

ACQUISITION LETTER

This Acquisition Letter is issued under the authorities of the Senior Procurement Executives of DOE and NNSA. It is intended for use by procurement professionals of DOE and NNSA, primarily Contracting Officers, and other officials of DOE and NNSA that are involved in the acquisition process. Other parties are welcome to its information, but definitive interpretations of its effect on contracts, and related procedures if any, may only be made by DOE and NNSA Contracting Officers.

Subject: Class Deviation to FAR 31.205-44(a), Training and education costs, and approval of training on overtime

References:

FAR 31.205-44—Training and education costs
FAR 22.103—Overtime

When is this Acquisition Letter (AL) effective?

This AL is effective upon issuance.

When does this AL Expire?

This AL remains in effect until cancelled.

Who Is the Intended Audience For this AL?

Department of Energy (DOE) and National Nuclear Security Administration (NNSA) Contracting Officers are the audience for this AL.

Who is the Point of Contact for this AL?

DOE Contracting Officers may contact Michael Righi of the Contracts and Financial Assistance Policy Division, Office of Policy, Office of Acquisition and Project Management by phone at (202) 287-1337 or by email to Michael.Righi@hq.doe.gov. NNSA Contracting Officers may contact Kenneth G. West of the Non-M&O Policy and Oversight Branch by phone at (505) 845-4337.

Need More Information on ALs?

Visit the website at <http://energy.gov/management/office-management/operational-management/procurement-and-acquisition/guidance-procurement> for information on Acquisition Letters and other policy issues.

What is the Purpose of this AL?

The purpose of this AL is to streamline DOE’s consideration and approval of contractors’ requests for approval of overtime premiums for training and education, while continuing to emphasize that overtime premiums for training and education merit special scrutiny. The AL’s purpose is achieved by granting Heads of Contracting Activities (HCAs), as DOE’s “Approving Officials for Overtime,” cognizance over the issue. The decisions to consider and to approve such requests are at the HCAs’ discretion.

What Types of Contracts Are Affected by this AL?

This AL applies only to those contracts or classes of contracts that HCAs identify.

What Guidance is included in this AL?

Use of the attached DOE Class Deviation is at the discretion of the HCA. HCAs are not required to use it in any existing or future contract or in any existing or future solicitation, but may do so if they deem it appropriate. If HCAs elect to use the DOE Class Deviation, they may approve contractors’ requests for overtime premiums for training and education if their approval process adheres to the requirements of the DOE Class Deviation. This authority is not delegable.

HCAs should share this AL with those contractors and prospective contractors that they deem appropriate.

This AL does not--

Require any action. Use of the DOE Class Deviation is at the discretion of the HCA.

Diminish the Department’s adherence to the Government’s policy regarding contractors’ use of overtime—contractors should not normally incur overtime costs and contracting officers should normally not specify delivery or performance schedules that require them (FAR 22.103).

Affect any contract without the contractor, the contracting officer, and the HCA taking the actions required in the DOE Class Deviation.

Require contracting officers to follow the procedures of or include the language from the DOE Class Deviation in any contract or solicitation. (These actions are only required if the HCA determines it appropriate to consider a contractor’s request for approval of overtime premiums for training and education.)

The attached DOE Class Deviation--

Does not immediately affect any contract or solicitation.

Is not automatically included in any contract or solicitation.

May be, but is not required to be, used in solicitations.

May be, but is not required to be, used in existing contracts.

Requires action by the contractor, the contracting officer, and the HCA before it has any effect on a contract or solicitation.

DOE Class Deviation

Instructions for use:

This DOE Class Deviation below—

Does not immediately affect any contract or solicitation. Its use is at the discretion of the HCA.

Is not automatically included in any contract or solicitation.

Does not require contracting officers to follow its procedures or to include language from it in any contract or solicitation.

May be, but is not required to be, used in solicitations.

May be, but is not required to be, used in existing contracts.

Before having any effect on a contract, requires action by the contractor, the contracting officer, and the HCA. That is,

While following the guidance of the DOE Class Deviation: the contractor must make the request; the HCA must approve it; and the contracting officer must modify the contract with the appropriate language.

For contracts, the contractor must make the request, the HCA must approve it, and the contracting officer must modify the contract with the pertinent DOE Class Deviation language for any contract to be affected.

For solicitations, after determining it appropriate, HCA's may include the appropriate language from the DOE Class Deviation.

After the decision to use the DOE Class Deviation is made and the actions described above are completed, DOE's Class Deviation will result in the following revisions (indicated in **bold**) to the procedures (at FAR 22.103-3(c)); approvals (at FAR 22.103-4(a)); cost principle (at 31.205-44(a)); and clause (at 52.222-2(a)).

22.103-3 Procedures.

(a) Solicitations normally shall not specify delivery or performance schedules that may require overtime at Government expense.

(b) In negotiating contracts, contracting officers should, consistent with the Government's needs, attempt to (1) ascertain the extent that offers are based on the payment of overtime and shift premiums and (2) negotiate contract prices or estimated costs without these premiums or obtain the requirement from other sources.

(c) When it becomes apparent during negotiations of applicable contracts (see 22.103-5(b)) that overtime will be required in contract performance, the contracting officer shall secure from the contractor a request for all overtime to be used during the life of the contract, to the extent that the overtime can be estimated with reasonable certainty. The contractor's request shall contain the information required by paragraph (b) of the clause at 52.222-2, Payment for Overtime Premiums. **[If the contractor's request includes overtime costs for training and education, the contractor must clearly identify such costs in a separate portion of its request. Absent express written approval of overtime costs for training and education, the costs are expressly unallowable.]**

22.103-4 Approvals.

(a) The contracting officer shall review the contractor's request for overtime. **[If the contractor's request includes overtime costs for training and education, approval by an agency approving official must clearly identify them in a separate portion of the approval. Absent express written approval of overtime costs for training and education, the costs are expressly unallowable.]** Approval of the use of overtime may be granted by an agency approving official after determining in writing that overtime is necessary to—

- (1) Meet essential delivery or performance schedules;
- (2) Make up for delays beyond the control and without the fault or negligence of the contractor; or
- (3) Eliminate foreseeable extended production bottlenecks that cannot be eliminated in any other way.

(b) Approval by the designated official of use and total dollar amount of overtime is required before inclusion of an amount in paragraph (a) of the clause at 52.222-2, Payment for Overtime Premiums.

(c) Contracting officer approval of payment of overtime premiums is required for time-and-materials and labor-hour contracts (see paragraph (a)(8) of the clause at 52.232-7, Payments Under Time-and-Materials and Labor-Hour Contracts).

(d) No approvals are required for paying overtime premiums under other types of contracts.

(e) Approvals by the agency approving official (see 22.103-4(a)) may be for an individual contract, project, program, plant, division, or company, as practical.

(f) During contract performance, contractor requests for overtime exceeding the amount authorized by paragraph (a) of the clause at 52.222-2, Payment for Overtime Premiums, shall be submitted as stated in paragraph (b) of the clause to the office administering the contract. That office will review the request and if it approves, send the request to the contracting officer. If the contracting officer determines that the requested overtime should be approved in whole or in part, the contracting officer shall request the approval of the agency's designated approving official and modify paragraph (a) of the clause to reflect any approval.

(g) Overtime premiums at Government expense should not be approved when the contractor is already obligated, without the right to additional compensation, to meet the required delivery date.

(h) When the use of overtime is authorized under a contract, the office administering the contract and the auditor should periodically review the use of overtime to ensure that it is allowable in accordance with the criteria in part 31. Only overtime premiums for work in those departments, sections, etc., of the contractor's plant that have been individually evaluated and the necessity for overtime confirmed shall be considered for approval.

(i) Approvals for using overtime shall ordinarily be prospective, but, if justified by emergency circumstances, approvals, **including approvals for overtime premiums for training**, may be retroactive.

31.205-44 Training and education costs.

Costs of training and education that are related to the field in which the employee is working or may reasonably be expected to work are allowable, except as follows:

(a) Overtime compensation for training and education is unallowable **[unless express written approval was obtained from an agency approving official for overtime before the costs were incurred. Also see 22.103-4(i), which addresses emergency circumstances]**.

(b) The cost of salaries for attending undergraduate level classes or part-time graduate level classes during working hours is unallowable, except when unusual circumstances do not permit attendance at such classes outside of regular working hours.

52.222-2 Payment for Overtime Premiums.

As prescribed in 22.103-5(b), insert the following clause:

Payment for Overtime Premiums (JUL 1990) (DEVIATION)

(a) The use of overtime [, other than for training and education unless express written approval is obtained from an agency approving official,] is authorized under this contract if the overtime premium cost does not exceed *__ or the overtime premium is paid for work—

*Insert either "zero" or the dollar amount agreed to during negotiations.

(1) Necessary to cope with emergencies such as those resulting from accidents, natural disasters, breakdowns of production equipment, or occasional production bottlenecks of a sporadic nature;

(2) By indirect-labor employees such as those performing duties in connection with administration, protection, transportation, maintenance, standby plant protection, operation of utilities, or accounting;

(3) To perform tests, industrial processes, laboratory procedures, loading or unloading of transportation conveyances, and operations in flight or afloat that are continuous in nature and cannot reasonably be interrupted or completed otherwise; or

(4) That will result in lower overall costs to the Government.

(b) Any request for estimated overtime premiums that exceeds the amount specified above shall include all estimated overtime for contract completion and shall—

(1) Identify the work unit; e.g., department or section in which the requested overtime will be used, together with present workload, staffing, and other data of the affected unit sufficient to permit the Contracting Officer to evaluate the necessity for the overtime;

(2) Demonstrate the effect that denial of the request will have on the contract delivery or performance schedule;

(3) Identify the extent to which approval of overtime would affect the performance or payments in connection with other Government contracts, together with identification of each affected contract; and

(4) Provide reasons why the required work cannot be performed by using multishift operations or by employing additional personnel.

(End of clause)