

GAO

Report to the Governmental Committee on
Governmental Affairs, US Senate

December 1991

ENERGY MANAGEMENT

DOE Has an Opportunity to Improve Its University of California Contracts



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United States
General Accounting Office
Washington, D.C. 20548

Resources, Community, and
Economic Development Division

B-246522

December 26, 1991

The Honorable John Glenn
Chairman, Committee on
Governmental Affairs
United States Senate

Dear Mr. Chairman:

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DOE is currently negotiating extensions of its management and operating (M&O) contracts with the University of California for the Lawrence Livermore National Laboratory, the Lawrence Berkeley Laboratory, and the Los Alamos National Laboratory. At your request, we examined issues related to the use of nonstandard contract clauses—that is, clauses that differ substantively from the contract clauses promulgated in DOE regulations—in the University's contracts. This report specifically focuses on (1) the impact of the nonstandard procurement and property management clauses in the contracts, (2) other nonstandard contract clauses that may limit DOE's ability to effectively oversee the contracts, and (3) DOE's plans to require the inclusion of standard clauses in new contracts with the University. Some of our findings on the first issue were presented at your August 1, 1991, hearing on DOE subcontracting.¹

This review is part of a special GAO audit effort to help ensure that areas vulnerable to fraud, waste, abuse, and mismanagement are identified and that adequate corrective actions are taken. This effort focuses on 16 areas, one of which is DOE's contractor oversight.

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Results in Brief

Nonstandard clauses in DOE's contracts with the University of California provide DOE with less authority to direct changes in the laboratories' procurement and property management systems by, among other things, requiring the laboratories to make only those changes with which they agree.² This situation has provided the Livermore Laboratory with a basis for delaying implementation of DOE recommendations to eliminate procurement deficiencies identified by DOE and GAO, such as a requirement that sole-source justifications be approved by an independent

¹DOE Management: DOE Needs to Improve Oversight of Subcontracting Practices of Management and Operating Contractors (GAO/T-RCED-91-79, Aug. 1, 1991).

²The mutual agreement provision used in a number of the nonstandard clauses is referred to as the "mutuality concept" or "mutuality principle."

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administrative official. Contract terms have also prevented DOE from requiring the Livermore Laboratory to have a property management system that is consistent with DOE property management regulations. The Livermore Laboratory's property management system did not have adequate internal controls to ensure that government property in the laboratory's custody was safeguarded against theft, unauthorized use, or loss.

The University's contracts contain other nonstandard clauses that can hinder DOE's ability to provide effective oversight. For example, in the University's contracts, the clause defining what costs will be allowed gives DOE substantially less authority to control contractors' costs than the standard clause would provide. The contracts deviate from the standard clause, for example, by specifying only 13 of the 35 standard unallowable costs found in DOE's regulations, thereby allowing expenses, such as interest, that are unallowable under the standard clause. Under another nonstandard clause, DOE has less authority to set requirements for internal audits because the clause requires audits only when they are mutually agreeable to DOE and the University. The standard clause would require the University to conduct annual internal audits of allowable costs in a manner approved by DOE.

DOE tried to make changes in the contracts in 1987 and 1990 but was not successful because the University refused to accept standard clauses. DOE is once again attempting to negotiate contracts with the University that include DOE's standard clauses. DOE's goals include eliminating the mutuality concept from contract clauses addressing business management issues, such as the procurement and property management clauses, and changing the allowable costs clause to provide the government with greater protection than it currently has. Recently, the University has indicated that it is willing to accept some of DOE's standard clauses. The results of DOE's negotiations with the University, however, are not expected to be known until the new contracts are signed sometime in 1992.

Background

In fiscal year 1991, the University of California received about \$2.4 billion in program funding to manage and operate the Lawrence Livermore, Lawrence Berkeley, and Los Alamos laboratories. DOE's M&O contracts with the University originated with the Manhattan Project to develop the atomic bomb in the early 1940s. Because of the nature of the project, the contracts provided the contractors with (1) a great deal of latitude in assigning work and (2) assurance that virtually all costs would be

reimbursed. DOE's regulations and standard contract clauses continue to exempt M&O contractors³ from a number of requirements applicable to most government contractors, such as requirements for publicizing proposed contract actions. Furthermore, DOE's M&O contracts with the University include a number of clauses that deviate from the standard clauses DOE developed specifically for its M&O contracts. The nonstandard clauses in the University's contracts were reviewed in a September 1990 DOE Inspector General report⁴ and in our reports on property management discussed below. We have also testified on this issue before your Committee; a Subcommittee of the House of Representatives Committee on Science, Space and Technology; and the Assembly Committee on Higher Education of the State of California Legislature (see "Related GAO Products" at the end of this report).

Nonstandard Contract Clauses Restrict DOE's Ability to Oversee Laboratory Purchasing and Property

DOE's Lawrence Livermore, Lawrence Berkeley, and Los Alamos laboratories are operated by the University of California under 5-year M&O contracts that are substantially the same. These contracts include identical nonstandard DOE contract clauses that hamper DOE's ability to effect changes in the laboratories' procurement and property management practices. For example, our work at the Livermore Laboratory shows that the nonstandard clauses have

- allowed the laboratory to delay the implementation of procurement system changes recommended by DOE;
- resulted in costly vehicle leases DOE did not approve, including leases with the University of California;
- contributed to a 5-year disagreement between DOE and the laboratory over the appropriate size of the vehicle fleet; and
- reduced DOE's ability to ensure that government-owned property and equipment are adequately protected.

While DOE and the laboratory have recently made progress in resolving some of their long-standing disagreements, similar problems may recur as long as the current nonstandard procurement and property management clauses remain in effect. Similarly, because the same nonstandard procurement and property clauses are used in the Lawrence Berkeley and Los Alamos contracts, the potential for such problems also exists at these laboratories.

³DOE has more than 50 M&O contracts with 35 contractors.

⁴Report on General Management Inspection of the San Francisco Operations Office (DOE/IG-0290, Sept. 20, 1990).

Mutuality Concept Impedes Corrective Actions to Address Procurement Deficiencies

The mutuality principle in the University's nonstandard procurement clause has limited DOE's ability to require the Livermore Laboratory to implement needed procurement policies and procedures. The standard DOE procurement systems clause requires M&O contractors to implement formal policies, practices, and procedures for subcontracting that are acceptable to DOE and in accordance with the policies described in DOE Acquisition Regulation (DEAR) 970.71, Management and Operating Contractor Purchasing. DOE's contracts with the University provide DOE with far less authority. While the procurement systems clause in the contracts does require that the University comply with procurement requirements contained in statutes or executive orders, it provides only that the University will "appropriately treat in its policies and procedures such additional DOE procurement policies" as DOE brings to its attention.

This nonstandard procurement clause has resulted in lengthy negotiations between DOE and the Livermore Laboratory over DOE's recommendations to correct deficiencies DOE identified in the laboratory's procurement system. In an initial report on the laboratory's purchasing system issued in September 1990, DOE made 59 recommendations concerning numerous significant weaknesses in procurement areas. These weaknesses included inadequate sole-source justifications, lack of advance acquisition planning, problems with solicitation and source selection, inadequate contract administration, and insufficient controls over intra-university transactions.⁵ DOE's findings paralleled weaknesses that we identified in our recent review of subcontracting practices at the Livermore Laboratory. For example, we found that in 1990 the laboratory awarded approximately two of every three purchases over \$10,000 on a sole-source or noncompetitive basis. In our August 1, 1991, testimony, we noted that the laboratory's sole-source leasing of 58 vehicles from the University of California cost almost \$600,000 more than it would have if similar vehicles had been authorized by DOE and leased through the General Services Administration (GSA).

To address sole-source deficiencies, DOE recommended that the laboratory institute an independent review of sole-source purchases and establish dollar thresholds for appropriate levels of review and approval. In its 1987 procurement review, DOE had made recommendations to address problems with sole-source procurement. However, DOE's 1990

⁵Intra-university transactions are laboratory purchases of goods and services from the University and its campuses.

review concluded that the laboratory had made no substantive improvement in justifying sole-source awards. To address poor controls over intra-university purchases, DOE recommended that the laboratory develop clear guidance for such transactions and also identified some elements that the laboratory's procurement procedure should include, such as criteria for making intra-university purchases.

The laboratory's initial response on October 22, 1990, to DOE's report emphasized that any procurement changes would require mutual consent. The response noted that some of DOE's "suggestions" would be "tantamount to a modification of the Prime Contract" and expressed disagreement with a number of DOE's recommendations. For example, DOE's recommendation for independent review of sole-source justifications was rejected because (1) it would be "an added layer of administration" and (2) emphasis should be placed instead on advance acquisition planning to improve competition.⁶ According to the laboratory, intra-university transactions were not part of its purchasing program and the laboratory did not identify any actions it intended to take in response to DOE's recommendations on intra-university transactions.

After the laboratory had negotiated with DOE for a year over the recommendations, its September 26, 1991, report summarizing the agreements reached as of that date was considerably more responsive to DOE's recommendations. However, the report stated that the laboratory had not yet agreed with DOE on the need for independent review of sole-source actions. Nor did the laboratory identify what actions it intended to take to address the open recommendations on intra-university transactions.

Costly Vehicle Leases Linked to Nonstandard Procurement Clause

The absence of the standard clause has also provided the laboratory with a rationale for not obtaining DOE's approval of costly vehicle leases. As mentioned above, the standard procurement systems clause requires that the procurement systems of M&O contractors comply with DOE's procurement policies. The standard policies (1) require DOE's approval of leases and purchases of vehicles and (2) provide that the vehicles are generally to be obtained through GSA. This requirement can save the government money because GSA's rates are substantially lower than

⁶The laboratory's response was, however, noncommittal on DOE's recommendation to establish policies and procedures to ensure adequate advance planning. The laboratory said that developing an advance planning system "will be an evolving process."

commercial rates. In contrast, the University contracts omit the requirement to comply with DOE's M&O contractor purchasing policies and do not specifically require DOE's approval of vehicle leases.

Our review at the Livermore Laboratory found that, while most of the more than 1,100 vehicles—predominately sedans and light trucks—used there have been approved by DOE, since 1986 the laboratory has obtained more than 90 passenger vehicles under leases that were not approved by DOE, including 58 vehicles it leased from the University. DOE's review of the leases could have substantially reduced the approximately \$2 million the government has paid since 1986 for the unauthorized vehicles. For example, a 12-passenger van leased from the University cost \$439 per month; a similar vehicle leased from GSA would have cost \$151. Furthermore, DOE may have determined that some vehicles were not needed, because in 1986 DOE had directed the laboratory to reduce its fleet size and instructed it to stop submitting requests for additional GSA leases. The laboratory's Deputy Business Manager stated in a July 19, 1991, letter to DOE that the laboratory did not request DOE approval of the leases because the contract's procurement clause does not require such approvals.

Vehicle Fleet Size Disagreement Extends More Than 5 Years

As we discussed in our August 1, 1991, testimony, the mutuality concept in the property management clause has hindered DOE's ability to resolve a disagreement with the laboratory on the appropriate fleet size for at least 5 years. For example, in 1990 DOE directed the laboratory in writing to terminate some commercial vehicle leases that DOE determined were not adequately justified. The laboratory did not comply with these directions. Instead, the laboratory's July 19, 1991, letter stated that directions by DOE property management officials to terminate commercial leases were regarded as the "basis for negotiation pursuant to the 'mutually agreed' principle" in the property management clause. According to a DOE property management official, it has been difficult and time-consuming to reach a mutually acceptable solution to the vehicle disputes.

One of the key areas on which DOE and the laboratory have disagreed is whether the laboratory vehicles will be subject to use criteria. The low mileage of a number of the vehicles leased since 1986 may indicate that the fleet is too large and/or is poorly managed. For example, after 54 months of service, a sedan and a station wagon averaged around 3,000 miles a year and a number of the other leased cars averaged around 5,000 miles per year. In contrast, GSA's annual mileage standard for

sedans and wagons is 12,000 miles a year. The laboratory has argued that annual mileage is not an appropriate criterion—that the laboratory's situation is unique. For example, laboratory officials told us that the average trip at the laboratory site is 0.8 of a mile. In 1989 DOE asked the laboratory to propose an alternative standard to the mileage standard, but the laboratory did not do so. Because of the mutuality concept in the current contract, DOE cannot unilaterally establish mileage standards or other vehicle use standards.

Property Management System Weaknesses Inadequately Protected Government Property

DOE's standard property management provision for M&O contractors requires that a contractor maintain a property management system according to sound business practices and DOE's property management regulations. Instead of the standard clause, the contract with the University provides for a "mutually approved system" for property management. The terms of this system, however, had never been developed or agreed upon. Because of the mutuality aspect of the property clause, DOE had not required the laboratory to conform with departmental property management regulations.

In April 1990 we reported that the system at the laboratory did not ensure that property was adequately safeguarded.⁷ We reported that, as of mid-January 1990, laboratory managers could not locate 27,528, or 16 percent, of the items recorded in the laboratory's property management data base. This missing property had an acquisition value of over \$45 million. We concluded that the laboratory did not have adequate internal controls to ensure that property in its custody was safeguarded against theft, unauthorized use, or loss. Among other things, we recommended that DOE include its standard property management provision in the contract with the University when it is renegotiated. In our follow-up property management report in May 1991,⁸ we found that the laboratory was able to locate about \$26.8 million worth of the missing items, but over 20,000 items (13 percent) of property with an acquisition value of \$18.6 million was still missing. We also reported that the dollar value of items that the laboratory covered in its property management system had been increased since April 1990. This change eliminated over 80

⁷Nuclear Security: DOE Oversight of Livermore's Property Management System Is Inadequate (GAO/RCED-90-122, Apr. 18, 1990).

⁸Nuclear Security: Property Control Problems at DOE's Livermore Laboratory Continue (GAO/RCED-91-141, May 16, 1991).

percent of the property items previously accounted for. Our recommendations included having DOE demonstrate the appropriateness of eliminating controls over previously accounted for equipment.

Recent Actions Are Addressing Long-standing Problems

DOE and laboratory officials report that progress is being made in resolving these long-standing procurement and property management problems. For example, in November 1991 the laboratory reported that it has developed interim procedures for sole-source purchases and is studying the feasibility of implementing DOE's recommendation that sole-source procurements be reviewed by an independent administrative official. The laboratory also reported that it is developing policies and procedures covering intra-university transactions. In addition, the laboratory (1) complied with DOE's August 1991 directive to terminate commercial vehicle leases and has agreed to obtain DOE's approval of long-term vehicle leases in the future; (2) has taken steps to resolve the disagreement on vehicle fleet size by, for example, initiating actions to obtain an independent study on this issue; and (3) anticipates DOE's approval of its revised property management system in June 1992. We note, however, that problems similar to those that arose in reaching mutually agreeable solutions in the past might also occur in the future as long as the current nonstandard procurement and property management clauses limiting DOE's authority to direct laboratory actions are retained.

Other Clauses Hinder DOE Oversight

The University of California's M&O contracts contain other nonstandard clauses in addition to the procurement and property management clauses. For example, the DOE Inspector General's 1990 report listed 19 other standard DOE clauses that were either omitted or modified in the Lawrence Livermore and Lawrence Berkeley laboratory contracts. While we have not evaluated the impact of these differences, we agree with the Inspector General that the absence of the standard clauses could adversely affect DOE's ability to administer the contracts. For example, one nonstandard clause limits DOE's ability to ensure that contract costs are appropriate. Furthermore, the clauses that set internal audit requirements and establish policies to avoid conflicts of interest for contractors limit DOE's authority because these clauses include the mutuality principle.

The University's nonstandard allowable costs clause provides DOE with substantially less authority to control the contractor's costs than the standard clause would provide. Specifically, the University's contracts

include only 13 of 35 standard unallowable costs, thereby allowing costs that are unallowable under other M&O contracts, such as interest and proposal costs. Limiting the unallowable cost provisions is significant because the contracts also include "general indemnity" provisions that DOE grants to some M&O contractors, mostly nonprofit organizations, defining all costs incurred as allowable except those (1) specifically identified in the contracts as unallowable or (2) caused directly by willful misconduct or bad faith on the part of a corporate officer, such as the laboratory director.

In addition, the University's contracts do not include the internal audit requirements that are part of DOE's "Accounts, Records and Inspection" standard clause. That standard clause requires M&O contractors to conduct, to the satisfaction of DOE, annual internal audits of allowable costs and to submit or make their workpapers available to DOE. The clauses in the University's contracts state only that the University agrees to perform an internal audit program and "occasional special audits" for DOE when requested and mutually agreed by DOE and the University. In a March 1991 memorandum on internal controls at the Livermore Laboratory, DOE's Office of the Inspector General (OIG) reported that the lack of the internal audit clause and its requirements were a material internal control deficiency. The OIG had reported previously that because of the absence of the audit clause and the office's inability to carry out alternative auditing procedures, it could not express an opinion on the allowability of the contractor's claimed costs for fiscal years 1989 and 1990.

In addition, the standard DOE accounts clause requires that the system of accounts shall be satisfactory to DOE and in accordance with generally accepted accounting principles consistently applied. The University's accounts clause does not require the application of generally accepted accounting principles and states that the system of accounts shall be changed only as mutually agreed. According to a DOE memorandum, the University of California refused to accept DOE's directives pertaining to generally accepted accounting principles and DOE's Acquisition Regulation cost principles because the contracts are silent as to their application.

Also, the University's contracts do not contain standard DOE clauses addressing the potential for "organizational conflict of interest"—that is, the potential that a contractor may have interests that (1) diminish the contractor's capacity to give impartial, technically sound, objective assistance or advice or (2) may result in the contractor's having an unfair competitive advantage over others competing for the contract.

DOE's policies apply both to the M&O contractors and to numerous subcontracts awarded by the M&O contractors. The University's organizational conflict-of-interest clause differs significantly from DOE's standard clauses for M&O contracts. For example, one of DOE's standard clauses requires contractors to include the conflict-of-interest clause in subcontracts for evaluation services, technical consulting, or management support services; requires a disclosure statement from subcontractors; and states that the contractor shall not enter into the subcontract until the DOE contracting officer has determined that there is little or no likelihood that an organizational conflict of interest exists.⁹ However, the University's contracts require only that the University and DOE agree to develop mutually acceptable procurement procedures on how conflict-of-interest requirements will be applied to the University's proposed subcontracts and consultant agreements.

DOE's Efforts to Change the Contracts

DOE's past efforts to include standard clauses in the University's contracts have not been successful. For example, when the contracts were being renewed in 1987, the University would not have renewed the contracts if DOE had required its standard contract clauses because it viewed DOE's standard terms as creating an unacceptable superior/subordinate relationship. DOE changed its plans to negotiate more standard clauses in the contracts in order to retain the services of the University and agreed to continue the significant deviations from its standard clauses that are contained in the current contracts.

Also, in 1990 the Secretary of Energy directed the San Francisco Field Office to initiate contract negotiations to modify the existing contracts to incorporate (1) the standard property management clause and (2) other clauses, as necessary, to correct the current situation in which the contracts provide the University with "the authority to spend any and all DOE funds without ever obtaining the prior approval of DOE." The President of the University stated in a May 15, 1990, letter to the Secretary of Energy that the standard DOE clauses the Secretary had requested would "strike at the very heart of our contractual understanding." The University's President said that solutions to the issues raised by the Secretary would best be achieved not by modifying the contracts to incorporate DOE's standard clauses but by continuing to work towards the University's and DOE's common objectives. As a result, the existing contracts were not modified.

⁹DOE's regulations include three standard conflict-of-interest clauses that may be used in various circumstances. The clause discussed here is cited at DEAR 252.209-72.

Currently, DOE is again trying to include more standard clauses in its contracts with the University of California. On July 24, 1991, the Secretary of Energy announced that DOE would negotiate with the University to restructure the current M&O contracts for the Lawrence Livermore, Lawrence Berkeley, and Los Alamos laboratories that expire in September 1992. DOE and the University began formal contract negotiations for the renewals in September 1991. DOE is negotiating all three contracts concurrently. According to DOE's Deputy Director for Procurement, DOE's objective is to negotiate contracts that include as many standard terms as possible. DOE's goals include eliminating the mutuality concept in the contract clauses that address business management—such as the procurement systems clause—and negotiating an allowable costs clause that better protects the government's interest.

Recently, the University has changed its position regarding DOE's standard clauses. In its August 15, 1991, letter to you responding to issues raised at the Committee's August 1, 1991, hearing on DOE subcontracting, the University said that it had notified DOE that it is willing to accept standard language for many of the clauses. However, the University stated that some of the standard clauses are inappropriate for any nonprofit organization and said specifically that the University's contracts must contain the nonstandard language in the current contracts with respect to allowability of costs.

We note, however, that DOE's M&O contracts with two other nonprofit organizations—the University of Chicago, for the Argonne National Laboratory, and Universities Research Associates, Inc., for the Superconducting Super Collider Laboratory—include DOE's 35 standard unallowable costs. These contracts also include DOE's standard procurement, property management, accounts, and organizational conflict-of-interest clauses—clauses for which the University of California has obtained substantive deviations.

DOE's Deputy Director of Procurement said that DOE hopes to have most of the negotiating points resolved or at least significantly narrowed down by early 1992. He also said that DOE and the University have agreed that, before the contracts are signed sometime in 1992, (1) deviations from the standard clauses would have to be explained and justified and (2) major deviations would have to be approved by DOE's top management.

Conclusions

DOE's ongoing contract renegotiations provide an opportunity to implement changes that will better enable DOE to ensure that the three major laboratories managed and operated by the University of California are operated in an effective and efficient manner.

Under its current contracts with the University, DOE does not have the authority to direct changes to the laboratories' procurement and property management policies and procedures. The nonstandard procurement and property management clauses in the current contracts have precluded the timely implementation of needed corrective actions in these areas and also permitted costly procurement actions that did not comply with DOE's policies and procedures. We also share the concerns of the Secretary of Energy and DOE's Inspector General that the University's contracts include a number of other nonstandard clauses that can further limit DOE's ability to effectively oversee the contracts, such as the nonstandard allowable costs clause.

We strongly support DOE's (1) goal of including as many standard clauses in the University of California contracts as possible and (2) decision to have any deviations fully justified and approved by DOE's top management. DOE's ability to provide effective oversight over the more than \$2 billion a year in research and development funding that these DOE laboratories receive would be enhanced by ensuring that any deviations granted do not include any terms and conditions that provide DOE with less authority than that provided in DOE's standard clauses.

Recommendations

To ensure that adequate policies, procedures, and controls are in place to protect the government's interests, we recommend that the Secretary of Energy require that

- the new M&O contracts with the University of California contain the standard DOE procurement and property management clauses and
- deviations from any other standard clauses provide DOE with authority at least equivalent to that provided in DOE's standard clauses.

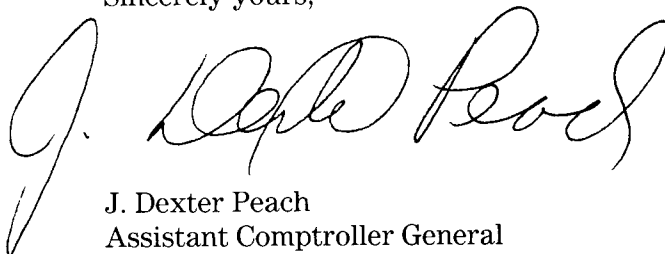
We performed our work at DOE headquarters, DOE's San Francisco Field Office, and the Lawrence Livermore National Laboratory between July 1990 and September 1991. To evaluate the Livermore Laboratory's subcontracting practices, we examined the laboratory's policies and procedures and DOE's oversight activities. We also examined subcontract and accounting records and interviewed DOE and laboratory officials. To

evaluate the University's contract clauses, we compared these contract clauses with DOE's standard clauses as well as with clauses contained in other DOE M&O contracts with nonprofit organizations, interviewed DOE officials, and analyzed related DOE Inspector General reports.

Our work was performed in accordance with generally accepted government auditing standards. We discussed information in this report with DOE officials, who agreed that it was accurate. However, in accordance with your wishes, we did not obtain written comments on a draft of this report.

Copies of this report are being sent to congressional energy committees and subcommittees; the Secretary of Energy; the Director, Office of Management and Budget; and other interested parties. This work was performed under the direction of Victor S. Rezendes, Director, Energy Issues, who can be reached at (202) 275-1441. Other major contributors to this report are listed in appendix I.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "J. Dexter Peach".

J. Dexter Peach
Assistant Comptroller General

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Related GAO Products

DOE Management: Improvements Needed in Oversight of Procurement and Property Management Practices at the Lawrence Livermore National Laboratory (GAO/T-RCED-91-88, Aug. 20, 1991).

DOE Management: DOE Needs to Improve Oversight of Subcontracting Practices of Management and Operating Contractors (GAO/T-RCED-91-79, Aug. 1, 1991).

DOE Management: Management Problems at the Three DOE Laboratories Operated by the University of California (GAO/T-RCED-91-86, July 31, 1991).

Nuclear Security: Property Control Problems at DOE's Livermore Laboratory Continue (GAO/RCED-91-141, May 16, 1991).

Energy Reports and Testimony: 1990 (GAO/RCED-91-84, Jan. 1991).

Nuclear Security: DOE Oversight of Livermore's Property Management System is Inadequate (GAO/RCED-90-122, Apr. 18, 1990).

Energy: Bibliography of GAO Documents January 1986 - December 1989 (GAO/RCED-90-179, July 1990).