

Office of the President

TO MEMBERS OF THE NATIONAL LABORATORIES SUBCOMMITTEE:

ACTION ITEM

For Meeting of November 14, 2017

**APPROVAL OF LAWRENCE BERKELEY NATIONAL LABORATORY
CONTRACT WITH THE DEPARTMENT OF ENERGY**

EXECUTIVE SUMMARY

The Regents of the University of California and the Department of Energy (DOE) have completed the contract reform negotiations described in the discussion item presented at the September 2017 Regents meeting. The nearly seven-month long negotiations culminated in a proposed modification to the Lawrence Berkeley National Laboratory management and operating contract with the DOE. The modification makes the contract a more useful, efficient, and effective instrument for accountable mission execution, and reduces UC's overall risk exposure.

RECOMMENDATION

The President of the University recommends that the National Laboratories Subcommittee recommend to the Regents that she be authorized to execute the modified Lawrence Berkeley National Laboratory management and operating contract with the Department of Energy (DOE), as negotiated by the University and the DOE.

BACKGROUND

UC has held the Lawrence Berkeley National Laboratory (LBNL or Laboratory) management and operating (M&O) contract since the early 1940s. In 2005, the Department of Energy (DOE) re-competed the contract, with UC submitting the only and winning bid. The contract was awarded for a ten-year period with the potential of earning ten one-year award terms based on performance. To date, UC has earned all award terms extending the contract through 2022, with the potential to earn additional award terms through the end of the contract in 2025. The total available fee that can be earned is currently \$6.6 million annually. The current annual operating budget for the Laboratory is about \$800 million.

Because of UC's strong partnership with DOE and its local site office, and the continually improving performance of LBNL, DOE selected LBNL and UC to participate in a reform initiative to transform the LBNL contract into a more effective instrument for mission execution. This contract reform effort provides the M&O contractor with greater autonomy for day-to-day

work execution along with correspondingly greater accountability for performance. This reform initiative grows out of an effort that was piloted at the SLAC National Accelerator Laboratory (SLAC), where its revised contract has been in effect for approximately one year. The SLAC effort provided a strong starting point for negotiating the LBNL contract reform, which is the first of its kind for a large multi-purpose laboratory in the DOE complex.

Goal and Objectives of Contract Reform

The goal of the modified contract is to return to the original intent of the government-owned contractor-operated contracting model for Federally Funded Research and Development Centers. Under the original intent of this model, the government “owns” the mission and provides the funding, and academia and private sector contractors are responsible for mission execution, and bringing the people, experience, systems, and capabilities to perform the work. DOE and the contractor work together as “co-trustees” of a shared enterprise.

To achieve this goal, UC, LBNL, and the DOE negotiated the modification of the LBNL contract to achieve the following objectives:

- A. Revising requirements to focus on “the what” and minimize “the how” so that the M&O contractor has greater autonomy for how it executes the work
- B. Replacing where appropriate DOE-mandated performance requirements with UC processes and procedures or best commercial practices
- C. Tailoring many of the remaining DOE-mandated requirements to the specific circumstances of LBNL
- D. Increasing UC accountability with the intent that as UC “steps up,” DOE will “step back”
- E. Establishing a more deliberate and defined contract maintenance process that will control the requirements “creep” that tends to occur during the life of the contract
- F. Driving DOE decision-making to the DOE site office line management rather than headquarters level
- G. Clarifying ambiguities, eliminating redundancies, and removing inapplicable requirements
- H. Reorganizing the contract according to topical areas to serve as a better guide for Laboratory managers responsible for executing requirements

The Negotiation Process and Quantitative Results

UC National Laboratories (UCNL), LBNL, and the DOE formed teams to review and optimize every contract requirement. The teams were comprised of subject-matter experts representing the

University, the Laboratory, and the DOE, and supported by the parties' respective legal teams, including a representative from the UC Office of General Counsel.

The negotiation teams reviewed the 300-plus-page contract with approximately 300 individual contract elements. The teams agreed to delete about 90 of these individual contract elements and to modify about 40 of the elements. The teams also reviewed 50 DOE Orders, which are DOE-mandated requirements for various operations and business functions applicable DOE-wide. Of these, the negotiation teams eliminated three Orders from the contract, and more than 30 Orders are being replaced by negotiated Site Compliance Plans tailored to other plans or policies specific to Laboratory circumstances.

Representative Modifications by Contract Reform Objective

The following are specific examples of the agreed-upon modifications, grouped according to contract objective.

Objective A: Focus on the “what” and minimize the “how”

As noted above, a sizeable number of contract clauses and DOE Orders were removed from the contract. For example, the “Conference Clause” was eliminated, and with it a burdensome regime for DOE’s tracking and approval of LBNL’s sponsorship of, and attendance at, scientific conferences. Without the clause, the LBNL will be governing its own conference sponsorship and attendance, subject to contract principles that are common to all activities (e.g., cost reasonableness). The parties also agreed to multiple changes to the contract’s Laboratory procurement requirements that cumulatively will increase efficiencies and remove non-value added reviews and processes.

Objective B: Replacing DOE-mandated requirements with UC or industry standards

Specific examples include replacing:

- Multiple DOE requirements relating to whistleblower procedures with UC policies.
- DOE Order on protection of human subjects with the corresponding UC policy, eliminating the Laboratory’s need to comply with two (UC and DOE) requirements.
- DOE Order on property management with industry (American Society for Testing and Materials) standards, which are more risk-based than the DOE Order (e.g., take into account depreciated value of property).

Objective C: Tailoring DOE-requirements to LBNL circumstances

The parties agreed to replace 30 DOE Orders with alternative requirements, such as LBNL-specific Site Compliance Plans. Other examples include:

- Replacing DOE Orders regarding cybersecurity with a Laboratory-specific cybersecurity plan which leverages UC policy as well as LBNL's widely recognized cybersecurity expertise and leadership.
- Substituting DOE Orders regarding physical security with a Laboratory-specific site security plan, which tailors requirements to the open research environment of LBNL.

Objective D: Increased UC accountability

The parties negotiated a modification of the clause that allows DOE to reduce fee for contract performance failures. The previous clause was limited to environment, safety, and health contract requirements whereas the new clause extends to other operations and business functions. The parties agreed to add a clause to the contract that provides the Laboratory with an additional option and greater flexibility for Laboratory-Business technology transfer partnerships and that increases the Laboratory's financial responsibilities for such partnerships. (See *Financial Risks* below.)

Objective E: More defined and deliberate contract modification process

The parties negotiated an annual modification process, whereas previously modifications were made ad hoc throughout the year. The parties agreed to a goal of keeping modifications to only essential changes. To ensure continuity of the contract reform principles going forward, the parties must consider whether each future modification will be consistent with the goals and objectives of the contract reform effort.

Objective F: Driving DOE decision-making to site level line management

The parties agreed to empower the DOE Berkeley Site Office manager (versus contracting officials and personnel in DOE headquarters) to make key decisions such as determining the applicability of new DOE Orders and approving alternatives to such Orders.

Objective G: Clarify requirements, eliminate redundancies and inapplicable clauses

The parties modified more than 54 clauses to, among other things, add clarity. The parties clarified the UC and DOE ownership of and responsibilities for data, in areas that had previously been ambiguous, and removed duplicative clauses dealing with the Buy American Act. A number of inapplicable clauses were identified and eliminated. For example, the parties removed the DOE Order governing nuclear materials as well as clauses associated with economic stimulus initiatives that already have been completed.

Objective H: Reorganizing the Contract

Contract clauses were organized according to the Performance Evaluation Management Plan's (PEMP) eight functional areas to serve as a better guide for Laboratory managers responsible for executing requirements. The Human Resources requirements, which had previously found in different clauses and appendixes, were re-mapped into one clause and organized according to the Human Resources PEMP topical area.

Impacts on the Contract's Risk Profile

In describing the changes to the risk profile for the University, it must first be noted that the contract reform effort leaves the substance of most of the key contract terms intact and unchanged, including:

- The type of contract (a cost-reimbursement M&O contract);
- The term of the contract (currently through 2022, with potential award term extensions through 2025) and associated award term provisions;
- The scope of work and the budget associated with such work;
- The standards by which costs are determined to be reimbursable under the contract;
- The maximum available fee (currently \$6.6 million per year); and
- The process for evaluating LBNL's performance through the PEMP and for translating PEMP grades into amount of fee earned.

On the whole, the University will gain a substantial net benefit from the contract reform, including a net positive impact on the contract's risk profile.

Strategic Risk

The modified contract will extend LBNL's leadership and competitive advantage within the DOE laboratory complex. LBNL is one of only a few laboratories that have been offered this contract reform opportunity. DOE has previously experimented with similar reforms at its Kansas City Plant, resulting in that plant's decade-long dominance in performance scores among all of DOE's national security sites. We anticipate that the LBNL contract reform will position the Laboratory for both better performance and additional research investments from DOE.

Compliance Risk

LBNL's compliance risk profile will be improved by the substantial reduction in contract clauses and DOE Orders. Duplicative and overlapping DOE and UC policies and processes have been eliminated. Requirements better suited to the environment at LBNL have been instituted in place

of DOE “one size fits all” requirements, including the replacement of more than 50 percent of DOE Orders with alternative requirements. With the contract’s reorganization, functional managers will be able to locate and better understand applicable requirements and their associated risks. Cumulatively, these negotiated changes will enhance the LBNL’s ability to comply with applicable requirements.

Operational Risk

The more streamlined and tailored requirements negotiated as part of contract reform will allow more efficient uses of resources, allowing LBNL to get the most out of each research dollar made available by the DOE and other sponsors.

Financial Risk

There is the potential for a modest change to the financial risk profile. The term of the contract and total available fee remain the same. UC’s greater accountability for performance failures in all functional areas at the Laboratory may manifest in more frequent decrements to net fee earned by the University. By the same token, efficiencies negotiated through the contract reform process may lead to increases in the Laboratory’s performance overall, potentially resulting in the Laboratory garnering a larger share of total available fee.

The clause that provides LBNL with an additional option and greater flexibility for Laboratory-Business partnerships requires an indemnity in favor of the Government that is broader than the University’s usual indemnification under Standing Order 100.4(dd)(9). Projects under this clause would be identified on an exception basis, and would be accompanied by sufficient compensation from the business partner, the purchase of appropriate insurance, and the execution of other prudent mitigating measures so as to reasonably bound any University liability and not unduly burden University resources.

Reputational Risk

Contract reform has already enhanced UC’s reputation with DOE and resulted in improved relationships among UC, LBNL, and the DOE. Because DOE chose UC as one of a very small number of DOE laboratories offered this contract reform opportunity, LBNL’s reputation among its sister laboratories will also be enhanced.

Along with these benefits to the risk profile of the contract, there will be greater expectation for oversight and accountability. UC, via UCNL, will continue to provide vigilant and effective oversight of LBNL activities, leveraging the resources available in the Office of President, especially in areas where UC standards will be replacing DOE requirements.

Approval Process

In parallel with UC's approval process, the DOE local site office will be obtaining requisite approvals from DOE organizations, including DOE headquarters. It is possible that the DOE approval process could result in minor variances from the modification proposal described above, but it is not anticipated that such variance would appreciably change the contract's risk profile.

The current projection is for both UC and DOE to execute the modification by January 30, 2018, after which the parties anticipate negotiations to further conform the contract with the goal and objectives of the contract reform.

Key to Acronyms

DOE	United States Department of Energy
LBNL	Lawrence Berkeley National Laboratory
PEMP	Performance Evaluation Management Plan
SLAC	SLAC National Accelerator Laboratory
UCNL	UC National Laboratories