



# ACQUISITION LETTER

This Acquisition Letter is issued under the authority of the Senior Procurement Executives of DOE and NNSA. It is intended for use by procurement professionals of DOE and NNSA, primarily Contracting Officers, and other officials of DOE and NNSA that are involved in the acquisition process. Other parties are welcome to its information, but definitive interpretations of its effect on contracts, and related procedures if any, may only be made by DOE and NNSA Contracting Officers.

**Subject:** Implications of Receiving Time-Limited Funds on Contract Planning, Award, and Administration

**References:**

Bona Fide Need Statute	31 U.S.C. § 1502(a)
Federal Acquisition Streamlining Act	41 U.S.C. § 3902
FAR 32.703-3	Contracts Crossing Fiscal Years

**When Is this Acquisition Letter (AL) Effective?**

This AL is effective immediately upon issuance.

**When Does this AL Expire?**

This AL remains in effect until superseded or canceled.

**Who Is the Intended Audience For this AL?**

Department of Energy (DOE) Contracting Officers are the audience for this AL.

**Who Is the Point of Contact For this AL?**

Contracting Officers may contact Michael Righi or Jason Taylor of the Contracts and Financial Assistance Policy Division, Office of Policy, Office of Procurement and Assistance Management by phone at (202) 287-1337 or (202) 287-1945 or by email at [Michael.Righi@hq.doe.gov](mailto:Michael.Righi@hq.doe.gov) or [Jason.Taylor@hq.doe.gov](mailto:Jason.Taylor@hq.doe.gov).

**Need More Information on ALs?**

Visit the website at <http://energy.gov/management/office-management/operational-management/procurement-and-acquisition/guidance-procurement> for information on Acquisition Letters and other policy issues.

**What Is the Purpose Of this AL?**

The purpose of this AL is to provide guidance to Contracting Officers on the implications of time-limited funding on contract planning, award, and administration.

### **What Types of Contracts Are Affected by this AL?**

This AL applies to all contracts funded by: DOE's FY12 Program Direction appropriations; and DOE's FY12 ARPA-E and Other Defense Activities appropriations.

### **What Is the Background Of this AL?**

In contrast to most federal agencies, the Department's appropriations have historically provided most of its funding in the form of "no-year" money. This type of funding may be obligated until expended. In other words, there is no time limit on the use of "no-year" money.

Similar to most federal agencies, the Department's appropriations have occasionally provided funding in the form of time-limited funds, typically referred to as one-year or multiple year appropriations. This type of funding is not available for obligation until expended, but is instead available for obligation only for a definite period, as expressed in the appropriations statute.

### **What Guidance is Included in this AL?**

#### *1. What's new for Contracting Officers?*

For FY12, contrary to past years, multiple appropriations for "Program Direction" activities will provide time-limited funds (a full listing of the appropriations affected is below in number 5). The time limitation will be in the form of "two-year" money, meaning that the money will be available for obligation for two years (from 10/1/2011 until 9/30/2013).

Also for FY12, contrary to past years, the appropriations for ARPA-E and for Other Defense Activities will provide time-limited funds. The time limitation will be in the form of "one-year" money, meaning that the money will be available for obligation for one year (from 10/1/2011 until 9/30/2012).

These changes will require everyone involved in the acquisition process that uses funds in the affected appropriations to perform contract planning, award, and administration differently than in the past. Among other things, requirements officials and contracting officers will have to assess how the *bona fide* needs rule applies to actions funded with FY12 time-limited funds.

#### *Bona fide* needs rule

The *bona fide* needs rule applies to acquiring goods and services using time-limited funds. The rule is derived from the so-called time statute, 31 U.S.C. § 1502(a), which provides, in part, that a fund limited for obligation to a definite period is available only for payment of expenses properly incurred in that period or to complete contracts properly made within that period. The rule limits the use of appropriated, time-limited funds to meet a legitimate need arising during the availability of the particular appropriation or paying for items obtained under contracts awarded per the requirements of 31 U.S.C. § 1502(a). The *bona fide* needs rule does not apply to no-year funds.

## Severability

The Government Accountability Office (GAO) has developed a concept called severability to help determine whether a requirement is a *bona fide* need. Briefly, a requirement is severable if it can be separated into components that independently provide value to the agency.

Severable services tend to be continuing and recurring in nature. The key to determining if a requirement is severable is deciding if the agency realizes a benefit at the time each of the components of the requirement (many services are severable) is provided—it is not relevant whether the contract has or has not been performed to completion. The classic example of a severable requirement is window-washing. Even if only half of the windows are washed, the agency has realized a benefit—it has half of its windows cleaned. When a requirement is severable, each of its separate components must be funded only with the time-limited funds applicable to the period in which the need for the component arises.

Non-severable requirements, on the other hand, involve work that cannot be separated into components for which the agency realizes a benefit at the time each component is provided. Non-severable requirements must be performed as a single effort to meet a single requirement. An example would be a study that must culminate in a final report for the agency to realize a benefit.

## The basic rules for use of time-limited funds

If using time-limited funds, the basic rules are:

For non-severable requirements, agencies may obligate time-limited funds to cover all requirements (such as non-severable services) that will be performed under the entire contract, including the portion of the requirements that will be performed subsequent to the period during which the time-limited funds may be obligated. The entire non-severable requirement (with all of its separate components) is considered a *bona fide* need of the time period that the agency entered into the contract.

For severable requirements, agencies may obligate time-limited funds only to cover the requirements (such as severable services) that will be performed in the period during which the time-limited funds may be obligated. Each of the separate components of the severable requirements must be funded only with the time-limited funds applicable to the period in which the need for the component arises. There is one partial exception to this basic rule for the funding of severable requirements. The Federal Acquisition Streamlining Act (41 U.S.C. § 3902) provides that an agency may enter into a contract, option, or order for severable services that crosses fiscal years and fund it (with all of its components) with funds of the current fiscal year, provided that the period of performance of the contract, option, or order does not exceed one year. The partial exception applies: to one-year funds; and to multiple year funds *in the last year of their availability for obligation* (prior to the last year there is no need for an exception to obligate funds across fiscal years during the normal period of availability).

## DOE's FY12 Time-Limited funds

Since many of DOE's FY12 Program Direction appropriations are two-year appropriations, the funds they provide will be available for the *bona fide* needs of DOE during the two year period starting at the beginning of FY12. In other words, the funds are available for *bona fide* needs arising during the period of October 1, 2011, through September 30, 2013.

Also, since DOE's ARPA-E and for Other Defense Activities appropriations are one-year appropriations, the funds they provide will be available for the *bona fide* needs of DOE during the one year period starting at the beginning of FY12. In other words, the funds are available for *bona fide* needs arising during the period of October 1, 2011, through September 30, 2012.

The partial exception to the basic rule discussed above applies. If a need for severable services arises during FY13 and extends into FY14, FY12 Program Direction funds may be used to contract for all of the services—provided the period of performance of the contract begins on or before September 30, 2013, and does not exceed one year. If a need for severable services arises during FY12, and extends into FY13, FY12 ARPA-E and Other Defense Activities funds may be used to contract for all of the services—provided the period of performance of the contract begins on or before September 30, 2012, and does not exceed one year.

Examples applicable for using DOE's FY12 Time-Limited funds

a) A requirement arises for an in-depth consulting study on Departmental procurement processes, culminating in a final report. The study is to begin on March 1, 2012, its final report is due on January 31, 2014, and it is funded with time-limited funds that are applicable to the period October 1, 2011, through September 30, 2013, (that is, it is funded with FY12 Program Direction funds). May the entire effort be funded with FY12 Program Direction funds?

**Yes. This type of effort is generally considered to be non-severable, so the entire effort is a *bona fide* need of the period in which the agency would enter into the contract, in this case the period October 1, 2011, through September 30, 2013.**

b) A requirement for IT help desk services arises. The basic period of performance of the contract runs from January 1, 2013, through December 31, 2013. May the entire effort be funded with FY12 Program Direction funds?

**Yes. Per the partial exception to the basic rule for severable requirements found in 41 U.S.C. § 3902, discussed above, even though these services are severable and extend into FY14 (which is beyond the period of availability of FY12 Program Direction funds), FY12 Program Direction funds may be used because the contract does not exceed one year.**

2. *What's new for Other Officials Involved in the Acquisition Process?*

All officials involved in the acquisition process must be aware of the implications of time-limited funding, and act in accordance with the relevant laws. Program officials must clearly identify any time-limited funds that they provide to the Contracting Officer for obligation.

3. *Who has what responsibility for implementing this AL's guidance?*

The Contracting Officer has the responsibility of implementing this AL.

4. *What changes implemented by this AL's guidance affect current contracts, future contracts, or both?*

This AL's guidance affects contracts that are funded with time-limited appropriations.

5. *Which appropriations are affected by this change?*

The following FY12 appropriations contain two-year funds:

- Energy Efficiency and Renewable Energy, Program Direction
- Electricity Delivery and Energy Reliability, Program Direction
- Nuclear Energy, Program Direction
- Fossil Energy Research and Development, Program Direction
- Science, Program Direction
- Departmental Administration
- Naval Reactors, Program Direction
- NNSA Office of the Administrator
- Defense Environmental Cleanup, Program Direction
- Other Defense Activities, Program Direction

The following FY12 appropriations contain one-year funds:

- Other Defense Activities
- Advanced Research Projects Agency-Energy