



**Department of Energy
Acquisition Regulation**

**No. AL 2011-05
Date 05/12/11**

**Department of Energy
Financial Assistance Regulations**

**No. FAL 2011-01
Date 05/12/11**

ACQUISITION/FINANCIAL ASSISTANCE LETTER

This Acquisition/Financial Assistance Letter is issued under the authority of the DOE and NNSA Senior Procurement Executives.

**Subject: Congressional Notification of Pending Contract or Financial Assistance
Actions in excess of \$1 Million**

References:

Division B, Full-Year Continuing Appropriations Act, 2011, Pub.L. 112-10, Title I –
General Provisions, section 1101(a)(2)

Energy and Water Development and Related Agencies Appropriations Act, 2010
Pub.L. 111-85, Title III, section 311

Acquisition Guide, Chapter 1.2, Head of Contracting Activity (HCA) Authority, Functions, and
Responsibilities

Acquisition Guide, Chapter 5.1, Release of Information: Congressional Notification and Long-
range Acquisition Estimates

When is this Acquisition Letter (AL)/Financial Assistance Letter (FAL) Effective?

This AL/FAL is effective May 16, 2011. The statutory provision addressed in this AL/FAL is a continuation of the provision effective as of the date of the enactment of the Energy and Water Development and Related Agencies Appropriations Act, 2010 which is October 28, 2009.

When does the AL/FAL expire?

The AL/FAL remains in effect until superseded or canceled.

Who are the Points of Contact?

For Department of Energy (DOE) acquisition questions, contact Barbara Binney at (202) 287-1340 or Barbara.binney@hq.doe.gov.

For DOE financial assistance questions, contact Ellen Colligan at (202) 287-1776 or ellen.colligan@hq.doe.gov.

For National Nuclear Security Administration (NNSA) acquisition and financial assistance questions, contact Steve Law, at (202) 586-4321 or stephen.law@nnsa.doe.gov.

For additional information on Acquisition Letters and other issues, visit our website at http://www.management.energy.gov/policy_guidance/procurement_acquisition.htm.

What is the purpose of this AL/FAL?

The purpose of this AL/FAL is to provide information and guidance on statutory and non-statutory requirements for Congressional notification of:

- (a) Pending award of a contract action in excess of \$1 million;
- (b) Announcement of selected applications for negotiation of financial assistance awards in excess of \$1 million; and
- (c) Award of a financial assistance action in excess of \$1 million.

This AL/FAL implements Section 1101(a)(2), Title I - General Provisions of Division B - Full-Year Continuing Appropriations Act, 2011 from the Department of Defense and Full-Year Continuing Appropriations Act, 2011 (Pub.L. 112-10). This statute is a continuation of the Energy and Water Development and Related Agencies Appropriations Act, 2010.

This AL/FAL prescribes instruction and guidance pertaining to the statutory Congressional notification required by Section 311 of the Energy and Water Development and Related Agencies Appropriations Act, 2010 (Pub.L. 111-85). In addition, this AL/FAL addresses a non-statutory Congressional notification for actions funded under the American Recovery and Reinvestment Act of 2009 (ARRA).

What is the background?

This AL/FAL implements Section 1101(a)(2) of Pub.L. 112-10 and Section 311 of Pub. L. 111-85, which requires the Department to provide Congressional notice for actions described in Section 311 that are in excess of \$1 million.

The following is the text of Section 311:

None of the funds made available by this Act may be used to make a grant allocation, discretionary grant award, discretionary contract award, Other Transaction Agreement, or to issue a letter of intent totaling in excess of \$1,000,000, or to announce publicly the intention to make such an award, including a contract covered by the Federal Acquisition Regulation, unless the Secretary of Energy notifies the Committees on Appropriations of the Senate and the House of Representatives at least 3 full business days in advance of making such an award or issuing such a letter: Provided, That if the Secretary of the Department of

Energy determines that compliance with this section would pose a substantial risk to human life, health, or safety, an award may be made without notification and the Committees on Appropriations of the Senate and the House of Representatives shall be notified not later than 5 full business days after such an award is made or letter issued

This Section 311 notice requirement is in addition to preexisting DOE procedures for Congressional notifications of contract and financial assistance actions (see Acquisition Guide, Chapter 5.1, Release of Information: Congressional Notification and Long-range Acquisition Estimates).

Section 311 does not apply to actions that are funded under the ARRA. However, with the significant Congressional interest in ARRA funded actions, the Department has determined, as a matter of policy, that notices of pending acquisition and assistance actions using ARRA funds will also be provided to Congress. Please refer to Section G. of this AL/FAL for information and guidance regarding ARRA notices.

What are the instructions/guidance of this Acquisition and Financial Assistance Letter?

A. Applicability

The Section 311 statutory notification applies only to actions described in Section 311 and paragraphs B., C., and D. of this AL/FAL, that are valued in excess of \$1 million, under which funds are made available from Pub.L.111-85 and Pub.L. 112-10.

B. Terms and Definitions

“Announce publicly,” as used in this AL/FAL, means the sharing of information in any form of communication with a non-DOE party. This includes press releases, award notices posted to FedBizOpps, apparently successful notices in small business set-asides, and successful/unsuccessful offeror notification letters. For block or formula grant programs, public announcement means the posting of the Funding Opportunity Announcement and the annual Program Notice. Prospective awardees or applicants who have been selected for negotiation of financial assistance awards must not be notified in advance to the completion of the Section 311 notification requirements or DOE policy to implement like processes as described in this AL/FAL.

“Discretionary contract award,” as used in Section 311, means all types of commitments that obligate the Government to an expenditure of funds that are made available under Pub.L. 111-85 and Pub.L.112-10, including but not limited to, contract awards; purchase orders; task and delivery orders under multiple award contracts to include Governmentwide acquisition contracts, indefinite delivery contracts, and Federal Supply Schedule contracts; orders/calls under basic order agreements and blanket purchase agreements; and letter contracts. For Power Marketing Administrations, except for Bonneville Power Marketing Administration, this includes purchase power and wheeling transactions.

“Discretionary grant award,” as used in Section 311, is an award of financial assistance, other than a grant allocation.

“Grant allocation,” as used in Section 311, means a block or formula grant.

“Other Transaction Agreement,” as used in Section 311, means “Technology Investment Agreement” codified in Federal regulation at 10 C.F.R. Part 603, pursuant to DOE’s Other Transaction Authority of 42 U.S.C. § 7256.

“Procurement Director,” as used in this AL/FAL, means for DOE the Field Contracting Office Procurement Director and for NNSA the NNSA Service Center Head of the Contracting Activity (HCA). For Power Marketing Administrations, except for Bonneville Power Marketing Administration, the definition includes the Field Office Power Marketing or Energy Marketing and Management Director/Manager for other than FAR-based contract actions.

“Three full business days,” as used in Section 311, means three consecutive days, excluding Saturdays, Sundays, and holidays, beginning at 8:30 a.m. eastern time on the first business day and ending at 5:30 p.m. eastern time on the third business day. Example – If a notice is sent to Congress on Monday by 5:30 p.m. eastern time, then award can be made on Friday.

“Totaling in excess of \$1,000,000,” as used in Section 311, for contract actions, non-competitive financial assistance awards, Other Transactions Agreements and Office of Science’s annual notices means the total value of the award including options, budget periods and cost share. For competitive financial assistance actions, it means the total value of the award, including cost share.

Note: DOE does not commonly use "letters of intent." In some instances, this term has been used to mean a letter contract. At other times Departments (such as Transportation) have received specific statutory direction to use "letters of intent" to announce an intention to obligate an amount from future available budget authority specified in law, with certain limitations, for defined major capital projects. DOE has not received similar statutory direction regarding "letters of intent" and it is not anticipated that a contracting officer would have need for one. Should circumstances arise where a contracting officer believes it would need to use a letter of intent, please contact the appropriate person under the points of contact section of this AL/FAL prior to use.

C. Section 311 Discretionary Contract Awards

1. Congressional notification is required for discretionary contract awards (see definition in Section B. of this AL/FAL) with a total value, including all options, in excess of \$1 million. Purchase power and wheeling transactions will use a modified instruction for preparation and submission of notices. The modified instruction will be issued separately from this AL/FAL to the Power Marketing Administration.
2. Congressional notification is also required for a non-competitive extension of a contract that requires a Justification for Other Than Full and Open Competition (JOFOC), or other

action that requires a JOFOC (e.g., new scope modification) pursuant to Federal Acquisition Regulation (FAR) Part 6, under either an existing contract or a new contract, when the value of the action is expected to exceed \$1 million. When a synopsis must be issued prior to award, the contracting officer should first consider responses to the synopsis prior to sending the required Congressional notification.

3. For small business programs, the pre-award notices to unsuccessful offerors required by FAR 15.503(a)(2), should not be provided until after the Congressional notification is made and the required three full business days have elapsed.
4. The notification requirement does not apply to the following:
 - (a) Modifications that are within the scope and subject to the terms and conditions of an existing contract, including modifications that are issued pursuant to the Changes clause of the contract, and administrative modifications (e.g., funding modification).
 - (b) The exercise of existing options that are contained in the contract.
 - (c) The issuance of a task and delivery order awarded under a DOE single award indefinite delivery contract.
 - (d) Contract actions, including orders, which are awarded using another agency's funds.
5. The appropriate Congressional notification shall be provided in accordance with the procedures prescribed in Section E. of this AL/FAL.

D. Section 311 Financial Assistance and Other Transactions

1. **Competitive Discretionary Grant Award:** Congressional notification is required prior to announcement of a selection of applications for negotiation of financial assistance awards from a Funding Opportunity Announcement when the total amount available for all awards is in excess of \$1 million. The Congressional notification shall be provided in accordance with the procedures prescribed in Section E. of this AL/FAL. Congressional notification is not required for subsequent award(s) made pursuant to the selection for which Congressional notification has already been provided.
2. **Grant Allocations (block and formula grants):** Congressional notification shall be provided in advance of announcing publicly the funding opportunity announcement and the annual program notice. The Congressional notification shall be provided in accordance with the procedures prescribed in Section E. of this AL/FAL. Congressional notification is not required for subsequent award(s) made pursuant to the selection for which Congressional notification has already been provided.
3. **Office of Science's Annual Funding Opportunity Notices:** Congressional notification shall be provided on those awards exceeding \$1 million after selection but prior to award.

The Congressional notification shall be provided in accordance with the procedures prescribed in Section E. of this AL/FAL.

4. **Non-competitive Discretionary Financial Assistance:** Congressional notification is required prior to award of a non-competitive, discretionary, grant, cooperative agreement or Other Transaction Agreement that is valued in excess of \$1 million in accordance with the procedures prescribed in Section E. of this AL/FAL. This includes all awards for congressionally directed projects.
5. **Renewals and Supplemental Awards:** Congressional notification shall be provided in advance of award for all actions in excess of \$1 million in additional estimated total projects costs. Continuation awards do not require notices.

E. Procedures for Submission of Section 311 Congressional Notifications

1. In accordance with Sections C. and D. above, for actions that are valued in excess of \$1 million and obligate FY-2011 appropriations under Pub.L. 112-10, at least three (3) days prior to making award (see E.2.(a) for details), the Head of the Contracting Activity (HCA) shall prepare, sign, and transmit the required notice using the appropriate form letter on DOE letterhead. The HCA can delegate this responsibility in writing no lower than the Procurement Director. *Note: If the action will include both ARRA and FY-2011 appropriations under Pub.L. 112-10, use the statutory notification form.* The Field Contracting Office shall prepare the appropriate form letter in draft for the HCA signature. **It is important to spell out all abbreviations and acronyms.** The model form letters are as follows:
 - Attachment 1 form letter, Subject: Section 311 Notification of Pending Contract Action
 - Attachment 2 version A form letter, Subject: Section 311 Notification of Pending Public Announcement of Selection of Applications for Negotiation of Financial Assistance Awards
 - Attachment 2 version B form letter, Subject: Section 311 Notification to Make a Non-competitive Financial Assistance Award.
2. **Head of the Contracting Activity (HCA) Responsibilities.** The HCA is responsible for ensuring the accountability, accuracy, and timeliness of the notification process. The responsibilities include:
 - (a) **Management of the notification process.**
 - i. Implementation of procedures to ensure compliance with this AL/FAL.
 - ii. Establishing a dedicated e-mail box and e-mail address (311notice/Program or site Office@doe.gov, for example 311noticeNETL@netl.doe.gov) to electronically transmit the signed notice(s) to designated Congressional staff with delivery receipt and blindcopy the 311notice@hq.doe.gov mailbox along with other identified Headquarters' staff, at least three (3) full business days prior to award.

- iii. Managing the accurate, effective and timely transmission of all notices for the fiscal year. **For end of fiscal year actions, to ensure an award or selection by September 30, 2011, the notice shall be sent no later than 5:30 p.m. eastern time September 26th. This is the last day and time for sending and showing receipt of FY2011 notices.**
- iv. Retention of electronic copies of all Congressional notification submissions for the official transaction file to include e-mail delivery receipt notices of the specific notice to all designated Congressional staff.
- v. Conducting periodic pre- and post-submission quality assurance to ensure that all required notices are or have been submitted.

(b) When the action is ready for award or public announcement.

- i. Completion of all reviews, concurrences and approvals before sending the notice.
- ii. Using the instructions provided in E.3. below, complete, date and sign the current version of the appropriate notice on DOE letterhead, and convert/scan dated and signed notice to Adobe pdf file.
- iii. At least three (3) full business days (see B. for definition and E. for details) in advance of the identified date of selection/award, submit valid Congressional notifications electronically, by e-mail, to designated Congressional Appropriations Committee staff. Send a courtesy blindcopy e-mail to 311Notice@hq.doe.gov and other designated DOE officials.
- iv. Ensuring the Selection Official is fully cognizant that no public announcement of selection or award may be made prior to confirmation that the required notice has been sent to Congress and that the requisite timeframe has elapsed.

3. Instructions.

(a) Notification content: The notification shall provide information prescribed in the attached model form letters including, as applicable:

- i. For contract/order actions, provide the name of the DOE Office that the action supports, contract/order number, contract title, contractor name with city and state, the dollar value of award to include options, and short description of the contract or order if the title is insufficient to provide a clear understanding of what is being procured. Use attachment 1. Where there is italic text in the letter, tailor the notice to insert the information in these areas and turn-off italic font.
- ii. For competitive financial assistance actions or Other Transaction Agreements, provide the name of the DOE Office that the action supports, identify number(s), e.g. DE-FOA-xxxxxx or award number with a short description of financial assistance effort, the grant number, the selectee name(s) with city and state, include published estimated dollar value available for the award. *(If there are more than a few selectees to list, then the list can be an enclosure to the letter.*

For an Office of Science 10 CFR 605 award, edit the letter to show it is for financial assistance awards instead of selection of applicants.) Use attachment 2A. Where there is italic text in the letter, tailor the notice to insert the information in these areas and turn-off italic font.

- iii. For non-competitive financial assistance actions or Other Transaction Agreements, provide the name of the DOE Office that this action supports, identify number(s), e.g. DE-FOA-xxxxx or award number with a short description of financial assistance effort, the grant number, the selectee name with city and state, include estimated dollar value of the award to include cost share if applicable. Use attachment 2B. Where there is italic text in the letter, tailor the notice to insert the information in these areas and turn-off italic font.
 - iv. If the e-mail will be sent before 5:30 p.m. eastern time, then date the notice for the business day the e-mail will be sent to Congress. If the e-mail will be sent after 5:30 p.m. eastern time on that business day, then date the notice for the next business day.
 - v. Assign the notice file name a specific title to include contracting office name. Do not include the name of the contractor, selectee, or awardee in the file name or the subject line of the e-mail.
- (b) **Transmitting notice, e-mail information, e-mail addresses, and waiting period.**
- i. Prior to e-mailing the notice, review the notice for proper format, content, date, signature on DOE letterhead, and file name.
 - ii. The subject line of the e-mail transmitting the notice to Congress shall provide the following: (1) a Contracting Activity specific sequential notice number along with identifying that it is DOE, for example, an action from NETL would state (NETL/DOE # xxx); (2) (Official Use Only); (3) Section 311 notice; (4) whether it is a contract or financial assistance action; (5) the contracting office name; and (6) the title of the contract or Funding Opportunity Announcement identified in the letter.
(Example of e-mail subject line follows: “Subject: (NETL/DOE #xxx) (Official Use Only) Section 311 Notice – Contract Action – NETL – title”).
 - iii. In addition to providing subject line information and attaching the Section 311 notice as a pdf, the following disclosures shall be included in the body of the e-mail:
 - a. For a contract action, state the following:

“The attachment is a Section 311 notice.

This information is source selection information related to the conduct of a Federal agency procurement. Disclosure of this information is restricted by

section 27 of the Procurement Integrity Act, 41 U.S.C. 423. This information is market sensitive, predecisional and not public at this time. Accordingly, we request that you do not further disseminate this information. If you are considering disseminating this predecisional information, we respectfully request that you consult with the Department prior to making such a decision.

XXX (insert the contracting activity name)
U.S. Department of Energy,
(insert the City, State)”

- b. For a financial assistance action, state the following:

“The attachment is a Section 311 notice.

This information is market sensitive, predecisional and not public at this time. Accordingly, we request that you do not further disseminate this information. If you are considering disseminating this predecisional information, we respectfully request that you consult with the Department prior to making such a decision.

XXX (insert the contracting activity name)
U.S. Department of Energy,
(insert the City, State)”

- c. For a Recovery Act action, state the following:

“The attachment is a notice for a Recovery Act action.

XXX (insert the contracting activity name)
U.S. Department of Energy,
(insert the City, State)”

- iv. **E-mail addresses.** Unless otherwise notified by Office of Procurement and Assistance Management (OPAM), the following is the list of e-mail addresses:

- a. E-mail “to” four Congressional Staff --
carrie_apostolou@appro.senate.gov
doug_clapp@appro.senate.gov
rob.blair@mail.house.gov
Taunja.Berquam@mail.house.gov
- b. E-mail blindcopy (bcc) to Headquarters DOE –
311notice@hq.doe.gov
Ali.Zaidi@hq.doe.gov
Ameila.Jenkins@hq.doe.gov
Brandon.Hurlbut@hq.doe.gov

Christopher.Hanson@hq.doe.gov
Dan.Leistikow@hq.doe.gov
Ingrid.Kolb@hq.doe.gov
Jonathan.Levy@hq.doe.gov
Missy.Owens@hq.doe.gov
Stephanie.Mueller@hq.doe.gov
Tom.Reynolds@hq.doe.gov

- v. **Waiting period.** No public announcement of a selection (per Section D. of this AL/FAL), or award (per Sections C. and D. of this AL/FAL) shall be made prior to the passage of three (3) full business days after the date in which e-mail delivery receipt confirmation is received by the HCA, that the required notice has been submitted to Congress. See Section B. for definition of three full business days and example. The notice must be received by the Congressional addresses prior to 5:30 p.m. eastern time on that business day. If a notice is sent after 5:30 p.m. eastern time, then it should be dated for the next business day. If the notice is received by the Congressional staff before 5:30 p.m. eastern time, then the three full business days would start the next business day.

F. Secretarial Determinations of Substantial Risk to Human Life, Health, or Safety

1. When compliance with the three (3) full business day advance notice requirement of Section 311 would pose a substantial risk to human life, health, or safety, 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 action that any one of these conditions exists.
2. 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 action for approval by the Secretary.
3. The HCA shall coordinate with the Head of the Program Element through the appropriate Senior Procurement Executive for obtaining necessary approval by the Secretary.
4. An award subject to the requirements of Section 311 shall not be made in advance of the Secretary's determination.
5. Upon approval by the Secretary, notification of the action to the Committees on Appropriations of the Senate and the House of Representatives shall be made not later than five (5) full business days after making such award. Follow the procedures at Section E. for preparation and submission of Section 311 Notice. Maintain a copy of the signed Secretary's determination for the official record and send a copy of the signed determination to the 311notice@hq.doe.gov mailbox.
6. It should be noted that the standard for unusual and compelling urgency, as prescribed at FAR 6.302-2, is distinct from the Section 311 exception that authorizes the Secretary to determine that compliance would pose a substantial risk to human life, health, or safety.

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

G. Procedures for Submission of ARRA Congressional Notifications

1. The ARRA non-statutory notification applies to actions that are valued in excess of \$1 million, under which funds are made available from the ARRA and the action will be the subject of a press release or other formal media event. Such actions may be identified by HQ officials, (e.g., Recovery Team, Congressional and Intergovernmental Affairs, Public Affairs) or by the program field office.
2. In addition to the procedures described in Section E. above, the following applies to actions described in G.1. above:
 - (a) The HCA shall prepare the draft notice, use Attachment 3 Form Letter, Subject: Notification of Pending Contract Action, or Public Announcement of Selected Applications for Negotiation of Financial Assistance Awards, or Pending Financial Assistance Award(s), or to Make a Non-competitive Financial Assistance Award under the American Recovery and Reinvestment Act. Follow the editing instructions to tailor the letter for a contract action or a competitive or a non-competitive financial assistance action.
 - (b) The notification shall provide summary information including, as applicable. State a short description of effort, if applicable, and as available, identifying number(s), e.g. DE-FOA-xxxxx or state a short description of solicitation, if applicable, and as available identifying number(s), e.g. solicitation number, request for proposal number, request for quotation number, order number, estimated value of award to include options. *For competitive financial assistance actions, include published estimated dollar value available for the award.* (Do not provide the name of the contractor or firm(s).) (Edit the paragraph to reflect the type of action.) Where there is italic text in the letter, tailor the notice to insert the information in these areas and turn-off italic font.
 - (c) The HCA, in coordination with the Program Office Recovery Act lead who will coordinate with the DOE Recovery Act Team, shall state, in the e-mail, whether or not DOE will issue a press release or any other media event (public announcement) on this action. If any earlier public announcement was made, state when this announcement occurred.

H. OPAM Responsibilities for Section 311 and ARRA Notices

OPAM will

1. Serve as the Department's central point to maintain a copy of all Section 311 notices

e-mailed from each HCA. Note: HCAs will maintain the official transmittal and delivery receipt notices to the Congressional staff.

2. Conduct periodic review of notices transmitted for accuracy and compliance.
3. Implement or supplement, as appropriate, existing procurement and financial assistance management oversight and control processes (e.g., Balanced Scorecard Self-Assessment, Procurement Management Review, and Business Clearance Programs) to ensure proper implementation of and compliance with the requirements of this AL/FAL.
4. Update DOE guidance on legislation pertaining to Section 311 Notice requirements, or similar requirements, for subsequent fiscal years.