



**Department of Energy
Acquisition Regulation**

**AL 2010-05
Date 05/06/10**

**Department of Energy
Financial Assistance Regulations**

**FAL 2010-05
Date 05/06/10**

ACQUISITION/FINANCIAL ASSISTANCE LETTER

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

Subject: Contract Periods of Performance Exceeding 5 Years

References:

FAR Subpart 17.204(e)

DEAR 970.1706

Acquisition Letter 2009-3

Competition in Contracting Act of 1984

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

The policies in this Acquisition Letter are effective upon issuance.

When does the AL/FAL expire?

This AL/FAL remains in effect until superseded or canceled.

Who are the points of contact?

Questions regarding this policy guidance should be directed to Ms. Melissa Rider, Director, Office of Procurement and Assistance Policy. Ms. Rider can be reached on 202-287-1304 or by email at melissa.rider@hq.doe.gov.

What is the purpose of this AL/FAL?

This AL/FAL provides guidance and instructions with respect to the Department of Energy's processes and procedures for approving contract periods of performance in excess of five years under the requirements of Federal Acquisition Regulation (FAR) 17.204(e).

What is the background?

Government-wide procurement statutes and regulations establish full and open competition as the basic tenet for ensuring that contracts provide the "best value" to the Government, represent sound business arrangements, and accomplish program requirements. Clearly, the statutory and

regulatory expectations are that an agency must compete its contract needs, except when one of the seven statutory exceptions to full and open competition can be justified and approved. Accordingly, the mandate to regularly compete agency contract requirements has direct relevance to both the contract type and the contract period of performance/term.

FAR Subpart 17.2, entitled "Options," prescribes policies and procedures for the use of contract options. FAR Subpart 17.200 excludes certain types of contracts from its requirements, unless otherwise provided for in agency regulations. FAR Subpart 17.200, by operative language, does not apply to contracts for (a) services involving the construction, alteration, or repair (including dredging, excavating, and painting) of buildings, bridges, roads, or other kinds of real property; (b) architect-engineer services; and (c) research and development services.

FAR Subpart 17.204(e) restricts the period of performance for contracts to five years but provides permissive authority to agencies to award contracts for periods longer than five years, subject to agency procedures. This FAR permissive authority is intended to allow agencies the flexibility, consistent with fiscal law, labor law, and other restrictions, to address the requirements of an instant acquisition.

Management and Operating Contracts

FAR Subpart 17.6 recognizes the unique and special nature of M&O contracts, and identifies DOE specifically in the scope of the Subpart. Accordingly, given the special regulatory recognition and coverage of DOE's M&O contracts, DOE has established specific policies and procedures governing the period of performance of an M&O contract. The DEAR, at Subpart 970.1706, authorizes periods of performance in excess of five years through the use of contract options for competitively awarded M&O contracts, subject to certain administrative requirements (see DEAR 970.1706 and Acquisition Letter 2009-3), including Secretary of Energy authorization and Senior Procurement Executive approval through the Headquarters Business Clearance process. Competitively awarded M&O contracts for laboratories are also permitted to exceed the 5 year limitation through the use of award term incentives, again subject to certain administrative requirements (see Acquisition Guide Chapter 70.15). Accordingly, any contract period of performance greater than 5 years for an M&O contract will be considered and authorized using those established processes and procedures. Non-competitively awarded or extended M&O contracts are subject to the 5 year review and renewal requirements of FAR 17.605 and DOE's implementing regulations and policies.

For contracts other than M&O contracts, DOE has authorized periods of performance in excess of five years where such longer periods can be justified by the specific circumstances of the procurement requirement. As a matter of policy and practice, the DOE's Office of Procurement and Assistance Management's or NNSA's Office of Acquisition & Supply Management Business Clearance processes (See Acquisition Guide Chapter 71) provide Senior Procurement Executive approval for both the type of contract and the period of performance for other than M&O contract actions on a case-by-case basis. Of note, contract periods of performance in excess of five years have been approved on a limited basis for certain types of requirements associated primarily with the Office of Environmental Management's (EM) line item construction and operating projects. However, even in those limited circumstances, contract periods of performance have been based on the specific work scope requirements and other special features of the project.

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

- A. As a general matter and consistent with the requirements of FAR 17.2, contract requirements, including the work scope, shall be structured to provide for contract periods of five years or less. Specifically, contracts for administrative, management, engineering, and advisory and assistance/consultative services shall not, except in the most exceptional circumstances, exceed the five year period of performance limitation, as these types of services are typically readily available in the market place. Blanket or class waivers to the five year period of performance limit will not be authorized.
- B. Where contract performance requirements require or would benefit from a period of performance in excess of five years, contracting officers shall address such need and supporting justification as part of the written acquisition plan (See FAR Part 7, Acquisition Letter 2009-3, and Acquisition Guide Chapters 7.0 and 7.1). Acquisition Plans that contemplate contract periods of performance in excess of five years require the approval of the DOE's Director, Acquisition Planning and Liaison Division, Office of Contract Management or the NNSA's Office of Acquisition & Supply Management, regardless of dollar value. The lack of advance acquisition planning, the avoidance of competition requirements, administrative convenience or administrative savings, and lack of Federal resources are not legitimate bases for contract periods of performances in excess of five years.
 - 1. Examples of the types of considerations that need to be addressed in the Acquisition Plan include, but are not limited to:
 - a. The work scope (including the ability of the requirements initiator to define with certainty the desired requirements and outcomes and identify clear measures for Government acceptance of work);
 - b. Contract type;
 - c. DOE resources to administer the contract;
 - d. Length of term in excess of 5 years;
 - e. Severability of the work requirements;
 - f. Evidence that the requirement can be priced with reasonable certainty;
 - g. Ability to provide a funding profile consistent with and adequate for contract performance; competition impacts both on the instant action and future requirements; and
 - h. Impact on DOE's socio-economic goals and objectives.
 - 2. Additional considerations relevant to DOE's EM contracts include:
 - a. Performance risk;
 - b. Design maturity;
 - c. Regulatory requirements and commitments;
 - d. Level of site characterization;

- e. Contamination levels in soil and/or buildings: and
 - f. Previous contracting history and experiences.
3. The thrust of the analysis and rationale should clearly explain why the longer period of performance will result in obtaining the best value for DOE where the services contemplated are readily available in the open market by a consideration of the past competition history, current and future market conditions, and by an explanation as to why competition is not appropriate for a lesser contract term. In support of this analysis, the explanation should identify the contract and project management controls that will be used during contract performance to ensure that the services provided under the contract will fulfill program/project needs and that the contract is the best means of satisfying requirements.
- C. Where contract options will be used to extend the period of performance beyond 5 years, the requirements of FAR 17.2 are instructive in providing criteria that would be assessed in determining the appropriateness of the contract period of performance.
- 1. This means that the work scope anticipated for the period beyond the first five years of performance will, among other things, be assessed to determine whether the work scope and other contract requirements would be considered proper contract options.
 - 2. FAR Subpart 17.202(b) clearly indicates that contract options are to be used in exceptional circumstances based on a Contracting Officer's determination, considering the factors set forth in that subpart.
 - 3. Further, Subpart 17.202(c) specifically precludes the use of contract options by the Contracting Officer when, among other things, the "contractor will incur undue risks" or "market prices for the supplies or services involved are likely to change substantially."
- D. Capital Projects Subject to DOE Order 413.3
- 1. While FAR Subpart 17.2 specifically excludes contracts services involving the construction, alteration, or repair (including dredging, excavating, and painting) of buildings, bridges, roads, or other kinds of real property as well as architect-engineer services, it is important that the period of performance of these types of contracts be structured to not only support the success of the project, but also support the competition and other objectives of the Federal contracting system.
 - 2. Accordingly, contract period of performance and type of contract shall be assessed, justified, documented, and approved as part of the Acquisition Plan process.
 - 3. Considerations that are to be taken into account in determining both the appropriate period of performance and contract type are the same, or substantially the same as the considerations provided above.