



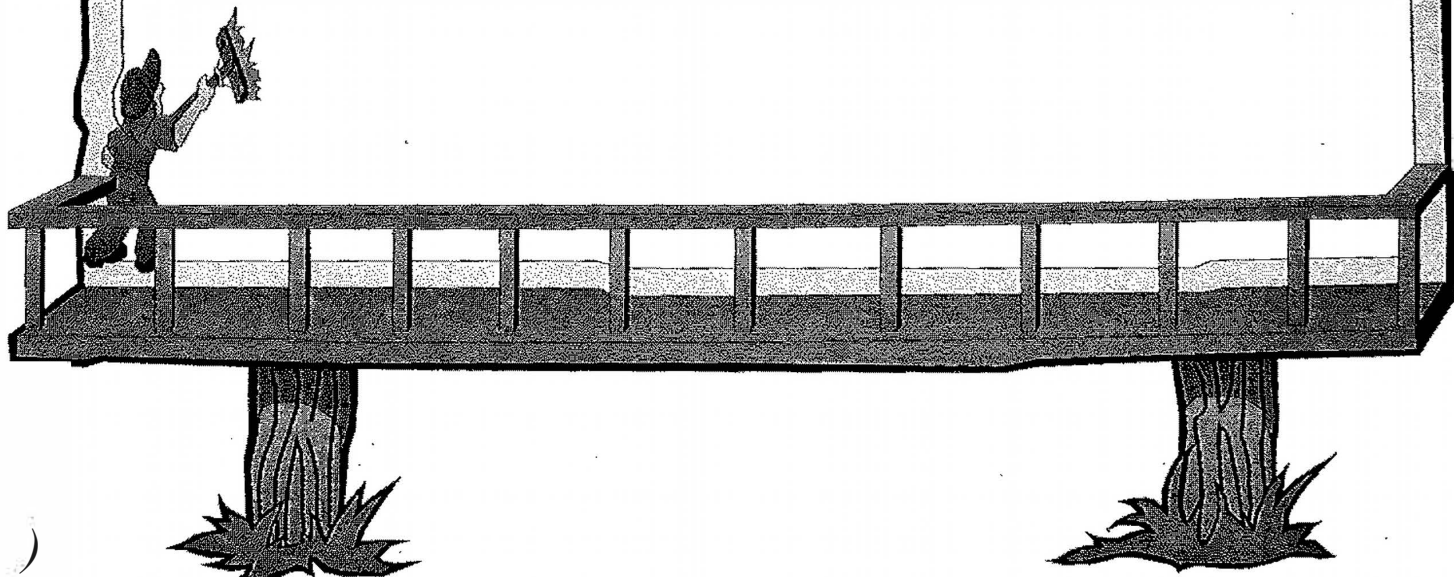
**HEADQUARTERS  
POLICY FLASH**

**POLICY FLASH 2005-21**

DATE: March 15, 2005  
TO: Procurement Directors  
FROM: Office of Procurement and Assistance Policy, ME-61  
Office of Procurement and Assistance Management

SUBJECT: **FY 2005 Procurement Related Legislative Provisions**

SUMMARY: This Flash transmits the new Acquisition Letter that provides implementing guidance on the below listed FY 2005 appropriation requirements:



Sections 301,304,307,312,313, and 501 of the Energy and Water Development Appropriations Act, 2005, Pub. L. 108-447, hereinafter referred to as the "Energy and Water Act."

Sections 301, 302, 332, and an unnumbered administrative provision contained in the Department of Interior and Related Agencies Appropriations Act, 2005, Pub. L. 108-447, hereinafter referred to as the "Interior Act."

Sections 807, 817, 818, and 821 of the Ronald Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. 108-375, hereinafter referred to as the "Defense Authorization Act."

The Flash and Acquisition Letter are posted at <http://professionals.pr.doe.gov>.

For questions related to this Acquisition Letter, contact the undersigned at (202) 287-1330 or via e-mail at [Michael.Fischetti@hq.doe.gov](mailto:Michael.Fischetti@hq.doe.gov).



Michael P. Fischetti  
Acting Director  
Office of Procurement and  
Assistance Policy, OMBE

Attachment

## (ii) ACQUISITION LETTER

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

**Subject: Implementation of Fiscal Year (FY) 2005 Legislative Provisions**

**References:**

DEAR917.6 Management and Operating Contracts  
DEAR 970.1706-1 Award, Renewal, and Extension

**When is this Acquisition Letter (AL) Effective?**

This AL implements certain provisions contained in the Consolidated Appropriations Act, 2005, Pub. L. 108-447. The Energy and Water Development Appropriations Act, 2005, Pub. L. 108-447 (Division C), and the Department of Interior and Related Agencies Appropriations Act, 2005, Pub. L. 108-447 (Division E), are contained in the Consolidated Appropriations Act. The Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. 108-375, implements additional statutory provisions. The statutory provisions addressed in this AL are effective on the date of the enactment of these laws. The Energy and Water Development Appropriations Act, 2005, and the Department of Interior and Related Agencies Act, 2005, were enacted December 8, 2004, and the Ronald W. Reagan National Defense Authorization Act, 2005, was enacted October 28, 2004.

**When Does This AL Expire?**

This AL remains in effect until superseded or canceled.

**Who is the Point of Contact?**

Contact Denise Wright of the Office of Procurement and Assistance Policy at (202) 287-1340 or by email at [denise.wright@h4.doe.gov](mailto:denise.wright@h4.doe.gov).

Visit our website at [www.pr.doe.gov](http://www.pr.doe.gov) for additional information on Acquisition Letters and other policy issues,

**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 and legislative direction.

Sections 301, 304, 307, 312, 313, and 501 of the Energy and Water Development Appropriations Act, 2005, Pub. L. 108-447, hereinafter referred to as the "Energy and Water Act."

Sections 301, 302, 332, and an unnumbered administrative provision contained in the Department of Interior and Related Agencies Appropriations Act, 2005, Pub. L. 108-447, hereinafter referred to as the "Interior Act."

Sections 807, 817, 818, and 821 of the Ronald Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. 108-375, hereinafter referred to as the "Defense Authorization Act."

Detailed guidance regarding the scope of these provisions is provided below.

**What is the Background?**

Sections 304, 307, and 501, of the Energy and Water Act are carried-over from the FY 2004 Energy and Water Development Appropriations Act, Pub. L. 108-137. Section 301 numbering remains consistent with previous Energy and Water appropriations legislation; however, Section 301 incorporates previous direction provided by Congress on the FY 2004 Energy and Water appropriations and previous direction provided by Congress regarding the extend/compete process for five Management and Operating (M&O) contracts. It also includes new direction regarding the use of competitive procedures for the award or significant extension or expansion of other M&O contracts and Secretarial notification to Congress in the absence of such competition. New to the Act this year are Sections 312 and 313, which discuss the breaking out of requirements from current facility management and operating contracts, among other things.

Sections 301, 302, 332, of the Interior Act and an unnumbered provision are carried-over from the FY 2004 Department of Interior and Related Agencies Appropriations Act (Pub. L. 108-108).

Sections 807, 817, 818, and 821 of the Ronald W. Reagan National Defense Authorization Act are acquisition related provisions with Government-wide applicability which requires implementation through the Federal Acquisition Regulation or other appropriate mechanism.

**Guidance Included in this Acquisition Letter**

**I. Summaries of Statutory Provisions, Legislative Direction, and Statutory Impact ..... 4**

**II. Competitive Procedures ..... 6**

**III. Preparation and Issuance of Procurement Documents for Unfunded Programs ..... 7**

**IV. User Facilities ..... 8**

**V. Achieving Small Business Contracting Goals ..... 10**

**VI. Limitation on Contract Management by M&O Contractors ..... 11**

**VII. Lobbying Restrictions ..... 12**

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## I. Summaries of Statutory Provisions, Legislative Direction, and Statutory Impact

### Energy and Water Act

**Section 301.** Prohibits the use of funds appropriated by this Act, any other appropriations Act for FY 2005 or any previous year, to make payments for a noncompetitive management and operating (M&O) contract unless 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.

This prohibition does not apply to an extension for up to 2 years of a noncompetitive M&O contract, if the extension is for purposes of allowing time to competitively award a new contract, provide continuity of service between contracts, or complete a contract that will not be renewed.

*Note: 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.*

*The term "competitive procedures" means procedures under which an agency enters into a contract pursuant to full and open competition" as provided in Section 4 of the Office of Federal Procurement Policy Act (41 USC 403), including procedures described in Section 303 of the Federal Property and Administrative Services Act of 1949 (41 USC 253), a procedure that solicits a proposal from only one source.*

For all M&O contracts other than the five identified Laboratory contracts, none of the funds appropriated by this Act may be used to award a M&O contract, or award a significant extension or expansion to an existing M&O 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 an award. The Secretary is directed not to delegate the authority to grant such a waiver. At least 60 days before a contract award for which the Secretary intends to grant 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 the particular award.

**Section 304.** Prohibits the use of funds appropriated in the Energy and Water Act to prepare or initiate Request For Proposals (RFPs) for a program if Congress has not funded the program.

**Section 307.** Directs the Department of Energy to ensure that broad public notice be given when a user facility is made 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.

**Section 312.** Provides, in part, that appropriated funds may be used to establish any procurement action necessary to achieve DOE's small business contracting goals set forth in 15 USC 644(g), except that none of the funds may be used for procurement actions resulting from the break-out of requirements from current facility M&O contracts unless, consistent with the requirements of FAR 19.4, Cooperation with the Small Business Administration, the Secretary of Energy or his designee formally requests, considers, and renders an appropriate decision on the views of the SBA Breakout Procurement Center Representative or the Representative's designee concerning cost effectiveness, mission performance, security, safety, small business participation, and other legitimate acquisition objectives of procurement actions at issue.

**Section 313.** Prohibits the use of funds appropriated by this Act to require M&O contractors to perform contract management oversight, or administration functions prohibited by FAR 7.503 in connection with any small business prime contract awarded by the Department.

**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.

#### Interior Act

**Section 301.** Provides, with respect to funds appropriated under this Act, that any consulting service through procurement contract, pursuant to 5 U.S.C. 3109, be limited to those contracts where expenditures are a matter of public record and are available for public inspection, except where otherwise provided by existing law or Executive order pursuant to existing law.

**Section 302.** Prohibits the use of funds appropriated in this Act for any activity or the publication or distribution of literature to promote public support or opposition to any legislative proposal on which Congressional action is not complete.

**Administrative Provision (unnumbered).** Similar to Section 304 of the Energy and Water Act, this section of the Interior Act prohibits the use of funds appropriated in this Act to

prepare, issue, or process procurement documents for programs or projects for which appropriations have not been made.

**Section 332.** Limits DOE funding to \$500,000 to initiate or continue competitive sourcing studies in fiscal year 2005 for programs, projects, and activities for which funds are appropriated by this Act or any other Act for Fiscal Year 2005, until such time as the Secretary submits a reprogramming proposal to the Committees on Appropriations of the Senate and the House of Representatives, and such proposal has been processed consistent with the reprogramming guidelines in House Report 108-330.

"Competitive sourcing study" is defined as a study on subjecting work performed by Federal Government employees or private contractors to public-private competition or on converting the Federal Government employees or the work performed by such employees to private contractor performance under the Office of Management and Budget Circular A-76 or any other administrative regulation, directive, or policy.

**Statutory Impact- Ronald Reagan Defense Authorization Act and Consolidated Appropriations Act**

The Ronald Reagan Defense Authorization Act and the Consolidated Appropriations Act also contain acquisition related provisions that require uniform Government-wide implementation. These requirements will be addressed through the Federal Acquisition Rulemaking process and supplemented by DOE as appropriate. When additional information is warranted, further guidance will be provided.

**II. Competitive Procedures**

**What is the scope of this requirement?**

Section 301 of the Energy and Water Act establishes various requirements that apply to five (Ames Laboratory, Argonne National Laboratory, Lawrence Berkeley National Laboratory, Lawrence Livermore National Laboratory, and Los Alamos National Laboratory) Federally Funded Research and Development Centers (FFRDC) managed by M&O contractors and to other procurement actions where funds may be used to award a M&O contract, or award a significant extension or expansion to an existing M&O contract.

This affects new M&O contracts, amendments, and modifications that extend existing M&O contracts beyond the term provided for in the contract (except as noted below) and 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.

**What procedures need to be followed to implement this requirement?**

The existing policy and procedure regarding the extend/compete process, specifically AL 96-09, remains unchanged and continues to affect all M&O contracts. The justification and Secretarial authorization required by DEAR 917.602(c) satisfy Section 301(c) of the Energy and Water Act for M&O contracts, other than the five FFRDC contracts specifically identified in Section 301 (b)(1),

**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 Act and the unnumbered administrative provision contained in the Interior Act apply to Departmental initiatives for a program or project that has not been funded by Congress:

Section 304 of the Energy and Water Act 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 by Congress.

The unnumbered administrative provision of the Interior Act prohibits the use of funds to prepare, issue, or process procurement documents for programs or projects for which appropriations have not been made.

**What procedures need to be followed to implement this requirement?**

For programs funded by the Energy and Water Act, contracting activities shall not prepare or initiate RFPs, in support of a program or project for which funds have not been appropriated,

For programs funded by the Interior Act, contracting activities shall not prepare, issue, or process procurement documents in support of a program or project for which funds have not been appropriated.

**Energy and Water Act (Programs)**

Energy Supply  
Non-Defense Environmental Management  
Uranium Facilities Maintenance and Remediation  
Science  
Nuclear Waste Disposal  
Departmental Administration  
Office of Inspector General  
Power Marketing Administrations  
Federal Energy Regulatory Commission  
National Nuclear Security Administration  
Defense Environmental Management

**Energy and Water Act (Programs cont.)**

Defense Nuclear Waste Disposal  
Energy Security and Assurance  
Security  
Intelligence  
Counterintelligence  
Independent Oversight and Performance Assurance  
Environmental, Safety and Health  
Worker and Community Transition  
Hearing and Appeals

**Interior Act (Programs)**

Naval Petroleum and Oil Shale  
Reserves  
Elk Hills School Lands Fund  
Strategic Petroleum Reserve  
Clean Coal Technology  
Economic Regulation  
Energy Information  
Administration  
Energy Conservation  
Fossil Energy Research &  
Development

**IV. User Facilities**

**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 (M&O) 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 M&O contractors enter into formal partnerships for the management or operation of DOE user facilities. Rather, the operation of these facilities 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 M&O 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".

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. Achieving Small Business Contracting Goals

### What is the scope of this requirement?

Section 312 of the Energy and Water Act provides that funds appropriated by the Act may not be used for the break-out of requirements from current M&O contracts unless, consistent with the requirements of FAR 19.4, Cooperation with the Small Business Administration (SBA), the Secretary of Energy or his designee formally requests, considers, and renders an appropriate decision on the views of the SBA Break-out Procurement Center Representative or designee concerning "cost effectiveness, mission performance, security, safety, small business participation, and other legitimate acquisition objectives of procurement actions at issue."

For DOE, there are two instances when a break-out requirement may occur. The requirement may arise either as a result of a determination by the Advance Planning Acquisition Team (APAT) or the contracting officer in the review of a particular acquisition. While the APAT does not apply to NNSA (see AL 2004-3), the breakout requirement may occur in NNSA as a result of a determination by the contracting officer in the review of a particular acquisition. The Director of the Office of Small Disadvantage Business Utilization (OSDBU) is the Department of Energy designated point of contact for obtaining the views of the SBA representative and rendering an appropriate decision. For NNSA, the Service Center Small Business Program Manager (SCSBPM) is the POC and the Head of Contracting Activity (HCA) of NNSA will render the decision.

### What procedures need to be followed to implement this requirement?

DOE contracting officers, prior to the use of appropriated funds for the intended break-out of work under an M&O contract, shall contact the Director of the Office of Small Disadvantage Business Utilization (OSDBU) for a decision on the views of the SBA Representative. The OSDBU will obtain the views of the designated SBA representative with respect to "cost effectiveness, mission performance, security, safety, small business participation, and other legitimate acquisition objectives," and render an opinion on the views of the SBA representative to the contracting officer.

NNSA contracting officers, prior to the use of appropriated funds for the intended break-out of work under an M&O contract, shall contact the SCSBPM to obtain the views of the SBA Representative with respect to "cost effectiveness, mission performance, security, safety, small business participation, and other legitimate acquisition objectives," and forward a recommendation on the views of the SBA representative, coordinated through OSDBU, for approval by the NNSA HCA, prior to rendering the approval decision to the contracting officer.

When determined by the APAT that an opportunity to break-out procurement requirements exists, the contracting officer shall be notified by the Director of the OSDBU on the views of the SBA Representative. The Director, OSDBU, should consider the views of the SBA Representative with respect to the elements identified in statute and render a decision as a result of that analysis. The views of the SBA

Representative and the OSDBU decision should be forwarded to the contracting officer and made part of the contract file.

## VI. Limitation on Contract Management by M&O Contractors

### What is the scope of this requirement?

Section 313 provides that DOE is prohibited from using funds under the Energy and Water Act to require M&O contractors to perform inherently governmental functions, as identified in FAR 7.503. FAR 7.503 specifically identifies inherently governmental functions to include, among other things, the following procurement activities with respect to federal prime contracts:

- (1) Determining what supplies or services are to be acquired by the Government (although an agency may give contractors authority to acquire supplies at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency);
- (2) Participating as a voting member on any source selection boards;
- (3) Approving any contractual documents, to include documents defining requirements, incentive plans, and evaluation criteria;
- (4) Awarding contracts;
- (5) Administering contracts (including ordering changes in contract performance or contract quantities, taking action based on evaluations of contractor performance, and accepting or rejecting contractor products or services);
- (6) Terminating contracts;
- (7) Determining whether contract costs are reasonable, allocable, and allowable; and reasonable;
- (8) Participating as a voting member on performance evaluation boards.

*Note: FAR 7.503(d) contains a list of functions which are examples of actions not generally considered inherently governmental functions, as it relates to contract management, oversight, or administration on contracts awarded by DOE where the M&O contractor is performing work.*

### What procedures need to be followed to implement this requirement?

Contracting Officers shall ensure that the contracting officer's representative (COR) and contracting officer (CO) functions do not cause the M&O contractor to perform inherently governmental functions as part of any DOE contract.

Contracting Officers shall ensure that the Acquisition Strategy that is developed for a procurement action fully describes the Government's management approach so as to ensure successful completion of work under a particular program or project without the risk of contractor performance of inherently governmental functions.

## VII. Lobbying Restrictions

### What is the scope of this requirement?

Section 501 of the Energy and Water Act and Section 302 of the Interior Act apply, respectively, to all solicitations and awards of DOE contracts under which funds appropriated in these Acts 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 Act:

#### ***Lobbying Restriction (Energy and Water Act 2005)***

*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)

The following clause shall be incorporated into solicitations and awards of DOE contracts where the expenditure of funds is made available in the Interior Act:

#### ***Lobbying Restriction (Interior Act 2005)***

*The contractor 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)