



ACQUISITION LETTER

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

Subject: Implementation of Fiscal Year (FY) 2006 Legislative Provisions

References:

DEAR 917.6 Management and Operating Contracts
DEAR 970.1706-1 Award, Renewal, and Extension

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 Energy and Water Development Appropriations Act, 2006, was enacted November 19, 2005. The Energy Policy Act of 2005 (EPAct 05) was effective August 8, 2005.

When Does This AL Expire?

This AL remains in effect until superseded or canceled.

Who is the Point of Contact?

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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.

- ❖ Sections 301, 304, 307, and 501 of the Energy and Water Development Appropriations Act, 2006.

- ❖ EAct 05 which was previously discussed in Acquisition Letters 2005-14, 2006-02 and 2006-03.

What is the Background?

This AL implements certain provisions contained in the Energy and Water Development Appropriations Act, 2006, Public Law 109-103. Unlike prior years, consistent with the reorganization of the subcommittees within the House Committee on Appropriations, all Department of Energy programs are funded within this bill rather than being contained in the Interior and Related Agencies Appropriations Act, as well as in the Energy and Water Development Appropriations Act.

There were additional procedures relating to competitive procedures for management and operating contracts in Section 995 of the EAct 05. That section provides an exemption from the Congressional notification requirements of the prior year's appropriation act for Lawrence Livermore, Los Alamos, Sandia, and Savannah River National Laboratories on the ground that they have been or are being competed.

Sections 301, 304, 307, and 501, of the Energy and Water Development Appropriations Act, 2006, are carried-over from the FY 2005 Energy and Water Development Appropriations Act, Pub. L. 108-447.

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

Energy and Water Development Appropriations Act, 2006,

Section 301. (a)(1) Prohibits the use of funds appropriated by this or any other Appropriations Act, for FY 2006, or any previous year, to make *payments* for a noncompetitive management and operating contract unless the Secretary of Energy has published in the Federal Register and has submitted to the Committees on Appropriations of the House and Senate a written notification of the Secretary's decision to use competitive procedures for the award of the contract, or to not renew the contract when the term of the contract expires.

(a)(2) Notwithstanding paragraph (1), this does not apply to an extension for up to 2 years of a noncompetitive management and operating contract, if the extension is for purposes of allowing time to competitively award a new contract in order to provide continuity of service between contracts, or complete a contract that will not be renewed.

(b)(1) 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 Laboratory, Argonne National Laboratory, Lawrence Berkeley National Laboratory, Lawrence Livermore National Laboratory, and Los Alamos National Laboratory.

(b)(2) The term "competitive procedures" means procedures under which an agency enters into a contract pursuant to full and open competition" and includes competition procedures other than a procedure that solicits a proposal from only one source.

(c) For all management and operating contracts other than the five identified Laboratory contracts [(b)(1) above], none of the funds appropriated by this Act may be used to *award* a management and operating contract, or award a significant extension or expansion to an existing management and operating contract, 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. At least 60 days before a contract award for which the Secretary intends to grant such a waiver, the Secretary shall submit, to the Committees on Appropriations of the House of Representatives and the Senate, a report notifying the Committees 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 304. Prohibits the use of funds appropriated in the Energy and Water Development Appropriations Act, 2006, to prepare or initiate a Request For Proposals (RFPs) for a program if the program has not been funded by Congress.

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” in selecting a university or other potential users as a formal partner in the establishment or operation of a user facility. 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 of 1992 (42 U.S.C. 13503(a)(2)); (2) A National Nuclear Security Administration Defense Programs Technology Development Center/User Facility; and (3) any other Departmental facility designated by the Department as 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.

Energy Policy Act of 2005

Section 995 Prohibits the use of funds authorized in the appropriation to award a management and operating contract for a National Laboratory (excluding Lawrence Livermore, Los Alamos, Sandia, and Savannah River National Laboratories) unless the contract is awarded competitively or the Secretary grants a waiver. The Secretary may not delegate authority to make the waiver and shall submit to Congress a report notifying it of the waiver and setting forth the reasons for the waiver at least 60 days prior to the date of award of such contract.

II. Competitive Procedures for Management and Operating Contracts

What is the scope of this requirement?

The requirements of Section 301 of the Energy and Water Development Appropriations Act, 2006, apply to 5 management and operating contracts (Ames Laboratory, Argonne National Laboratory, Lawrence Berkeley National Laboratory, Lawrence Livermore National Laboratory, and Los Alamos National Laboratory) which are Federally Funded Research and Development Centers (FFRDC), *and to all other management and operating contracts*, including awards of significant extensions or expansions to existing contracts.

Section 301 of the Energy and Water Development Appropriations Act, 2006, provides that funding may be used to maintain operations of the five FFRDCs identified when the Secretary of Energy publishes in the Federal Register and submits to the Committees on Appropriations of the House and Senate a written notice 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. However, this requirement does not apply to an extension of up to 2 years of a noncompetitive management and operating contract, if the extension is for the purpose of allowing time to competitively award a new contract in order to provide continuity of services between contracts, or complete a contract that will not be renewed.

For all other management and operating contracts and all awards of a significant extension or expansion to an existing management and operating contract, the Energy and Water

Development Appropriations Act, 2006 requires the award to be based on competitive procedures unless the Secretary of Energy grants, on a case-by-case basis, a waiver to allow for a deviation. This waiver decision may not be delegated. *This requirement affects new management and operating contracts, amendments, and modifications* that extend existing management and operating contracts beyond the term provided for in the contract (except as noted below) that are awarded using funds appropriated in this Act without providing for full and open competition in accordance with the policies and procedures set forth at DEAR 917.602(b) and FAR Subpart 6.3. Section 301 and the guidance set forth herein, do not apply to the exercise of an option in accordance with DEAR 970.1706-1.

Similarly, Section 995 of the EPOA provides that *all management and operating contract awards* with the exception of the Lawrence Livermore, Los Alamos, Sandia and Savannah River National Laboratories, must be competitively awarded unless the Secretary grants a waiver after Congressional notification is provided. Section 995 of the Energy Policy Act is covered in Acquisition Letter (AL) 2005-14.

What procedures need to be followed to implement this requirement?

In order to execute a noncompetitive extension of a management and operating contract, the Contracting Activity shall use the existing policy and procedures regarding the extend/compete process found in AL 96-09, which provides for the use of competition in the award of management and operating contracts while maintaining the benefits of long term contract relationships. AL 96-09 uses a class deviation to FAR 17.605(b), which allows a 10 year term for management and operating contracts, consisting of a 5 year base period and a 5 year option period. When the Head of the Agency has approved the use of a long term contract, the Head of the Contracting Activity, with the concurrence of the Program Assistant Secretary, may execute an option to extend the contract if performance under the base period has been satisfactory.

Should a Contracting Activity believe a noncompetitive extension of a management and operating contract to be necessary, the Head of the Contracting Activity shall have the Contracting Officer begin an extend-competitiveness review, prepare the necessary documentation specified at Attachment A of AL 96-09, and forward the documentation to the Procurement Executive. These procedures are not required for noncompetitive extensions, not to exceed 2 years, needed to compete the contract or to complete and closeout the contract.

The Procurement Executive will coordinate the request with other appropriate Headquarters Officials, prepare a waiver and supporting documentation required by Section 301 of the Energy and Water Development Appropriations Act, 2006, and refer the matter to the Secretary for consideration. If the Secretary supports the waiver, the Secretary will notify the Congress. Sixty days following the Congressional notification of the Department's intent to grant a waiver for a noncompetitive extension, the Secretary will approve the notice, unless the Congress has directed some other action. The Secretary will notify the Procurement Executive of the appropriate action to be taken.

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 Development Appropriations Act, 2006, applies to Departmental initiatives for a program or project that has not been funded by Congress:

- ❖ Section 304 of the Energy and Water Development Appropriations Act, 2006, 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.

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 Facility

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 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 management and operating contractors enter into formal partnerships for the management or operation of a DOE user facility. Rather, the operation of a user facility 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 management and operating 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”¹.

Contracting officers should assure that, in the unlikely event that DOE or its management and operating 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 of the Energy and Water Development Appropriations Act, 2006, 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 Appropriations Act, 2006,:

Lobbying Restriction (Energy and Water Act 2006)

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)

¹ Section 307 uses the phrase “full and open competition.” That phrase is a term of art 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 a management and operating contractor to subcontract the requirement, a broad public announcement of the funding opportunity will satisfy the statute.