



## **AL-2004-02 (02/27/04)**

### **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 the following statutory provisions and legislative direction.

- ❖ Sections 301, 304, 307, 501 and 502 of the Energy and Water Development Appropriations Act, 2004, Pub. L 108-137, hereinafter referred to as the "Energy and Water Act."
- ❖ Sections 301, 302, 340, and an administrative provision contained in the Department of Interior and Related Agencies Appropriations Act, 2004, Pub. L. 108-108, hereinafter referred to as the "Interior Act."
- ❖ Sections 1411-1414, 1421-1423, 1426-1428, 1431-1433, and 1441-1443 of the National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136, hereinafter referred to as the "Defense Authorization Act."
- ❖ Sections 602, 617, 621, 624, 631, 637, 638, and 645 of Division F of the Consolidated Appropriations Act, 2004, Pub. L. 108-199, hereinafter referred to as the "Consolidated Appropriations Act."

Detailed guidance regarding the scope of these provisions is provided below.

### **What is the Background?**

Sections 304, 307, 501, and 502 of the Energy and Water Act are carried-over from the FY 2003 Energy and Water Development Appropriations Act (Pub. L. 108-7 (Division D)). However, while Section 301 numbering is consistent with previous Energy and Water appropriations legislation, the direction provided by Congress regarding the extend/compete process for 5 Management and Operating (M&O) contracts is significantly changed.

Sections 301, 302, and the unnumbered provision are carried-over from the FY 2003 Department of Interior and Related Agencies Appropriations Act (Pub. L. 108-7 (Division F)). New to the Interior Act this year is Section 340, Justification of Competitive Sourcing Activities, which limits competitive sourcing studies, among other things.

Sections 1411-1414, 1421-1423, 1426-1428, 1431-1433, and 1441-1443 comprise Title XIV of the Defense Authorization Act which may be cited as Services Acquisition Reform Act of 2003 (SARA).

Sections 602, 617, 621, 624, 631, 637, 638, and 645 of the Consolidated Appropriations Act are acquisition related provisions with government-wide applicability, which requires implementation through the Federal Acquisition Regulation or other appropriate mechanism.

**Guidance Included in this Acquisition Letter**

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## I. Summaries of Statutory Provisions, Legislative Direction, and Statutory Impact

### Energy and Water Act

**Section 301.** Prohibits the use of funds appropriated by this Act, or any other appropriations Act for FY 2004 or any previous year, to make payments for a noncompetitive management and operating contract (M&O) unless, not later than 60-days after enactment of this Act, the Secretary of Energy publishes in the Federal Register and submits to the Committees on Appropriations of the House and Senate a written notification, with respect to each contract, of the decision to use competitive procedures for the award of the contract, or not to renew the contract, when the term of the contract expires. Also, notwithstanding the above, the Secretary may use appropriated funds to maintain operations of noncompetitive management and operating contracts as necessary during the 60-day period beginning on the date of enactment of this Act. In addition, this direction does not apply to an extension for up to 2 years of a noncompetitive M&O contract, if the extension is for purposes of allowing time to competitively award a new contract, provide continuity of service between contracts, or complete a contract that will not be renewed. The term “noncompetitive management and operating contract” means a contract that was awarded more than 50 years ago without competition for the management and operation of Ames National Laboratory, Argonne National Laboratory, Lawrence Berkeley National Laboratory, Lawrence Livermore National Laboratory, and Los Alamos National Laboratory.

The list below highlights the differences between earlier versions of the Section 301 requirement and FY 2004 Section 301 requirement.

<u>Prior Years' E&amp;W Section 301</u>	<u>FY 2004 E&amp;W Section 301</u>
<ul style="list-style-type: none"> <li>✓ Secretary must grant (authorize) a waiver for deviation to the competitive process.</li> <li>✓ Authority is not delegable.</li> <li>✓ Justify to Congress, 60 days before Secretary's intent to grant a waiver (30 days in FY 2003).</li> </ul>	Requires Department of Energy to compete 5 laboratories.

In contrast to previous years' Energy and Water Acts, the Act for 2004 no longer generally obligates the Department to compete its M&O contracts or provide Secretarial notification to Congress in the absence of competition.

**Section 304.** Prohibits the use of funds appropriated in the Energy and Water Act to prepare or initiate Request For Proposals (RFPs) for a program if Congress has not funded the program.

**Section 307.** Directs the Department of Energy to ensure that broad public notice be given when a user facility is available to universities and other potential users or when the Department of Energy seeks input from universities and other potential users regarding significant characteristics or equipment in a user facility or a proposed user facility. In addition, this provision further requires the Department of Energy to employ “full and open competition”<sup>1</sup> in selecting a university or other potential users as a formal partner in the establishment or operation of a user facility.

**Section 501.** Prohibits the use of funds appropriated in the Act, either directly or indirectly, to influence congressional action on any legislation or appropriation matter pending before Congress, other than to communicate to Members of Congress as described in section 1913 of title 18, United States Code.

**Section 502.** Provides that it is the sense of Congress that, to the greatest extent practicable, all equipment and products purchased with funds appropriated by this Act should be American-made. Additionally, when providing financial assistance to or entering into any contract with any entity notice of this policy shall be given. This section prohibits the award of contracts and subcontracts to persons who falsely label products as made in America. Persons determined by a court or Federal agency to have intentionally affixed such a false label, or any inscription with the same meaning, will be ineligible to receive any contract or subcontract using funds made available in the Act, pursuant to the debarment, suspension, and ineligibility procedures contained in FAR 9.4.

### **Interior Act**

**Section 301.** Provides, with respect to funds appropriated under this Act, that any publicly funded consulting service contract pursuant to 5 U.S.C. 3109 be limited to those contracts where expenditures are a matter of public record and are available for public inspection, except where otherwise provided by law or Executive order.

**Section 302.** Prohibits the use of funds appropriated in this Act for any activity or the publication/distribution of literature to promote public support or opposition to any legislative proposal on which Congressional action is not complete.

**Administrative Provision (unnumbered).** Similar to Section 304 of the Energy and Water Act, this section of the Interior Act prohibits the use of funds appropriated in this Act to prepare, issue, or process procurement documents for programs or projects for which appropriations have not been made.

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<sup>1</sup>See Item IV. User Facilities.

**Section 340.** Provides that beginning in fiscal year 2005 each budget submitted to the Congress in accordance with 31 USC 1105 shall separately identify amounts requested to perform competitive sourcing studies for programs, projects and activities within the DOE for which funds are appropriated by this Act. This provision includes annual reporting requirements to begin December 31, 2003.

FY 2004 limits the funds made available to DOE and DOI, by this or any other Act, for competitive sourcing studies. Not more than \$500,000 may be used by the Secretary of Energy to initiate or continue competitive sourcing studies in FY 2004 for programs, projects, and activities for which funds are appropriated by this Act, until such time as the Secretary submits a reprogramming proposal that has been processed consistent with the FY 2004 reprogramming guidelines.

Limits the conversion to contractor performance by DOE of an activity or function performed under programs, projects, and activities for which funds are appropriated by this Act, if such activity or function is performed on or after the date of the enactment of the Act by more than 10 Federal employees unless-

- ❖ The conversion is based on the result of a public-private competition that includes a more efficient and cost effective organization plan developed by the activity or function; and
- ❖ The Competitive Sourcing Official determines that, over all performance periods stated in the solicitation for performance of the activity or function, the cost of performance of the activity or function by a contractor would be less costly to the Federal Government by an amount that equals or exceeds the lesser of 10% of the more efficient organization's personnel related costs or \$10,000,000.

#### **Legislative Direction - Energy and Water Act**

**Augmenting Federal Staff.** Directs the Department of Energy not to exceed 220 management and operating contractor employees assigned to the Washington metropolitan area for fiscal year 2004, the same ceiling as fiscal year 2003. The reporting requirements shall remain the same.

#### **Statutory Impact – Defense Authorization Act and Consolidated Appropriations Act**

The Defense Authorization Act and the Consolidated Appropriations Act contain various acquisition reform provisions. These provisions may require uniform government-wide implementation. Requirements and authorities that have a direct impact on DOE will be addressed through the Federal Acquisition Rulemaking process or other appropriate channels. When additional information is warranted, further guidance will be provided.

## II. Competitive Procedures

### **What is the scope of this requirement?**

The requirements of Section 301 of the Energy and Water Act apply to 5 (Ames National Laboratory, Argonne National Laboratory, Lawrence Berkeley National Laboratory, Lawrence Livermore National Laboratory, and Los Alamos National Laboratory) Federally Funded Research and Development Centers (FFRDC) managed by M&O contractors. The Energy and Water Act provides that funding may be used to maintain operations of identified sites during the 60 day period beginning on the date of enactment of this Act. Also established, is an extension for up to 2 years on identified noncompetitive management and operating contracts if the extension is to allow time to competitively award a new contract, provide continuity of service between contracts, or complete a contract that will not be renewed. Accordingly, on January 27, 2004, the Secretary announced in the Federal Register, 69 Fed. Reg. 3904 (2004) his decision to use competitive procedures described in Section 301 to award the Ames National, Argonne National, Lawrence Berkeley National, and Lawrence Livermore National Laboratories. This notice is consistent with the Secretary's previous decision announced April 30, 2003 to competitively award the Los Alamos National Laboratory M&O contract.

In conjunction with the decisions regarding the 5 Laboratories discussed in Section 301, the Secretary on January 30, 2004, announced the extension and competition of 5 M&O contracts for additional science and national defense laboratories (Thomas Jefferson National Accelerator Facility, Stanford Linear Accelerator Center, Fermi National Accelerator Center, Brookhaven National Laboratory, and the National Renewable Energy Laboratory). This action is consistent with the Secretary's belief that a competitive environment is generally desirable for the effective and efficient operation of our laboratories.

### **What procedures need to be followed to implement this requirement?**

The existing policy and procedure regarding the extend/compete process, specifically AL 96-09, remains unchanged and continues to affect all M&O contracts.

### III. Preparation and Issuance of Procurement Documents for Unfunded Programs

#### What is the scope of this requirement?

The requirement of Section 304 of the Energy and Water Act and the unnumbered administrative provision contained in the Interior Act apply to Departmental initiatives for a program or project that has not been funded by Congress:

- ❖ Section 304 of the Energy and Water Act requires that funds appropriated by the Act shall not be used to prepare or initiate RFPs for a program if the program has not been funded.
- ❖ The unnumbered administrative provision of the Interior Act prohibits the use of funds to prepare, issue, or process procurement documents for programs or projects for which appropriations have not been made.

#### What procedures need to be followed to implement this requirement?

- ❖ For programs funded by the Energy and Water Act, contracting activities shall not prepare or initiate RFPs, in support of a program or project for which funds have not been appropriated.
- ❖ For programs funded by the Interior Act, contracting activities shall not prepare, issue, or process procurement documents in support of a program or project for which funds have not been appropriated.

#### Energy and Water Act (Programs)

Energy Supply  
Non-Defense Environmental Management  
Uranium Facilities Maintenance and Remediation  
Science  
Nuclear Waste Disposal  
Departmental Administration  
Office of Inspector General  
Power Marketing Administrations  
Federal Energy Regulatory Commission  
National Nuclear Security Administration  
Defense Environmental Management

#### Interior Act (Programs)

Naval Petroleum and Oil Shale  
Reserves  
Elk Hills School Lands Fund  
Strategic Petroleum Reserve  
Clean Coal Technology  
Economic Regulation  
Energy Information  
Administration  
Energy Conservation  
Fossil Energy Research &  
Development

**Energy and Water Act (Programs cont.)**

Defense Nuclear Waste Disposal  
Energy Security and Assurance  
Security  
Intelligence  
Counterintelligence  
Independent Oversight and Performance Assurance  
Environmental, Safety and Health  
Worker and Community Transition  
Hearing and Appeals

**IV. User Facilities**

**What is the scope of this requirement?**

There are three circumstances under which Departmental processes are affected by Section 307:

- ❖ The first circumstance is where the Department or its management and operating (M&O) contractor makes a user facility available to universities and other potential users;
- ❖ The second is 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
- ❖ The third instance is 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 in two ways: (1) the Department seeks to enter into a formal partnership with a private party to establish or operate a user facility; or (2) a DOE contractor responsible for the management and operation of a DOE user facility seeks to enter into a formal partnership with a university or other potential user to establish or operate a user facility.

*Note: Normally, neither DOE nor its M&O contractors enter into formal partnerships for the management or operation of DOE user facilities. Rather, the operation of these facilities is accomplished under contractual service arrangements, which do not contain legal indicia of a formal partnership. Accordingly, it is not anticipated that this circumstance will arise.*

**What procedures need to be followed to implement this requirement?**

In the first two circumstances as noted on the previous page, DOE should assure that the activities are conducted in a manner that promotes broad participation by all potential scientific and technical users of the facility. The DOE or contractor program element with responsibility for a user facility should ensure that broad public notice of these two activities is provided through publication in the Federal Register or FedBizOpps, in addition to relevant scientific journals.

The third circumstance requires that any formal partnership between DOE, its M&O contractor, and a private party for the establishment or operation of a user facility be accomplished through a selection process based on “full and open competition”<sup>2</sup>.

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.

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2 Section 307 uses the phrase “full and open competition.” That phrase is a term of art in the Government procurement process. Where 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 in creating a formal partnership, a broad public announcement of the opportunity being open to all will satisfy the statute.

## V. Lobbying Restrictions

### **What is the scope of this requirement?**

Section 501 of the Energy and Water Act and Section 302 of the Interior Act apply, respectively, to all solicitations and awards of DOE contracts under which funds appropriated in these Acts 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 Energy and Water Act:

#### ***Lobbying Restriction (Energy and Water Act 2004)***

*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)

The following clause shall be incorporated into solicitations and awards of DOE contracts where the expenditure of funds is made available in the Interior Act:

#### ***Lobbying Restriction (Interior Act 2004)***

*The contractor agrees that none of the funds obligated on this award shall be made available for any activity or the publication or distribution of literature that in any way tends to promote public support or opposition to any legislative proposal on which Congressional action is not complete. This restriction is in addition to those prescribed elsewhere in statute and regulation.*

(End of Clause)

**VI. Purchase of American-Made Equipment and Products-Sense of Congress**

**What is the scope of this requirement?**

Section 502, paragraphs (a) and (b) of the Energy and Water Act apply to all solicitations and awards of contracts using funds appropriated in the Act.

**What procedures need to be followed to implement this requirement?**

The following notice shall be incorporated into solicitations and awards of contracts using funds appropriated in the Energy and Water Act.

*Notice Regarding the Purchase of American-Made Equipment and Products-Sense of Congress.*

*It is the sense of the Congress that, to the greatest extent practicable, all equipment and products purchased with funds made available under this award should be American – Made.*

(End of Notice)

**VII. Prohibition of Contracts with Persons Falsely Labeling Products as Made in America**

**What is the scope of this requirement?**

Section 502, paragraph (c), of the Energy and Water Act, applies to all contracts, and subcontracts, under which funds are appropriated in this Act and obligated.

**What procedures need to be followed to implement this requirement?**

Pursuant to FAR 9.405(b), awards shall not be made to entities that are included on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

If DOE, or contractor personnel become aware of any possible violation of the prohibition against falsely labeling products as made in America, and the entity is not on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs, the matter should be promptly reported through the Contracting Officer. The report of an entity in violation of the prohibition against falsely labeling products as American-Made should be submitted to the Office of Management Systems, Office of Procurement and Assistance Management, for potential debarment of the entity pursuant to FAR 9.406-2(a)(4) and 9.406-2(b)(1)(iii). For NNSA contracts, the Office of Management Systems will coordinate its activities with the NNSA Office of Procurement and Assistance Management.

## VIII. Legislative Direction - Energy and Water

### Augmenting Federal Staff

#### **What is the scope of this requirement?**

The Department is to provide a report on the use of M&O contractor employees assigned to the Washington metropolitan area. The report is to include detailed information for each support service contract at Headquarters. The committee agrees that the number of M&O contractor employees assigned to the Washington metropolitan area shall not exceed 220.

#### **What procedures need to be followed to implement this requirement?**

Controls for the use of facility contractor employees for services in the Washington metropolitan area are established in DOE Order 350.2, "Use of Facility Contractor Employees for Services to DOE in the Washington, D. C. Area." The Headquarters Office of Contract Management is responsible for preparation and submission of the report to Committee.