



Department of Energy  
Acquisition Regulation

No. AL 99-03  
Date April 2, 1999

# ACQUISITION LETTER

The Procurement Executive is issuing this Acquisition Letter through a delegation from the Secretary and under the authority of the Federal Acquisition Regulation (FAR), Section 1.301(a)(2).

*\* \* \* Plain Language Note \* " \**

*In his memorandum dated June 1, 1998, the President directed the federal government to begin using plain language in its written communications. This Acquisition Letter is one of the first that we are issuing in a revised format as part of our continuing effort to comply with the intent of the President's request. We will publish future Acquisition Letters in this plain language format and we welcome your comments on our approach, as well as your suggestions for additional ways we can simplify our written products - please contact Kevin Smith in the Office of Procurement and Assistance Policy at [kevin.m.smith@hq.doe.gov](mailto:kevin.m.smith@hq.doe.gov), or at 202-586-8189.*

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## References:

Executive Order 12829, January 6, 1993, *National Industrial Security Program (NISP)*,  
Executive Order 12958, April 17, 1995, *Classified National Security Information*,  
National Industrial Security Program Operating Manual (NISPOM)  
DEAR 904.20 Foreign Ownership, Control or Influence Over Contractors  
Standard Form 328, *Certificate Pertaining to Foreign Interests*  
DEAR 952.204-73, *Foreign Ownership, Control or Influence Over Contractor (Representation)*  
DEAR 952.204-74, *Foreign Ownership, Control or Influence Over Contractor (Clause)*  
DEAR 970.0404, *Safeguarding Classified Information*  
DEAR 970.5204-10, *Foreign Ownership, Control or Influence Over Contractors (FOCI)*

Subject: Foreign, Ownership, Control or Influence

When is this Acquisition Letter effective?

This AL is effective 10 days after the date of issuance.

When does this Acquisition Letter expire?

This AL is effective until it is canceled.

Whom do you contact for more information?

Contact Richard Langston of the Office of Procurement and Assistance Policy on 202-586-8247 or send E-mail to [richard.Langston@hq.doe.gov](mailto:richard.Langston@hq.doe.gov).

AL 99-03 (04/02/99)

Visit our website at <http://www.pr.doe.gov> for information on Acquisition Letters and other policy issues.

What is the purpose of this Acquisition Letter?

The purpose of this AL is to provide guidance regarding:

1. the adoption by all agencies of a Standard Form (SF) 328, ~~Certificate Pertaining to Foreign Interests~~, for collecting FOCI information;
2. Contracting Officer responsibilities associated with foreign ownership, control or influence clearance and administration procedures; and
3. authorized deviations from use of the solicitation provision and contract clause at DEAR 952.204-73 and 74 and the use, in lieu thereof, of a model solicitation provision and a model contract clause regarding foreign ownership, control or influence clearance requirements and procedures.

This AL replaces previous interim guidance contained in AL 92-2R which is rescinded by this Acquisition Letter.

What is the Background?

The National Industrial Security Program was established by Executive Order 12829, January 6, 1993, for the protection of information classified pursuant to Executive Order 12958, April 17, 1995, Classified National Security Information, or its successor or predecessor orders, and the Atomic Energy Act of 1954, as amended. Under the National Industrial Security Program (NISP), the Executive Branch undertook to standardize industrial security requirements, including the Foreign Ownership, Control or Influence (FOCI) process. These and other security changes will revise or supersede portions of the DEAR and other regulations and directives relative to security procedures and are the subject of a rule making which is in progress at this time. In the interim, personnel should follow the procedures described in this AL for acquisitions requiring access authorizations for access to classified information or special nuclear materials.

Prior to this initiative, the DOE utilized a set of eleven questions to collect FOCI information from contractors seeking a contract that involved access to classified information or special nuclear material. As part of the NISP, DOE and DOD examined the FOCI questions used by the two agencies and developed a new set of 10 questions. These questions were designed to ease the burden of information collection imposed on contractors and to eliminate questions which required duplicative information. The questions were submitted to the Office of Management and Budget (OMB) and in April 1997 were issued as Certificate Pertaining to Foreign Interests, Standard Form 328.

Generally, DOD and DOE have agreed to accept each others facility clearances including foreign ownership, control or influence determinations. An exception to this agreement is when the contractor will need to possess information that is classified at the Secret, Restricted Data level for which DOE has higher security requirements than does DOD. In this case, "possess information" means to maintain such information within its own facility as contrasted with accessing it within a DOE facility. Before accepting a DOD clearance or determination, the Contracting Officer shall consult the local DOE Safeguards and Security Office.

What must the Contracting Officer do when contemplating an award which will involve access to classified information or special nuclear material if the awardee is a contractor not possessing an active facility clearance, including a current FOCI determination?

The Contracting Officer should solicit information from the planned awardee through use of the Standard Form (SF) 328, *Certificate Pertaining to Foreign Interests*. The prospective awardee should also be furnished current guidelines for completing the SF328 and a format for listing the contractor's officers and directors. A model solicitation provision and a model contract clause are included.

Where can these forms be obtained?

The forms and instructions may be obtained from the local Safeguards and Security Office

Who should submit the information.

Any entity that has been selected for the award of a contract which will require access to classified information or special nuclear material. In the case of competitive acquisitions, only the apparent successful offerer should be required to submit a SF328 unless it is anticipated that there will be insufficient lead time between selection and contract award to allow deferral of the review.

Is there anything else the Contracting Officer can do to facilitate the process.

Yes. The contracting officer, prior to submitting a FOCI submission from an offerer to the local DOE Safeguards and Security office, should review the submission to ensure that:

- (1) The SF328 has been signed and dated by an authorized official of the company;
- (2) If publicly owned, the contractor's most recent annual report, and its most recent proxy statement for its annual meeting of stockholders have been attached;
- (3) A copy of the company's articles of incorporation and an attested copy of the company's by-laws, or similar documents filed for the company's existence and management, and amendments to those documents;

- (4) A list identifying the organization's owners, officers, directors, and executive personnel, including their names; social security numbers; citizenship; titles of all positions they hold within the organization; and what clearances, if any, they possess or are in the process of obtaining and identification of the government agency(ies) that granted or will be granting those clearances;
- (5) A consolidated financial information report has been attached;
- (6) A FOCI submission has been attached for each tier parent organization (i.e. ultimate parent and any intervening levels of ownership); and,
- (7) A summary FOCI data sheet.

If any of these documents are missing or incomplete, the contracting officer should advise the offeror that award cannot be made until all documents are furnished.

### **What if the prospective awardee advises that it has been previously cleared under an existing DOD or DOE contract?**

If an offeror advises the contracting officer that it does not need to submit FOCI information because it already has a DOD or DOE facility clearance and determination and furnishes the appropriate DOD or DOE identifying number, the Contracting Officer should verify this information with the local Safeguards and Security Office.

### **What tools are available to help us?**

The Office of Nonproliferation and National Security maintains a Web page at <http://www.nn.doe.gov/default.htm> and the Nonproliferation and National Security Institute, formerly the Central Training Academy maintains a Web page at <http://www.nnsi.doe.gov>. Another useful site is provided by the Defense Security Service, formerly the Defense Investigative Service. Their Web page is at <http://www.dis.mil/>. The National Industrial Security Program Operating Manual can be downloaded from this site.

### **MODEL SOLICITATION PROVISION AND CONTRACT CLAUSE**

Pending formal revision of the DEAR, the following solicitation provision (Attachment 1) and contract clause (Attachment 2) have been developed as appropriate for use in place of those contained at 952.204-73 and 952.204-74. This guidance constitutes authority to deviate from the DEAR provision and clause.

Use this solicitation provision with Standard Form 328, Certificate Pertaining to Foreign Interests, in place of that found at DEAR 952.204-73.

### DEAR 952.204-73 FACILITY CLEARANCE [Deviation]

#### NOTICES

Statute prohibits the award of a contract under a national security program to a company owned by an entity controlled by a foreign government unless a waiver is granted by the Secretary of Energy.

Offerors who have either a Department of Defense or a Department of Energy facility clearance, generally need not resubmit the following FOCI information unless specifically requested to do so, instead, provide your DOE facility clearance code or your DOD assigned commercial and government entity (CAGE) code. If uncertain, consult the office which issued this solicitation.

#### (a) Use of Certificate Pertaining to Foreign Interests, Standard Form 328

(1) The contract work anticipated by this solicitation will require access to classified information or special nuclear material. Such access will require a facility clearance for the contractor organization and access authorizations (security clearances) for contractor personnel working with the classified information or special nuclear material. To obtain a facility clearance the offeror must submit a Certificate Pertaining to Foreign Interests, Standard Form 328.

(2) Information submitted by the offeror in response to the Standard Form 328 shall be used solely for the purposes of evaluating FOCI and shall be treated by the DOE, to the extent permitted by law, as business or financial information submitted in confidence.

(3) Following submission of a Standard Form 328, the contractor shall immediately submit to the contracting officer written notification of any changes in the extent and nature of FOCI which could affect the offeror's answers to the questions in Standard Form 328. Notice of changes in ownership or control which are required to be reported to the Securities and Exchange Commission, the Federal Trade Commission, or the Department of Justice shall also be furnished concurrently to the contracting officer.

#### (b) Definitions:

(1) A foreign interest is defined as any of the following:

- A foreign government, foreign government agency, or representative of a foreign government;
- Any form of business enterprise or legal entity organized, chartered or incorporated under the laws of any country other than the United States or its possessions and trust territories; and
- Any person who is not a citizen or national of the United States.

(2) Foreign ownership, control, or influence (FOCI) means the situation where the degree of ownership, control, or influence over a contractor by a foreign interest is such that a reasonable basis exists for concluding that compromise of classified information or special nuclear material may result.

(c) A facility clearance is an administrative determination that a facility is eligible for access to classified information or special nuclear materials. A Facility Clearance shall be based upon a determination that satisfactory safeguards and security measures are afforded the activities being performed at the facility. It is DOE policy that all contractors or subcontractors requiring access to classified information or special nuclear material be processed for a Facility Clearance at the level appropriate to the activities being performed at the facility. Approval for a Facility Clearance shall be based upon:

(1) A favorable foreign ownership, control, or influence (FOCI) determination. This determination will be based upon the contractor's response to the ten questions in Standard Form 328 and any supporting data provided by the contractor. Prior to award of a contract, the DOE must determine that award of the contract to the offeror will not pose an undue risk to the common defense and security as a result of its access to classified information or special nuclear material in the performance of the contract. The contracting officer may require the offeror to submit such additional information as deemed pertinent to this determination.

(2) A contract containing the appropriate security clauses.

(3) Approved safeguards and security plans which describe protective measures appropriate to the classified activities being performed at the facility.

(4) If access to nuclear materials is involved, an established Reporting Identification Symbol code for the Nuclear Materials Management and Safeguards Reporting System.

(5) For a facility to possess classified matter or special nuclear material at its location, a survey conducted no more than 6 months before the facility clearance date, with a composite facility rating of satisfactory.

(6) Appointment of a Facility Security Officer, and, if applicable, a Materials Control and Accountability Representative. The Facility Security Officer must possess an access authorization equivalent to the Facility Clearance.

(7) Access authorizations for key management personnel. Key management personnel, who will be determined on a case-by-case basis, must possess access authorizations equivalent to the level of the Facility Clearance.

(d) A Facility Clearance is required even for contracts which do not require contractor's offices to receive, process, reproduce, store, transmit, or handle classified information or special nuclear material,

Use the following contract clause in place of that contained in DEAR 952.204-74.

**DEAR 952.204-74 FOREIGN OWNERSHIP, CONTROL, OR INFLUENCE  
OVER CONTRACTOR (Deviation)**

- (a) For purposes of this clause, subcontractor means any subcontractor at any tier and the term "contracting officer" shall mean DOE contracting officer. When this clause is included in a subcontract, the term "contractor" shall mean subcontractor and the term "contract" shall mean subcontract.
- (b) The contractor shall immediately provide the contracting officer written notice of any changes in the extent and nature of FOCI over the contractor which would affect the information provided in the Certificate Pertaining to Foreign Interests and its supporting data. Further, notice of changes in ownership or control which are required to be reported to the Securities and Exchange Commission, the Federal Trade Commission, or the Department of Justice shall also be furnished concurrently to the contracting officer.
- (c) In those cases where a contractor has changes involving FOCI, the DOE must determine whether the changes will pose an undue risk to the common defense and security. In making this determination, the Department shall consider proposals made by the contractor to avoid or mitigate foreign influences.
- (d) If the contracting officer at any time determines that the contractor is, or is potentially, subject to FOCI, the contractor shall comply with such instructions as the contracting officer shall provide in writing to safeguard any classified information or special nuclear material.
- (e) The contractor agrees to insert terms that conform substantially to the language of this clause including this paragraph (e) in all subcontracts under this contract that will require access authorizations for access to classified information or special nuclear material. Additionally, the contractor shall require such subcontractors to submit a completed SF328, to the DOE Office of Safeguards and Security (marked to identify the applicable prime contract). Such subcontracts or purchase orders shall not be awarded until the contractor is notified that the proposed subcontractors have been cleared. Information to be provided by a subcontractor pursuant to this clause may be submitted directly to the contracting officer.
- (f) Information submitted by the contractor or any affected subcontractor as required pursuant to this clause shall be treated by DOE to the extent permitted by law, as business or financial information submitted in confidence to be used solely for purposes of evaluating FOCI.
- (g) The requirements of this clause are in addition to the requirement that a contractor obtain and retain the employee security clearances required by the contract. This clause shall not operate as a limitation on DOE's rights, including its rights to terminate this contract.

## Attachment 2

(h) The contracting officer may terminate this contract for default either if the contractor fails to meet obligations imposed by this clause, e.g., provide the information required by this clause, comply with the contracting officer's instructions about safeguarding classified information, or make this clause applicable to subcontractors, or if, in the contracting officer's judgment, the contractor creates an FOCI situation in order to avoid performance or a termination for default. The contracting officer may terminate this contract for convenience if the contractor becomes subject to FOCI and for reasons other than avoidance of performance of the contract, cannot, or chooses not to, avoid or mitigate the FOCI problem.