

**GENERAL FOREIGN OWNERSHIP, CONTROL, OR INFLUENCE (FOCI)
INFORMATION TO AID OFFERORS PROPOSING ON AN OFFICE OF
ENVIRONMENTAL MANAGEMENT (EM) PROCUREMENT**

A FOCI determination and Facility Clearance (FCL) are required when the contract or subcontract to be awarded is expected to require employees to have access authorizations. If required by the terms of a solicitation, an Offeror will be required to undergo a FOCI review. The objective of this process is to ensure that DOE and its contractors engaged in DOE activities are eligible for access to, and meet the requirements to possess, secure, and protect DOE assets and conduct security activities on behalf of DOE. While the FOCI and FCL programs are primarily focused on ensuring that a foreign entity is not granted access to classified information or special nuclear material (SNM) that would put our national security at risk, these programs are also employed if the contractor will require unescorted access to security areas, work with other hazardous materials presenting a potential radiological, chemical, or biological sabotage threat, or will manage DOE property of significant monetary value. Generally, the solicitation will include a provision (in Section L) for a FOCI determination and FCL if one of these situations is included in the work scope as determined by the Officially Designated Federal Security Authority (ODFSA) at the site.

DOE Order 470.4B, Change 3, *Safeguards and Security Program*, Appendix B, Section 1, states that the purpose of the FCL program is to regulate DOE approval of a Federal or contractor facility's eligibility to access, receive, generate, reproduce, store, transmit, or destroy classified information or matter; SNM; other hazardous material presenting a potential radiological, chemical, or biological sabotage threat; and/or DOE property of significant monetary value, exclusive of facilities and land values (hereinafter referred to as security assets and activities). For the successful Offeror, a favorable FOCI determination is required prior to contract award in accordance with DEAR 952.204-73, Facility Clearance (Aug 2016) (DEVIATION) and an FCL granted post-award by the DOE Headquarters Office of Environmental Management (EM), Office Safeguards, Security and Emergency Preparedness (EM-3.114).

Definitions.

- (1) Entity - means the organization(s) that will be required to possess an FCL.
- (2) Facility - means a plant, laboratory, office, college, university, or commercial structure with associated warehouses, storage areas, utilities, and components, that, when related by function and location, form an operating entity.
- (3) Facility Clearance (FCL) – means an administrative determination, from a security viewpoint, that a facility (including an appropriately sponsored contractor) is eligible to access, receive, produce, use, and/or store classified matter, nuclear materials, other hazardous material presenting a potential radiological, chemical, or biological sabotage threat, and/or Departmental property of significant monetary value. An FCL is based upon a determination that satisfactory safeguards and security measures are carried out for the activities being performed at the entity's facility, in accordance with the requirement of DEAR 952.204-73. It is DOE policy that all

contractors and/or subcontractors requiring access authorizations be processed for an FCL at the level appropriate to the activities being performed under the contract.

(4) Foreign Interest - means any of the following— (i) Any foreign government, foreign government agency, or representative of a foreign government; (ii) Any form of business enterprise or legal entity organized, chartered, or incorporated under the laws of any country other than the United States or its possessions and trust territories; and (iii) Any person who is not a citizen or national of the United States.

(5) Foreign Ownership, Control, or Influence (FOCI) - means the situation where the degree of ownership, control, or influence over a contractor by a foreign interest is such that a reasonable basis exists for concluding that compromise of classified information or SNM may result.

Initial Steps to Obtain a FOCI:

In response to an EM solicitation that requires an FCL, an Offeror should request access to the e-FOCI System at <https://foci.anl.gov/doesub/dashboard#/registrations/new> to start the FOCI process. For each proposal, a FOCI package must be submitted through the DOE's e-FOCI system by the Offeror and each teaming subcontractor (if applicable). If the Offeror is a joint venture, limited liability entity, limited liability partnership, or other similar entity (multi-member, shared ownership), a FOCI package must also be submitted by each member. A separate FOCI package must also be submitted for each tier parent organization located in the U.S., Puerto Rico, or a U.S. possession or territory. The parent must have an FCL at the same or higher level as the subsidiary organization. DOE will determine whether the parent will be cleared or excluded from access to classified information.

All Offerors must submit a Standard Form 328, *Certificate Pertaining to Foreign Interests*, as part of their proposal. Any questions that are answered “yes” on the SF-328 form must be accompanied by an explanation. The SF-328 form must be current, meaning it cannot be more than one year (12 months) old at the time of submission. Therefore, if an entity already has a record in e-FOCI, it may request that its package in e-FOCI be unlocked so that new or updated information can be uploaded if necessary (e.g., a recent signed SF-328).

Each Offeror must also submit a list of Key Management Personnel (KMP) with the SF-328 form. Per 32 Code of Federal Regulations (CFR) 117.7 and DOE Order 470.4, all company officials who occupy positions with the authority to affect the organization's policies or practices in security activities conducted under the contract, as determined by the DOE cognizant security office, must be designated as KMP. The FOCI package must include the names and identifying information of the entity owners, officers, and executives, and must also identify the entity's Facility Security Officer (FSO), Insider Threat Program Senior Official (ITPSO), and Senior Management Official (SMO) for the proposed contract. KMPs must possess final active security clearances for a contractor to be eligible for a final FCL involving classified information or matter, or SNM. **NOTE: KMPs for FOCI purposes are different from proposed “Key Personnel” in response to Sections H, L, and M of a specific solicitation.**

If an entity has already been issued a FOCI determination/FCL by the DOE or Department of Defense (DoD), the Offeror must submit a copy of the signed, final determination letter as well. If a facility is under the cognizance of the DoD, a full FOCI package submission through DOE's e-FOCI system is not required. A contractor granted an FCL by another Government Agency may be granted a DOE FCL for receiving, processing, using, or storing classified information or matter under a DOE contract at the same clearance level, based on reciprocity.

Moving From a FOCI Determination to an FCL:

Once a favorable FOCI determination has been made based upon all information available to the Cognizant Security Office (CSO) including information on the SF-328 and any required supporting documentation, the contract can be awarded in accordance with the DOE Acquisition Regulation (48 CFR 952) and the entity eligibility process can begin. In accordance with DOE Order 470.4, *Safeguards and Security Program*, Appendix B, all eligibility requirements listed below must be satisfied prior to the issuance of an FCL.

1. A contract or proposed contract containing the appropriate security clauses found in the DEAR (also as marked in Block 14, Security Requirements of the DOE Form 470.1, *Contract Security Classification Specification (CSCS)*).
2. Safeguards and Security Plan(s), developed in accordance with DOE policy in Attachment 2 of DOE Order 470.4, that describes protective measures appropriate to the activities to be performed at the facility and approved by the DOE CSO.
3. If the contract requires access to SNM, the CSO will establish a Reporting Identification Symbol for the Nuclear Materials Management and Safeguards System.
4. A comprehensive initial security survey of the facility conducted no more than six months prior to the approval of the FCL with a composite rating of "Satisfactory," if the facility will possess classified information or SNM at its location or if the facility has an importance rating of PP (Property Protection).
5. Appointment of an FSO, who must be a U.S. citizen, an employee of the entity, and have (or be in the process of obtaining) a security clearance equivalent to the level of the FCL.
6. Appointment of a Materials Control and Accountability Representative (if applicable).
7. Access authorizations (i.e., security clearances) for KMPs equivalent to the level of the FCL.

Once the FCL is granted, the contract can be registered, and the contractor can begin submitting its employees (other than KMPs) for personnel security clearances through the appropriate Cognizant Personnel Security Office (CPSO).

Maintaining the FOCI and FCL:

The FSO is responsible for assisting both management and employees with security matters during daily operations. They are also responsible for maintaining records of the FOCI/FCL

determination and reporting changes related to the FOCI/FCL process. The following pages contain information about reporting requirements. These reporting requirements are necessary to keep the entity's FOCI and FCL determination in good standing.

FACILITY CLEARANCE REPORTING REQUIREMENTS

Reporting Significant Changes:

When changes to the extent and nature of FOCI affect the information in an Offeror's/contractor's most recent FOCI submission(s), the entity's FSO must immediately provide written notification and supporting documentation relevant to the changes to the respective DOE Cognizant Security Office (CSO) by completing a significant change package through e-FOCI. The Contracting Officer should be notified in writing as well. Significant changes that may warrant processing of the contractor/parent for a new FOCI determination include, but are not limited to, the following:

- All circumstances that would change any answer on the SF-328 from "No" to "Yes" must be reported by submitting an updated SF-328.
- A previously reported threshold or factor that was favorably adjudicated by the CSO has increased to a level requiring a determination by the DOE Office of Environment, Health, Safety and Security.
- When a foreign interest owns five percent or more of a U.S. business organization (Questions 1a and 1b, SF-328), a five percent or greater increase in the beneficial ownership of a class of equity securities of the business organization, or a five percent increase in the beneficial ownership of the business itself, as determined by voting or investment rights, by one or more foreign interests and/or any U.S. person effectively controlled by a foreign interest.
- When a U.S. business organization owns ten percent or more of a foreign interest (Question 2, SF-328), any increase equivalent to ten percent or more of the tangible net worth of the business organization.
- When a U.S. business organization has non-U.S. citizen Key Management Personnel (KMP) (Question 3, SF-328), appointment of any additional non-U.S. citizen to a position required to be cleared in connection with the FCL or to any position identified in the articles of incorporation, by-laws, articles of organization, or equivalent governance documentation or charter for the business organization.
- When a foreign person has the power to control selection or tenure of KMPs/other decisions (Question 4, SF-328), any change in such power/authority except amendments or waivers to governance documentation either to correct manifest error or which are of a formal, minor, or technical nature and do not change materially any person's rights or obligations.

- When there are contracts, agreements, understandings, or arrangements with foreign person(s) (Question 5, SF-328), any change expected to result in annual payments to or from an entity where the payments exceed twenty percent of the U.S. business organization's annual gross revenues.
- When indebtedness, liabilities, or obligations to foreign persons exist (Question 6, SF-328), there is a changed condition reportable on the SF-328 for:
 1. Any new indebtedness to foreign persons which results in a liability exceeding ten percent of the tangible net worth of the business organization or includes an instrument creating a mortgage, deed of trust, pledge, lien, security interest or other charge or encumbrance against: (A) any of its property, assets or leasehold interests exceeding ten percent of the business organization's tangible net worth, or (B) pledges five percent or more of the voting securities of the business organization as collateral, or
 2. Any other new foreign indebtedness where the business organization permits to exist a leverage ratio exceeding two-to-one (2:1) based on the business organization's indebtedness to its tangible net worth and calculated on the basis of information set forth in its financial statement.
- When the business organization derives five percent or more of total revenues/net income from a single foreign person (Question 7a, SF-328), with respect to the business organization and that single foreign person, any change expected to result in annual payments to or from the business organization where the payments exceed an additional ten percent of the business organization's gross revenues.
- When the business organization derives thirty percent or more of total revenues/net income from foreign persons (Question 7b, SF-328), with respect to the business organization and any foreign persons, any change expected to result in annual payments to or from the business organization where the payments exceed an additional twenty percent of the business organization's annual gross revenue.
- When there are ten percent or more voting securities held in a method which does not identify the beneficial owner (Question 8, SF-328), any change of five percent or more in the total number of shares held in "nominee" shares, in "street names" or in some other method which does not identify the beneficial owner or any amendment to the bylaws of the business organization or its parent related specifically to voting rights of such nominee holders and any requirement regarding notice of any matter to be presented by a nominee stockholder at a shareholders meeting including any amendment affecting the voting and notice rights and obligations of nominee holders and associated persons who fail to make timely disclosures required by the U.S. Securities and Exchange Commission such as Schedule 13D.

- When KMP(s) hold positions, or serve as consultants for foreign person(s) (Question 9, SF-328), any new position held by persons required to be cleared in connection with the FCL (excludes positions where the KMP is appointed by the U.S. parent business organization to a seat on the board or similar governing body of a foreign subsidiary, provided that the business organization promptly gives the DOE Cognizant Security Office notice of such appointment.)
- Where any other factors of foreign person(s) control or influence (Question 10, SF-328), each change qualifying as an affirmative answer to this question on the SF-328 and each change having a material effect on the ownership, control or influence of the business, operations, prospects, condition (financial or otherwise), or property of the business organization such that the security measures contemplated by an agreement with DOE to mitigate FOCI would not reasonably be expected to remove the possibility of unauthorized access to or adverse effect on the performance of classified contracts.
- A previously reported foreign ownership threshold or factor that was favorably adjudicated has increased to the extent that a FOCI mitigation method (if none previously existed) or a different FOCI mitigation method is required.
- Any changes in ownership or control, including stock transfers that affect control of the entity. Notice of changes includes ownership or control events that are required to be reported to the Securities and Exchange Commission (SEC), the Federal Trade Commission (FTC), or the Department of Justice (DOJ).

Reporting Anticipated Changes:

Anticipated changes are events that arise when an entity or any of its tier parents enter into formal negotiations toward an agreement, and in any event when the parties enter a written memorandum of understanding, or, in the case of financing agreements, when written application for financing is made. The FSO must immediately provide written notification of anticipated actions to EM-3.114 via email to em-3.114fociteam@em.doe.gov. Failure to do so may result in suspension or termination of the FCL.

Anticipated actions include, but are not limited to, the following:

- An action to terminate business or operations of the entity or any of its parents for any reason, including, but not limited to, entering into any transaction of merger, consolidation, or amalgamation with another entity; conveying, selling, leasing, transferring, or otherwise disposing of all or a substantial part of its business or assets; and/or making any material change that could have an adverse effect on the contractor organization's ability to perform its contractual obligations for EM or other contractors of EM. **Note:** The FSO is required to notify EM-3.114 when their entity enters negotiations for a proposed merger, acquisition, takeover, or restructure within the entity's chain of

ownership. Failure to notify EM-3.114 **PRIOR** to a merger, acquisition, takeover, or restructure **WILL** result in the suspension or termination of the FCL.

- Legal actions are taken to initiate bankruptcy proceedings involving the contractor/subcontractor entity or any of its tier parents.
- Imminent adjudication of, or reorganization resulting from, bankruptcy actions involving the contractor entity or any of its tier parents.
- The contractor or its tier parents enter negotiations with non-U.S. citizens that may reasonably be expected to require amendment of the SF-328, *Certificate Pertaining to Foreign Interests*, including, but not limited to, negotiations for the sale of securities to non-U.S. citizen(s).

Reporting Other Changes:

The FSO must immediately provide written notification via email to EM-3.114 at em-3.114fociteam@em.doe.gov and e-FOCI of the changes listed below. Failure to do so may result in suspension or termination of a contractor's FCL.

Other reportable changes include, but are not limited to, the following:

- Any change of operating name or address of the entity or any of its cleared locations.
- Any changes to information previously submitted for KMPs, including, if appropriate, the names of the individuals that incoming KMPs are replacing. Note: A complete new KMP listing must be submitted any time a KMP change is made by the entity and/or when requested in writing by EM-3.114.
- Any pre-contract negotiation or award not placed through a government contracting authority that involves or may involve:
 - (1) the release or disclosure of U.S. classified information to a foreign interest; or
 - (2) access to classified information furnished by a foreign interest.
- When requested by EM-3.114, the contractor shall provide a current list of all classified contracts as well as classified lower-tier contracts issued to other subcontractors.
- When requested by EM, selected contractors shall provide security costs charged to the government for a specified time. The data will be used by EM in developing the annual Report to Congress on overall National Industrial Security Program Costs.

For questions, please contact the EM-3.114 HQ FOCI Office via email at em-3.114fociteam@em.doe.gov. You may also reach out the EMCBC FOCI Liaison, Kimberly Tate at 937-673-4570 or kimberly.tate@emcbc.doe.gov for assistance.

References

Here is a hyperlink to the electronic CFR website for more information:

<https://www.ecfr.gov/current/title-32/subtitle-A/chapter-I/subchapter-D/part-117>