




The Under Secretary for Science and Energy

Washington, DC 20585

October 25, 2021

MEMORANDUM FOR DISTRIBUTION

FROM: DR. KATHLEEN HOGAN 

SUBJECT: Implementation of the 2021 Science and Energy Determination of Exceptional Circumstances

On June 8, 2021, in connection with the 100-day review of critical supply chains as directed under E.O. 14017, *America's Supply Chains*, the Science and Energy Determination of Exceptional Circumstances (S&E DEC) was announced as part of a series of new policy actions to support U.S. job creation and bolster the domestic manufacturing supply chain. The S&E DEC strengthens U.S. manufacturing requirements in the Department of Energy (DOE)-funded grants, cooperative agreements, and research and development contracts. The S&E DEC ensures that all innovations—including those relating to advanced batteries—developed with taxpayer dollars through DOE Science and Energy Programs are substantially manufactured in the U.S. Specifically, the S&E DEC authorizes inclusion of a U.S. Competitiveness provision, which requires substantial U.S. manufacture of products embodying DOE-funded subject inventions, in agreements funded by DOE Science and Energy Programs.

S&E DEC Implementation

Accompanying this Memo is an Implementation Plan to provide guidance to Science and Energy programs on the consistent application of the S&E DEC across programs while minimizing the creation of new processes and contracting delays. The Implementation Plan is designed to provide flexibilities to programs to ensure successful application of the U.S. Competitiveness provision in Science and Energy program funding agreements.

The following guidance documents are included in the Implementation Plan for distribution to the relevant DOE programs and Contracting Officers, Science and Energy National Laboratories, financial assistance awardees, contractors, and other stakeholders, as relevant and appropriate, at the beginning of Fiscal Year (FY) 2022, using standard DOE Office of Management (MA) processes and channels:

- Financial Assistance Letter (FAL)
- Acquisition Letter (AL)
- Standard Contract Terms
- Interim Appeals Process
- Frequently Asked Questions (FAQ)

FAL: The FAL applies to appropriated funds of DOE Science and Energy Programs for funding opportunity announcements and financial assistance actions for FY2022 and after. The FAL provides guidance to DOE programs and contracting officers regarding when and how to implement the DEC-enabled U.S. Manufacturing standard in awards to all entity types that qualify for election of title. The FAL includes several appendices that provide additional guidance.

- Appendix 1: a copy of the S&E DEC, executed June 7, 2021.
- Appendix 2: Opt-Out Document. The FAL particularly sets forth that all applicable agreements incorporate U.S. Competitiveness as the U.S. manufacturing requirement. However, programs are given the flexibility to use the Bayh-Dole standard requirement (known as U.S. Preference) as previously used prior to the adoption of the S&E DEC, with written justification that specific considerations and factors support not applying the U.S. Competitiveness requirements of the S&E DEC.
- Appendix 3: Standard Funding Opportunity Announcement (FOA) Language. To provide the necessary consistency in the use of the S&E DEC by the various programs, standard FOA language is provided to the contracting teams.
- Appendix 4: Class deviation to 2 CFR 910.362. To provide the necessary consistency in the use of the S&E DEC by the various programs, standard language is provided to the contracting teams.
- Appendix 5: Modifications and Waiver Guidance. Because some business circumstances require flexibilities regarding domestic manufacture, guidance is provided on how to approach requests for modifications and waivers of the U.S. manufacturing requirement. The guidance describes the modification/waiver process and factors for program to consider for granting a modification or waiver prior to concurrence of the Assistant General Counsel for Technology Transfer and Intellectual Property (GC-62).

The FAL will be distributed through the usual MA channels and placed on the S&E DEC webpage on Acquisition Answers. Standard contract terms requiring U.S. Competitiveness in contract patent clauses will be found on the S&E DEC webpage on Acquisition Answers as well as on the GC-62 website. These standard terms will provide consistency and ease of contracting in the implementation of the DEC.

AL: The AL provides instructions on updating the patent clause in lab contracts starting in FY22, and guidance to the Contracting Officers and other procurement executives regarding the change in the patent clause, as well as how that will be implemented in the task order, work authorizations, or other mechanisms in which DOE provides funding to the labs. My office will soon distribute further direction to the appropriate DOE contracting personnel to implement these changes in the lab contracts within sixty (60) days of the issuance of the AL.

The AL will be distributed through the usual MA channels and placed on the S&E DEC page on Acquisition Answers.

FAQ: The FAQ are provided primarily for program use, such as for FOA development, potential FOA applicants, and other interested stakeholders. The document itself aligns with previous documents provided to the Office of Public Affairs for public dissemination, but it has also been updated to address concerns flagged by internal and external stakeholders since the S&E DEC was announced.

These FAQ will be on the S&E DEC Acquisition Answers webpage and will be provided on each FOA webpage to which it applies.

cc: Dr. Jennifer Gerbi, Advanced Research Projects Agency - Energy

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