



ACQUISITION,
TECHNOLOGY
AND LOGISTICS

OFFICE OF THE UNDER SECRETARY OF DEFENSE

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MEMORANDUM FOR ASSISTANT SECRETARY OF THE ARMY (INSTALLATIONS,
ENERGY AND ENVIRONMENT)
ASSISTANT SECRETARY OF THE NAVY (ENERGY,
INSTALLATIONS AND ENVIRONMENT)
ASSISTANT SECRETARY OF THE AIR FORCE
(INSTALLATIONS, ENVIRONMENT AND LOGISTICS)

SUBJECT: Financing of Renewable Energy Projects Policy

Developing renewable energy projects using non-governmental financing and with private sector partners will increasingly become a more central element of the Department's energy strategy. With this in mind, it is imperative for the Department to develop basic policy on how to interpret current authorities relating to renewable energy project development using such financing.

The attached policy addresses both enhanced-use leases found in 10 U.S.C. § 2667 and special agreement authority provided by 10 U.S.C. § 2922a. These types of projects can be complicated and require the submission of a project package to my office. Therefore, the policy outlines exact provisions that are needed for project review and approval.

My point of contact for this policy is Ms. Sara Streff at 571-372-6843,
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John Conger
Acting Deputy Under Secretary of Defense
(Installations and Environment)

Attachment:
As stated

**DEPARTMENT OF DEFENSE
GUIDANCE
ON
FINANCING OF ENERGY PROJECTS**
November 9, 2012

I. References

- (a) Department of Defense (DoD) Directive 5134.01, *Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L))*
- (b) Federal Acquisition Regulation (FAR) Clause 52.241-5, *Contractor's Facilities*
- (c) 10 U.S.C. § 2662, *Real property transactions: reports to congressional committees*
- (d) 10 U.S.C. § 2667, *Leases: non-excess property of military departments and Defense Agencies*
- (e) 10 U.S.C. § 2911, *Energy performance goals and master plan for the Department of Defense*
- (f) 10 U.S.C. § 2916, *Sale of electricity from alternate energy and cogeneration production facilities*
- (g) 10 U.S.C. § 2917, *Development of geothermal energy on military lands*
- (h) 10 U.S.C. § 2922a, *Contracts for energy or fuel for military installations*
- (i) 40 U.S.C. § 591, *Purchase of electricity*
- (j) 40 U.S.C. § 501, *Services for Executive Agencies*
- (k) DoD Instruction 4170.11, *Installation Energy Management*
- (l) DoDI 4165.70, *Real Property Management*
- (m) Federal Acquisition Regulation (FAR) Part 41, *Acquisition of Utility Services*

II. Purpose

This memorandum provides guidance to the DoD Components on the authorities for mechanisms used to cover initial capital costs for energy projects utilizing private (sometimes referred to as 'third-party') financing. It does not address Energy Savings Performance Contracts (ESPCs) nor Utility Energy Services Contracts (UESCs); those will be addressed in subsequent policy memoranda. The following guidance addresses the certification of energy related enhanced use leases (EULs) and the special agreement authority (SAA) found in 10 U.S.C. § 2922a. The discussion that follows does not address all applicable statutory requirements; the user should carefully read the applicable statutes.

III. Policy

DoD continues to address energy needs and energy security as a fundamental part of military planning. The development and operation of renewable energy projects on DoD installations provides energy security which supports the DoD mission. As it works to comply with a variety of energy mandates and goals, DoD anticipates that, through its Components, it will need to make significant investments in both large and small scale renewable energy projects. Due to significant capital requirements needed to fund large-scale renewable energy projects, DoD may need to rely on financing mechanisms that allow initial capital costs to be paid by a party other

than DoD. Such financing mechanisms may include an SAA such as the acquisition authority found in 10 U.S.C. § 2922a. The following provides an overview of the authorities supporting some of these financing mechanisms and guidance on coordination requirements for use of such mechanisms.

A. Special Agreement Authority

Under section 2922a, a Military Department may enter into a contract for up to thirty years for energy production facilities on DoD real property or on private property and purchase the energy produced from such facilities. Such a contract allows a Military Department to contract for on-site energy generating projects without providing the capital costs at the time of construction. Under section 2922a, a developer may install an energy production facility on DoD or private property under an agreement pursuant to which the Military Department would purchase the energy generated by the facility. The Military Department would pay for some or all of the facility through these power payments over the life of the contract. After installation, the developer would own, operate, and maintain the facility for the life of the contract.

- Such contracts must be approved in advance of award by the Secretary of Defense. The DoD approval authority has been re-delegated to DUSD(I&E).
- While the authority under section 2922a applies to a facility on DoD or private land, it does not apply to a facility on non-DoD Federal property, *e.g.*, public domain lands not withdrawn for military uses, or on non-Federal public property, *e.g.*, state or local government property.
- Section 2922a applies to any type of energy production facility, not just geothermal.

Appropriate contract documentation consistent with FAR 52.241-5 relating to providing the developer a revocable permit or license to enter the service location for any proper purpose under the contract is required. Also, contracts under section 2922a will typically require additional supporting documentation to address real property rights. To the extent that a contract under section 2922a provides for the exclusive use of DoD real property by the contractor (which is normally the case), the contract must also include an appropriate real property outgrant in accordance with DoD Instruction 4165.70, *Real Property Management*. Such an outgrant will normally be a lease but may include, *e.g.*, a right-of-way or easement for associated power lines.

- To the extent an outgrant under section 2922a includes a lease reportable to Congress under 10 U.S.C. § 2662, the lease must also comply with the requirements of 10 U.S.C. § 2662(b)(2)(G) relating to certification that the project is consistent with the DoD energy performance goals and master plan. The section 2662 certification requirement applies to a proposed lease while the section 2922a contract approval applies to a ready-to-award contract. The section 2662 certification is made during the preliminary stage of a proposed lease before a solicitation has even been issued while the section 2922a contract approval is made at the end of the contract solicitation/negotiation process. Since they are divided in time, they cannot be submitted concurrently.
- Any such outgrant must clearly provide that the outgrant cannot be transferred without the consent of the United States. Contracting and real estate agents should be careful to

ensure that the *order of precedence* clauses in the outgrant and associated contract do not provide otherwise.

B. Other Power Acquisition Authorities

1. 40 U.S.C. § 501

Under 40 U.S.C. § 501, the DoD may contract for public utility services for a period of not more than 10 years.

2. 40 U.S.C. § 591

Under 40 U.S.C. § 591, DoD may not purchase electricity in a manner inconsistent with state law governing the provision of electric utility service. This applies to purchase of the commodity, not to acquiring transmission services. Typically, this means that DoD is only allowed to use authorized electric providers for electricity purchases unless the purchase is in a state with a competitive electricity market. Section 591 does not preclude:

- Entering into an ESPC.
- The Secretary of a Military Department from—
 - entering into a contract under section 2922a; or
 - purchasing electricity from any provider if the Secretary finds that the utility having the applicable state-approved franchise (or other service authorization) is unwilling or unable to meet unusual standards of service reliability that are necessary for purposes of national defense.

3. 10 U.S.C. § 2916

Pursuant to 10 U.S.C. § 2916, a Military Department may sell, contract to sell, or authorize the sale by a contractor to a public or private utility company of all the electrical energy generated from an alternate energy or co-generation type production facility under the jurisdiction (or produced on land which is under the jurisdiction) of the Military Department. Proceeds from such sales may be used to purchase electrical energy and to carry out military construction projects under the DoD energy performance goals and master plan, including minor military construction projects designed to increase energy conservation.

C . Leases: 10 U.S.C. §§ 2662 and 2667

The general leasing statute, 10 U.S.C. § 2667, authorizes a Military Department to lease non-excess property when the Department determines that the property is not currently needed for public use, that the lease is advantageous to the United States, and that the lease will promote the national defense. Such a lease can be contracted for longer than five years if the Secretary concerned determines that a lease for a longer period will promote the national defense or be in the public interest. Some such leases are frequently referred to as enhanced use leases (EULs), although the law makes no such distinction. An EUL can be used for renewable energy projects

but must include payment (in cash or in-kind) by the lessee of consideration in an amount not less than the fair market value of the leasehold.

An EUL shall be limited in term to the useful life of the energy production facility. It shall not extend beyond that to allow installation of follow-on facilities. Leases that encumber DoD properties for lengthy periods of time can be detrimental to the long-term ability of the DoD to manage its property portfolio.

In accordance with 10 U.S.C. § 2662, if an EUL involves a project that is related to energy production and is reportable to Congress under 10 U.S.C. § 2662, the Secretary of Defense must certify that the project as it will be specified in the contract solicitation or other lease offering is consistent with the DoD energy performance goals and master plan required by 10 U.S.C. § 2911. The authority for such certifications has been delegated to the DUSD(I&E) and is required prior to issuing a contract solicitation or lease offering. EUL packages submitted for Secretary of Defense certification must contain data supporting the fair market value of the leased interest and specify the anticipated useful life of the facility.

D. Production or Procurement Under 10 U.S.C. § 2911(e)

For renewable energy projects used to meet facility energy needs, subsection (e) of section 2911 specifies that:

“(1) It shall be the goal of the Department of Defense—

“(A) to produce or procure not less than 25 percent of the total quantity of facility energy it consumes within its facilities during fiscal year 2025 and each fiscal year thereafter from renewable energy sources; and

“(B) to produce or procure facility energy from renewable energy sources whenever the use of such renewable energy sources is consistent with the energy performance goals and energy performance master plan for the Department and supported by the special considerations specified in subsection (c).”

Section 2911(e) requires that the DoD either produce or procure renewable facility energy. For renewable energy projects that apply leasing authority found under 10 U.S.C. § 2667, the Military Department must demonstrate more than a mere passive activity. For production or procurement of facility energy to qualify as being consistent with the DoD energy performance goals and master plan (and consequently qualify for an energy certification), DoD must do one of the following—

- Have consumption by the DoD Component of some or all of the facility energy from the project;
- Structure the project to provide energy security for the installation by, e.g., retaining the right to divert to the installation the energy produced by the project in times of emergency;
- Reinvest in renewable facility energy or energy conservation measures a minimum of 50 percent of proceeds (including both in-kind and cash) from any lease.

These requirements apply whether or not the lease is reportable to Congress under section 2662.

E. Required Submissions for Coordination

The DoD Components are required to provide the Office of the Deputy Under Secretary of Defense for Installations and Environment a concept briefing for renewable energy projects that will be submitted to DUSD(I&E) for OSD approval.

1. Submissions pursuant to 10 U.S.C. § 2922a for OSD approval:

When submitting a package to DUSD(I&E) for a project pursuant to section 2922a, the Military Department shall ensure the package contains the following:

- a. Ready to award contract (a contract that has been agreed to by the contractor but has not yet been awarded); where there is a master award contract with subordinate task orders under it, each task order shall be treated as a separate contract for purposes of these requirements.
- b. Necessary changes to FAR 52.241-5 to ensure consistency with the real property outgrant.
- c. If located on DoD property:
 - i. Appropriate real property outgrant documentation consistent with DoDI 4165.70.
 - ii. A statement of the fair market value of the outgrant. If the fair market value meets any of the reporting requirements of 10 U.S.C. § 2662, how and when the required reports were or will be made.
 - iii. An explanation why the property is not currently needed for public use.
- d. Appropriate National Environmental Policy Act (NEPA) documentation.
- e. Memorandum for Record addressing whether the renewable energy project is on withdrawn lands (include Public Land Orders/Executive Orders, as appropriate).
- f. Economic/Business Case Analysis Summary (energy project cash flow display for each fiscal year included within the contract and an accompanying narrative). This narrative should include applicable federal, state, local, and utility incentives. In addition, where appropriate, the analysis should include an investigation into the financial feasibility of the project using other financing options.
- g. Summary of Contribution to Energy Goals (e.g., section 2911 goals, Energy Policy Act goals, National Energy Conservation Policy Act goals (as amended by the Energy Independence and Security Act of 2007), and greenhouse gas reductions goals, where applicable).
- h. Pursuant to section 2822 of the National Defense Authorization Act for Fiscal Year 2012, a justification and cost-benefit-analysis of the decision to exclude the pursuit of energy security on the grounds that the inclusion of energy security is cost prohibitive.

2. Submissions pursuant to 10 U.S.C. §§ 2662 and 2667 for OSD certification:

When submitting a package to DUSD(I&E) for a project that includes an outgrant pursuant to section 2667, the DoD Component should ensure the package contains the following (if the transaction is only a lease under section 2667 and not associated with an energy purchase):

- a. A statement of the fair market value of the outgrant. If the fair market value meets any of the reporting requirements of 10 U.S.C. § 2662, how and when the required reports were or will be made.
- b. An explanation why the property is not currently needed for public use.
- c. An explanation as to how the proposal is consistent with the requirements of 10 U.S.C. § 2911, and specifically section 2911(e)(1), or DoD's energy performance goals and master plan pursuant to section 2911.
- d. If the proposal involves a passive lease, how and when the Military Department will reinvest the proceeds in energy related initiatives (e.g., energy conservation measures or renewable energy).
- e. Pursuant to section 2822 of the National Defense Authorization Act for Fiscal Year 2012, a justification and cost-benefit-analysis of the decision to exclude the pursuit of energy security on the grounds that the inclusion of energy security is cost prohibitive.