U.S. Department of Energy
Notice of Proposed Rulemaking on
Convention on Supplementary Compensation for Nuclear Damage
Contingent Cost Allocation,
79 Fed.Reg. 75076 (December 17, 2014)
and
80 Fed.Reg. 4227 (January 27, 2015)

Docket Number DOE-HQ-2014-0021
and
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Questions and Topic Suggestions of Contractors International Group on Nuclear Liability for February 20, 2015 Public Workshop

February 2015

The Contractors International Group on Nuclear Liability (CIGNL) hereby submits questions and topic suggestions for the February 20, 2015 public workshop on the U.S. Department of Energy (DOE) Notice of Notice of Proposed Rulemaking (NOPR) on the Convention on Supplementary Compensation for Nuclear Damage (CSC) Contingent Cost Allocation. 79 Fed.Reg. 75076 (Dec. 17, 2014) and 80 Fed.Reg. 4227 (Jan. 27, 2015).

CIGNL's Interest

CIGNL is an *ad hoc* nongovernmental group of major U.S. nuclear suppliers formed in 1993 to promote more widespread adherence to the international nuclear liability conventions and adoption of domestic nuclear liability laws. In particular, CIGNL actively promoted ratification of the CSC by the United States after it was signed in 1997, because CIGNL believed the CSC would help open international nuclear export markets to the United States. CIGNL worked closely with the Administration and Congress in securing the ratification of the CSC in 2006 and enactment of implementing legislation in 2007. CIGNL also has been working closely with the U.S. Government, the International Atomic Energy Agency (IAEA) and others to encourage more States to join this important Convention, noting it will enter into force on April 15, 2015 following Japan's recent acceptance.

CIGNL's current members are as follows: The Babcock & Wilcox Company; Bechtel Power Corporation; CB&I; Centrus Energy Corp.; GE Hitachi Nuclear Energy LLC; and, Westinghouse Electric Company LLC.

In November 2010, CIGNL submitted comments intended to provide preliminary observations on the Department's earlier Notice of Inquiry (NOI) in this rulemaking. 75 Fed. Reg. 43945 (Jul. 27, 2010); 75 Fed. Reg. 51986 (Aug. 24, 2010); and, 75 Fed. Reg. 64717 (Oct. 20, 2010). On March 2, 2011, representatives of CIGNL met at the Forrestal Building with DOE officials at their invitation to discuss CIGNL's November 2010 written comments. Recognizing the difficult task that DOE faces and the considerable uncertainty about how to implement the 2007 legislation, CIGNL and each of its members respectfully reserve our rights to provide additional comments, collectively or individually, as this rulemaking proceeds.

Primary Questions and Suggested Topics

Given the complexity of the issues presented by the NOPR and the fact that the DOE workshop is scheduled for only a single day, it would be advisable for the workshop to concentrate first on a few significant threshold issues and to move on to secondary matters, as time permits. CIGNL, therefore, submits that the Department's February 20, 2015 public workshop on the NOPR should first address the following questions and topics:

Covered nuclear suppliers and reportable transactions: The NOPR (79 Fed.Reg. at 75093) indicates DOE has submitted its proposal to the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1995 based assumption that the rule should apply to only about 25 U.S. suppliers. CIGNL's November 2010 comments noted as many as 300 to 1,800 types of goods and services go into constructing and operating a nuclear power plant. The NOPR, on the other hand, appears to limit CSC cost allocation to a "final nuclear supplier"

and/or "lead nuclear supplier." The term "lead nuclear supplier" used only in Alternative 2 (coupled with the provision in proposed §951.3) would mean a nuclear supplier whose adjusted value of reportable transactions for the period 1960 through 2007 "exceeds $500 million [or some other amount, e.g., $1 billion]").

This topic presents the following questions:

1. What is the basis for DOE's assumption that the rule should apply to only about 25 U.S. suppliers?
2. Is the term "lead nuclear supplier" used only in Alternative 2 based on the Department's assumption that only about 25 U.S suppliers should be liable for the U.S. share?
3. Would not tying assessments only to suppliers with export licenses or authorizations unduly limit the number of suppliers covered, particularly since such licenses or authorizations often are obtained by "freight forwarders" acting as agents for the true exporter and whose current average number of employees and/or average annual sales receipts could entitle them to exclusion as a "small" nuclear supplier?
4. How would the Department determine the party that actually produced the product being exported corresponds to the "final nuclear supplier" as a general matter?
5. Appreciating the point that export licenses/authorizations might be a relatively good source of relevant records, could DOE share more information to explain/support the stated rationale for the criteria proposed for determining which suppliers are in-scope versus including all suppliers subject to 10 CFR Part 21 or suppliers with 10 CFR Part 50, Appendix B quality assurance programs?
6. Did DOE consider proportionately allocating assessments as between the (1) NSSS vendor, (2) architect/engineer, and (3) constructor (supplemented, as may be appropriate, by other/post-construction suppliers of equipment and services, *e.g.,* post-construction vendors)? If not, why not?
7. Since it appears that DOE may be operating under an assumption that the allocation of risk under its proposed rule as between the nuclear power plant vendor/designer, the architect/engineer, and the constructor is adequately addressed via commercial contracts, is such an assumption reasonable or equitable, considering that would have required U.S. suppliers (as far back as the 1960s) to anticipate this complex series of governmental acts, *i.e.* establishment of treaty relations, other countries' ratification of the CSC, passage of the 2007 CSC Contingent Cost Allocation Act, and promulgation of the implementing regulations proposed in this NOPR?
8. Is the measure of "value" based solely on payments in U.S. dollars, or would a company have to assess other elements of non-monetary value? Is value based only on what was paid in U.S. dollars under the contract for specific exports from the United States? What if the contract also required follow-on services; are those included in the value calculation? How is the value of technology to be measured?

Retrospective premium payment cap: The Department proposes a cap on the retrospective premium payment for any one nuclear supplier. The Department seeks comment from the public on a specific amount that is appropriate as a cap on any one supplier's premium payment, such as "$25 million," or a percentage of contingent cost, such as "5% or 25%." In its November 2010 comments, CIGNL urged the Department to clearly state that no single company will be asked to contribute more than $5 million of the contingent cost, based on the assumption such an amount would be more consistent with the actual number of suppliers to nuclear installations.

This topic presents the following questions:

1. What is the basis for the Department's suggestion that a cap of "$25 million" or "5% or 25%" of contingent costs would be appropriate?
2. Is this based on the Department's assumption that only about 25 U.S suppliers should be liable for the U.S. share?
3. How would any single cap be applied to companies and entities falling under a consolidated balance sheet?

Information collection: The NOPR would require U.S. suppliers to furnish DOE with reports on exports of nuclear goods and/or services as far back as 1960. This appears to be based on the assumption that all U.S. suppliers subject to assessments have retained such records. The NOPR (79 Fed.Reg. at 75093) suggests the number of burden hours for suppliers would be only 25 hours annually, and a one-time reporting requirement totaling 100 hours, with annual estimated reporting and recordkeeping cost burden of $8,000 annually, and a one-time reporting requirement cost of $32,000.

This topic presents the following questions:

1. On what basis did DOE determine that companies could search records back as far as 1960 in the times and at the costs projected by DOE in the NOPR's discussion with respect to the Paperwork Reduction Act of 1995?
2. Did DOE contact any small, medium or large suppliers that might be subject to the rule to determine what types of records they may have and/or an estimate of time and cost involved for them to produce the information DOE is seeking?
3. How would DOE determine the assessment of a company that has not maintained or has imperfect records back as far as 1960?
4. How should companies report transactions involving exports of nuclear goods or services when they have been subject to mergers, acquisitions, and/or bankruptcies, and to what extent would companies face legacy responsibility for exports by predecessor organizations?
5. How would assessments be allocated among partners in joint ventures and/or consortiums?
6. How would assessments be allocated among sub-suppliers and/or manufacturers (*e.g.,* if another company obtained the export license or authorization as the shipper and had not modified the product or incorporated it into another component)?
7. If a US supplier used a local fabricator or contractor in a foreign installation state, would the value of the local fabrication or work be excluded from the assessment calculation?
8. Can DOE clarify whether and how sub-suppliers/sub-contractors, especially major/large subs, are included in DOE's definition of supplier?
9. Can DOE clarify whether and how "pass-through" sub-supplier/contractor relationships would be addressed?
10. How does DOE anticipate sales by foreign subsidiaries, affiliates or branches of a US supplier being treated?
11. How does DOE propose to treat licensing and royalty arrangements among suppliers, their partners or customers?
12. How should vertically integrated companies report transactions involving exports of nuclear goods or services in more than one of the sectors identified in the NOPR? Would this have an additive burden on the supplier?

13. If only "covered transactions" are the basis for risk exposure, could suppliers report only such "covered transactions," rather than "any transactions?"
14. Why does the proposed rule provide the risk exposure of a nuclear supplier would be based the "adjusted value" ("expressed in U.S. dollars") of all covered transactions by the nuclear supplier, while none of the six example risk factors in the 2007 CSC Contingent Cost Allocation Act, 42 U.S.C. §17373(e)(2)(C)(i), refer to the revenue, profit or other commercial benefit earned by suppliers from nuclear trade?
15. Will a transaction have to be reported if goods or services exported from the United States were not used at a foreign nuclear installation?
16. What if the goods exported from the United States have been replaced at the foreign nuclear installation?
17. For Alternative 2, on what basis did the Department elect to use the quantity of transactions in determining the risk exposure of nuclear suppliers in the facility sector and metric tonnage in the nuclear materials and nuclear materials transportation sectors, while using adjusted value for the other facilities sectors?
18. What is the unit of measurement for "quantity" in Alternative 2's facility sector?
19. Could the Department provide examples of a risk exposure calculation under each of the proposed alternatives (*i.e.,* proposed §951.7 of Alternative 1 and proposed §§951.10 – 951.13 of Alternative 2)? For this purpose, could the Department create a sample database of fictional transactions and then apply each alternative to that database to show suppliers how each alternative would work?

Access to information and dispute resolution: The NOPR does not address how suppliers would be able to obtain information about potential assessments to enable them to comply with financial reporting requirements and/or to contest their allocations and/or those of other suppliers, or to facilitate the possibility of securing insurance therefor.

This topic presents the following questions:
1. Why does not the proposed rule provide for any process for suppliers to challenge DOE's assessment calculations, either as to their own assessments or those of other suppliers (keeping in mind the need to protect trade secrets and proprietary or business confidential information)?
2. What mechanism exists to ensure all suppliers are interpreting or applying the rule in a consistent manner, *i.e.* what mechanism would DOE have in place to assess, audit or otherwise check the completeness and accuracy of such information?
3. Will DOE provide U.S. suppliers with the detailed information about their expected assessments both for use in their annual financial reports and to facilitate the possibility of securing insurance therefor?

Risk allocation: For both Alternatives 1 and 2, the NOPR generally would allocate risk exposure on a two-to-one basis for components, systems or structures (Alternative 1) or fifty-fifty basis for sectors (Alternative 2).

This topic presents the following questions:
1. How did DOE decide upon and what is the basis for the proposed risk weighting to be applied across DOE's proposed alternatives and sectors? Can DOE provide any detailed analysis/justification for this risk weighting?

2. In general, the proposed weighting factors and percentages seem arbitrary. Notably, several of the Alternative 1, Appendix B items listed do not contribute appreciably to the risk. Similarly, it is unclear why the four sectors in Alternative 2 have different risk allocations, ranging from 50 percent to 10 percent. What studies, if any, have been performed to validate these weightings?

3. In developing this methodology (especially the proposed risk weighting under the two Alternatives), did the DOE consult or leverage the expertise at the Nuclear Regulatory Commission, Department of Commerce, or international insurers? If not, is DOE now seeking or willing to seek that input?

Secondary Questions and Suggested Topics

As noted *supra,* given the complexity of the issues presented by the NOPR and the fact that the DOE workshop is scheduled for only a single day, it would be advisable for the workshop to concentrate first on a few threshold issues and to move on to secondary matters, as time permits. This, however, should not be interpreted to suggest that other issues raised by the NOPR are not important. CIGNL, therefore, submits that the Department's February 20, 2015 public workshop on the NOPR also should address the following questions and topics to the extent time permits or that DOE otherwise should address them in a Federal Register notice prior to the due date for comments on the NOPR:

Payments to the United States: The NOPR contains less than detailed information with respect to suppliers' payments to the United States of their retrospective assessments. The proposed penalty for untimely payment (assessment + interest + mandatory penalty) seems excessive or unduly punitive, particularly in light of the general mode of notification (by Federal Register publication) and the short suspense period for making payment (60 days).

This topic presents the following questions:

1. What mechanism is in place to assure some suppliers do not bear an inequitable share of the risk/cost, due to other suppliers' failure or inability to pay?

2. Would DOE extract such a penalty (original assessment x 2) where the supplier is 1-day late?

3. Would the Federal Register notice list the assessments of all liable U.S. suppliers by name and amount?

4. In addition to the Federal Register notice, will DOE separately and directly notify the affected suppliers?

5. Could DOE exercise its authority to make any such penalty discretionary, taking into account all attendant facts and circumstances?

6. Would it be sufficient to memorialize this discretionary authority in the implementing regulations or would a statutory amendment be needed?

7. How does DOE intend to adjust for inflation or time value of money, if at all?

Other CSC Member States: U.S. suppliers are to be assessed for goods and services exported to covered nuclear installations in other CSC Member States, of which there will be only 5 as of April 15, 2015.

This topic presents the following questions:

1. Will DOE ensure that the International Atomic Energy Agency list of covered facilities and any updates thereto given only to CSC Member State Governments are made available to U.S. suppliers, preferably by prompt posting on the DOE website?
2. As more States join the CSC, will the United States review their domestic nuclear liability laws to ensure that they are compatible with the object, purpose and specific terms of the CSC to ensure that U.S. suppliers are not required to pay the U.S. share of the CSC international fund for an accident in a country whose law is not CSC-compliant, even if they never had done work there?
3. Why does the proposed rule limit the examination to "covered installations" in countries that have ratified the CSC?
4. Why did the Department choose not to follow the legislative history of the 2007 CSC Contingent Cost Allocation Act, which says that, in developing the cost allocation formula, DOE need not limit the examination to "covered installations" in countries that have ratified the Convention, but should consider covered installations in countries that have signed the CSC and in other countries that DOE concludes are likely to join the CSC within a reasonable period of time?

"Small" nuclear supplier exclusion: The NOPR contains provisions proposing that companies qualifying as a "small business" under U.S. Small Business Administration size standards would be exempt from being assessed a retrospective premium payment. SBA size standards are based on *average annual* sales receipts expressed in millions of dollars or *average current* number of employees.

This topic presents the following question:

1. Would not a preferable approach to defining the rule's "small" nuclear supplier exclusion be to exclude a supplier from the formula if its average revenue from the export of nuclear goods and services over some prescribed period prior to the date of a nuclear incident is less than the minimum share?

Natural Uranium: The NOPR (79 Fed.Reg. at 75082) says DOE agrees that suppliers of natural or depleted uranium or uranium conversion services are not suppliers of fuel and thus not nuclear suppliers that would be subject to the requirements of the proposed rule.

This topic presents the following questions:

1. Why is depleted and natural uranium supplied to a nuclear installation not considered to be "nuclear material", since release of this material at an installation, such as an enrichment or fabrication plant, could cause a nuclear incident given the toxic properties of this material?
2. Since they supply enrichment facilities with converted uranium hexafluoride, should not suppliers of converted uranium, transporters of converted uranium and suppliers of the equipment used to transport such uranium be nuclear suppliers under the proposed rule?
3. Rather than exclude natural and depleted uranium from the definition of "nuclear material", would a better approach be to exclude mines and conversion facilities from the definition of "nuclear installation" but include natural and depleted uranium in the definition of "nuclear material"?

Conclusions

CIGNL looks forward to participating in the Department's February 20, 2015 public workshop, and urges DOE to fully consider the above questions and topics on the CSC Contingent Cost Allocation at the public workshop and to publish further information in the Federal Register addressing each of them before written comments from the public are due on the NOPR.