

The Regents of the University of California

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

July 19, 2006

The Committee on Oversight of the Department of Energy Laboratories met on the above date at the UCSF–Mission Bay Community Center, San Francisco.

Members present: Regents Blum, Dynes, Marcus, Moores, Parsky, Pattiz, and Schreiner; Advisory member Oakley

In attendance: Regents Coombs, Gould, Hopkinson, Island, Johnson, Kozberg, Ledesma, Lozano, Ruiz, Schilling, and Wachter, Regents-designate Brewer and Bugay, Faculty Representative Brown, Acting Secretary Shaw, Acting General Counsel Blair, Chief Investment Officer Berggren, Provost Hume, Senior Vice President Darling, Vice Presidents Foley, Gomes, Gurtner, and Hershman, Chancellors Birgeneau, Córdoba, Drake, Fox, Tomlinson-Keasey, Vanderhoef, and Yang, Acting Chancellor Blumenthal, University Auditor Reed, and Recording Secretary Bryan

The meeting convened at 9:40 a.m. with Committee Chair Pattiz presiding.

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

Upon motion duly made and seconded, the minutes of the meeting of May 18, 2006 were approved.

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

Vice President Foley reported that on July 14 the Department of Energy released the final Request for Proposal for management of Lawrence Livermore National Laboratory. Proposals will be due on October 12, affording a relatively generous 90-day window. Following detailed analysis of the final RFP, a recommendation will be submitted to The Regents concerning the University's participation. It is proposed that a Laboratory Director be appointed contingent upon the University's being awarded the contract should the University's participation be authorized.

Vice President Foley reported that a preliminary assessment of the RFP finds it to be nearly identical to the RFP for Los Alamos National Laboratory. This RFP, like that one, gives the greatest weight and importance to science. As the final RFP is being evaluated, activities continue to prepare the University for possible participation in the competition. Authorization is being sought for University participation in a limited liability company such as the one that was created for the Los Alamos bid, as the final RFP for Livermore contains the same requirement for a special purpose entity to be created to be the

contractor for the laboratory. The authorization seeks only to create the company and develop a process for the appointment of UC representatives on its governing board. In the event that the Regents do not authorize the University's participation in the competition, or if the LLC's bid is rejected by the National Nuclear Security Administration (NNSA), the LLC will be disbanded.

Vice President Foley reported that the operational transfer from the University to the Los Alamos National Security, LLC was effective June 1. The University and LANS together worked closely with the NNSA to make the transfer as smooth as possible. This was the first time in its 60-year history that there had been a change of contractors at Los Alamos. He credited Laboratory Directors Kuckuck and Anastasio and all the employees involved for making the transition a success and recognized the NNSA also for its part in the undertaking. Chairman Parsky reported that he, Chancellor Fox, Senior Vice President Darling, and Vice President Foley had participated in a debriefing at the Los Alamos laboratory by the Department of Energy during which the University's handling of the management transition was praised highly.

3. **AUTHORIZATION TO APPROVE AND EXECUTE MODIFICATION TO THE DEPARTMENT OF ENERGY CONTRACT FOR THE LAWRENCE BERKELEY NATIONAL LABORATORY TO AMEND CLAUSES AS A RESULT OF CHANGES TO THE FEDERAL ACQUISITION REGULATIONS AND THE DOE ACQUISITION REGULATIONS AND TO ADD NEW CLAUSE UNDER SECTION H SPECIAL CONTRACT REQUIREMENTS**

The President recommended that he be authorized to execute a modification to the provisions of Lawrence Berkeley National Laboratory contract DE-AC02-05CH11231 in order to add a new clause and incorporate revisions to seven clauses, as shown below:

New Section H Clause

H. 45 - SPECIAL AGREEMENT ON FEE FROM JUNE 1, 2005 TO SEPTEMBER 30, 2006

Section I Changes

I.8 - FAR 52.203-12 Limitation on Payments to Influence Certain Federal Transactions (JUN 2003)

Date change to SEPT 2005 and text changes in paragraph (b)(3).

I.35 - FAR 52.225-13 Restrictions on Certain Foreign Purchases (JAN 2004)

Date change to FEB 2006 and update of website address.

I.39 - FAR 52.230-6 Administration of Cost Accounting Standards (NOV 1999)
Date change to APR 2005 and rewrite.

I.50 - FAR 52.244-6 Subcontracts for Commercial Items (DEC 2004)
Date change to FEB 2006 and minor text changes.

I.51 - FAR 52.247-1 Commercial Bill of Lading Notations (APR 1984)
Date change to FEB 2006 and minor text changes.

I.53 - FAR 52.247-64 Preference for Privately Owned U.S.-Flag Commercial
Vessels (APR 2003)
Date change to FEB 2006 and minor text changes.

I.54 - FAR 52.247-67 Submission of Commercial Transportation Bills to the
General Services Administration for Audit (JUN 1997)
Title and date change to FEB 2006 and text changes.

The table of contents for the LBNL contract will be revised to reflect the changes.

It was recalled that from time to time changes are necessary to reflect the ongoing agreement between the University and the Department of Energy (DOE) with respect to the Lawrence Berkeley laboratory. As a result of updates to the Federal Acquisition Regulations (FAR), DOE has requested that standard clauses in Section I of the LBNL prime contract be updated. Also, a new clause H. 45 is proposed that will address a \$2 million mismatch between accruals recorded for fees in FY2005 and FY2006 and the maximum authorized fee for that period (\$6 million). DOE has agreed to waive its contingent rights on an offsetting amount of fee earned under the prior contract but which was refundable to DOE at final settlement of that contract rather than have the Laboratory increase charges to research sponsors. Accruals will be increased for FY2007 and subsequent years where the funding picture for research sponsors is more favorable than at present. This "step" process will also ease the change in research costs during a period when Lawrence Berkeley National Laboratory performance fees are being increased from a maximum of \$1.6 million annually to \$4.5 million annually.

Vice President Foley noted that the University is committed to negotiating in good faith periodic changes to federal procurement clauses as they arise. The seven proposed clause revisions update rules on lobbying, accounting, and purchasing. The contract change relating to the laboratory fee is proposed because in setting the charges for the various research projects for the new contract, rates were placed at a level that would collect only two-thirds of the potential fee. This under-accrual was identified in January. The options were to increase the charges to research projects to make up the difference, for the University to limit its fee to two-thirds of the maximum, or to negotiate an alternative arrangement with the DOE. Neither of the first two alternatives was attractive. Charging more cost to sponsored research projects invariably results in the production of less research, and foregoing fee reduces the amount of funds available for discretionary

research by the laboratory. The University negotiated a proposal to have the shortfall made up by the DOE, giving up its right to refund of fee earned under the old contract. Fees earned under the old Berkeley and Los Alamos contracts and the current Livermore contract may be used only for limited purposes. Any balance remaining at the final contract settlement must be refunded to the government. The DOE agreed to remove this contingency from fee previously earned at Berkeley that was held in reserve by the University. One result of adopting this approach is that charges to sponsored research will be increased in steps rather than all at once, enabling the laboratory to soften the impact. Funding for FY2007 at the Berkeley laboratory is more robust, so the impact of charging the amount of increased fees will be less starting in FY2007 than it would have been during the current year.

Regent Blum asked whether the U.S. government might be persuaded to participate in funding some of the laboratory's capital expenditures. Mr. Foley responded that the Office of Science, which has oversight over the Berkeley laboratory, has indicated that a certain amount of money may be provided but not enough to cover all buildings. Securing federal funding to appropriate for new construction has become increasingly difficult; therefore, third-party financing has become the method used most commonly.

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

4. **RESOLUTION TO EXCLUDE ACCESS TO CLASSIFIED INFORMATION FOR A REGENT**

The President recommended that The Regents adopt the following resolution pertaining to the University's respective Department of Defense and Department of Energy Facility Security Clearances, as follows:

WHEREAS, current Department of Defense and Department of Energy Regulations contain a provision making it mandatory that the Chairman of the Board, Chief Executive Officer, and those other officers and officials who are to have access to classified information meet the personnel clearance requirements established for a contractor's facility clearance; and

WHEREAS, said Regulations permit the exclusion from the personnel clearance requirements of certain members of the Board of Regents, provided that this action is recorded in the University Regents' Board Minutes;

NOW, THEREFORE, BE IT DECLARED that the Chairman of the Board, at least an official quorum of the Board of Regents, and the Chief Executive Officer at the present time do possess, or will be processed for, the required security clearance; and

BE IT RESOLVED that in the future, when any individual enters upon any duties as Chairman of the Board, as a replacement for one of the cleared quorum of the Board, or as the Chief Executive Officer, such individual shall immediately make application for the required security clearance; and

BE IT RESOLVED FURTHER that the following member of the Board of Regents shall not require, shall not have, and shall be effectively excluded from access to all classified information in the possession of the Corporation and does not occupy a position that would enable her to affect adversely Corporate policies or practices in the performance of classified contracts for the Department of Defense, U.S. Department of Energy, or contracts with other Federal User Agencies of the National Industrial Security Program:

<u>Name</u>	<u>Title</u>
Leslie Tang Schilling	Regent

It was recalled that the University has security agreements with the U.S. Department of Defense (DOD) and the U.S. Department of Energy in connection with research performed by the University involving classified national security information and the University's management of the DOE weapons laboratories. At present, the University holds classified contracts involving research in the national defense. Classified research undertaken by the University is not performed on campus, but is carried out off-campus, often at military installations. Weapons design work takes place at the Lawrence Livermore and the Los Alamos National Laboratories.

The University's security agreement with the DOD incorporates the National Industrial Security Program Operating Manual (NISPOM). The NISPOM, which applies to the DOD, DOE, and other Federal User Agencies, provides that the Chief Executive Officer, the Chairman of the Board of Regents, and at least a quorum of the Board of Regents have security clearances and that all other Regents have clearances unless specifically excluded from access to classified information in the possession of the University. The exclusion provision of the security agreement further requires that the University, by formal action of the Board of Regents, invoke such exclusion procedures designating the names of all Regents not in process for or who are ineligible for DOD/DOE clearances, and that this action be made a matter of record in the minutes of the Board.

Regent Schilling would prefer not to apply for any government security clearances (DOD Top Secret or DOE Q), because the process would require renouncing her dual citizenship with Ireland. Consequently, she must be excluded from all matters or deliberations that would affect corporate policies or practices followed in the performance of classified work under contracts for the DOD, the DOE, or other Federal User Agencies under the NISPOM. Although she must be excluded from possession of classified matter and from other deliberations, as specified above, Regent Schilling, along with other uncleared guests, will be allowed to visit the weapons laboratories in accordance with procedures

for uncleared visitors. Therefore, in accordance with NISPOM procedures the proposed new resolution is recommended for adoption by the Board of Regents for Regents not in process and/or not eligible for a security clearance.

The proposed action is consistent with past resolutions.

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

5. **CONTINUED APPOINTMENT OF A TEMPORARY UNIVERSITY OF CALIFORNIA REPRESENTATIVE ON THE LOS ALAMOS NATIONAL SECURITY, LLC BOARD OF GOVERNORS**

It was recalled that since June 1, 2006, the Los Alamos National Laboratory has been managed and operated by Los Alamos National Security, LLC (LANS), a limited liability company owned and controlled by the University, Bechtel National, Inc., BWX Technologies, Inc., and Washington Group International, Inc. The governance structure of LANS includes a Board of Governors, which is charged with oversight and governance of the company. A six-person Executive Committee is the decision-making body of the Board of Governors. Under the LANS LLC Agreement, the University is entitled to fill three positions on the Executive Committee.

The LANS LLC agreement authorizes the University to appoint UC replacements to the LANS Executive Committee. UC policy prescribes a mechanism for appointing a permanent UC Board representative. During the interim period since Senior Vice President Mullinix's departure, the University, acting through its Chairman and the Chairman of the LANS Board, has appointed temporary substitutes. For the May 2006 meeting, Vice President Foley was appointed. For the June 2006 meeting, Senior Vice President Darling was appointed. Mr. Darling will continue to serve in this temporary position through the September meeting of the LANS Board of Governors. It is expected that the permanent replacement will be one of the individuals recruited to fill the Senior Officer position currently under consideration. The permanent replacement will be approved by the Board of Regents.

6. **ESTABLISHMENT OF LIMITED LIABILITY COMPANY IN PREPARATION FOR LAWRENCE LIVERMORE NATIONAL LABORATORY COMPETITION AND AUTHORIZATION OF REGENTS' PROCEDURES APPROVED PREVIOUSLY TO BE USED TO APPOINT INDIVIDUALS TO GOVERNING BOARD OF COMPARABLE LLC FOR LIVERMORE COMPETITION**

The President recommended that the Chairman of The Regents, supported by appropriate University personnel, be authorized to participate in the establishment of a limited liability company (LLC) to be created for the purpose of competing for and performing the contract for the operation of the Lawrence Livermore National Laboratory, and that individuals be appointed to the governing board of such LLC in the same manner as has

been approved by The Regents with regard to the Board of Governors of Los Alamos National Security, LLC.

It was recalled that the National Nuclear Security Administration of the U.S. Department of Energy has begun a competition for the award of the management and operating contract for the Lawrence Livermore National Laboratory (LLNL). This competition was mandated by Congress in 2003 and follows similar competitions already completed for the Lawrence Berkeley and Los Alamos National Laboratories. A draft Request for Proposals (RFP) has been released by NNSA, and a final RFP is expected within weeks.

The draft RFP requires that any bidder or team of bidders establish a dedicated corporate entity to perform the LLNL contract. It is highly likely this requirement will be continued in the final RFP. By action of January 15, 2004, The Regents authorized the President to enter into teaming agreements with others to prepare for the competitions for the three DOE laboratory contracts. Establishment of an LLC is an ordinary corollary to a teaming agreement and will enable the University to prepare for and participate in the LLNL competition as an institution. This recommendation is made pursuant to Standing Order 100.4(oo), which requires Regental approval of the participation by the University in the establishment of corporations, companies, or partnerships. This action will not affect or preclude a final decision by The Regents as to whether to enter the competition for the LLNL contract following a review and evaluation of the final RFP when it is issued.

An LLC created for the Livermore competition will likely have a governing board similar to that of Los Alamos National Security, LLC. This action will authorize the same Regents' procedure that was approved at the March 2006 meeting, to be used to appoint individuals to the governing board of a comparable LLC for the Livermore competition. This procedure would involve the nomination by the President and the Chairman of the Board of Regents of individuals to be appointed to the LLC governing board, with approval of the Committee on Oversight of the Department of Energy Laboratories and The Regents.

Chairman Parsky noted that in carrying out this responsibility to work on an LLC, strong support will be needed from the General Counsel's Office and outside counsel in the early stages. Acting General Counsel Blair affirmed that a contract and relationship of this complexity deserves the close scrutiny of the General Counsel's Office, which is negotiating to engage a national law firm specializing in government contracts. He expected that the General Counsel's Office would be closely involved at all stages of the contract development.

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

7. **ESTABLISHMENT OF ANNUAL REPORT TO THE REGENTS ON OPERATIONS OF DEPARTMENT OF ENERGY LABORATORIES AND**

EXPENDITURES OF MANAGEMENT FEE AND PROCESS FOR REGENTAL APPROVAL OF MANAGEMENT FEE EXPENDITURES

Chairman Parsky believed that the Regents should become familiar with the structure of the limited liability companies that are the vehicles under which net fee income from the DOE laboratory contracts comes to the University. The Regents should be closely involved in assessing the magnitude of those resources, including approving an annual budget for the expenditure of those resources and being able to represent to the public that one of the basic thrusts of managing the laboratories is to promote science and research.

Chairman Parsky believed it would be possible to break out separately the fee income that would be earned from the laboratories and approve annually the expenditure of that money so as to demonstrate that it is predominately going to research. Doing so would be mechanically possible and consistent with other elements of the budget process. He noted that the Regents' budget document always incorporates a budget plan with respect to laboratory fees. He believed that it was the responsibility of the Regents to ensure that the money is audited and does not get lost in the overall budget of the University. A specific recommendation will be presented at the September meeting.

Regent Marcus recalled that over the last few years there have been discussions about establishing an advisory board to the laboratories. Chairman Parsky noted that the LLC for Los Alamos includes governors who are the equivalent of advisors from outside of the designated corporate entities, as they come from a broad cross section of the community. Regent Marcus expressed concern about the complexity and detail of the activities that relate to the operations of the laboratories. He suggested reconstituting the DOE Oversight Committee by adding a professional group of specialists who could make recommendations through the Vice President–Laboratory Affairs or directly to the Committee, operating similarly to the Investment Advisory Committee. Chairman Parsky suggested considering the proposal somewhat later in the process of creating the LLC for the Livermore laboratory. He explained that this item is meant to address the expenditure of money, after all costs are dealt with, that comes back to the University, which is a direct responsibility of The Regents. In addition to that and not covered by this discussion is how the representatives of the University, namely the three active voting members of the LLC Board, will report to The Regents on the activities of the LLC overall – an issue that needs to be thought through. Not only do the Regents need to be involved in and approve the expenditure of the net money that is available for the University, which the LLC will not be involved in, but at the same time they need to make sure that they are carrying out their responsibilities in the LLC. He reported that at the September meeting he would present suggestions for accomplishing this.

Committee Chair Pattiz commented that there are certain things the Regents need to know about that will be decided at the board level of the LLC. On the board of the LLC are what would be deemed independent directors who are not members of the corporate partners or the University who have been asked to serve because of their particular standing or expertise in various areas. He hoped that by the September meeting it will

have been determined what role the Committee should have and how best to assure that the Regents are kept abreast of laboratory matters and are exercising their responsibilities on behalf of the University.

Chairman Parsky reported that to aid the decision as to whether to bid for the Livermore contract, a report will be provided that discloses the resources that will be spent by the University in the preparation of the bid that are not covered by the government and any other resources that will have to be spent. The report will include similar information from the Los Alamos experience.

Regent Johnson asked for details about how the fees are shared among the partners. Vice President Foley responded that there are tentative agreements for splitting the fees with respect to the Los Alamos laboratory but that it has not been determined what the arrangement should be for the Livermore laboratory. The information will be disclosed at some point if the University decides to bid for the contract and its bid is accepted.

Faculty Representative Oakley commented that the relationship between the University and the LLCs that manage Los Alamos and could manage Livermore is a matter of interest to the faculty. The DOE's decision to put up for competition the management contract at Los Alamos led to the formation of the Academic Council Special Committee on the National Laboratories. A series of white papers was issued and a survey of all the faculty taken. By a three to one vote, the Academic Senate supported UC's joining the competition to continue management at Los Alamos. An intervening circumstance was the Department of Energy's decision not to permit the University in its own capacity to remain a qualified bidder to manage the lab. That led to the formation of LANS under circumstances that called for confidentiality because rival bids were expected. There was never a survey taken of faculty support, but the Academic Senate has remained supportive. There is growing concern among the faculty, however, about the fact that the terms of the LANS operating agreement have remained secret. Professor Oakley sought confirmation that, upon conclusion of the Livermore competition, the concerns of faculty about the University's being engaged in secret business deals with corporate partners will be assuaged.

Faculty Representative Oakley noted that under the arrangement with UC's partners in LANS, it is the University's primary responsibility to run not the business or security functions but the science and technology functions. For the University to be successful in that mission and to make good on its commitment to the nation to provide continued world class science at the national laboratories, the faculty must be involved. This is a challenge because Los Alamos laboratory employees are no longer UC employees, a factor that may harm retention and recruitment efforts. It is important also that the faculty have an active voice in designing an LLC that could compete for Livermore and in assessing the mid-course corrections necessary to the governance of LANS. Chairman Parsky and Vice President Foley assured him that the faculty's participation was always welcome. Chairman Parsky commented that he would value particularly the faculty's assessment of whether the role of science was being and would continue to be given the

greatest weight in the ongoing work of the laboratories. Professor Oakley reported that, through the President, the Academic Council's special committee would present its recommendations for maintaining optimal faculty-laboratory interaction.

The meeting adjourned at 10:20 a.m.

Attest:

Acting Secretary