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**Flash # 14**

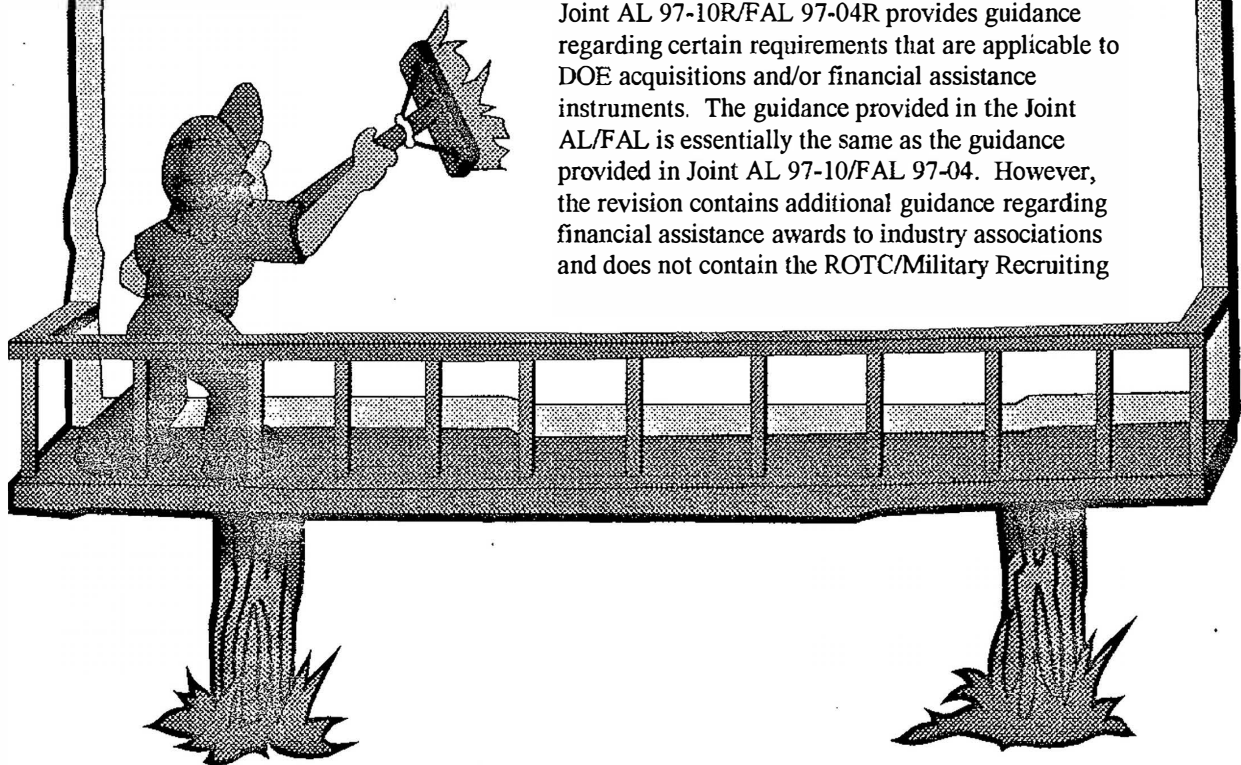
DATE: December 8, 1998  
TO: Distribution  
FROM: Office of Procurement and Assistance Policy (MA-51)  
Office of Procurement and Assistance Management

SUBJ: **FY 99 Energy and Water Development Appropriations Act (Pub. L. 105-245) and the FY 99 Department of Interior and Related Agencies Appropriations Act (Pub. L. 105-277)**

On November 20, 1998, Acquisition Letter (AL) 98-02R and Joint Acquisition Letter (AL) 97-10R/Financial Assistance Letter (FAL) 97-04R were issued.

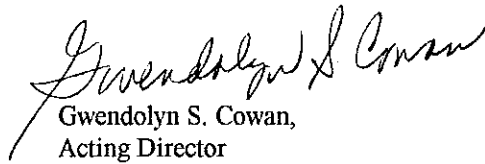
AL 98-02R provides guidance regarding the implementation of Sections 301, 302, 305 and 307 of Pub. L. 105-245 as they pertain to DOE acquisitions. Sections 301, 302 and 305 of Pub. L. 105-245 are carried-over from the Energy and Water Development Appropriations Act, 1998 (Pub. L. 105-62); whereas, Section 307 of Pub. L. 105-245 provides new authorities concerning the funding of multi-year contracts entered into by DOE.

Joint AL 97-10R/FAL 97-04R provides guidance regarding certain requirements that are applicable to DOE acquisitions and/or financial assistance instruments. The guidance provided in the Joint AL/FAL is essentially the same as the guidance provided in Joint AL 97-10/FAL 97-04. However, the revision contains additional guidance regarding financial assistance awards to industry associations and does not contain the ROTC/Military Recruiting



Access to Campus requirement or the prohibition on awards to contractors who have not filed their annual report concerning the employment of certain veterans – these provisions were not included in the FY 99 legislation.

If you would like more information, please contact John Bashista on (202) 586-8192 regarding AL 98-02R, or Trudy Wood on (202) 586-5625 regarding Joint AL 97-10R/FAL 97-04R.



Gwendolyn S. Cowan,  
Acting Director

Attachments

1. AL 98-02R
2. Joint AL 97-10R/FAL 97-04R

cc: R. Hopf, HR-5  
E. Lovett, HR-5  
S. Mournighan, HR-52  
E. Simpson, HR-52  
S. Michelsen, HR-53



# ACQUISITION LETTER

## AUTHORITY

This Acquisition Letter is issued by the Procurement Executive pursuant to a delegation from the Secretary and under the authority of the Federal Acquisition Regulation (FAR), Section 1.301(a)(2).

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## CONTENT

### CITATION

### TITLE

Chapter 1, Acquisition Guide	Acquisition Regulations System
FAR 1.4	Deviations from the FAR
DEAR 917.6	Management and Operating Contracts
DEAR 970.1702-1	Term of contract and option to extend
DEAR 970.5202	Deviations

**Subject: FY 99 Energy and Water Provisions**

- I. **Purpose.** The purpose of this Acquisition Letter (AL) is to provide guidance regarding the implementation of Sections 301, 302, 305 and 307 of the Energy and Water Development Appropriations Act, 1999, Pub. L. 105-245, which was enacted on October 7, 1998.
- II. **Applicability.** The guidance set forth in this AL with respect to sections 301, 302, and 305 is applicable to actions which are funded under Pub. L. 105-245, and any prior appropriations Act. However, the guidance provided with respect to section 307 is applicable to actions funded under Pub. L. 105-245. This guidance is not applicable to actions which are funded under Public Laws enacted subsequent to Pub. L. 105-245, including legislation making appropriations for the Department of the Interior and related agencies for the fiscal year ending September 30, 1999, under which certain Departmental programs are funded. Detailed guidance regarding the scope of Sections 301, 302, 305 and 307 is set forth in paragraph IV. below.
- III. **Background.** Sections 301, 302 and 305 of Pub. L. 105-245 are carried-over from the Energy and Water Development Appropriations Act, 1998 (Pub. L. 105-62); whereas, Section 307 of Pub. L. 105-245 provides new authorities concerning the funding of multi-year contracts entered into by the Department of Energy (DOE). The following is a summary of these provisions:

**Section 301** prohibits the use of funds appropriated under Pub. L. 105-245, or any prior appropriations Act, to award or extend a management and operating (M&O) contract unless the contract or extension is awarded using competitive procedures, or the Secretary of Energy

authorizes, on a case-by-case basis, the use of other than competitive procedures. This requirement parallels the current DOE policy set forth at DEAR 917.602 of providing for full and open competition in the award and extension of M&O contracts, and requiring a justification and Secretarial authorization when such awards are made without providing for full and open competition. However, Section 301 also requires that the Department submit a report which includes reasons for the action to the Subcommittees on Energy and Water Development of the Committees on Appropriations of the House of Representatives and the Senate at least 60 days prior to the award or modification of an M&O contract for which the Secretary intends to authorize the use of other than competitive procedures.

**Section 302** prohibits the use of funds appropriated under Pub. L. 105-245, or any prior appropriations Act, to award or modify any DOE contract (i.e., both M&O and non-M&O) which contains a deviation from a provision or clause prescribed by the Federal Acquisition Regulation (FAR), unless the Secretary of Energy authorizes, on a case-by-case basis, such a deviation. This provision also requires that the Department notify the Subcommittees on Energy and Water Development of the Committees on Appropriations of the House of Representatives and the Senate at least 60 days prior to the award or modification of a DOE contract which contains a provision or clause which deviates from that prescribed in the FAR, and the reasons therefore.

**Section 305** prohibits the use of funds appropriated under Pub. L. 105-245, or any prior appropriations Act, to prepare or initiate requests for proposals (RFP) for goods or services in support of a program if the program has not been funded by Congress.

**Section 307** permits the Department to enter into multi-year contracts using funds appropriated under Pub. L. 105-245 without obligating the estimated costs associated with any necessary cancellation or termination of the contract. This provides the DOE with the same flexibility provided to the Department of Defense. This provision specifically exempts the Department from the statutory requirement set forth at 41 U.S.C. section 254c(a) which otherwise requires such obligations for multi-year contracts entered into by civilian agencies.

#### **IV. Guidance.**

##### **A. Use of Other Than Competitive Procedures for M&O Contracts and Extensions (Sec. 301)**

1. **Scope:** This guidance applies to new M&O contracts, and modifications which extend an M&O contract beyond the term provided for in the contract (except as noted below) that are awarded 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. The requirements of Section 301, and the guidance set forth herein, do not apply to the exercise of an option in accordance with DEAR 970.1702-1.

2. Procedures:

a. The justification and Secretarial authorization required by DEAR 917.602(b) will address and satisfy the Secretarial authorization requirements of Section 301 for new M&O contracts and extensions that are awarded without providing for full and open competition.

b. The Office of Management Systems will review and process the justification for Secretarial authorization, and will coordinate, for approval by the Secretary, the written notification to the Subcommittees on Energy and Water Development of the Committees on Appropriations of the House of Representatives and the Senate as soon as practicable following the Secretarial authorization required by DEAR 917.602(b), but not later than 60 days prior to the award or modification of an M&O contract that is subject to the requirements of Section 301.

**B. Deviations From Provisions and Clauses Prescribed By The FAR (Sec. 302)**

1. Scope: This guidance applies to the use of solicitation provisions and contract clauses that deviate from solicitation provisions or contract clauses that are prescribed by the FAR. The requirements of Section 302, and the guidance set forth herein, do not apply to the use of the following in DOE solicitations, contracts, or modifications because they do not constitute deviations from the FAR:

- ▶ Provisions and clauses prescribed in DEAR Parts 952 and 970, including any deviations, or modifications thereto which are authorized in accordance with the policies and procedures set forth in FAR Subpart 1.4, and internal DOE procedures;
- ▶ Provisions and clauses prescribed by local policies and procedures, as long as such provisions and clauses are not inconsistent with provisions and clauses prescribed by the FAR for use in the immediate contract or modification;
- ▶ Provisions and clauses prescribed in the FAR which have been modified in accordance with FAR 52.104;
- ▶ Provisions and clauses prescribed in the FAR with their alternate(s) in accordance with FAR 52.105; and
- ▶ FAR provisions and clauses which are otherwise not prescribed for the particular contract or modification in which the provisions or clauses will be used.

2. Procedures:

a. For all DOE solicitations/contracts, including M&O contracts, deviations from FAR solicitation provisions or contract clauses that are to be incorporated into a DOE solicitation or contract shall be made only in accordance with the deviation procedures set forth at FAR

**AL 98-02 (11/20/98)**

Subpart 1.4 and internal Departmental procedures. The baseline for determining deviations is the version of the provision or clause that is prescribed in the FAR at the time of award.

b. To ensure consistency with the definitions and requirements prescribed by the FAR pertaining to deviations from, and modifications to, standard solicitation provisions and contract clauses, a technical amendment to the DEAR was recently issued to amend section 970.5202, Deviations. Accordingly, deviations from, and modifications to, the standard solicitation provisions and contract clauses prescribed in FAR Part 52 and DEAR Parts 952 and 970 for use in DOE contracts shall be made only in accordance with the deviation procedures of FAR subpart 1.4 and internal Departmental procedures.

c. Requests to deviate from a FAR provision or clause pursuant to FAR Subpart 1.4, as described above, shall be submitted to the Office of Management Systems in accordance with the procedures and documentation requirements set forth in Chapter 1 of the DOE Acquisition Guide. These procedures state that deviation requests that are submitted to the Office of Management Systems must include certain types of information, including the identification of the specific FAR clause, the reason why the deviation is necessary, and a description of the intended effect of the deviation. This information shall include a line-in/line-out comparison of the provision or clause prescribed by the FAR with the version containing the desired deviation.

d. Heads of Contracting Activities shall ensure that FAR deviation requests are submitted to the Office of Management Systems as soon as possible after the need is identified and, where practicable, not later than 120 days prior to the award of a contract or modification that is subject to Section 302.

e. The Office of Management Systems will review and process the request for Secretarial authorization, and will coordinate the written notification to the Subcommittees on Energy and Water Development of the Committees on Appropriations of the House of Representatives and the Senate for signature by the Secretary as soon as practicable following Secretarial authorization, but not later than 60 days prior to the award or modification of a DOE contract that is subject to the requirements of Section 302.

**C. Preparation and Issuance of RFP's For Unfunded Programs (Sec. 305)**

1. Scope: This guidance applies to Departmental initiatives proposed as budget line-item programs for which Congress has specifically denied funding in enacting Pub. L. 105-245, or any prior appropriations Act (e.g., the *Nuclear Security Program*, which Congress declined to fund under Pub. L. 105-62, and which was a budget line-item under the broader budget category of *Nuclear Energy Programs*). This guidance also applies to any program that Congress explicitly has declined to fund in enacted bill language, whether or not it is a budget line-item program.

Section 305 does not preclude DOE from issuing RFPs subject to the availability of funds (e.g., see FAR 32.703-2), as long as the RFP is not in support of a program for which Congress has, as described above, specifically denied funding under Pub. L. 105-245, or any prior appropriations Act.

2. Procedures:

a. DOE Program/Project Managers and Budget Officials shall not initiate/certify procurement requests for goods or services that are in support of a program for which funding has been specifically denied by Congress under Pub. L. 105-245, or any prior appropriations Act, as described above.

b. DOE contracting activities shall not prepare or issue RFPs, including draft RFPs, for goods or services in support of a program requirement for which funds have not been properly certified by the designated authorities as appropriate and available for the requirement.

**D. Multi-Year Contract Funding (Sec. 307)**

1. Scope: This guidance applies to multi-year contracts entered into by DOE in accordance with FAR Subpart 17.1 using funds appropriated under Pub. L. 105-245.

2. Procedures: Notwithstanding the requirements of 41 U.S.C. section 254c(a), funds appropriated by Pub. L. 105-245 may be used to enter into multi-year contracts for the acquisition of property or services without obligating the estimated costs associated with any necessary cancellation or termination of the contract. The costs of termination or cancellation may be paid from:

- ▶ appropriations originally available for the performance of the contract concerned;
- ▶ appropriations currently available for procurement of the type of property or services concerned, and not otherwise obligated; or
- ▶ funds appropriated for those payments.

V. Effective Date. This AL is effective on the date of its issuance.

VI. Expiration Date. September 30, 1999, or such later date as awards utilizing funds from the Energy and Water Development Appropriations Act, 1999, or prior appropriations Acts may be made.



Department of Energy  
Acquisition and Assistance Regulations

AL No. 97-10R  
FAL No. 97-04R  
Date 11/20/98

## ACQUISITION/FINANCIAL ASSISTANCE LETTER

### AUTHORITY

This joint Acquisition/Financial Assistance Letter (AL/FAL) is issued pursuant to a delegation of authority from the Secretary.

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**Subject: FY 99 Energy and Water/Interior (Grants and Contracts)**

- I. **Purpose.** The purpose of this joint AL/FAL is to provide guidance regarding certain requirements applicable to acquisition and financial assistance instruments that are set forth in the Energy and Water Development Appropriations Act, 1999, Pub. L. 105-245 (Energy & Water Act), which was enacted on October 7, 1998, and the Department of Interior and Related Agencies Appropriations Act, Section 101 (e) of Division A of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105-277 (Interior Act), which was enacted on October 21, 1998.
- II. **Applicability.** In general, the guidance set forth in this AL/FAL is applicable to contracts and financial assistance instruments that are awarded by the Department using appropriations made available under the Energy & Water Act and the Interior Act. Moreover, certain of these requirements apply to subcontracts awarded under DOE prime contracts, as well as purchases made by recipients under DOE financial assistance instruments. Detailed guidance regarding the scope of the requirements set forth in these statutes, as well as implementing procedures, are provided in paragraph IV below.
- III. **Background.** The guidance provided in this AL/FAL is essentially the same as the guidance provided in joint AL No. 97-10/FAL No. 97-04, except it contains some additional guidance regarding financial assistance awards to industry associations and does not contain the ROTC and Military Recruiting Access to Campus requirement or the prohibition on awards to contractors who have not filed their annual report regarding employment of certain veterans. Paragraphs IV, A and B apply to both DOE prime contracts and financial assistance awards. Paragraphs IV, C and F apply only to DOE financial assistance. Paragraph D applies to DOE prime contracts, and subcontracts thereunder. Paragraph IV, E applies only to DOE prime contracts. The guidance in this AL/FAL results from the following statutory requirements

**AL 97-10R/FAL 97-04R (11/20/98)**

Lobbying Restrictions (Energy & Water §501/Interior §303)

The Energy & Water Act prohibits the use of funds appropriated in the Act, either 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 section 1913 of title 18, United States Code. The Interior Act prohibits the use of funds appropriated under the Act 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.

Purchase of American-Made Equipment and Products--Sense of Congress (Energy & Water §502(a) & (b)/Interior §307(b))

These provisions provide that it is the sense of Congress that all equipment and products purchased with funds made available from the Energy & Water Act or the Interior Act should be American-made. The Energy & Water Act provision applies to both contracts and financial assistance instruments. The Interior Act provision applies only to financial assistance instruments.

Compliance with Buy American Act (Interior §307(a))

This provision provides that none of the funds made available under the Interior Act may be expended by an entity unless the entity agrees that in expending the funds the entity will comply with sections 2 through 4 of the Act of March 3, 1933 (41 U.S.C. 10a-10c; popularly known as the "Buy American Act").

Prohibition of Contracts with Persons Falsely Labeling Products as Made In America (Energy & Water §502(c)/Interior §307(c)).

These provisions prohibit the award of contracts and subcontracts to persons who falsely label products as made in America. Persons determined to have intentionally affixed such a false label, or any inscription with the same meaning, will be considered for debarment pursuant to FAR 9.406-2(a)(4) and 9.406-2(b)(1)(iii).

Consulting Contracts As Public Records (Interior §301)

This provision prohibits the use of funds made available under the Interior Act for consulting contracts pursuant to 5 U.S.C. 3109 unless such contracts are a matter of public record and are available for public inspection.

Inappropriate Use of Appropriated Funds (Energy and Water Conference Report 105-245)

The report provides guidance on the appropriate use of funds for DOE financial assistance awards to industry associations. The conferees conclude that, as a general rule, appropriated funds should not be used to underwrite the operating expenses of industry associations and that the Department should compete its financial assistance awards for information dissemination and outreach activities conducted by trade associations and use merit review procedures.

**IV. Guidance.**

**A. Lobbying Restrictions**

1. Scope: This guidance applies to all solicitations and awards of DOE contracts and financial assistance instruments under which funds appropriated in either the Energy & Water Act or the Interior Act are obligated.
2. Procedures: The following clauses shall be incorporated into applicable solicitations and awards of DOE contracts and financial assistance instruments where the expenditure of funds is made available under the Energy & Water or Interior Acts.

**LOBBYING RESTRICTION (ENERGY & WATER DEVELOPMENT  
APPROPRIATIONS ACT, 1999)**

The contractor or awardee 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)

**LOBBYING RESTRICTION (DEPARTMENT OF INTERIOR & RELATED AGENCIES  
APPROPRIATIONS ACT, 1999)**

The contractor or awardee 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)

**B. Purchase of American-made Equipment and Products—Sense of Congress.**

1. **Scope:** This guidance applies to all solicitations and awards of DOE contracts and financial assistance under which funds appropriated in the Energy & Water Act are obligated. This guidance also applies to solicitations and awards of financial assistance under which funds appropriated in the Interior Act are obligated (*This guidance is not applicable to contracts under which funds appropriated in the Interior Act are obligated*).

2. **Procedures:** The following notice shall be incorporated into applicable solicitations and awards of DOE contracts and financial assistance instruments using funds appropriated under the Energy & Water Act. The notice shall also be included in solicitations and awards of financial assistance instruments using funds appropriated under the Interior 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.

**C. Compliance with Buy American Act**

1. **Scope:** This guidance applies to all solicitations and awards of DOE financial assistance under which funds appropriated in the Interior Act are obligated.

2. **Procedures:** The following clause shall be incorporated into applicable financial assistance solicitations and awards.

COMPLIANCE WITH BUY AMERICAN ACT

In accepting this award, the recipient agrees to comply with sections 2 through 4 of the Act of March 3, 1933 (41 U.S.C. 10a - 10c, popularly known as the "Buy American Act"). The recipient should review the provisions of the Act to ensure that expenditures made under this award are in accordance with it.

(End of Clause)

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

1. **Scope:** This guidance applies to all DOE contracts, and subcontracts thereunder, under which funds appropriated in either the Energy & Water Act or the Interior Act are obligated.

2. Procedures:

- a. Pursuant to FAR 9.405(a), awards shall not be made to entities that are included on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs.
- b. If DOE, or DOE contractor personnel become aware of a possible violation of the prohibition against falsely mislabeling 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 DOE contracting officer 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).

**E. Consulting Contracts As Public Records**

1. Scope: This guidance applies to awards of DOE prime contracts for consulting services pursuant to 5 U.S.C. 3109 using funds appropriated in the Interior Act.
2. Procedures: Pursuant to the Freedom of Information Act (5 U.S.C. 552), as implemented in the Federal Acquisition Regulation at Part 24 and the Department of Energy's Freedom of Information Act Regulation at 10 CFR 1004, prime contracts are a matter of public record and are to be made available for public inspection upon request. Accordingly, these existing statutory and regulatory requirements would preclude violation of the prohibition set forth in Section 301 of the Interior Act.

**F. Financial Assistance Awards to Industry Associations**

1. Scope: This guidance applies to all awards of DOE financial assistance to industry associations under which funds appropriated in the Energy & Water Act are obligated.
2. Procedures:
  - a. Prior to making any award to an industry association, the DOE contracting officer shall ensure that the funds are provided for discrete tasks which accomplish a public purpose of support or stimulation and not for the principal purpose of paying the association's operating costs.
  - b. Overhead and general and administrative type-expenses incurred by industry associations as the result of conducting such discrete tasks may be reimbursed in accordance with the Government-wide rules for financial assistance.
  - c. The objective merit review policy stated at 10 CFR 600.13 applies to all discretionary financial assistance awards, including awards to industry associations.

**AL 97-10R/FAL 97-04R (11/20/98)**

d. Financial assistance activities for information dissemination and outreach activities conducted by industry associations shall be competed, to the greatest extent practicable. Any non-competitive award must satisfy the procedures established by the Department for non-competitive financial assistance.

**V. Effective Date.** This joint AL/FAL is effective upon its date of issuance shown on page 1.

**VI. Expiration Date.** September 30, 1999 or such later date as awards utilizing funds from the Energy & Water Development Appropriations Act, 1999, or the Department of the Interior and Related Agencies Appropriations Act, 1999 may be made and until the completion of any portion of such awards utilizing funds from those appropriations.

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Gwendolyn S. Cowan  
Acting Director  
Office of Procurement and  
Assistance Policy, MA-51

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Gwendolyn S. Cowan A.M.  
(Signature of authorizing official) P.M.

8. DATE  
December 8, 1998

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