

The Regents of the University of California

**COMMITTEE ON OVERSIGHT OF THE
DEPARTMENT OF ENERGY LABORATORIES**

January 20, 2005

The Committee on Oversight of the Department of Energy Laboratories met on the above date at UCSF–Laurel Heights, San Francisco.

Members present: Regents Blum, Dynes, Johnson, Marcus, Montoya, Moores, Ornellas, Parsky, Pattiz, Preuss, Ruiz, and Wachter; Advisory members Rosenthal and Brunk

In attendance: Regents Anderson, Bustamante, Connerly, Hopkinson, Lansing, Lozano, Novack, and Sayles, Regents-designate Juline and Rominger, Faculty Representative Blumenthal, Secretary Trivette, General Counsel Holst, Treasurer Russ, Provost Greenwood, Senior Vice Presidents Darling and Mullinix, Vice Presidents Broome, Foley, Gomes, Gurtner, and Hershman, Chancellors Birgeneau, Bishop, Carnesale, Cicerone, Córdoba, Fox, Tomlinson-Keasey, Vanderhoef, and Yang, Laboratory Directors Anastasio and Chu, and Recording Secretary Bryan

The meeting convened at 11:00 a.m. with Committee Chair Preuss presiding.

1. **APPROVAL OF MINUTES OF PREVIOUS MEETING**

Upon motion duly made and seconded, the minutes of the meeting of November 18, 2004 were approved.

2. **STATUS OF COMPETITION AND OTHER MATTERS AT THE DEPARTMENT OF ENERGY LABORATORIES**

Vice President Foley commented on ongoing laboratory activities. He reported that a draft Request for Proposal for the Los Alamos National Laboratory issued on December 1, 2004, had been received from the Department of Energy National Nuclear Security Administration (NNSA). In conjunction with this, parties who might be interested in bidding were invited to visit the site, and a bid conference was held that was attended by 133 individuals. On December 15, the University participated in a meeting with the Source Evaluation Board, where it was given the opportunity to provide initial commentary and requests for clarification. The final RFP is expected to be released no earlier than February 15, following which interested parties will have 60 days to submit a proposal. The NNSA hopes to award the Los Alamos contract by July 1.

Vice President Foley reported that the discussions that have been held during the past year with potential industrial partners have gone well; however, the University has not formed any agreements. Outside counsel will review any such agreements, and all

questions will be resolved to the satisfaction of the Regents before any action might be proposed. A team will be formalized in time to prepare for any proposal. Due to the competitive aspects, Mr. Foley stated that the University plans no announcement of its team members until an award decision has been made or, at the earliest, a proposal is submitted.

Turning to other matters concerning the Los Alamos laboratory, Vice President Foley reported that the laboratory, which was shut down for a time, had completed its plans for a complete restart and that nearly all activities had been resumed. He emphasized that the laboratory has upheld its stockpile stewardship mission during the time that the work has gone on to improve safety and security.

Vice President Foley reported that NNSA has not yet indicated that it is prepared to open the management contract for the Lawrence Livermore National Laboratory to bid. The laboratory's contract is set to expire at the end of September, 2005. Secretary Abrahams has indicated in the past that DOE intends to extend its contract for two years.

Committee Chair Preuss welcomed Senator Ducheny to the Board table to present her remarks concerning the Los Alamos National Laboratory. He noted that Senator Ducheny was elected to the California State Senate in 2002, representing the 40th District. Ms. Ducheny heads the Senate Select Committee on oversight of the Department of Energy laboratories managed by the University and is chair of the Senate Subcommittee on Health and Human Services.

Senator Ducheny reported that she was appearing on behalf of both the California and New Mexico Legislatures to urge the Regents to bid on the management contract for the Los Alamos laboratory. She reported that there is an important relationship between the two Legislatures, which have been working together toward making the Los Alamos laboratory an important place for both states and making sure that Californians were aware of the role that the laboratory plays in homeland security and defense work. She reported that the University has done impressive work on outreach in northern New Mexico, including building relationships with New Mexico University in Albuquerque and New Mexico Highlands University, with which it has formed an engineering school partnership. She believed that bidding successfully for the Los Alamos contract would enhance the University's chance of retaining the management contract for the Lawrence Livermore laboratory. It is critical that the two laboratories retain the synergy that exists between them. Ms. Ducheny presented a letter on behalf of the New Mexico Legislature in support of the University's continued stewardship of the Los Alamos laboratory. She emphasized that there is united support in New Mexico for having the University bid for the management contract.

Committee Chair Preuss thanked Senator Ducheny for her support and for her help in expanding that support to other areas.

Regent Parsky emphasized the importance of understanding that in making a decision about whether to bid for the management contract, the Regents must feel comfortable that personnel and a process are in place that will prevent, to the extent possible, further safety and security problems.

Regent Bustamante asked about issues such as gender discrimination that had been raised by employees at the Los Alamos laboratory, as mentioned by one of the speakers during the public comment period. General Counsel Holst pointed out the distinction between winning a class action suit and having to settle one, as was the case at the laboratory. He suggested that he provide an update to the Regents on employee-related litigation at the laboratory.

Regent Bustamante noted that he considered the University to be the best to manage the laboratories, but he was seeking assurance that policies had been put in place concerning personnel matters that would prevent having to settle further litigation. General Counsel Holst responded that, with considerable input from the Office of the President, the laboratories have been very attentive to issues concerning human resources. He noted that some issues had been settled because of concerns about liability, others because of the uncertainty of a trial outcome. He reported that the University and the laboratories had addressed effectively the few isolated instances that had presented problems. Associate Vice President Boyette added that the University was striving to be open in dealing with laboratory personnel, apart from any lawsuit, and to assure compliance of the policies that are in place.

President Dynes thanked Senator Ducheny for her continued support of the University. Vice President Foley commented that in the preparation for the proposal for the Lawrence Berkeley laboratory, involvement from the Los Alamos and Livermore laboratories had been extensive. President Dynes added that personnel from the Livermore laboratory had gone to Los Alamos to shore up operations where there had been weaknesses.

[For speakers' comments, refer to the January 20, 2005 minutes of the Committee of the Whole.]

3. **AUTHORIZATION TO SUBMIT A PROPOSAL TO THE DEPARTMENT OF ENERGY FOR THE MANAGEMENT AND OPERATION OF THE LAWRENCE BERKELEY NATIONAL LABORATORY**

The President recommended that, after consultation with the General Counsel, the President be authorized to submit a responsive proposal to the Department of Energy (DOE) Request for Proposal, dated December 15, 2004, for the management and operation of the Lawrence Berkeley National Laboratory.

It was recalled that the future management and operating contract for the Lawrence Berkeley National Laboratory is being awarded competitively, as required by Section 301 of the Energy and Water Appropriations Act for fiscal year 2004. The Request for

Proposal that was issued by DOE mid-December asked for proposals to be submitted no later than February 9, 2005. In accordance with the authorization of The Regents in January 2004, the University has been making preparations to submit a proposal in response to this solicitation. It is anticipated that an award will be made in spring 2005.

The Lawrence Berkeley National Laboratory is a basic sciences research facility operated for the Office of Science within the Department of Energy. In contrast to the two weapons laboratories – Los Alamos and Lawrence Livermore – the Berkeley laboratory performs only unclassified work, much of which is fundamental research in the physical and biological sciences. Historically, the Berkeley laboratory has been managed by the University, based upon a sole source determination that the University was uniquely qualified; however, as a matter of federal policy, the Congress has directed DOE to open to competition all contracts that had not been competed for in over 50 years. Accordingly, the future contract will be awarded competitively.

Due to federal regulations associated with competitive procurement, the future contract for management and operation of the Berkeley laboratory will not have certain negotiated terms that have been a part of the University's past contracts but which cannot be offered to all potential offerors:

- University's right to terminate the contract.
- Unrestricted application of the University's corporate practices and programs to the laboratory.
- Exemption from termination for default.

Instead, the University and all offerors must submit proposals that conform to the requirements of the solicitation. In such a process, the University must be prepared to accept standard terms and conditions in order to be eligible to receive the contract. The principal features of the solicitation are as follows:

- Standard contract clauses that conform to the requirements of the Federal Acquisition Regulations and the Department of Energy Acquisition Regulations, as published in the Federal Register and applicable to management and operating contracts.
- Special terms associated with the Berkeley contract to include the following:
 - A contract compliance assurance process
 - Commitment to use best practices
 - Commitment to greater use of small business enterprises in subcontracting
 - An opportunity to substitute DOE orders with external regulatory and industrial standards

- An opportunity to extend the contract performance period from five years to twenty years without an extend or compete decision by DOE
- An opportunity to earn a fee not to exceed \$34 million during the initial five-year period
- DOE approval of human resource practices and employee pensions and benefits

The solicitation recognizes certain unique conditions affecting the Berkeley laboratory, specifically the University's ownership of the land and the requirement that projects and other activities be assessed by The Regents under the California Environmental Quality Act (CEQA). Given that the solicitation and the resulting contract will continue to ensure that all new projects and other activities at LBNL are conducted in compliance with CEQA, the General Counsel has determined that independent CEQA documentation to support a decision to submit a proposal is not necessary.

The solicitation specifies that it is DOE's intent to award without negotiating any of the required terms and conditions. This requires that, if the University is to make a responsive proposal, it must agree to certain contract terms without negotiation that can result in changes to existing operations. The most significant of these are the following:

- DOE may direct the University to remove an employee from the contract work under specified circumstances.
- DOE will have the right to terminate the University "for default."
- DOE will have the right to reduce otherwise earned fees based on specified environmental, safety, and health violations.

Some of the provisions outlined above are new to the Lawrence Berkeley contract but not new to the other management and operating contracts between the University and DOE's National Nuclear Security Administration. General Counsel Holst has provided separate advice to The Regents on the legal implications of these changes in contract terms.

President Dynes described in detail some of the outstanding work that has been done by scientists at the Lawrence Berkeley laboratory. He noted that the University's proposal to be the prime contractor will include a fee proposal that is financially responsible and will continue the practice of using the fees for the benefit of the scientific programs. He reported that the government has authorized, and the University has proposed, that the laboratory staff remain part of the systemwide pension and benefits program. The technical proposal will highlight the strengths of the University and its capacity to produce scientific achievement at the Berkeley laboratory. He noted that, due to the competitive nature of the DOE's process, the proposal could not be discussed in detail.

Regent Novack asked whether there was concern that losing one laboratory contract would put the others in danger of being lost. Regent Parsky noted that, although each

contract will be bid separately, the collaboration among the laboratories is an important element. He believed that bidding on the Berkeley laboratory would be a positive step toward bidding on the other contracts.

Faculty Representative Blumenthal observed that there was little controversy about bidding for this contract, but he called the Regents' attention to one provision in the RFP that could be problematic. That item would give the DOE the right to remove any laboratory employee from a project, based on DOE's own considerations. In the past, these provisions had been negotiated addenda. He was hopeful that the Regents would strive to preserve the academic freedom that UC researchers had enjoyed. Vice President Foley noted that other laboratories within the DOE system had accepted these proposals and that removal of an individual would have to take place at the level of the Secretary of Energy. He believed any such action was unlikely but that if it were to happen, it would be only after there had been involved discussions with the University. Laboratory Director Chu believed that the DOE was firm in its resolve to include this provision.

Regent Connerly supported the President's recommendation. He was satisfied that the University had done everything possible to strengthen its management of the DOE laboratories. Regent Hopkinson voiced support also, noting that the benefits of the Berkeley laboratory to the University and the country were clear. Regent Pattiz, however, remained concerned about the issue that Faculty Representative Blumenthal had raised. Vice President Foley confirmed that protections were adequate and that there was no need to press the issue with the DOE. Chairman Parsky also was comfortable that the provision was acceptable.

Upon motion duly made and seconded, the Committee approved the President's recommendation and voted to present it to the Board.

The meeting adjourned at 11:50 a.m.

Attest:

Secretary