



**Department of Energy
Acquisition Regulation**

**No. AL 2013-08
Date 06/19/2013**

**Department of Energy
Financial Assistance Regulations**

**No. FAL 2013-05
Date 06/19/2013**

ACQUISITION/FINANCIAL ASSISTANCE LETTER

This Acquisition/Financial Assistance Letter is issued under the authority of the DOE and NNSA Senior Procurement Executives.

**Subject: The Whistleblower Protection Enhancement Act of 2012 and How It Affects
Federal Employee Non-Disclosure Policies, Forms, Certificates,
Agreements and Acknowledgments**

References:

Pub.L. 112-199 Whistleblower Protection Enhancement Act of 2012 (WPEA)
U.S. Office
of Special Counsel Memorandum for Executive Departments and Agencies on
“The Whistleblower Protection Act of 2012 and Non-Disclosure Policies,
Forms and Agreements”
DOE Merit Review Guide for Financial Assistance
DOE Acquisition Guide Chapter 15.1, Source Selection

When is this Acquisition Letter (AL)/Financial Assistance Letter (FAL) Effective?

This AL/FAL is effective immediately upon issuance.

When does the AL/FAL Expire?

This AL/FAL remains in effect until superseded or canceled.

Who Is the Intended Audience For this AL/FAL?

Department of Energy (DOE) and National Nuclear Security Administration (NNSA)
Contracting Officers who are responsible for using Nondisclosure Policies, Forms,
Certifications, Agreements and Acknowledgments are the audience for this AL/FAL.

Who are the Points of Contact?

For questions concerning the Whistleblower Protection Enhancement Act of 2012 or the April
24, 2013 DOECAS, contact Beth Kelly, Deputy Assistant General Counsel for Procurement
and Financial Assistance at (202) 586-6906 or beth.kelly@hq.doe.gov.

For DOE, contact Richard Bonnell of the Contract and Financial Assistance Policy Division, Office of Policy, Office of Acquisition and Project Management at (202) 287-1747 or richard.bonnell@hq.doe.gov; or for NNSA, contact Kim Gallegos at (202) 586-8069 or kim.gallegos@nnsa.doe.gov.

What is the Purpose of this AL/FAL?

The purpose of this AL/FAL is to provide Contracting Officers with notice of the recently passed, Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub.L. 112-199, and the DOECAST issued in response on April 24, 2013. This AL/FAL informs DOE/NNSA Contracting Officers to update any Non-Disclosure Policies, Forms, Certificates, Agreements, and Acknowledgements (collectively "NDAs") to be used with Federal employees participating in proposal or application evaluations, source selection committees as well as in merit review boards, to conform to the new requirements of this law. It also informs DOE/NNSA Contracting Officers on how to document the notification to Federal employees of the new protections stated in the WPEA if they have signed NDAs without the new statement as required by the WPEA.

What is the Relevant Background Information?

The WPEA was signed into law on November 27, 2012 and became effective on December 26, 2012. The WPEA modifies rules on the use of agencies' NDAs with their employees by requiring the NDAs to contain standard language, as set forth below. The WPEA strengthens protections for **Federal employees** who disclose evidence of waste, fraud, or abuse. In addition, the WPEA modifies rules on the use of NDAs by government agencies. Section 104 of the WPEA amends section 2302(b) of Title 5 of the United States Code, making it a prohibited personnel practice to "implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the following statement:

These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling."

At DOE/NNSA, NDA forms are commonly used for evaluators and others receiving access to source selection and merit review information. DOE/NNSA must update NDAs by adding the above statement to conform to the WPEA's notification requirements.

In the case of NDAs in effect before the WPEA's effective date (Dec. 26, 2012) or those without the new required statement, DOE/NNSA can continue to enforce an existing NDA that does not contain the new statement if DOE/NNSA gives the Federal employee notice of the new statement. To cure non-complying NDAs and avoid the need to reissue current NDAs for

current employees, DOE/NNSA sent a Department-wide e-mail (April 24, 2013 DOECAST) which notified employees of the WPEA and the new notification statement required for all Federal employee NDAs. The April 24, 2013 DOECAST stated:

“On November 27, 2012, President Obama signed into law the Whistleblower Protection Enhancement Act of 2012 (“WPEA”). The WPEA strengthens the protections for federal employees who disclose evidence of waste, fraud, or abuse. The WPEA also requires that any non-disclosure policy, form, agreement, or acknowledgement (collectively, “NDAs”) include the statement below, and provides that NDAs executed without the statement below may be enforced as long as agencies give employees notice of the statement. This communication serves as that notice to employees.

As a DOE employee, you may have been required to sign an NDA to access classified or other information. You should read the statement below as if it were incorporated into any non-disclosure policy, form, agreement, or acknowledgement you have signed:

These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to: (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provision are incorporated into this agreement and are controlling.

Employees are reminded that reporting evidence of fraud, waste, or abuse involving classified information programs must continue to be made consistent with established rules and procedures designed to protect classified information.

If you have any questions, please contact Beth Kelly at (202)586-6906.”

What is the Applicability of this AL/FAL?

This AL/FAL is applicable to all DOE elements, including the NNSA, which utilizes NDAs for **Federal employees** that participate in proposal or application evaluations, source selection committees as well as in merit review boards. This AL/FAL is inapplicable to non-Federal employees.

What Guidance is Included in this AL/FAL?

1. In accordance with the WPEA’s requirements, DOE/NNSA must ensure that NDAs applicable to Federal employees contain the new notification statement required by the

WPEA. Accordingly, the following statement should be incorporated into every NDA used by DOE/NNSA for Federal employees:

These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.

Attachments 1 and 2 provide samples for procurement and financial assistance NDAs.

2. If COs need to confirm that the Federal employees who have signed NDAs without the new required statement have been notified of the new protections stated in the WPEA, COs can email the following statement to those who are participating in current source selections or merit reviews and place a copy of the email with the associated NDAs.

Dear [DOE/NNSA Employee participating in a source selection or merit review]:

The Whistleblower Protection Enhancement Act of 2012 (WPEA) was signed into law by President Obama on November 27, 2012. The law strengthens the protections for federal employees who disclose evidence of waste, fraud, or abuse. The WPEA also requires that any non-disclosure policy, form, certificate, agreement or acknowledgement (NDA) include the statement copied below, and provides that NDAs executed without the language may be enforced as long as agencies give employees notice of the statement. This communication serves as that notice to employees.

As a Department of Energy employee participating in [source selection/merit review title] you have been required to sign an NDA to receive [source selection information, or merit review information]. You should read this statement as if it were incorporated into any non-disclosure policy, form, certificate, agreement or acknowledgement you have signed.

These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.

Attachments

U.S. Office of Special Counsel's Memorandum for Executive Departments and Agencies on
"Whistleblower Protection Act of 2012 and Non-Disclosure Policies, Forms and Agreements"

Attachment 1
Sample Source Selection COI/NDA

CONFIDENTIALITY CERTIFICATE

As a participant in the source selection process for _____, I certify that I will not disclose any information concerning this procurement, during the proceedings or at any subsequent time, to anyone outside the Source Evaluation Board (SEB) who is not authorized, in accordance with DOE regulations or procedures, by the agency head or the contracting officer to receive such information. I understand that unauthorized disclosure of such information may subject me to administrative, civil, and criminal penalties, including fines, imprisonment, and loss of employment under the Procurement Integrity Act (41 U.S.C. §§ 2101 et seq.). I will only use the information obtained during the source selection process for official purposes related to this procurement. Furthermore, I will report to the Contracting Officer any communication concerning the procurement or the SEB's composition directed to me by anyone outside the SEB.

For Federal employees, these provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to: (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.

Printed Name

Printed Name of Company or Agency/Office

Signature

Date

ATTACHMENT 2- Sample Merit Review COI/NDAs for Federal Employees

U.S. DEPARTMENT OF ENERGY
CONFLICT-OF-INTEREST/NON-DISCLOSURE CERTIFICATE
For
Merit Reviewers Involved in the Selection of

INSERT TITLE
INSERT FINANCIAL ASSISTANCE OPPORTUNITY ANNOUNCEMENT NUMBER

The Department of Energy has a policy that individuals with a conflict of interest cannot participate in the merit review of a financial assistance Application. This certification must be completed by DOE or Federal employees prior to their participation in the merit review process.

1. I will not participate in the review of any financial assistance Application involving a particular matter that would have a direct and predictable effect on any person, company or organization with which I have a relationship, financial or otherwise. For purposes of this statement, the interests of my spouse, my minor child, my general partner, any organization in which I serve as officer, director, trustee, general partner, or employee, and any person or organization with whom I am negotiating employment, are attributed to me.
2. Further, I will not participate in the review of any financial assistance Application involving a particular person or a particular matter that I believe would cause a reasonable person with knowledge of the relevant facts to question my impartiality.
3. Prior to my participation as a merit reviewer, I agree that I will disclose any actual or perceived conflicts of interest that I may have with such duties. In addition, I agree to disclose any actual or perceived conflicts of interest as soon as I am aware of the conflict.
4. I certify that I will not disclose, except pursuant to the order of a court of competent jurisdiction, any information concerning the assessment and analysis or the content of Applications/proposals either during the proceedings of the merit review or at any subsequent time, to anyone who is not authorized access to the information by the Department of Energy or by law or regulation, and then only to the extent that such information is required in connection with such person's official responsibilities. Furthermore, I will report to the DOE Official responsible for the process any communication concerning the assessment and analysis or the individuals involved in the assessment and selection and activities directed to me from any source outside this process.
5. These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or

safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.

Signature/Date: _____

Name/Title: _____

Phone number: _____

Email address: _____