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WASHINGTON, D.C. 20548

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RELEASED

The Honorable John E. Moss
House of Representatives *CHR*

Dear Mr. Moss:

In response to your February 5, 1976, request, we have reviewed the proposed modified contract which the Energy Research and Development Administration is seeking to enter into with Project Management Corporation, Commonwealth Edison, and the Tennessee Valley Authority. The proposed modified contract would change the present arrangement for designing, constructing, and operating the Clinch River Breeder Reactor demonstration plant by giving the energy agency, rather than the corporation, overall management responsibility. The corporation was created in March 1972 to manage the Clinch River Breeder Reactor project and to administer the contracts for the design, construction, and operation of the plant. *127*
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The relationship and responsibilities of the energy agency and the corporation are being changed because the amount of the Government's financial commitment to this project has greatly increased--from an estimated \$425 million, or about 61 percent of the then estimated total project cost of \$699 million to \$1.7 billion, or about 87 percent of the current estimated total project cost of \$1.95 billion. The financial contribution of the participating utilities is fixed at about \$257 million. In addition, the Tennessee Valley Authority is donating land for the reactor site.

Our review focused on determining whether the proposed modified contract represents a sound arrangement for successfully completing the Clinch River Breeder Reactor demonstration project. We held discussions with energy agency representatives knowledgeable of, and responsible for, preparing and negotiating the proposed modified contract and reviewed underlying documentation.

02 In an April 4, 1975, report to the Joint Committee on Atomic Energy, we were concerned that the documents *TNT400*

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establishing the restrictions under which the energy agency planned to negotiate changes to the existing contract did not clearly delineate how the project would be managed. We were concerned over the ambiguous language regarding project responsibilities and management. At that time, energy agency officials said that the proposed modified contract would make it clear that the energy agency would manage the project through a single Government-utility-staffed organization.

The proposed modified contract clarified some of the ambiguities we were concerned about; however, the role that the corporation's board of directors will have in managing the project is still subject to interpretation. Also, although specific language allowing project termination due to changes in the reference design has been deleted, a section in the proposed contract may still allow the project to be terminated because of a project delay caused by a design change required for licensing. In addition, we are concerned that the project's integrated management organization could lead to a situation where private individuals would function under the supervision of Federal employees in a manner inconsistent with the Federal personnel laws.

Energy agency officials disagree that the corporation's management role needs to be clarified or that the contract includes any unnecessary termination criteria. According to the officials, all parties to the contract clearly understand that the energy agency is completely responsible for managing the project and that the management arrangement regarding private employees is legal and in accordance with the documents submitted to the Congress in April 1975. We were informed that much of the contract language we were concerned about resulted from compromises reached during negotiations. However, formal records establishing the intent of the parties were not prepared and thus were not available for our review.

It seems that the energy agency's inability to obtain, during the negotiation process, the corporation's agreement (1) on more specific language defining the role that the corporation's board of directors will have in managing the project and (2) that any design change required for licensing would not be a basis for project termination fore-shadows even more serious problems if the energy agency attempts to exercise its management prerogative during performance of the contract. Therefore, we recommend that the Administrator of the Energy Research and Development Administration negotiate with the other parties to the contract to revise the proposed modified contract so that it (1) more clearly states the extent of the corporation's

involvement in managing the project, (2) eliminates options permitting contract termination because of project delays caused by design changes to meet licensing requirements, and (3) includes provisions penalizing private participant's employees if they are involved in conflict of interest, bribery, and/or graft in relation to the project.

ENERGY AGENCY'S ROLE AS PROJECT MANAGER
DIMINISHED BY THE ROLE OF THE CORPORATION'S
BOARD OF DIRECTORS

The proposed modified contract establishes the project steering committee to review decisions made by the energy agency's project manager for the corporation board of directors and to keep the board informed of all major project matters and activities. The project steering committee is composed of one board member acceptable to the Tennessee Valley Authority, one board member acceptable to Commonwealth Edison, and one member to represent the energy agency. The board is composed of two directors from the Tennessee Valley Authority, two directors from Commonwealth Edison, and one director from Breeder Reactor Corporation.

The proposed modified contract states:

"After the PMC Board has announced its position on any matter relating to the Project, including any matter referred to it by PSC, the ERDA member of PSC or any member of the Board may, by giving notice within 48 hours, reserve the right to refer the matter to the heads of ERDA, CE and TVA within a reasonable time * * * for their unanimous resolution of the matter. The heads shall attempt to resolve the matter within 30 days of the time of referral to them. Upon unanimous resolution of the matter by the heads within the 30-day period, the parties shall be advised of the decision of the heads which decision shall be binding upon the parties and shall be implemented by appropriate action. In the event the heads are unable to reach a unanimous resolution of the matter within the 30-day period, the Administrator of ERDA shall decide the matter consistent with the Principal Project Objectives and the contractual rights and obligations of the parties under the contract and other Principal Project Agreements."

It seems that in the event of a disagreement between the board and the project manager, this section of the

proposed contract may be subject to interpretation as to whether the board's announced position or the project manager's initial decision prevails. Our interpretation is that the board's announced position would prevail unless the energy agency's member on the project steering committee disagrees with a position taken by the board and, by giving notice within 48 hours, reserves the right to appeal the matter for review by a group composed of the Chairman or President of Commonwealth Edison, the Chairman or designated Director of the Tennessee Valley Authority, and the Administrator of the Energy Research and Development Administration. This group has 30 days to reach a unanimous decision which would be binding on all parties. If a unanimous decision is not reached, the Administrator decides the matter. While a decision is being appealed, work continues on the project in accordance with the project manager's original decision.

Our concern is that the possible interpretation of the contract permitting the board's announced position to prevail over the project manager's decision would be inconsistent with the energy agency's responsibilities for managing the project and could diminish the project manager's ability to effectively manage the project.

Energy agency officials believe that this section of the contract would not allow the board's position to prevail over a decision made by the project manager. They interpret this section to mean that the board announces its position on any matter, and, if the project manager does not agree with this position, the manager's initial decision would stand and the board would have to appeal the matter.

This difference of interpretation further indicates that some clarification is needed. We recognize that the board, as the overseer of utility funds, needs to be able to monitor the project and protect the utilities' investment, in the event of disagreement, it should be afforded opportunities to expeditiously appeal such decisions. A revision to the proposed modified contract clearly indicating that the burden of appeal is on the board would be a change consistent with the energy agency's role as project manager.

PROJECT TERMINATION MAY RESULT FROM DESIGN
CHANGES TO MEET LICENSING REQUIREMENTS

The proposed modified contract provides that the four contracting parties and the Breeder Reactor Corporation may terminate the project if the energy agency fails to secure any necessary governmental permit, license, authorization,

or approval for constructing or operating the plant within 6 months of the approved schedule date for these actions, thus seriously delaying or hindering the project. Although the energy agency can initiate changes to project schedules to allow for delays, if the project is delayed and the participating partners do not agree to changing the schedule, the project may be terminated.

The project is proceeding slower than specified in the energy agency reference project schedule. For example, criticality¹, which was originally anticipated in July 1982, is not expected until October 1983, a delay of 15 months. The reference project schedule also set milestone dates for receiving the Nuclear Regulatory Commission's Limited Work Authorization (September 1975) and Construction Permit (August 1976). The energy agency currently expects that these permits will not be issued until November 1976 and July 1977, respectively. In view of current estimates of the project's progress, it appears that the project may be susceptible to additional delays and therefore termination.

The termination criterion may be met if the Clinch River Breeder Reactor is required to be redesigned to accommodate the consequences of a core disruptive accident. The Nuclear Regulatory Commission believes that such an accident, although unlikely, is possible and should be provided for in designing the reactor. Accommodation of a core disruptive accident, according to the Nuclear Regulatory Commission, may necessitate additional features, such as a core catcher². The current reference design does not provide for a core catcher. The energy agency has started work on an alternative plant design which includes a core catcher if ongoing research and development fails to show that a core catcher is not needed.

There are strong indications that the utility participants are opposed to including a core catcher in the Clinch River Breeder Reactor design. It seems likely that if a Nuclear Regulatory Commission ruling requires a core catcher to be added to the design, the project may be seriously delayed by more than 6 months beyond the energy agency's

¹ The state of a reactor sustaining a chain reaction.

² A core catcher is a device below or within the reactor vessel which, in the event of a core disruptive accident, will spread out the core debris. This would prevent material from reforming into a mass capable of a chain reaction and prevent core residue from melting through the bottom of the reactor.

approved schedule. The participating parties could then initiate termination proceedings.

Our concern in this instance is that although licenseability is a prime objective of the proposed modified contract, a change in the reference design required for Nuclear Regulatory Commission licensing--while no longer a specific criterion for termination--may seriously delay the project and thus permit terminating the project.

Energy agency officials stated that although this termination criterion provides a method for private parties to terminate the project in the event of a delay caused by a major design change, it also provides the energy agency with a method to terminate the project if design changes required by the Nuclear Regulatory Commission make the cost of the project unreasonable.

We believe that, because licenseability is a principal project objective, the proposed contract should be revised to prevent any of the participating parties from terminating the project because of project delays caused by changes in the design to meeting license requirements.

PROJECT MANGEMENT ARRANGEMENT
MAY NOT BE FEASIBLE

The proposed contract assigns the energy agency the responsibility for managing and carrying out the Clinch River Breeder Reactor project; however, the contract also states that the energy agency is to "manage and carry out the project through an integrated project management organization." To carry out its functions, under normal circumstances, the energy agency is required to use Government employees, appointed and compensated in accordance with civil service and classification laws. However, where it is economical, feasible, or necessary due to unusual circumstances, non-Government personnel can be employed under a "proper contractual arrangement." A proper contract for such an arrangement between Government and non-Government personnel is one in which performance requirements are established in the contract and the relationship is not that of an employer to an employee.

The proposed modified contract, negotiated after the criteria were submitted by the energy agency to the Joint Committee, provides that the integrated project management organization is to be comprised of personnel from the energy agency, the corporation, and the utility industry. Including corporation and utility personnel is considered

necessary to achieve the project's objectives of demonstrating the commercial value of breeder reactors and of providing a broad base of experience and information important for utility operation of such plants. Our concern centers on the arrangement established in the proposed modified contract.

Three criteria, established by 5 U.S.C. 2105(a), are used to determine whether any employer-employee relationship exists between the Federal Government and employees of a non-Governmental concern. The most important criterion concerns a Federal officer or employees supervising a contractor employee during the performance of his duties. The other criteria are performance of a Federal function and proper appointment of the individual to the Federal service.

The proposed arrangement involves a detailed integrated management organization. The energy agency said that corporation representatives would occupy 8 of the 19 top positions in the integrated project management organization. The corporation will also be able to nominate corporation and utility personnel for these key positions (which are designated by the project steering committee) in the organization. While the energy agency has the right to approve or reject the nominees, this right shall be exercised only after consultation with the corporation. The energy agency is also required to make a reasonable number of staff positions available to corporation and utility personnel. Approximately 70 of the estimated 200 people in the project organization will be energy agency personnel. The other 130 members of the organization will be either corporation or utility employees. At the corporation's request, the energy agency will allow various corporation and utility personnel acceptable to the energy agency to participate in the management organization for education and training purposes. The corporation will be responsible for the salaries and related costs associated with utility personnel in the management organization. Moreover, while the project is a cooperative arrangement, the funds involved are primarily Federal, and the Administration is responsible for project management.

We are concerned that the energy agency's proposed management arrangement could lead to a situation where the private employees are being directly supervised by Federal employees in their day-to-day project duties. We have considered relationships which are tantamount to that of an employer and an employee as being in conflict with the system of Federal personnel laws.

Energy agency officials said that the private participants' employees would undertake technical duties, hardware

development, and related scientific work. These employees would be given a task to do and would be required to do it on their own. Any contact between Federal and non-Federal employees would be to clarify a task. Energy agency officials stated that there would be no daily review by energy agency officials and that they would control work on a broad basis only. It also appears that the private participants would be required to furnish their own tools and equipment.

Energy agency officials maintain that the private participants' employees will function as employees of its prime contractor--the Project Mangement Corporation. If this arrangement impairs the feasibility of prompt performance of project objectives and leads to direct and detailed supervision of private employees by energy agency personnel, it could establish a relationship which should be under the Federal personnel laws.

At this time, we believe that the private participants' employees cannot be considered employees under 5 U.S.C. 2105(a). Accordingly, the private participants' employees would not be subject to the provisions of title 18 of the United States Code for bribery, graft, or conflict of interest, since those provisions concern actual Federal employees. While the contract does contain certain provisions concerning conflict of interest and related matters, they could not be construed as substitutes for the provisions of title 18. This situation might be resolved by including in the contract effective provisions penalizing involvement in conflict of interest, bribery, and/or graft situations.

The contents of this report were discussed with energy agency officials and their comments were incorporated where appropriate. We are sending a copy of this report to the Chairman and Vice Chairman of the Joint Committee on Atomic Energy.

We invite your attention to the fact that this report contains recommendations to the Administrator of the Energy Research and Development Administration. As you know, section 236 of the Legislative Reorganization Act of 1970 requires the head of a Federal agency to submit a written statement on actions taken on our recommendations to the House and Senate Committees on Government Operations not later than 60 days after the date of the report and to the House and Senate Committees on Appropriations with the agency's first request for appropriations made more than 60 days after the date of the report. We will be in touch with your office in the near future to arrange for release

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of the report so that the requirements of section 236 can be set in motion.

Sincerely yours,

A handwritten signature in cursive script, reading "James B. Stacks". The signature is written in dark ink and is positioned above the typed name.

Comptroller General
of the United States