legislation pending in the Congress. We believe this interpretation limiting the coverage of the antilobbying cost principle was supported by the legislative history of section 1534 of Public Law 99-145² and was within DOE's discretion. Consequently, the antilobbying cost principle only covers situations where the contractor initiates activities to influence legislation not ordered or approved by DOE and charges the costs incurred to the contract.

In addition, DOE regulations provide that before the antilobbying cost principle is applicable there must be an advance agreement between DOE and the contractor. As of August 25, 1987, none of the national laboratory contracts included such an agreement even though DOE had opportunities

¹By grass-roots lobbying, we mean activities designed to reach the general public to exert influence through public pressure on elected officials.

²131 Cong. Rec. H 9232 (daily ed. October 29, 1985).

to include an antilobbying cost principle when it recently renegotiated some of these contracts.

Most recently, an exemption for national laboratory management and operating contractors from coverage of DOE's regulations implementing section 1534 of Public Law 99-145 has been added to the 1988 DOE Appropriation Bill (H.R. 2700) reported by the Senate Committee on Appropriations on September 16, 1987. If such legislation is enacted, the national laboratories would be exempt from the cost principle by legislation.

Unlike the national laboratory contracts, consulting and technical support services contracts such as the RDA Logicon contract are subject to antilobbying restrictions in the federal acquisition regulations. Like the Public Law 99-145 antilobbying cost principle, DOE does not apply the federal acquisition regulations cost principle where the lobbying services or materials were specifically requested by DOE.

With regard to DOE's use of the national laboratories and RDA Logicon and its compliance with the applicable regulations, we found that

- DOE extensively used national laboratory employees to prepare material for, initiate contacts with, and participate in briefings for Members of the Congress and staff. While these activities appear to constitute a lobbying effort, they are not subject to the antilobbying cost principle in Public Law 99-145, because such contractor activities were ordered and approved by DOE. Accordingly, costs incurred for these activities are reimbursable.
- DOE used RDA Logicon employees to prepare material on nuclear testing in its program to influence the Congress and its proposed media efforts. Because RDA Logicon employees prepared all materials at DOE's request, these activities are reimbursable under federal acquisition regulations.

RDA Logicon Products Little Used
and Duplicated DOE Functions

During our review of DOE's management of RDA Logicon's work supporting lobbying activities, we identified several areas where actions were inconsistent with applicable agency regulations and Office of Management and Budget circulars. For example,

- DOE continued to request and pay for work products after

it became apparent that they generally were not being used.

- some requested work products from RDA Logicon duplicated services available from organizations within DOE.
- DOE officials directly managed RDA Logicon staff working on products associated with the nuclear test limitations issue.

Use of National Laboratory Employees Inconsistent with Guidelines

We recognize the special relationship that exists between DOE and the management and operating contractors at the national laboratories and the importance of the national laboratories in providing technical information and analyses to both DOE and the Congress. However, a balance is needed to ensure that the laboratories continue to provide this service while operating in a manner that is consistent with applicable regulations and guidance.

During our review, we also noted inconsistencies in DOE's use of national laboratory employees with federal acquisition regulations and Office of Management and Budget circulars. These inconsistencies include

- using national laboratory employees in management roles,
- establishing employer-employee relationships between government and contractor employees, and
- using consulting services to aid in influencing pending legislation.

RECOMMENDATION

We recommend that the Secretary, DOE, eliminate the requirement in DOE regulations for an advance agreement before the cost principle is made applicable to management and operating contractors. In our view all management and operating contractors subject to the law should be treated equally with respect to the cost principle.

Our report makes additional recommendations to the Secretary regarding improvements in DOE's contractor management.

MATTERS FOR CONSIDERATION OF THE CONGRESS

The cost principle legislation contained in Public Law 99-145 is designed to control lobbying activities by contractors. However, H.R. 2700 would exempt management and

operating contractors at the national laboratories from the cost principle. In considering H.R. 2700 the Congress will need to decide whether lobbying activities by such contractors should be restricted at all and, if so, the degree of restriction that should be applied. The alternatives include (1) eliminating all restrictions as proposed in H.R. 2700; (2) continuing the existing restriction, where DOE has broad discretion to apply the cost principle to contractors through its implementing regulations; and (3) mandating restrictions by statute, with minimal DOE discretion.

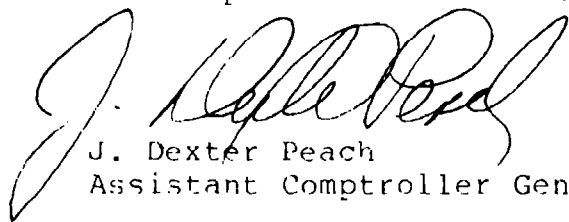
If the Congress wishes to restrict lobbying activities on the part of DOE officials in addition to DOE contractors, it may wish to consider including language in DOE's next appropriations act for this purpose. DOE's 1986 Appropriation Act does not include antilobbying restrictions on the use of appropriated funds by agency officials for lobbying activities. This contrasts with the appropriation acts of certain other government departments and agencies that include antilobbying restrictions, including the Department of Defense.

SCOPE OF WORK

In preparing this report, we reviewed classified and unclassified documents and files maintained by DOE, RDA Logicon, and the national laboratories involved in the congressional briefing process on nuclear testing. With the exception of DOE's Office of General Counsel, who declined to discuss these matters with us, we interviewed DOE, RDA Logicon, and national laboratory employees. We examined the DOE contract with RDA Logicon and the relevant supporting documents. Our audit work covered May 24-September 4, 1987.

We discussed the accuracy of the data in the report with responsible agency program officials and made changes where appropriate. As requested, we did not obtain official agency comments. We are sending copies of the report to the Secretary, Department of Energy and other interested parties. Copies will be available to others upon request.

This report was prepared under the direction of Flora H. Milans, Associate Director. Major contributors to this report are listed in appendix I.



J. Dexter Peach
Assistant Comptroller General

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ABBREVIATIONS

ACWG	Arms Control Working Group
DOE	Department of Energy
DNA	Defense Nuclear Agency
DOD	Department of Defense
FAR	Federal Acquisition Regulations
GAO	General Accounting Office
IG	Interagency Group
LANL	Los Alamos National Laboratory
OISA	Office of International Security Affairs
OMB	Office of Management and Budget
M&O	Management and Operating

SECTION 1

BACKGROUND

BACKGROUND

Press Reports

- May 1987 press reports allege improper Department of Energy (DOE) contractor lobbying on nuclear testing.

Congressional Requests

- Requests dated May 1987 for GAO review of DOE and contractor lobbying received from the Chairmen of the House Armed Services Committee and the Subcommittee on Procurement and Military Nuclear Systems, and Representatives Patricia Schroeder, Vic Fazio, Richard A. Gephardt, Thomas J. Downey, Edward J. Markey, and Barbara Boxer.

In mid-May 1987, the Washington, D.C., press published articles describing an effort by the DOE to lobby Members of the Congress against proposed legislation that would substantially lower ceilings on the explosive yields of U.S. nuclear weapons tests. The articles stated that DOE hired a private contractor, R&D Associates (RDA Logicon), to assist in the lobbying effort despite federal law prohibiting federal agencies from reimbursing government contractors for their costs of attempting to influence legislation. The articles further stated that personnel at the national nuclear laboratories, under contract with DOE, were concurrently involved in coordinating lobbying activities and had initiated contacts with Congress in apparent violation of laws proscribing such unsolicited contact by laboratory employees. By late May, eight Members of the Congress had requested a GAO review of DOE's use of contractors in the lobbying effort.

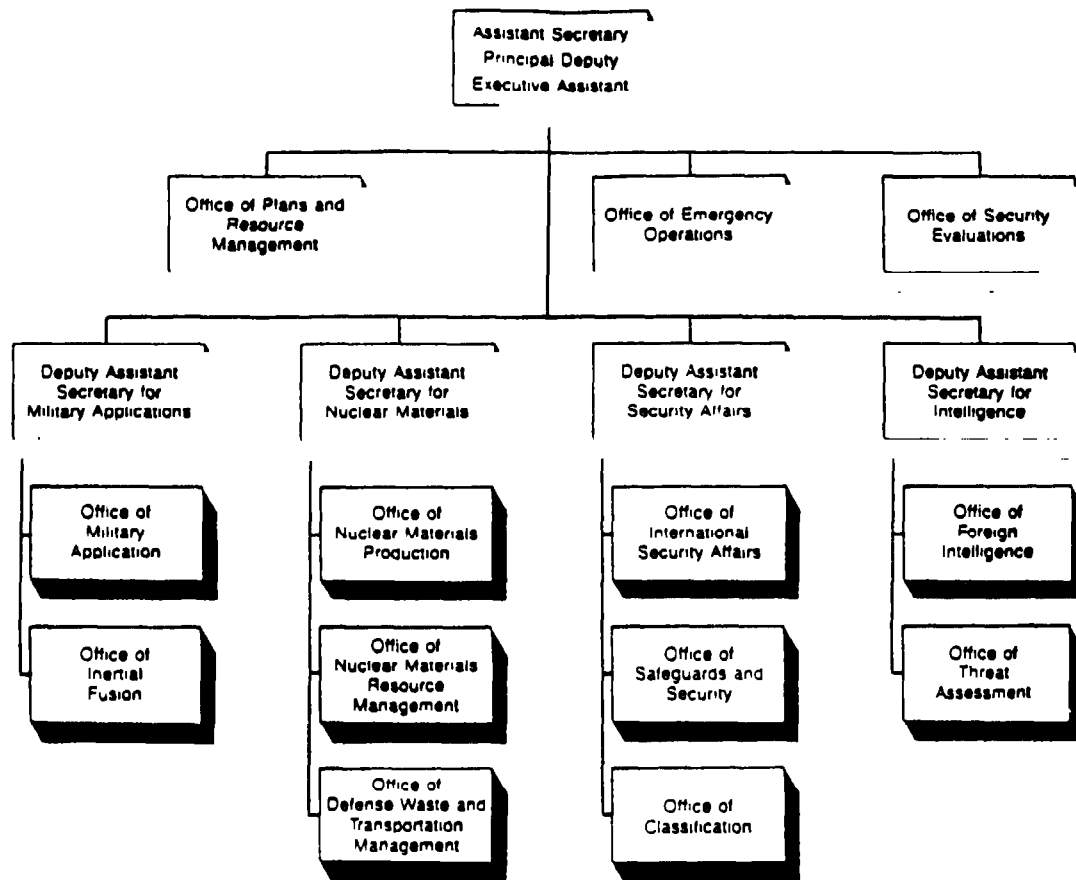
DOE'S DEFENSE PROGRAMS ORGANIZATION

- DOE's Assistant Secretary for Defense Programs directs U.S. nuclear weapons development, production, and testing programs.
- Defense Programs extensively relies on the Lawrence Livermore, Los Alamos, and Sandia national nuclear laboratories to conduct its work.
- Arms Control Working Group (ACWG) comprised of DOE and laboratory employees was established in December 1986 within Defense Programs to take the lead in DOE's arms control activities.

DOE's Assistant Secretary for Defense Programs directs the U.S. nuclear weapons development, production, and testing program. Charged with maintaining a reliable stockpile of nuclear weapons to meet the needs of an adequate strategic deterrent, the Assistant Secretary is also responsible for monitoring compliance with international arms control and nuclear weapons testing agreements. Research and testing of new weapons technologies--including the small intercontinental ballistic missile and nuclear testing on the Strategic Defense Initiative in support of DOD research--are also functions of the Defense Programs branch.

Defense Programs is subdivided into four program areas and three support offices (see fig 1.1). Each of the program areas is directed by a deputy assistant secretary with two or more offices reporting to the deputy. In performing its duties in the nuclear area, the Defense Programs organization relies extensively on the work conducted at three national nuclear laboratories: the Lawrence Livermore National Laboratory in California, and the Los Alamos and Sandia National Laboratories in New Mexico. These are government-owned, contractor-operated facilities engaged primarily in nuclear weapons-related research and development. The Lawrence Livermore and Los Alamos laboratories are staffed by employees of the University of California under contract with DOE. The Sandia Corporation supplies personnel to the Sandia National Laboratory through a similar DOE contract.

Figure 1.1: Office of the Assistant Secretary for Defense Programs



A designated official from the Defense Programs area also serves as the DOE representative on the executive branch Nuclear Testing Interagency Group (IG). The Nuclear Testing IG, which was established in 1981, coordinates among the relevant agencies and departments support for the President's policies on arms control and national security. Other participants in the IG represent the Departments of Defense and State, the National Security Council, the Arms Control and Disarmament Agency, the Central Intelligence Agency, and the Joint Chiefs of Staff.

During the summer and early fall of 1986, officials in Defense Programs became increasingly aware of a need to improve DOE's ability to support the efforts of the IG and to promote administration policy on arms control and nuclear testing. Events such as the unilateral Soviet moratorium on nuclear tests and the August 1986 House of Representatives vote in support of a bill calling for a similar U.S. halt focused attention on the future of the U.S. testing program. The administration suffered a setback when an amendment to the fiscal year 1987 Defense Authorization Act (H.R. 4428), sponsored by the Chairman of the House Armed Services Committee, was adopted by the House of Representatives on August 8, 1986.¹ That amendment would have suspended funding for all nuclear tests with an explosive force greater than one kiloton of TNT, thus drastically curtailing the U.S. nuclear testing program. Although the amendment was later dropped, the continuing Soviet freeze on testing kept the issue on the informal congressional agenda as 1986 ended.

After the August vote, however, the National Security Council designated DOE as the lead agency for promoting the administration's nuclear testing position before the Congress. In late summer 1986, the Deputy Assistant Secretary for Security Affairs, Defense Programs issued an internal memo laying out a proposed plan for improving DOE's abilities to represent the administration on nuclear testing policy. This plan recommended a broad effort to promote DOE views on nuclear testing in both the Congress and before the general public through various methods, including an extensive media effort. Between October and December other plans were developed in the Office of International Security Affairs (OISA) that called for the creation of a special task force or "tiger team" to serve as the central focus of this action. This group was the proposed predecessor of the ACWG.

¹132 Cong. Rec. H. 5738 (daily ed. August 8, 1986).

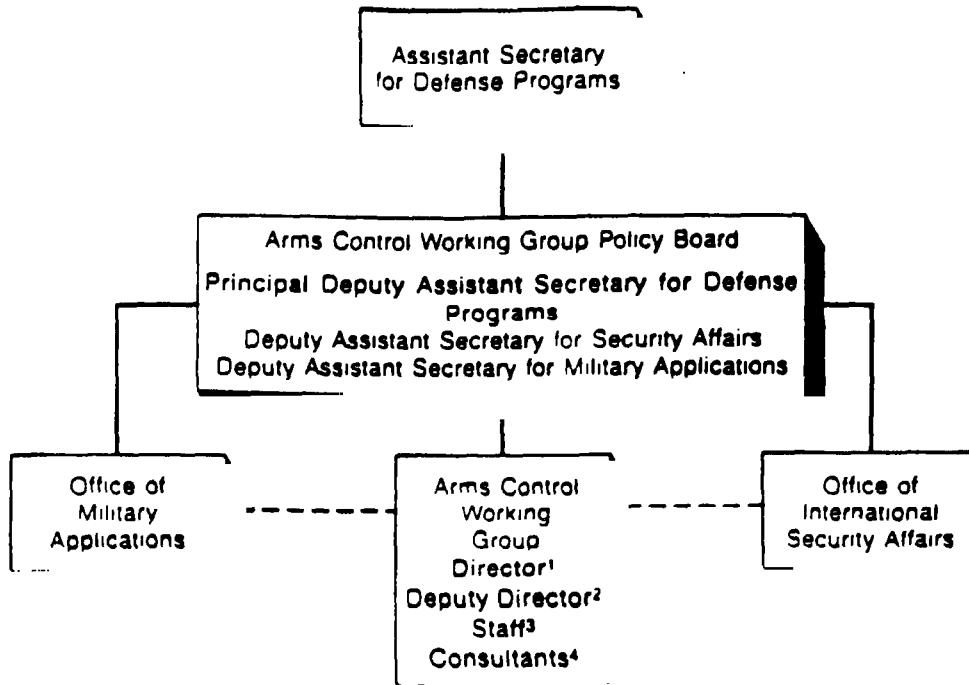
ARMS CONTROL WORKING GROUP (ACWG) ESTABLISHED

Purpose, Composition

- From October through December 1986, plans and charter were proposed for a far-reaching public affairs and congressional approach to be used by DOE in communicating on nuclear testing issues.
- In December 1986, the Assistant Secretary for Defense Programs established ACWG as an ad hoc group for nuclear technical analyses and information dissemination activities.
- The ACWG Policy Board, comprised of three DOE Deputy Assistant Secretaries, was appointed.
- Full-time national laboratory staff were assigned to the ACWG for day-to-day operations.

On December 30, 1986, the DOE Assistant Secretary for Defense Programs issued a memorandum announcing the establishment of the ACWG. The memorandum was distributed throughout DOE and the national nuclear laboratories. It described the ACWG as an ad hoc group within Defense Programs that would take the lead in DOE's arms control activities. The Assistant Secretary designated the director of the Office of Classification, Security Affairs as director of the ACWG, and a Los Alamos National Laboratory (LANL) contractor employee on 2-year assignment in Washington as the ACWG deputy director and executive officer. The group would report to a policy board composed of the principal deputy assistant secretary for defense programs and the deputy assistant secretaries for security affairs and military applications. (See fig. 1.2.)

Figure 1.2: Arms Control Working Group Organizations



¹Director, Office of Classification, Security Affairs

²LANL employee

³DOE and laboratory employees

⁴RDA Logicon employees

Although the establishment of the ACWG was announced in late December 1986, the concept was apparently initiated much earlier. A series of revisions to an October 28, 1986, draft charter outlined ACWG responsibilities in conducting a far-reaching public affairs and congressional approach to communicate the administration's position on nuclear testing issues. Initially, DOE also planned to use pro-defense public interest groups to influence Members of the Congress. However, DOE and laboratory officials stated that the plan was never approved or implemented. The ACWG director subsequently described the group's planned activities. According to his memo, ACWG's purpose was threefold: (1) to coordinate and expedite the flow of technical information between the national laboratories and DOE, (2) assist DOE participation in the IG and Geneva arms control negotiations, and (3) organize and implement the presentation of DOE policy on nuclear testing to the Congress. Various DOE Defense Programs and laboratory contractor staff comprised the membership of the ACWG. RDA Logicon employees under contract to DOE were to serve in a consulting capacity. DOE employees assigned to the ACWG continued to maintain their regular responsibilities in the respective offices to which they were permanently assigned, and served on a part-time basis in the ACWG. National laboratory personnel assigned to the ACWG served on a full-time basis.

RDA LOGICON CONTRACT

-- Task 2.2a for 6,000 staff hours at an estimated cost of \$550,000 was established in November 1986 as part of a \$6 million contract signed by DOE with RDA Logicon in September 1985.

-- Under 2.2a, RDA Logicon was tasked with supporting DOE's efforts to promote the administration's policy on arms control and nuclear testing issues.

On September 23, 1985, DOE entered into a task order technical support services contract with RDA Logicon of Marina del Rey, California. The base contract and option periods authorized RDA Logicon to provide about 73,500 staff hours of technical support services to the DOE Assistant Secretary for Defense Programs and perform security analyses related to the DOE nuclear weapons program. The base contract was for a 3-year period with a provision for two 1-year renewable option periods for a total duration not to exceed 5 years. The contract is a cost-plus-fixed-fee type with an estimated total cost not to exceed \$6,174,480 and a fixed-fee limited to a maximum of \$535,328, with a plus-or-minus-10-percent variance in the level of effort (staff hours) in the option years under the contract. Although the contract had been advertised for competition, according to the Chief, Resources Management Branch, Office of International Security Affairs (OISA), Defense Programs, only one bid--from RDA Logicon--was received.

On November 25, 1986, DOE approved a new task assignment (2.2a) as part of the contract. DOE allocated up to 6,000 hours and about \$550,000 for task assignment 2.2a, making it the single largest task assignment of the contract's 18 tasks. The next largest task assignments, 1.3 and 6.2, dealing with verification topics and nuclear testing negotiations, consisted of 3,000 hours and 2,600 hours each and estimated costs of \$300,000 and \$260,000, respectively.

Under the broad umbrella of providing policy support to DOE on nuclear testing, under task assignment 2.2a, RDA Logicon was tasked with

-- assisting DOE in planning and organizing up to three separate nuclear testing symposia for Members of the Congress, their staff, and selected individuals outside of the government;

- supporting DOE participation in the U.S. Senate ratification proceedings for the Threshold Test Ban Treaty and Peaceful Nuclear Explosion Treaty by providing information and analyses on nuclear testing to DOE for presentation to various Members of the Senate Foreign Relations Committee and other Members;
- supporting the various actions (nuclear testing modifications, congressional liaison, and updating DOE's package of information on the need for nuclear testing) planned for the DOE Nuclear Testing Group;
- providing quick-response support for DOE participation in the Nuclear Test Limitation Interagency Group and Working Group;
- assisting DOE in preparing and presenting information on nuclear testing to various congressional Members, committees, and staff; and
- supporting DOE's planning and preparation for future negotiations on nuclear testing.

At least three of the above tasks supported a media campaign that was proposed by DOE. The work to be accomplished under 2.2a was initially intended to support the efforts of the Deputy Assistant Secretary for Security Affairs related to promoting administration policy on arms control and nuclear testing in the public and private sectors. RDA Logicon staff assigned to task 2.2a reported to the Deputy Assistant Secretary. When the ACWG was formed, and took over certain arms control functions (including the promotional work) from Security Affairs, the Deputy Assistant Secretary offered the services of the RDA Logicon staff to the ACWG, and RDA Logicon staff began working with the ACWG staff.

SECTION 2

LEGISLATION AND REGULATIONS AFFECTING
DOE AND CONTRACTOR LOBBYING ACTIVITIES

CURRENT LIMITS ON LOBBYING

Laws

- The antilobbying criminal statute (18 U.S.C. 1913) prohibits grass-roots lobbying campaigns by federal agency employees, but does not prohibit congressional briefings.
- The 1986 Energy Department Appropriation Act does not include antilobbying restrictions against the use of its appropriations, as is the case with certain other departments' and agencies' appropriations acts.
- Section 1534 of Public Law 99-145, the antilobbying cost principle, precludes an agency from reimbursing certain contractors for their lobbying expenses.

Regulations

- On January 14, 1987, DOE issued regulations to incorporate the antilobbying cost principle in DOE's management and operating (M&O) contracts, after advance agreement with the contractor. These regulations apply to national laboratories.
- The RDA Logicon contract, which is not a management and operating contract, is subject to the Federal Acquisition Regulations (FAR). These regulations also contain an antilobbying cost principle that disallows contractor costs associated with certain lobbying activities.

CONCLUSIONS

DOE

- We found no evidence that DOE violated grass-roots lobbying prohibitions.

RDA Logicon

- Because RDA Logicon provided material to assist DOE to influence legislation which DOE requested under a contract it did not violate antilobbying provisions of the FAR.

National Laboratories

- Because DOE requested and approved the activities of the national laboratories to influence legislation, the antilobbying cost principle was not violated.

- The antilobbying cost principle has not been made applicable to the national laboratories by virtue of an exception in DOE's implementing regulations.

MOST CURRENT LOBBYING LIMITS DO NOT
APPLY TO DOE AND ITS CONTRACTORS

Criminal Statute Limitations

The antilobbying criminal statute (18 U.S.C. 1913), applicable to all federal employees, has been interpreted by the Department of Justice as prohibiting grass-roots lobbying activities--activities designed to reach the general public so as to exert influence through public pressure on Members of the Congress. That interpretation does not, however, prohibit congressional briefings by DOE officials.

The statute reads in part as follows:

"No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to Members of the Congress, through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business."

The statute also provides for penalties of a fine, imprisonment, and removal from federal service. Because of the criminal penalties provisions, its interpretation and enforcement are the responsibility of the Department of Justice. There has never been a prosecution under the statute.

The Department of Justice interprets the statute as applying when funds are spent in a grass-roots lobbying effort, where an attempt is clearly made to induce members of the public to contact their representatives in Congress to persuade them either to support or oppose pending legislation. Further, the Department of Justice has interpreted an "official channels" exception in the statute as permitting representatives of federal agencies and departments to expend appropriated funds for the purpose of contacting Members and committees of the Congress to express their views on legislative issues. Under this interpretation, DOE officials are permitted to express their views to Members of the Congress and their staffs on the merits of any pending legislation.

Appropriation Acts Restrictions

The DOE's annual appropriation act does not include a restriction on the use of appropriations for lobbying, as is the case with certain other government departments and agencies. The annual Energy and Water Development Appropriation Act, under which DOE receives most of its appropriations, does not contain a restriction on the use of appropriated funds for lobbying.¹ In contrast the appropriation acts of certain other departments--such as Defense, Education, and Health and Human Services--do contain provisions restricting lobbying activities.

Antilobbying Cost Principle

In 1985 Congress enacted an antilobbying cost principle (Public Law 99-145) applicable to "certain" contractors which stipulates that contractor lobbying expenses are not to be a reimbursable cost item under the terms of the contract. Section 1534 of Public law 99-145 contains cost principles applicable to contracts of more than \$100,000 awarded by DOE with funds appropriated for DOE national security programs. Included was a cost principle designed to prohibit the reimbursement of contractor lobbying costs. That antilobbying principle stated that contract costs were not to be allowed that were "incurred to influence (directly or indirectly) legislative action on any matter pending before the Congress" That section further directed that regulations were to be promulgated by DOE to implement the cost principles within 150 days after the date of the act. However, Congress also empowered DOE with discretion to "establish appropriate definitions, exclusions, limitations, and qualifications" in drafting the implementing regulations.

DOE Regulations Allow Significant Exemptions

DOE promulgated the required regulations, 48 CFR 970.3102-7, on January 14, 1987. National laboratory M&O contractors are covered by the regulation.² After making costs associated with any attempt of a contractor to influence legislation unallowable, DOE defined a significant exemption. The antilobbying cost principle does not cover cases in which contractors provide Members of the Congress or their staffs with "factual, technical and scientific

¹See for example Joint Resolution Making Continuing Appropriations for Fiscal Year 1987, Title III, Department of Energy, Public Law 99-591, October 30, 1986, 100 Stat. 3341-204-210.

²On September 16, 1987, the Senate Committee on Appropriations, reported on House Bill H.R. 2700, 100th Congress. Section 305 of the bill excludes DOE's national laboratories' M&O contractors from coverage of DOE acquisition regulations 48 CFR Part 970, section 970.3102.7, that implement section 1534 of Public Law 99-145.

information or advice of contractor-employed experts on topics directly related to the performance of the contract," provided (1) it was in response to a request from a Member of Congress or staff and (2) DOE was concurrently furnished with the same information.

The exemption contains a further caveat that costs for transportation, lodging, and meals incurred for the purpose of providing information to Members of the Congress or staff are unallowable unless incurred pursuant to a request for such informal presentations made through DOE.

Further, not all contractors covered by the statute as of August 25, 1987, have been included in DOE's implementing regulations. DOE's regulations made the cost principle applicable only to M&O contracts. As a result, other contracts, such as the RDA Logicon contract for technical support services, are not covered by the cost principle. They are, however, covered by a similar cost principle in the Federal Acquisition Regulations. Further, although DOE contracts for the national laboratories are M&O contracts which the regulations purport to cover, DOE included a provision in its implementing regulations that required an advance agreement with such contractors before the antilobbying cost principle would apply.³

DOE Memo Further Interprets Regulations

Recently, DOE interpreted the provisions of the cost principle to exclude certain activities. In a June 30, 1987, memorandum from the DOE General Counsel to the Assistant Secretary for Defense Programs, DOE has interpreted its antilobbying cost principle regulations as excluding situations where DOE requests the contractor to present information to the Congress while accompanied by a DOE official. We believe this interpretation limiting the coverage of the antilobbying cost principle was supported by the legislative history of section 1534 of Public Law 99-145⁴ and was within DOE's discretion. In DOE's view, the antilobbying cost principle only covers situations where the contractor initiates

³As of August 25, 1987, none of the approximately 45 DOE M&O contracts were covered by the antilobbying provision of the regulations, due to DOE's failure to negotiate advance agreements. DOE has renegotiated six M&O contracts since the regulations became effective; none have included cost principle language. We recognize that 48 CFR 970.3106.6 states that the absence of an advance agreement would not serve to make a cost element either allowable or unallowable. However, we believe that the specific requirement for an advance agreement included in 48 CFR 970.3102.7, which does not include this caveat, would be controlling over the general provisions in section 970.3106.6.

⁴131 Cong. Rec. H 9282 (daily ed. October 29, 1985).

activities to influence legislation not ordered or approved by DOE and charges the costs incurred to the contract.

Federal Acquisition Regulations

Lobbying limitations in the Federal Acquisition Regulations apply to RDA Logicon, but not to the national laboratories' M&O contractors. The provisions of the regulations are generally applicable to the procurement activities of most federal agencies. The contracts with the national laboratories are M&O contracts and are not subject to the FAR, but instead are subject to DOE regulations governing M&O contracts (48 CFR 970), by virtue of the special status of national laboratories. The FAR (Section 31.205.22) contains an antilobbying cost principle that prohibits contractor costs associated with certain lobbying activities. Like the Public Law 99-145 antilobbying cost principle, DOE does not apply the FAR cost principle where the lobbying services or materials were specifically requested by DOE.

CONCLUSIONS

DOE

DOE's extensive briefing effort for Members of the Congress and staff falls within the Department of Justice's interpretation of authorized lobbying efforts by federal employees under section 1913 of 18 U.S.C. However, DOE proposed activities such as the media campaign described earlier which, had DOE and RDA Logicon carried them out, could have constituted grass-roots lobbying.

Through its regulations and a recent internal memo, DOE has interpreted the laws prohibiting reimbursement of contractor lobbying costs in a manner that allows contractors to be reimbursed for costs incurred when attempting to influence legislation. It appears to us that this interpretation is within DOE's authority.

DOE implementing regulations (48 CFR 970.3102.7) apply only to M&O contracts and only when an advance agreement had been reached under the contract. No such agreements had been reached as of August 25, 1987, although six M&O contracts have been renegotiated since the regulations became effective. We believe the advance agreement requirement is inequitable because there is the potential for treating certain management and operating contractors differently than others. Further, DOE's appropriations have not been covered by a lobbying restriction, as is the case with certain other federal agencies. The inclusion of an antilobbying restriction in DOE's next appropriations act would bring DOE in line with certain other federal agencies, including DOD.

RDA Logicon

Although RDA Logicon prepared materials that DOE used in its efforts to influence legislation pending before the Congress, these activities do not appear to violate the FAR cost restrictions on legislative lobbying costs because DOE ordered and approved such materials.

National Laboratories

Although national laboratory contractor staff directly participated in the congressional briefing process, their costs incurred are allowable under DOE regulations. This is because DOE ordered and approved the work of the national laboratories. Also the application of DOE regulations requires advance agreements with the contractors and DOE did not negotiate such an agreement that the contractors were to comply with the antilobbying cost principle.

While laboratory personnel are an invaluable resource to DOE and the Congress and should be involved in assisting DOE in providing technical information and analyses, the issue is one of balance to ensure that the laboratories continue to provide support while ensuring that they operate in a manner consistent with applicable regulations and guidance.

RECOMMENDATION

We recommend that the Secretary, DOE, eliminate the requirement in DOE regulations for an advance agreement before the cost principle is made applicable to M&O contractors. In our view all M&O contractors subject to the law should be treated equally with respect to the cost principle.

MATTERS FOR CONSIDERATION OF THE CONGRESS

The cost principle legislation contained in Public Law 99-145 is designed to control lobbying activities by contractors. However, H.R. 2700 would exempt M&O contractors at the national laboratories from the cost principle. In considering H.R. 2700, the Congress will need to decide whether lobbying activities by such contractors should be restricted at all and, if so, the degree of restriction that should be applied. The alternatives include (1) eliminating all restrictions as proposed in H.R. 2700; (2) continuing the existing restriction, where DOE has broad discretion to apply the cost principle to contractors through its implementing regulations; and (3) mandating restrictions by statute, with minimal DOE discretion.

If the Congress wishes to restrict lobbying activities on the part of DOE officials in addition to DOE contractors, it may wish

to consider including language in DOE's next appropriations act for this purpose. DOE's 1986 Appropriation Act does not include antilobbying restrictions on the use of appropriated funds by agency officials for lobbying activities. This contrasts with the appropriation acts of certain other government departments and agencies that include antilobbying restrictions, including the Department of Defense.

SECTION 3

NATIONAL LABORATORY INVOLVEMENT IN
ARMS CONTROL WORKING GROUP ACTIVITIES

MANAGEMENT ISSUES CONCERNING
USE OF NATIONAL LABORATORIES

Limits on Contractor Participation

- Federal regulations prohibit the use of contractor staff in management and policymaking.
- Office of Management and Budget (OMB) prohibits federal agencies from establishing employer-employee relationships between government and contractor employees and using consulting services to influence legislation.

ACWG Support

- All full-time operating members of the ACWG including the deputy director of the group were full-time laboratory employees, on extended loan to DOE.

Congressional Briefings

- ACWG national laboratory staff assisted in developing the nuclear testing briefing, made appointments for briefings, and substantially participated in the briefing process with Members of the Congress and staff.

Among the various functions and activities expressly reserved for government employees in regulations and administration guidelines are (1) day-to-day supervision or management of government employees and oversight of contractor operations, (2) the determination of basic government policies, and (3) involvement in influencing or enacting legislation before the Congress.

Various government regulations prohibit the use of contractor employees in such roles, including the FAR (Section 17.603(a)), OMB Circular A-120, and OMB Circular A-76. Section 17.603(a) places limitations on the use of M&O contractor staff in that M&O contracts are not authorized for functions involving the direction, supervision, or control of government personnel; functions involved with determining basic government policies; and day-to-day staff or management functions of an agency.

The provisions of OMB Circular A-120, paragraph 6, ("Guidelines for the Use of Consulting Services," April 14, 1980) restrict the use of contractor personnel by stating that consulting services will not be used in performing work of a policy, decision making, or managerial nature, which is the direct responsibility of agency officials. It also states that consulting services will not be used under any circumstances to specifically aid in influencing

or enacting legislation, and that consulting services will not be used to bypass or undermine personnel ceilings, pay limitations, or competitive employment procedures.

Finally, OMB Circular A-76 (Revised) ("Performance of Commercial Activities," Aug. 4, 1983) states that federal agencies and departments are not to establish an employer-employee relationship between government and contractor employees. An employer-employee relationship involves close continual supervision of individual contractor employees by government employees, as distinguished from general oversight of contractor operations.

Relationship Between DOE and the Laboratories

As stated in section 1, a LANL contractor employee, on 2-year assignment in Washington, was the ACWG executive officer and deputy director. Various DOE Defense Programs staff and as many as seven laboratory contractor employees were also designated for assignment on the ACWG.¹ These staff were therefore subject to the direction and supervision of the ACWG director--a DOE employee--and the executive officer and deputy director. The ACWG director completed advisory ratings on national laboratory contractor staff assigned to the ACWG. Other DOE officials we talked with viewed national laboratory contractor employees assigned to the ACWG as working for them, and gave them periodic supervision and instructions in their roles at DOE. As described earlier, DOE employees assigned to the ACWG maintained their regular responsibilities in the respective offices to which they were permanently assigned, and served on a part-time basis on the ACWG. National laboratory contractor personnel from the three nuclear national laboratories--Lawrence Livermore, Los Alamos, and Sandia--were assigned to the ACWG and served on a full-time basis.

A national laboratory contractor staff member on assignment at the ACWG represented DOE at IG group meetings. Further, in his role at the ACWG, an ACWG national laboratory contractor staff member sent out a March 30, 1987, memorandum to DOE officials and national laboratory employees requesting them to make appointments for briefing designated Members of the Congress.

Laboratory Efforts to Influence Legislation

National laboratory contractor staff at the ACWG were among the first to suggest that the best way to promote the administration's testing policy and influence legislation that would limit testing would be to have representatives from the

¹Laboratory contractor staff on assignment at DOE were to be assigned to Washington in a consultant capacity. However, the ACWG membership roster identifies laboratory contractor personnel as "staff" and RDA Logicon employees as consultants.

various laboratories responsible for nuclear testing present the reasons on the need for such testing to Members of the Congress at a series of briefings. Subsequently, the Defense Programs congressional liaison staff identified 124 representatives and 20 senators who should be briefed. Criteria for inclusion on this list included the Member's voting record on defense issues, and whether a DOE facility was located in the Member's district.

Briefings were begun by the ACWG in late March 1987, and continued through the third week in May. Of the briefings planned, 118 were completed--96 House and 22 Senate members. Laboratory staff participated in various degrees in virtually all of the briefings. Briefing teams were organized consisting of a DOE Defense Programs official, one national laboratory contractor staff member, and a staff member from either DOE's Congressional Liaison Office or an employee of the DOD's Defense Nuclear Agency (DNA).

The briefings were planned to last about 15 minutes, with about an equal amount of time for questions. The briefings varied in structure and the level of participation. On some occasions, the DOE employee gave the main presentation on the need for testing and the laboratory representative provided a technical commentary and answered questions. At other times, the main part of the briefing was given by a laboratory contractor staff person. When present, the DNA representative discussed nuclear effects testing issues affecting DOD.

The briefings were provided to Members of the Congress or their staff aides, depending on who was available. On at least 12 occasions during the initial briefings, the briefing team did not include a DOE employee. There were at least 10 instances where only a laboratory and a DNA staff person were present. On two occasions a laboratory representative was the only briefer, which did not conform to DOE internal policy requiring the presence of a DOE employee at such briefings. Follow-up briefings were provided when requested by the Member. Originally, the briefing document was based on input from RDA Logicon and subsequently revised to follow recommendations from national laboratory contractor staff, both at headquarters and in Los Alamos.

At the request of the Defense Program's congressional liaison staff, briefers were to complete an evaluation form after each briefing, in order to gauge the success of their efforts. These forms asked briefers to rank the Members' stand on testing on a numerical scale between strongly against and strongly in favor. It included a space to indicate whether or not the member was willing to help the DOE cause.

In addition to the briefings, national laboratory contractor staff at the ACWG assisted in preparing testimony presented at Senate hearings by DOE officials, in January and February 1987.

They also provided direction and reviewed, revised, and commented upon work submitted by RDA Logicon.

CONCLUSIONS

Overall, the director of the ACWG, a DOE official, supervised national laboratory contractor employees assigned in Washington to staff the ACWG. One national laboratory contractor employee was assigned as the ACWG deputy director, which appears to be a managerial role. Other DOE officials we talked with viewed national laboratory contractor employees assigned to the ACWG as working for them, and gave them periodic supervision and instructions in their roles at DOE in what could be considered an employer-employee relationship, which is prohibited by OMB Circular A-76.

The congressional briefings on nuclear testing issues involved substantial input and participation by national laboratory contractor staff. The use of national laboratory contractor staff in the briefing process was not in accordance with the prohibitions imposed in OMB Circular A-120 against DOE's use of consulting services to aid in influencing legislation pending before the Congress.

While we recognize the importance of the national laboratories to DOE, DOE has not reconciled these apparent inconsistencies with the OMB circulars or provided any official rationale for exceptions to them.

RECOMMENDATION

We recommend that the Secretary, DOE, draft regulations and any additional guidance necessary to make the use of national laboratory contractor personnel consistent with OMB Circulars A-76 and A-120 and FAR section 17.603(a) regarding the use of contractor employees or to provide the rationale for any exceptions to the circulars and regulations.

SECTION 4

DOE MANAGEMENT OF THE
RDA LOGICON CONTRACT

DEPARTMENT OF ENERGY RDA LOGICON CONTRACT

MANAGEMENT DEFICIENCIES

Direct Government Supervision of Contractor Personnel

- The direct supervision of RDA Logicon staff working on task assignment 2.2a provided by DOE officials is inconsistent with DOE's support services procurement requirements.

Purchased Products Not Used

- DOE continued to request and pay for work products on nuclear testing issues from RDA Logicon after it became apparent they were generally not being used.

Duplication of Contracted Work

- Some requested RDA Logicon work products duplicated services available from existing DOE organizations.

DOE's Rationale for Continuing Task Assignment 2.2a is Inconsistent

- DOE program officials assert that terminating task 2.2a was not warranted and would involve lengthy and complex termination procedures.
- DOE contracting officials assert that task 2.2a could have been easily terminated if determined to be no longer useful.

Task Assignment 2.2a Directly Managed by DOE Officials

According to the chief, Resource Management Branch, OISA, all task assignments under the RDA Logicon contract had designated DOE technical monitors who were primarily responsible for coordinating with the contractor regarding work to be performed. The technical monitors typically communicated their requirements to a central RDA Logicon official with primary responsibility for the contract, he said. The RDA Logicon contract official would identify the appropriate contractor employee to perform the task and then serve as a facilitator between the DOE technical monitor and the contractor employee.

However, unlike all other task assignments under the RDA contract, the RDA Logicon employees working on task assignment 2.2a were managed by DOE officials and ACWG members. According to the responsible RDA Logicon contracting official, he had not been involved in any of the task assignment development efforts and

remained uninvolved after the task assignment was approved and requests for specific work products were made by DOE.

The OISA Resource Management branch chief, acknowledged that task assignment 2.2a was administratively established differently from all other task assignments under the contract. He also acknowledged that the two principal RDA Logicon employees working on the task assignment were specifically requested by the Deputy Assistant Secretary.

DOE Requested and Paid for Work
Products That Generally Were Not Used

Since task assignment 2.2a was approved in late November 1986, RDA Logicon staff have produced approximately 60 individual nuclear testing- and arms control-related "deliverables." According to one of the RDA Logicon principals who performed the work, these deliverables were all either requested by DOE or ACWG officials, or agreed to in those instances where RDA Logicon suggested deliverables. According to records submitted to DOE by RDA Logicon, as of September 4, 1987, about \$272,000 had been billed for work done under task assignment 2.2a.

RDA Logicon's initial effort was directed at preparing for a series of symposia on nuclear testing. These were to be sponsored by DOE for leaders in both the public and private sectors along with congressional Members and staff. In addition, RDA Logicon staff prepared support material--speeches, letters, newspaper op-ed articles--for the various proposed activities of the ACWG. Other products included draft testimony for the Assistant Secretary for Defense Programs to present to the various Senate committees during proceedings on ratification of the Threshold Test Ban and Peaceful Nuclear Explosions treaties, discussion and briefing papers, planning documents, notes and observations on congressional hearings, analyses of congressional support for nuclear testing, and technical analyses and policy background papers for use by the IG and arms control negotiators in Geneva.

According to various cognizant DOE officials, most of the products produced for DOE by RDA Logicon under task assignment 2.2a were never used for their intended purposes. For example, the series of symposia that RDA Logicon planned and prepared was eventually replaced by the individual briefings to congressional Members and staff. Speeches, letters, and media material were requested, prepared, and delivered by RDA Logicon, and then never used.

According to some officials, the quality of the deliverables was adequate; other cognizant officials said it was not. The Deputy Assistant Secretary, Defense Programs, for whom much of the early RDA Logicon work under task assignment 2.2a was done, said that he believed the contractor's work to be of excellent quality.

However, according to DOE's Acting Principal Deputy Assistant Secretary for Congressional, Intergovernmental, and Public Affairs, some op-ed pieces requested from RDA were of such poor quality that they had to be redrafted by DOE staff prior to their submission for top management approval. By the time the material was redrafted, the issues being discussed were outdated by events and no longer appeared topical, he said. Accordingly, the material was never used.

In other instances, requested materials presented to the ACWG for approval were rejected on the basis that they lacked the necessary technical orientation. The Director of the ACWG said that he rejected RDA deliverables because the wording of the material was inappropriate and lacked the required technical orientation.

Although an RDA official and the OISA Resource Management branch chief agreed that most of the deliverables were never used for their intended purposes, they told us that they believed that the work performed under task 2.2a was effective and useful. They said that, in their opinion, the work done under 2.2a had provided DOE officials with additional points of view and another perspective from which to analyze nuclear testing issues.

Certain Contract Deliverables Duplicated Services Available at DOE

Section 5.c.(3) of DOE Order 4200.3B, "Management of Support Services Contract Activity," states that DOE shall not maintain a support services contract if the services are readily available and may be provided through other means at a substantial cost savings. Our review of contract deliverables and discussions with cognizant DOE officials shows that some deliverables duplicated services readily available within the department.

The Director of the Defense Programs Office of Congressional Liaison, when asked about some biographical and nuclear test ban voting record material regarding key Members of the Congress which were prepared by RDA Logicon, said that the material was not used and should not have been prepared. He said that the material was of limited value because (1) the material was readily available within his office, and (2) his office did not fully agree with RDA Logicon's assessments of the voting potential of many key Members of the Congress.

In addition, our review of RDA Logicon technical progress reports of work done under the task assignment revealed many instances in which other material related to congressional affairs was prepared. This material included lists of key Senate and House staff Members, a Senate calendar for the 100th Congress, suggested witness lists for test ban treaty ratification proceedings, and

suggested schedules for preparation of Senate test ban treaty ratification proceedings.

We also examined an RDA Logicon deliverable entitled "Nuclear Testing," dated April 1987, and noted its similarity to a DOE policy paper entitled "Nuclear Weapons Testing," dated January 1987. The deliverable very nearly paralleled the DOE document in terms of format, issues, and presentation. According to the Director, ACWG, RDA Logicon had been asked to produce "Nuclear Testing" as an interim briefing document when DOE temporarily ran out of copies of its "Nuclear Weapons Testing." However, there was some opposition to a few statements in the RDA Logicon document and, before this issue was resolved, additional copies of the DOE document had been printed, he said. As a result, the RDA Logicon product was never used. When questioned about the similarity of the two documents, the RDA Logicon official who did the work acknowledged the similarity and noted that, with DOE concurrence, the deliverable was intentionally developed so as to parallel the DOE document. The official explained that the deliverable was an update of the DOE package as provided for in the contract.

DOE's Rationale for Continuing
Task Assignment 2.2a Is Inconsistent

According to the chief, Contract Operations Branch, work under the task assignment could have been terminated if program office officials did not believe the deliverables were useful or required. The procedure to limit or curtail work assignments is relatively simple and contract payments could be adjusted accordingly at the end of the contract period, he said. His office was not informed by program office officials that the deliverables were not being used and, accordingly, the deliverables were paid for in accordance with the terms of the contract, he stated.

According to the contract specialist responsible for administering the task assignment, he also was not informed by program officials that the deliverables were of little or no use. He said vouchers for payment are routinely processed without official acceptance and approval of the work performed unless there is notification from program office officials that the work was unacceptable. This approach, while not consistent with provisions of the contract, required that all work under the contract be officially accepted by the contracting officer or duly designated successor, and was informally adopted in order to expedite contract payments and avoid late payment penalties under the Prompt Payment Act, he said.

The chief, Resource Management Branch, OISA said that in spite of the limited use being made of the RDA Logicon deliverables, his office never initiated any reduction or curtailment of the work assignments under the task assignment because (1) a DOE termination or curtailment initiative would not have been warranted, and (2)

contrary to the views of DOE contracting officials, he believed that to do so would require considerable time and effort, including a legal analysis. He said the government cannot easily reduce or terminate its commitment once a company, relying on the government's commitment, takes actions such as staffing. He said that he did not believe the limited use made of the RDA Logicon work indicated a contracting or contractor deficiency. Instead, he said the work done provided another perspective and facilitated issue analyses.

The Director, OISA, Defense Programs, said that although the task assignment was funded and administered through his office, all work under the task assignment was in fact managed by the Deputy Assistant Secretary for Security Affairs and members of the ACWG. He had no input to the task assignment, was refused feedback from the Deputy Assistant Secretary for Security Affairs on what was being done, and was unaware of the quality of the work being accomplished. He added that had he known the deliverables were of little use he would have changed the direction or focus of the work.

CONCLUSIONS

We believe that DOE officials did not properly manage the RDA Logicon contract when they continued to request deliverables under task assignment 2.2a that were of limited value or use. In our opinion, DOE officials who were aware that most of the deliverables requested and provided were not being used because they (1) were inappropriate for their intended purpose or (2) duplicated services already available within DOE should have acted to control or redirect the focus of the work under task 2.2a. We also believe that the establishment of task assignment 2.2a apart from centralized DOE contractor control requirements and the direct management by DOE officials of RDA Logicon employees is inconsistent with DOE procurement requirements.

In addition to apparent noncompliance with contract management requirements, a marked difference of opinion exists between program and procurement officials on the ability of DOE to terminate or curtail the work proposed under a specific task within a task order contractor. We also noted a lack of communication between the recipients of the contractor's work products and the contract specialist responsible for certifying payment vouchers.

RECOMMENDATIONS

We recommend that the Secretary, DOE, direct the Assistant Secretary for Defense Programs to

- determine whether work under task assignment 2.2a should be continued, considering what other services are available to DOE and the appropriateness of the work; and

-- if there is a need for the work and it is appropriate, ensure that all efforts under the task are in accordance with applicable DOE and Federal Acquisition Regulations governing (1) inspection and acceptance of work products; (2) approvals, authorizations, and documentation for payments requested; and (3) supervision of contractor personnel.

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