

Department of Energy
Assistance Regulation

No. AL-2008-04
Date 02/21/08



ACQUISITION LETTER

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

**Subject: Implementation of the Consolidated Appropriations Act, 2008
(Energy and Water Development and Related Agencies Appropriations Act, 2008)**

References:

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|---------------------------------------|---|
| Consolidated Appropriations Act, 2008 | Pub. L. 110-161, sections 301, 302, 307, 311 and 501 |
| FAR Part 6 | Competition Requirements |
| DEAR 906.3 | Other Than Full and Open Competition |
| DEAR 917.6 | Management and Operating (M&O) Contracts |
| DEAR 970.1706-1 | Award, Renewal, and Extension |
| DOE Acquisition Guide | Chapter 6.1, Competition Requirements |
| Acquisition Letter 96-09 | Extend and Compete Process of M&O Contracts |
| Acquisition Letter 2005-14 | 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 Act. The Consolidated Appropriations Act, 2008, was enacted December 26, 2007.

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This AL remains in effect until superseded or canceled.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, 307, 311, and 501 of the Consolidated Appropriations Act, 2008.

What is the Background?

This AL implements certain provisions contained in the Consolidated Appropriations Act, 2008, Public Law 110-161.

Note that the provisions of the Consolidated Appropriations Act, 2008 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

Energy and Water Development and Related Agencies Appropriations Act, 2008

Section 301 CONTRACT COMPETITION.

(a) None of the funds in this or any other Appropriations Act for fiscal year 2008 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) 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.

(c) 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.

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 307 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 311 USE PERMIT.

The Use Permit granted to the contractor for activities conducted at the Pacific Northwest National Laboratory by Agreement DE-GM05-00RL01831 between the Department of Energy and the contractor shall continue in effect during the term of the existing Operating Contract and the extensions or renewals thereof and shall be incorporated into any future management and operating contract for the Pacific Northwest National Laboratory and such Use Permit may not be waived, modified or terminated unless agreed to by both contractor and the Department of Energy. (Local implementation is required by Pacific Northwest National Laboratory.)

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. 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 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 procedures need to be followed to implement this requirement?

Noncompetitive management and operating contracts to include awards of significant extension or expansion

In order to execute a noncompetitive management and operating contract, to include an award or modification of significant extension or expansion, the Contracting Activity shall use the existing policy and procedures set forth at DEAR Subpart 906.3, the DOE Acquisition Guide, Chapter 6.1, Competition Requirements, and FAR Subpart 6.3. In addition to providing for full and open competition in accordance with the policies and procedures set forth at DEAR Subpart 917.602 and FAR Part 6, the Contracting Activity shall use the existing policy and procedures regarding the extend/compete process found in Acquisition Letter (AL) 96-09, which provides for the use of competition in the award of M&O contracts while maintaining the benefits of long term contract relationships. Should a Contracting Activity believe a noncompetitive extension or expansion is necessary, the Head of the Contracting Activity (HCA) shall have the Contracting Officer begin an extend-competes review, prepare the necessary documentation specified at Attachment A of AL 96-09, and forward the documentation to the Senior Procurement Executive (SPE).

The SPE will coordinate the request with other appropriate Headquarters Officials, prepare a waiver and supporting documentation and refer the matter to the Secretary for consideration. If the Secretary approves the waiver, the Secretary will notify Congress within 30 days of formally notifying the incumbent contractor of the intention to grant a waiver. The SPE will notify the HCA when Congress receives the notice; then, the HCA may initiate the noncompetitive action.

Noncompetitive environmental remediation or waste management contracts at a current or former management and operating contract site or facility contracts to include awards of significant extension or expansion related to the contract.

The Contracting Activity shall use the existing policy and procedures set forth at DEAR Subpart 906.3; the DOE Acquisition Guide, Chapter 6.1, Competition Requirements; and FAR Subparts 6.2 and 6.3. The documentation shall set forth, in specificity, the substantive reasons why the HCA believes the requirement for competition should be waived for this particular action. The HCA shall require the Contracting Officer to coordinate preparation of the necessary documentation as follows: (1) a justification for other than full and open competition prepared in accordance with FAR Part 6, the DEAR Subpart 906.3 and the DOE Acquisition Guide, Chapter 6.1, Competition Requirements; (2) a separate certification by the HCA and the cognizant program Assistant Secretary(s) that the use of full and open competition is not in the best interests of the Department; and (3) substantive reasons why the HCA believes competition should be waived for this particular action. The Contracting Activity shall forward the documentation to the SPE.

The SPE will coordinate the request with appropriate Headquarters Officials, prepare a waiver and supporting documentation as required by Section 301 and refer the matter to the Secretary for consideration. If the Secretary approves the waiver, the Secretary will notify Congress within 30 days of formally notifying the incumbent contractor of the intention to grant a waiver. The SPE will notify the HCA when Congress receives the notice; then, the HCA may continue the noncompetitive action.

III. Unfunded Request for Proposals

What is the scope of this requirement?

Section 302 of the Consolidated Appropriations Act, 2008, 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. User Facilities

What is the scope of this requirement?

There are three circumstances where Departmental processes are affected by Section 307:

- ❖ 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.

V. 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 Energy and Water Development and Related Agencies Appropriations Act, 2008:

1 Section 307 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 will suffice.

Lobbying Restriction (Energy and Water Development and Related Agencies Appropriations Act, 2008)

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)