



ACQUISITION LETTER

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

Subject: Implementation of Division B, Title III, Title V and Division C Title VII, Consolidated Appropriations Act, 2012, Pub. L. No. 112-74 and Related Conference Report

References:

Consolidated Appropriations Act, 2012,
Pub. L. No. 112-74
and Related Conference Report 112-331

Title III, Section 301(a), 301(b),
308, 310
Title V, Sections 501, 504, 505
Title VII, Sections 738, 743
Conference – Nuclear Safety, User
Facilities

When is this Acquisition Letter (AL) effective?

The statutory provisions addressed in this AL are a continuation of the provisions effective on the enactment date of the Consolidated Appropriations Act of 2012, enacted December 23, 2011. The AL also addresses provisions from the related Conference Report 112-331.

When does this AL expire?

This AL remains in effect until superseded or canceled. This AL supersedes AL 2011-04.

Who is the intended audience?

Department of Energy (DOE) and National Nuclear Security Administration (NNSA) Contracting Officers.

Who is the point of contact?

For DOE, contact Barbara Binney of the Contract and Financial Assistance Policy Division, Office of Policy at (202) 287-1340 or at Barbara.binney@hq.doe.gov or for NNSA, contact NNSA at (202) 586-6681.

Need more information on ALs?

Visit the website at <http://energy.gov/management/office-management/operational-management/procurement-and-acquisition/guidance-procurement> for information on Acquisition Letters and other policy issues.

What is the purpose?

The purpose of this AL is to provide information and guidance regarding the Department of Energy's (DOE or Department) implementation of Division B, Title III and Title V and Division C Title VII, Consolidated Appropriations Act, 2012, Pub. L. No.112-74 and Conference Report 112-331. Congressional notifications required by Section 311 of Division B, Title III are addressed in AL 2012-07.

What types of contracts are affected by this AL?

This AL applies to all DOE and NNSA solicitations and contract actions including task and delivery orders funded with fiscal year 2012 appropriated funds. Management and Operating (M&O) contracts may be affected if construction activities are authorized.

What is the background?

This AL implements Division B, Title III and Title V and Division C Title VII, Consolidated Appropriations Act, 2012, Pub. L. No.112-74 and Conference Report 112-331.

What guidance is included in this AL?**Appropriations Act**

- I. Section 301(a) Unfunded Requests for Proposals**
- II. Section 301(b) Congressional Notification of Multi-year Contract Award**
- III. Section 308 Construction of High-hazard Nuclear Facilities**
- IV. Section 310 Independent Cost Estimate (ICE) for Critical Decision (CD)-2 and CD-3
DOE O 413.3B Construction Projects**
- V. Section 501 Lobbying Restrictions**
- VI. Section 504 Felony Criminal Violations**
- VII. Section 505 Unpaid Federal Tax Liability**
- VIII. Section 738 Prohibition on Contracting with Inverted Domestic
Corporations**
- IX. Section 743 Any Payment for the Election for a Federal Office or to a
Political Committee**

Conference Report

- X. Nuclear Safety**
- XI. User Facilities**

APPROPRIATIONS ACT

I. SECTION 301(a) UNFUNDED REQUESTS FOR PROPOSALS

What is the law?

None of the funds appropriated by this Act may be used to initiate or resume any program, project or activity, or to initiate Requests for Proposals (RFPs) or similar arrangements (including request for quotations, requests for information and funding opportunity announcements) for a program, project or activity if the program, project or activity has not been funded by Congress.

What is the scope of this requirement?

Section 301(a) of Division B of the Consolidated Appropriations Act, 2012 requires that funds appropriated by the Act not be used to prepare or initiate RFPs or similar arrangements (including request for quotations, requests for information and funding opportunity announcements) for a program, project or activity if the program, project or activity has not been funded.

What procedures need to be followed to implement this requirement?

Before preparing or initiating a RFP or similar arrangements (including request for quotations or requests for information) in support of a program, project or activity, the Contracting Officer shall work with the program office and the program budget office officials to ensure the program or project is funded.

II. SECTION 301(b) CONGRESSIONAL NOTIFICATION OF MULTI-YEAR CONTRACT AWARD

It does not apply to the following: NNSA, Power Marketing Administration, and Environmental Management programs defined as an Atomic Energy Defense Activity.

What is the law?

Section 301(b) - The Department of Energy may not, with respect to any program, project, or activity that uses budget authority made available in title III of this Act under the heading “Department of Energy—Energy Programs,” enter into a multi-year contract award, a multi-year grant, or enter into a multi-year cooperative agreement unless the contract, grant, or cooperative agreement includes a clause conditioning the Federal Government’s obligation on the availability of future-year budget authority and the Secretary notifies the Committees on Appropriations of the House of Representatives and the Senate at least 14 days in advance.

Section 301(f) - (1) The Secretary of Energy may waive any requirement or restriction in this section that applies to the use of funds made available for the Department of Energy if compliance with such requirement or restriction would pose a substantial risk to human health, the environment, welfare, or national security.

(2) The Secretary of Energy shall notify the Committees on Appropriations of any waiver under paragraph (1) as soon as practicable, but not later than 3 days after the date of the activity to which a requirement or restriction would otherwise have applied. Such notice shall include an explanation of the substantial risk under paragraph (1) that permitted such waiver.

What is the scope of this requirement?

Section 301(b) of Division B of the Consolidated Appropriations Act, 2012 requires that multi-year contracts funded by the Act include in the contract a clause conditioning the obligation on the availability of future-year budget authority. It requires DOE to notify the Committees on Appropriations of the House of Representatives and the Senate at least 14 calendar days in advance of making the award. Section 301(f) permits the Secretary of Energy to waive any requirement or restriction if compliance with such requirement or restriction would pose a substantial risk to human health, the environment, welfare, or national security.

What is a multiyear contract?

Multiyear contract, as defined at FAR 17.103, means a contract for the purchase of supplies or services for more than 1, but not more than 5, program years. A multiyear contract may provide that performance under the contract during the second and subsequent years of the contract is contingent upon the appropriation of funds, and (if it does so provide) may provide for a cancellation payment to be made to the contractor if appropriations are not made. The key distinguishing difference between multiyear contracts and multiple year contracts is that multiyear contracts, defined in the statutes cited at FAR 17.101, buy more than 1 year's requirement of a product or service without establishing and having to exercise an option for each program year after the first.

This applies to all contracts that exceed one year but no more than five years. It does not apply to indefinite delivery/ indefinite quantity (IDIQ) contracts as an IDIQ is a multiple year contract, not a multiyear contract. Nor, does it apply to construction contracts with a performance period covering two or more years that is incrementally funded. To determine if reporting is necessary, consult with local Counsel.

What procedures need to be followed to implement this requirement?

Clauses. When a new multi-year contract is contemplated, as defined at 17.103, the contracting officer shall insert the clauses FAR 52.217-2, *Cancellation Under Multi-year Contracts*, and FAR 52.232-19, *Availability of Funds for the Next Fiscal Year*, or similar language conditioning the obligation on the availability of future-year budget authority, in affected solicitations and contracts.

DOE 301(b) Reporting.

Reporting. At least 14 calendar days before awarding a multiyear contract, as defined at FAR 17.103, the Head of the Contracting Activity (HCA), or designee, shall enter the required information in the DOE 301(b) Reporting spreadsheet on the Office of Management and Budget (OMB) MAX Information System at <https://max.omb.gov/community/display/DOE/301%28b%29+Reporting>.

The first day of the 14 calendar notification period will begin with the date stated in the e-mail sent to the HCA, or designee, from the DOE HQ Budget Office confirming that the information was sent to Congress. Awards can be made on the 15th calendar day after the date stated in the confirmation e-mail. For example, the HCA, or designee, inputs the information on April 3rd and receives the confirmation e-mail from the DOE HQ Budget Office on April 4th stating that the information was sent to Congress on April 3rd, therefore the award can be made on the 15th calendar day from April 3rd which is April 17th.

Access to DOE 301b Reporting Page. The HCA, or designee, must have a MAX ID and password to access the page. If the HCA, or designee, does not already have access, they will need to register on the MAX Homepage at <https://max.omb.gov/maxportal/>. Once registered, the HCA, or designee, must send an e-mail to casey.pearce@hq.doe.gov with name and e-mail information to request access to the DOE 301b Reporting Page. Once page access is granted, the DOE 301(b) Reporting Page will appear on the person's collaboration group page. The DOE 301(b) Reporting Page includes instructions on the reporting page for inputting the required information in the spreadsheet and a point of contact for any reporting questions.

Reporting Spreadsheet. The spreadsheet is self-explanatory. One of the questions requires a detailed explanation of the special circumstances justifying the commitment of future funds. The contracting officer will need this detailed explanation from the project office. The explanation should specifically address the question of why the award is not fully funded with fiscal year 2012 and prior appropriations. Explanations of stage-gates and budget periods do not alone address this question.

End of Fiscal Year Actions. To ensure an award by September 28, 2012, the required information for the DOE 301(b) Reporting spreadsheet action shall be entered in the spreadsheet no later than 5:30 p.m. eastern time, Thursday, September 13, 2012. This is the last day and time for DOE 301(b) Reporting information submission to ensure a confirmation e-mail is sent from the DOE HQ Budget Office that will allow enough time for the 14 calendar day notification period.

Waiver - Secretarial Determination of Substantial Risk to Human Health, the Environment, Welfare, or National Security. When compliance with the fourteen (14) calendar day advance notice requirement of Section 301(b) would pose a substantial risk to human health, the environment, welfare, or national security, an award may be made without such advance notification to the Committees on Appropriations of the Senate and the House of Representatives if the Secretary determines in advance to the award that any one of these conditions exists, i.e., substantial risk to human health, the environment, welfare, or national security [Section 301(f)(1)].

If an award must be made pursuant to this authority, the HCA, in coordination with the cognizant program official(s) and legal counsel, shall develop a written recommendation supporting the waiver for approval by the Secretary. The HCA shall coordinate with the Head of the Program Element through the appropriate Senior Procurement Executive for obtaining necessary waiver approval by the Secretary.

An award subject to the requirements of Section 301(b) shall not be made in advance of the Secretary's determination.

Upon approval by the Secretary, notification of the waiver and award (activity) to the Committees on Appropriations of the Senate and the House of Representatives shall be made as soon as practicable, but not later than three (3) days after the date of the activity to which a requirement or restriction would otherwise have applied. Use the DOE 301(b) reporting spreadsheet to submit the Section 301(b) notifications to include the explanation of the substantial risk that necessitated the waiver [Section 301(f)(1)]. Maintain a copy of the signed Secretary's determination for the official record.

Note: If the Secretary delegates the authority to make these determinations, any such delegation will be issued separately from this AL.

III SECTION 308 CONSTRUCTION OF HIGH-HAZARD NUCLEAR FACILITIES

What is the law?

None of the funds made available in title III of this Act shall be used for the construction of facilities classified as high-hazard nuclear facilities under 10 C.F.R. Part 830 unless independent oversight is conducted by the Office of Health, Safety, and Security to ensure the project is in compliance with nuclear safety requirements.

What is the scope of this requirement?

Section 308 of Division B of the Consolidated Appropriations Act, 2012 applies to all solicitations and awards of DOE contracts that include the construction of facilities classified as DOE nuclear facilities (hazard category 1, 2, or 3) under 10 C.F.R. Part 830 under which funds are made available by this Act. This requirement applies to subcontract actions, including subcontract under an M&O prime contract using these appropriated funds.

What procedures need to be followed to implement this requirement?

When funding the construction of DOE nuclear facilities (hazard category 1, 2, or 3), the contracting officer shall work with the designated federal project director (FPD) to ensure that the Office of Health, Safety, and Security (HSS) performs the required independent review of the project and contract management for positive nuclear safety culture and resolution of nuclear safety-related design issues, and should obtain copy of the review(s). Until the contracting officer receives the HSS independent review(s), the contracting officer shall not obligate Consolidation Appropriations Act of 2012 funds for the construction of DOE nuclear facilities (hazard category 1, 2, and 3).

IV. SECTION 310 INDEPENDENT COST ESTIMATE (ICE) FOR CRITICAL DECISION (CD) CD-2 AND CD-3 DOE ORDER 413.3B CONSTRUCTION PROJECTS

What is the law?

None of the funds made available in title III of this Act may be used to approve critical decision-2 or critical decision-3 under Department of Energy Order 413.3B, or any successive departmental guidance, for construction projects where the total project cost exceeds \$100,000,000 until a separate independent cost estimate has been developed for the project for that critical decision.

What is the scope of this requirement?

Section 310 of Division B of the Consolidated Appropriations Act, 2012 applies to all DOE solicitations and awards that include DOE Order (DOE O) 413.3B construction work where a project with a total project cost (TPC) exceeds \$100,000,000. No funds are available until a separate independent cost estimate (ICE) has been developed for the project for CD-2 or CD-3. This requirement applies to subcontract actions, including subcontract under an M&O prime contract using these appropriated funds.

What procedures need to be followed to implement this requirement?

For a DOE O 413.3B construction project with a total project cost (TPC) or high end cost range exceeding \$100,000,000, the contracting officer shall work with the designated FPD to ensure that an independent cost estimate (ICE) led by the Office of Engineering and Construction Management (OECM) is conducted prior to submission of CD-2 or CD-3 for approval by the acquisition executive (AE).

V. SECTION 501 LOBBYING RESTRICTION**What is the law?**

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.

What is the scope of this requirement?

Section 501 of Division B of the Consolidated Appropriations Act, 2012 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 Consolidated Appropriations Act, 2012:

Lobbying Restriction (Consolidated Appropriations Act, 2012)

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)

VI. SECTION 504 FELONY CRIMINAL VIOLATIONS.**What is the law?**

None of the funds made available by this Act may be used to enter into a contract, memorandum of understanding, or cooperative agreement with, make a grant to, or provide a loan or loan guarantee to any corporation that was convicted (or had an officer or agent of such corporation acting on behalf of the corporation convicted) of a felony criminal violation under any Federal law within the preceding 24 months, where the awarding agency is aware of the conviction, unless the agency has considered suspension or debarment of the corporation, or such officer or agent, and made a determination that this further action is not necessary to protect the interests of the Government.

What is the scope of this requirement?

Section 504 of Division B of the Consolidated Appropriations Act, 2012 applies to all new DOE contracts funded by the Act that are to be awarded to a corporation.

What procedures need to be followed to implement this requirement?

DOE will issue a separate policy flash to issue a class deviation to implement this requirement.

VII. SECTION 505 UNPAID FEDERAL TAX LIABILITY**What is the law?**

None of the funds made available by this Act may be used to enter into a contract, memorandum of understanding, or cooperative agreement with, make a grant to, or provide a loan or loan guarantee to, any corporation that has any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability, where the awarding agency is aware of the unpaid tax liability, unless the agency has considered suspension or debarment of the corporation and made a determination that this further action is not necessary to protect the interests of the Government.

What is the scope of this requirement?

Section 505 of Division B of the Consolidated Appropriations Act, 2012 applies to all new DOE contracts funded by the Act that are to be awarded to a corporation.

What procedures need to be followed to implement this requirement?

DOE will issue a separate policy flash to issue a class deviation to implement this requirement.

VIII. SECTION 738 PROHIBITION ON CONTRACTING WITH INVERTED DOMESTIC CORPORATIONS

What is the law?

None of the funds appropriated by this Act or otherwise made available by this or any other Act may be used for any Federal Government contract with any foreign incorporated entity which is treated as an inverted domestic corporation under section 835(b) of the Homeland Security Act of 2002 (6 U.S.C. 395(b)) or any subsidiary of such an entity.

What is the scope of this requirement?

Section 738 of Division C of the Consolidated Appropriations Act, 2012 applies to all solicitations and awards of DOE contracts under which funds appropriated or otherwise made available by this or any other Act providing FY 2012 appropriations.

What procedures need to be followed to implement this requirement?

Federal Acquisition Regulation (FAR) 9.108 implements the prohibition on contracting with inverted domestic corporations and prescribes the applicable solicitation provision and contract clause. In each solicitation and contract using funds appropriated in Fiscal Year 2012, unless waived in accordance with FAR 9.108-4, the contracting officer shall use the provision 52.209-2, Prohibition on Contracting with Inverted Domestic Corporations – Representation, and clause 52.209-10, Prohibition on Contracting with Inverted Domestic Corporations, respectively.

IX. SECTION 743 ANY PAYMENT FOR THE ELECTION FOR A FEDERAL OFFICE OR TO A POLITICAL COMMITTEE

What is the law?

(a) None of the funds made available in this or any other Act may be used to recommend or require any entity submitting an offer for a Federal contract to disclose any of the following information as a condition of submitting the offer:

(1) Any payment consisting of a contribution, expenditure, independent expenditure, or disbursement for an electioneering communication that is made by the entity, its officers or directors, or any of its affiliates or subsidiaries to a candidate for election for Federal office or to a political committee, or that is otherwise made with respect to any election for Federal office.

(2) Any disbursement of funds (other than a payment described in paragraph (1)) made by the entity, its officers or directors, or any of its affiliates or subsidiaries to any person with the intent or the reasonable expectation that the person will use the funds to make a payment described in paragraph (1).

(b) In this section, each of the terms “contribution”, “expenditure”, “independent expenditure”, “electioneering communication”, “candidate”, “election”, and “Federal office” has the meaning given such term in the Federal Election Campaign Act of 1971 (2 U.S.C. 431 et seq.).

What is the scope of this requirement?

Section 743 of the Consolidated Appropriations Act, 2012 applies to all solicitations and awards of DOE contracts under which funds appropriated or otherwise made available by this Act or any act providing supplementary FY 2012 appropriations.

What procedures need to be followed to implement this requirement?

Contracting Officers may not recommend or require any entity submitting an offer for a Federal contract to disclose any of the above described information as a condition of submitting the offer via solicitation provision or any other communication.

CONFERENCE REPORT**X. NUCLEAR SAFETY****What do the conferees direct?**

The conferees direct the Secretary of Energy to review all Department of Energy nuclear facility construction projects with a total project cost greater than \$1,000,000,000 to determine if those projects are being managed in a way which could pressure contractors of Department managers to disregard nuclear safety in order to demonstrate acceptable project performance. The review should investigate contract management, including the award of contractor fee, project management practices, and the framing of program and policy goals to evaluate if Department practices have complicated efforts to foster a positive nuclear safety culture or resolve nuclear safety-related design issues. The Secretary shall report to the House and Senate Committees on Appropriations no later than May 1, 2012, on improvements to contracting and other management practices which will assist Department managers in ensuring that design flaws and safety issues do not go ignored or unrecognized.

What is the scope of this requirement?

DOE must to prepare a report to the House and Senate Committees on Appropriations no later than May 1, 2012, on improvements to contracting and other management practices which will assist Department managers in ensuring that design flaws and safety issues do not go ignored or unrecognized.

What procedures need to be followed to implement this requirement?

The Office of Health, Safety, and Security is leading the team preparing the report. There are 5 projects identified for review:

- Waste Treatment Plant – Environmental Management (EM) – Office of River Protection
- Mixed Oxide Fuel Fabrication Facility – NNSA - Savannah River
- Salt Waste Processing Facility - EM – Savannah River Site
- Uranium Processing Facility - NNSA – Oak Ridge

- Chemistry and Metallurgy Research Replacement Facility – Office of Science - Los Alamos

X. USER FACILITIES

What do the conferees expect?

The conferees expect DOE to continue to follow the guidelines established in section 305 of Title III of the Energy and Water Development and Related Agencies Appropriations Act, 2010, Public Law 111-85. When DOE 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 DOE 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.

What is the scope of this requirement?

There are three circumstances where Departmental processes are affected by Section 305:

- ❖ Where the Department or its Management and Operating (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 Grants.gov and/or FedBizOpps, in addition to relevant scientific journals and on facility websites.

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 competitive selection.