

Department of Energy
Assistance Regulation

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ACQUISITION LETTER

This Acquisition Letter is issued under the authority of the Senior Procurement Executives of DOE and NNSA

**Subject: Implementation of the Omnibus Appropriations Act, 2009
(Energy and Water Development and Related Agencies Appropriations Act, 2009)**

References:

Omnibus Appropriations Act, 2009
Energy and Water Development and
Related Agencies Appropriations
Act, 2009

FAR Part 6
DEAR 906.3
DEAR 917.6

DEAR 970.1706-1
DOE Acquisition Guide
Acquisition Letter 2009-03

Acquisition Letter 2005-14

Pub. L. 111-008
Division C, Title III, sections 301, 302,
306, and 501

Competition Requirements
Other Than Full and Open Competition
Management and Operating (M&O)
Contracts
Award, Renewal, and Extension
Chapter 6.1, Competition Requirements
Acquisition Planning -- Extending a
Management and Operating Contract
Without Full and Open Competition; and
Site Utilization Management Planning
Competition Requirements for M&O
Contracts Under Section 995 of the
Energy Policy Act of 2005

When is this Acquisition Letter (AL) Effective?

The statutory provisions addressed in this AL are effective on the date of the enactment of the Omnibus Appropriations Act, 2009 which is March 11, 2009. This AL supersedes AL 2008-04, Implementation of the Consolidated Appropriations Act, 2008.

When Does This AL Expire?

This AL remains in effect until superseded or canceled.

Who is the Point of Contact?

Contact Barbara Binney of the Office of Procurement and Assistance Policy at (202) 287-1340 or at Barbara.binney@hq.doe.gov or Stephen Law, of the National Nuclear

Security Administration at (202) 586-4321 or at stephen.law@nnsa.gov. For additional information on Acquisition Letters and other issues, visit our website at http://www.management.energy.gov/policy_guidance/procurement_acquisition.htm.

What is the Purpose of this Acquisition Letter?

The purpose of this Acquisition Letter (AL) is to provide information and guidance regarding the Department’s implementation of Sections 301, 302, 306, and 501 of the Omnibus Appropriations Act, 2009 as these pertain to contracts or financial assistance instruments.

What is the Background?

This AL implements certain provisions contained in the Omnibus Appropriations Act, 2009, Public Law 111-008, Energy and Water Development and Related Agencies Appropriations Act, 2009.

Note that the provisions of the Omnibus Appropriations Act, 2009 regarding competition are in addition to section 995 of The Energy Policy Act of 2005 (EPACT 05), which is covered in Acquisition Letter 2005-14. Section 995 also required competition to award a management and operating contract for a National Laboratory in certain cases.

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I. Summary of Relevant Provisions, Legislative Direction, and Statutory Impact

Omnibus Appropriations Act, 2009

Section 301 CONTRACT COMPETITION.

(a) None of the funds in this or any other Appropriations Act for fiscal year 2009 or any previous fiscal year may be used to make payments for a noncompetitive management and operating contract, or a contract for environmental remediation or waste management in excess of \$100,000,000 in annual funding at a current or former management and operating contract site or facility, or award a significant extension or expansion to an existing

management and operating contract, or other contract covered by this section, unless such contract is awarded using competitive procedures or the Secretary of Energy grants, on a case-by-case basis, a waiver to allow for such a deviation. The Secretary may not delegate the authority to grant such a waiver.

(b) Within 30 days of formally notifying an incumbent contractor that the Secretary intends to grant such a waiver, the Secretary shall submit to the Subcommittees on Energy and Water Development of the Committees on Appropriations of the House of Representatives and the Senate a report notifying the Subcommittees of the waiver and setting forth, in specificity, the substantive reasons why the Secretary believes the requirement for competition should be waived for this particular award.

(c) The term “competitive procedures” has the meaning provided in section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403) and includes procedures described in section 303 of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253) other than a procedure that solicits a proposal from only one source.

Section 302 UNFUNDED REQUESTS FOR PROPOSALS.

None of the funds appropriated by this Act may be used to prepare or initiate Requests For Proposals (RFPs) for a program, if the program has not been funded by Congress.

Section 306 USER FACILITIES.

When the Department of Energy makes a user facility available to universities or other potential users, or seeks input from universities or other potential users regarding significant characteristics or equipment in a user facility or a proposed user facility, the Department shall ensure broad public notice of such availability or such need for input to universities and other potential users. When the Department of Energy considers the participation of a university or other potential user as a formal partner in the establishment or operation of a user facility, the Department shall employ full and open competition in selecting such a partner. For purposes of this section, the term 'user facility' includes, but is not limited to: (1) a user facility as described in section 2203(a)(2) of the Energy Policy Act of 1992 (42 U.S.C. 13503(a)(2)); (2) a National Nuclear Security Administration Defense Programs Technology Deployment Center/User Facility; and (3) any other Departmental facility designated by the Department as a user facility.

Section 501 LOBBYING RESTRICTIONS.

None of the funds appropriated by this Act may be used in any way, directly or indirectly, to influence congressional action on any legislation or appropriation matters pending before Congress, other than to communicate to Members of Congress as described in 18 U.S.C. 1913.

II. Section 301 -- Contract Competition for Management and Operating Contracts or Contracts for Environmental Remediation or Waste Management at a Current or Former Management and Operation Contract Site or Facility

What is the scope of this requirement?

Section 301 applies to (1) any noncompetitively awarded management and operating (M&O) contract, (2) any noncompetitively awarded contract for environmental remediation or waste management over \$100M in annual funding at a current or former M&O contract site or facility, or (3) a significant extension or expansion to (1) and (2) above, unless awarded under full and open competition or the Secretary, on a case-by-case basis, grants a waiver. This waiver authority is not delegable and must be reported to Congress with supporting rationale within 30 days of formally notifying an incumbent contractor.

What is the guidance pertaining to noncompetitively awarded management and operating contracts to include a noncompetitive award or a modification for significant extension or expansion of work?

In order to award a noncompetitive M&O contract, to include an award or a modification for a significant extension or expansion of work, the Contracting Activity shall use the existing policy and procedures set forth at FAR Subpart 6.3, DEAR Subpart 906.3, DEAR 917.602, the DOE Acquisition Guide, Chapter 6.1, Competition Requirements, and Acquisition Letter (AL) 2009-03.

The Office of Contract Management will coordinate the waiver and the congressional notification requirements of Section 301 and the approval of the Justification for Other Than Full and Open Competition (JOFOC) by the Senior Procurement Executive.

What is the guidance pertaining to noncompetitively awarded environmental remediation or waste management contracts at a current or former management and operating contract site or facility contracts to include a noncompetitive award or a modification for significant extension or expansion of work (increase in scope of work)?

In order to award a noncompetitive contract, to include an award or a modification for a significant extension or expansion of work (increase in scope of work), the Contracting Activity shall use the existing policy and procedures set forth at FAR Subpart 6.3, DEAR Subpart 906.3, and the DOE Acquisition Guide, Chapter 6.1, Competition Requirements.

The Office of Contract Management will coordinate the waiver and the congressional notification requirements of Section 301 and the approval of the JOFOC by the Senior Procurement Executive.

III. Section 302 -- Unfunded Request for Proposals

What is the scope of this requirement?

Section 302 of the Omnibus Appropriations Act, 2009, requires that funds appropriated by the Act not be used to prepare or initiate RFPs for a program if the program has not been funded.

What procedures need to be followed to implement this requirement?

- ❖ Contracting activities shall not prepare or initiate RFPs in support of a program or project for which funds have not been appropriated.

IV. Section 306 -- User Facilities

What is the scope of this requirement?

There are three circumstances where Departmental processes are affected by Section 306:

- ❖ Where the Department or its M&O contractor makes a user facility available to universities and other potential users;
- ❖ Where the Department seeks advice or information from universities or other potential users on the significant characteristics or equipment to be used in a user facility or a proposed user facility; and
- ❖ Where the Department seeks to create a formal partnership with a university or other potential user for the establishment or operation of a user facility. This can occur by the Department or its M&O contractor responsible for a DOE user facility.

Note: Normally, neither DOE nor its M&O contractors enter into formal partnerships for the management or operation of a DOE user facility. Accordingly, it is not anticipated that this circumstance will arise.

What procedures need to be followed to implement this requirement?

DOE should assure broad participation by all potential scientific and technical users of the facility. Public notice is provided through publication in the Federal Register or FedBizOpps, in addition to relevant scientific journals.

Any formal partnership between DOE, its M&O contractor, and a private party for the establishment or operation of a user facility must be accomplished through a selection process based on “full and open competition”¹.

Contracting officers should assure that, in the unlikely event that DOE or its M&O contractor seeks to establish a formal partnership for the establishment or operation of a user facility, the competition requirements conform to this AL.

¹ Section 306 uses the phrase “full and open competition,” as used in the Government procurement process. If DOE is not awarding a contract creating a formal partnership, but instead is using a financial assistance instrument or allowing an M&O contractor to subcontract the requirement, a broad public announcement of the funding opportunity is appropriate.

V. Section 501 -- Lobbying Restrictions

What is the scope of this requirement?

Section 501 applies to all solicitations and awards of DOE contracts under which funds appropriated in the Act are obligated.

What procedures need to be followed to implement this requirement?

The following clause shall be incorporated into solicitations and awards of contracts where the expenditure of funds is made available under the Omnibus Appropriations Act, 2009:

Lobbying Restriction (Energy and Water Development and Related Agencies Appropriations Act, 2009)

The contractor agrees that none of the funds obligated on this award shall be expended, directly or indirectly, to influence congressional action on any legislation or appropriation matters pending before Congress, other than to communicate to Members of Congress as described in 18 U.S.C. 1913. This restriction is in addition to those prescribed elsewhere in statute and regulation.

(End of Clause)