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Department of Energy
Acquisition Regulation

No. AL-2016-03
Date March 07, 2016

ACQUISITION LETTER

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

Subject: Implementation of Division D, Title III and Title V, and Division E, Title Title VII of the Consolidated Appropriations Act, 2016, Pub. L. No.114-113

References:

Consolidated Appropriations Act, 2016, Pub.L. No. 114-113	Division D, Title III, Sections 301(a), 304, 305, 306, 307, and 311 and Title V, Section 501; Division E, Title VII, Sections 733, 735, 739, 743, 744, 745 and 746

When is this Acquisition Letter (AL) effective?

The statutory provisions addressed in this AL are effective as of the enactment date of the Consolidated Appropriations Act, 2016, December 18, 2015.

When does this AL expire?

This AL is in effect for FY 16. This AL and all previous ALs on appropriations will be archived after the end of the applicable AL. Generally, the guidance will remain in effect when obligating dollars appropriated under that applicable Act. Please request assistance from your local counsel for applicability after the end of an FY.

Who is the point of contact?

For DOE, contact Jason Taylor of the Contract and Financial Assistance Policy Division, Office of Policy at (202) 287-1560 or at Jason.Taylor@hq.doe.gov, or for NNSA, contact NNSA at (505) 845-4337.

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Who is the intended audience?

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

What is the purpose?

The purpose of this AL is to provide information and guidance regarding the Department of Energy's (DOE or Department) implementation of Division D, Title III and Title V, and Division E, Title VII of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 (2016 Act). The Congressional notification requirements of the Act will be addressed in a separate Acquisition Letter/Financial Assistance Letter.

What types of contracts are affected by this AL?

This AL applies to all DOE and NNSA solicitations and contract actions including task and delivery orders funded with fiscal year 2016 appropriated funds.

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What guidance is included in this AL?

Appropriations Act

I. **Section 301(a) Unfunded Requests for Proposals**
II. **Section 304 Construction of High-hazard Nuclear Facilities**
III. **Section 305 Independent Cost Estimate (ICE) for Critical Decision (CD)-2 and CD-3 DOE O 413.3B Construction Projects**
IV. **Section 306 Multiyear Award Funding for DOE—Energy Programs—Science**
V. **Section 307 Prohibition on Awards to the Russian Federation**
VI. **Section 311 FITARA Exemption for DOE Sponsored FFRDCs**
VII. **Section 501 Lobbying Restrictions**
VIII. **Section 735 Any Payment for the Election for a Federal Office or to a Political Committee**
IX. **Section 739 Reporting on Conference Spending**
X. **Section 743 Confidentiality Agreements Prohibiting Whistleblower Activities**
XI. **Section 744 Prohibition on Funding for Certain Nondisclosure Agreements**
XII. **Section 745 Unpaid Federal Tax Liability**
XIII. **Section 746 Felony Criminal Violations**

NOTE: Section 301(b) and 301(c) will be addressed in a separate AL.

I. SECTION 301(a) UNFUNDED REQUESTS FOR PROPOSALS

What is the law?

No appropriation, funds, or authority made available by this title for the Department of Energy shall be used to initiate or resume any program, project, or activity or to prepare or initiate Requests For Proposals or similar arrangements (including Requests for Quotations, Requests for Information, and Funding Opportunity Announcements) for a program, project, or activity if the program, project, or activity has not been funded by Congress.

What is the scope of this requirement?

Division D of the Consolidated Appropriations Act, 2016 requires that funds appropriated by the Act not be used to prepare or initiate RFPs or similar arrangements (including request for quotations, requests for information and funding opportunity announcements) for a program, project or activity if the program, project or activity has not been funded by Congress.

What procedures need to be followed to implement this requirement?

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

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II SECTION 304 CONSTRUCTION OF HIGH-HAZARD NUCLEAR FACILITIES

What is the law?

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

What is the scope of this requirement?

Section 304 of Division D of the Consolidated Appropriations Act, 2016, applies to all solicitations and awards of DOE contracts that include the construction of facilities classified as DOE nuclear facilities (hazard category 1, 2, or 3) under 10 C.F.R. Part 830 under which funds are made available by this Act. This requirement applies to subcontract actions, including subcontracts under an M&O prime contract using these appropriated funds.

What procedures need to be followed to implement this requirement?

When funding the construction of DOE nuclear facilities (hazard category 1, 2, or 3), the contracting officer shall work with the designated federal project director (FPD) to ensure that the Office of Independent Enterprise Assessments performs the required independent review of the project and contract management for positive nuclear safety culture and resolution of nuclear safety-related design issues, and should obtain copy of the review(s). Until the contracting officer receives the HSS independent review(s), the contracting officer shall not obligate Consolidated Appropriations Act of 2016 funds for the construction of DOE nuclear facilities (hazard category 1, 2, and 3).

III. SECTION 305 INDEPENDENT COST ESTIMATE (ICE) FOR CRITICAL DECISION (CD) CD-2 AND CD-3 DOE ORDER 413.3B CONSTRUCTION PROJECTS

What is the law?

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

What is the scope of this requirement?

Section 305 of Division D of the Consolidated Appropriations Act, 2016 applies to all DOE solicitations and awards that include DOE Order (DOE O) 413.3B construction work where a project with a total project cost (TPC) exceeds $100,000,000. No funds are available until a separate independent cost estimate (ICE) has been developed for the project for CD-2 or CD-3. This requirement applies to subcontract actions, including subcontract under an M&O prime contract using these appropriated funds.

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What procedures need to be followed to implement this requirement?

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

IV. SECTION 306 MULTIYEAR AWARD FUNDING FOR DOE—ENERGY PROGRAMS—SCIENCE

What is the law?

Notwithstanding section 301(c) of this Act, none of the funds made available under the heading ''Department of Energy—Energy Programs—Science'' in this or any subsequent Energy and Water Development and Related Agencies appropriations Act for any fiscal year may be used for a multiyear contract, grant, cooperative agreement, or Other Transaction (OT) Agreement of $1,000,000 or less unless the contract, grant, cooperative agreement, or Other Transaction Agreement is funded for the full period of performance as anticipated at the time of award.

What is the scope of this requirement?

Section 307 of Division D of the 2016 Act requires that multiyear contracts, grants, cooperative agreements, or Other Transaction Agreements of $1,000,000 or less awarded with funds appropriated by the 2016 Act or any subsequent Energy and Water Development and Related Agencies appropriations Act for any fiscal year under the heading ''Department of Energy—Energy Programs—Science'' must be funded for the full period of performance as anticipated at the time of award.

What procedures need to be followed to implement this requirement?

Contracting Officers awarding multiyear contracts of $1,000,000 or less with funds appropriated by the 2016 Act or any other FY 2016 appropriation act under the heading ''Department of Energy—Energy Programs—Science'' must ensure that the funds for the full period of performance, as anticipated at the time of award, are available prior to award and obligated at award.

"Multiyear contract" or "Multi-year contract", as defined at FAR 17.103, means a contract for the purchase of supplies or services for more than 1, but not more than 5, program years. A multiyear contract may provide that performance under the contract during the second and subsequent years of the contract is contingent upon the appropriation of funds, and (if it does so provide) may provide for a cancellation payment to be made to the contractor if appropriations are not made. The key distinguishing difference between multiyear contracts and multiple year contracts is that multiyear contracts, defined in the statutes cited at FAR 17.101, buy more than 1

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year's requirement of a product or service without establishing and having to exercise an option for each program year after the first.

V. SECTION 307 PROHIBITION ON AWARDS TO THE RUSSIAN FEDERATION

What is the law?

(a) None of the funds made available in this or any prior Act under the heading ''Defense Nuclear Nonproliferation'' may be made available to enter into new contracts with, or new agreements for Federal assistance to, the Russian Federation.

(b) The Secretary of Energy may waive the prohibition in subsection (a) if the Secretary determines that such activity is in the national security interests of the United States. This waiver authority may not be delegated.

(c) A waiver under subsection (b) shall not be effective until 15 days after the date on which the Secretary submits to the Committees on Appropriations of both Houses of Congress, in classified form if necessary, a report on the justification for the waiver.

What is the scope of this requirement?

Section 307 of Division D of the 2016 Act requires that none of the funds made available in this or any prior Act under the heading ''Defense Nuclear Nonproliferation'' be made available to enter into new contracts with, or new agreements for Federal assistance to, the Russian Federation unless the Secretary of Energy waives the prohibition.

What procedures need to be followed to implement this requirement?

Contracting Officers may not make any new awards with funds made available **in this or any prior Act** under the heading ''Defense Nuclear Nonproliferation'' to the Russian Federation. Contracting Officers may not provide any additional funding to previous awards made to the Russian Federation with funds made available **in this or any prior Act** under the heading ''Defense Nuclear Nonproliferation''.

The Secretary of Energy may waive this prohibition if the Secretary determines that such activity is in the national security interests of the United States. This waiver authority may not be delegated. The waiver shall not be effective until 15 days after the date on which the Secretary submits to the Committees on Appropriations of the House of Representatives and the Senate, in classified form if necessary, a report on the justification for the waiver.

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VI. SECTION 311 Federal Information Technology Acquisition Reform EXEMPTION FOR DOE SPONSORED FFRDCs

What is the law?

Notwithstanding any other provision of law, the provisions of 40 U.S.C. 11319 shall not apply to funds appropriated in this title to Federally Funded Research and Development Centers (FFRDCs) sponsored by the Department of Energy.

What is the scope of this requirement?

Section 311 of Division D of the 2016 Act provides that the Federal information technology acquisition reform requirements of 40 U.S.C. 11319 (commonly referred to as FITARA and enacted by Title VIII, Subtitle D of the National Defense Authorization Act (NDAA) for Fiscal Year 2015, Pub. L. No. 113-291) shall not apply to funds appropriated to DOE sponsored FFRDCs.

VII. SECTION 501 LOBBYING RESTRICTION

What is the law?

None of the funds appropriated by this Act may be used in any way, directly or indirectly, to influence congressional action on any legislation or appropriation matters pending before Congress, other than to communicate to Members of Congress as described in 18 U.S.C. § 1913.

What is the scope of this requirement?

Section 501 applies to all solicitations and awards of DOE contracts under which funds appropriated under Division D of the Consolidated Appropriations Act, 2016 the 2016 Act are obligated.

What procedures need to be followed to implement this requirement?

The following clause shall be incorporated into solicitations and awards of contracts funded under the Consolidated Appropriations Act, 2016:

Lobbying Restriction

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)

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VIII. SECTION 735 ANY PAYMENT FOR THE ELECTION FOR A FEDERAL OFFICE OR TO A POLITICAL COMMITTEE

What is the law?

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

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

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

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

What is the scope of this requirement?

Section 735 of the Consolidated Appropriations Act, 2016 applies to all solicitations and awards of DOE contracts under which funds appropriated or otherwise made available by this Act or any act providing supplementary FY 2016 appropriations.

What procedures need to be followed to implement this requirement?

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

IX. SECTION 739 REPORTING ON CONFERENCE SPENDING

What is the law?

(a) The head of any Executive branch department, agency, board, commission, or office funded by this or any other appropriations Act shall submit annual reports to the Inspector General or senior ethics official for any entity without an Inspector General, regarding the costs and contracting procedures related to each conference held by any such department, agency, board, commission, or office during fiscal year 2016 for which the cost to the United States Government was more than $100,000.

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(b) Each report submitted shall include, for each conference described in subsection (a) held during the applicable period--
(1) a description of its purpose;
(2) the number of participants attending;
(3) a detailed statement of the costs to the United States Government, including--
(A) the cost of any food or beverages;
(B) the cost of any audio-visual services;
(C) the cost of employee or contractor travel to and from the conference; and
(D) a discussion of the methodology used to determine which costs relate to the conference; and
(4) a description of the contracting procedures used including--
(A) whether contracts were awarded on a competitive basis; and
(B) a discussion of any cost comparison conducted by the departmental component or office in evaluating potential contractors for the conference.

(c) Within 15 days of the date of a conference held by any Executive branch department, agency, board, commission, or office funded by this or any other appropriations Act during fiscal year 2016 for which the cost to the United States Government was more than $20,000, the head of any such department, agency, board, commission, or office shall notify the Inspector General or senior ethics official for any entity without an Inspector General, of the date, location, and number of employees attending such conference.

(d) A grant or contract funded by amounts appropriated by this or any other appropriations Act to an Executive branch agency may not be used for the purpose of defraying the costs of a conference described in subsection (c) that is not directly and programmatically related to the purpose for which the grant or contract was awarded, such as a conference held in connection with planning, training, assessment, review, or other routine purposes related to a project funded by the grant or contract.

(e) None of the funds made available in this or any other appropriations Act may be used for travel and conference activities that are not in compliance with Office of Management and Budget Memorandum M-12-12 dated May 11, 2012.

What is the scope of this requirement?

Section 739 of Division E of the Consolidated Appropriations Act, 2016 applies to all solicitations and awards or contracts funded by this, or any other appropriation act during fiscal year 2016.

What procedures need to be followed to implement this requirement?

The implementation guidance and model clause provided in Acquisition Letter 2015-09 remain applicable.

X. SECTION 743 CONFIDENTIALITY AGREEMENTS PROHIBITING WHISTLEBLOWER ACTIVITIES

What is the law?

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(a) None of the funds appropriated or otherwise made available by this or any other Act may be available for a contract, grant, or cooperative agreement with an entity that requires employees or contractors of such entity seeking to report fraud, waste, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or contactors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.

(b) The limitation in subsection (a) shall not contravene requirements applicable to Standard Form 312, Form 4414, or any other form issued by a Federal department or agency governing the nondisclosure of classified information.

What is the scope of this requirement?

Section 743 of Division D of the 2015 Act applies to all new and existing DOE contracts. This requirement includes no dollar value threshold and does flow down to subcontractors. SF312 is the Classified Information Nondisclosure Agreement.

What procedures need to be followed to implement this requirement?

DOE issued a class deviation to the FAR via policy flash 2015-22 to implement the requirements of this section.

XI. SECTION 744 PROHIBITION ON FUNDING FOR CERTAIN NONDISCLOSURE AGREEMENTS

What is the law?

(a) No funds appropriated in this or any other Act may be used to implement or enforce the agreements in Standard Forms 312 and 4414 of the Government or any other nondisclosure policy, form, or agreement if such policy, form, or agreement does not contain the following provisions: ''These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.'': *Provided*, That notwithstanding the preceding provision of this section, a nondisclosure policy form or agreement that is to be executed by a person connected with the conduct of an intelligence or intelligence-related activity, other than an employee or officer of the United States Government, may contain provisions appropriate to the particular activity for which such document is to be used. Such form or agreement shall, at a minimum, require that the person will not disclose any classified information received in the course of such activity unless specifically authorized to do so by the United States Government. Such nondisclosure forms shall also make it clear that they do not bar disclosures to Congress, or to an authorized official of an executive agency or the Department of Justice, that are essential to reporting a substantial violation of law.

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(b) A nondisclosure agreement may continue to be implemented and enforced notwithstanding subsection (a) if it complies with the requirements for such agreement that were in effect when the agreement was entered into.

(c) No funds appropriated in this or any other Act may be used to implement or enforce any agreement entered into during fiscal year 2014 which does not contain substantially similar language to that required in subsection (a).

What is the scope of this requirement?

Section 744 of Division E of the Act applies to Government nondisclosure policies, forms or agreements and contractor nondisclosure policies, forms, or agreements in use while performing under a Government contract.

What procedures need to be followed to implement this requirement?

Contracting Officers shall ensure that the following clause is inserted in all new cost reimbursement contracts and existing cost reimbursement contracts to which funding was or will be added after December 16, 2014:

H.XX PROHIBITION ON FUNDING FOR CERTAIN NONDISCLOSURE AGREEMENTS

The Contractor agrees that:

> *a) No cost associated with implementation or enforcement of nondisclosure policies, forms or agreements shall be allowable under this contract if such policies, forms or agreements do not contain the following provisions: ''These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.''*
> *b) The limitation above shall not contravene requirements applicable to Standard Form 312, Form 4414, or any other form issued by a Federal department or agency governing the nondisclosure of classified information.*
> *c) Notwithstanding the provisions of paragraph (a), a nondisclosure or confidentiality policy form or agreement that is to be executed by a person connected with the conduct of an intelligence or intelligence-related activity, other than an employee or officer of the United States Government, may contain provisions appropriate to the particular activity for which such document is to be used. Such form or agreement shall, at a minimum, require that the person will not disclose any classified information received in the course of such activity unless specifically authorized to do so by the United States Government. Such nondisclosure or confidentiality forms shall*

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also make it clear that they do not bar disclosures to Congress, or to an authorized official of an executive agency or the Department of Justice, that are essential to reporting a substantial violation of law.

XII. SECTION 745 UNPAID FEDERAL TAX LIABILITY

What is the law?

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

What is the scope of this requirement?

Section 745 of Division E of the Consolidated Appropriations Act, 2016 applies to all new DOE contracts funded by the Act that are to be awarded to a corporation.

What procedures need to be followed to implement this requirement?

An interim FAR rule was published in the Federal Register (80 FR 75903) to implement the requirements of this section. The class deviation issued via Policy Flash 2014-28 remains in effect until the effective date of the rule (2/26/16). As of 2/26/16, the FAR will address this requirement.

XIII. SECTION 746 FELONY CRIMINAL VIOLATIONS.

What is the law?

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

What is the scope of this requirement?

Section 746 of Division E of the Consolidated Appropriations Act, 2016 applies to all new DOE contracts funded by the Act that are to be awarded to a corporation.

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What procedures need to be followed to implement this requirement?

An interim FAR rule was published in the Federal Register (80 FR 75903) to implement the requirements of this section. The class deviation issued via Policy Flash 2014-28 remains in effect until the effective date of the rule (2/26/16). As of 2/26/16, the FAR will address this requirement.