



Foreign Entity Participation and Performance of Foreign Work in the United States Guidance

Applicants that seek to include Foreign Entity participation or foreign work in a U.S. Department of Energy (DOE) Office of Clean Energy Demonstrations (OCED) funded project are required to submit a waiver request for all foreign entity participation (FEP) and proposed foreign work (FW) on OCED projects as part of their application and during the performance of the award. The following guidance provides general information about these waiver request requirements.

What is considered a Foreign Entity?

For the purposes of this guidance, a foreign entity is defined as:

- (i) A government of a foreign country;
- (ii) A partnership, association, corporation, organization or other combination of persons organized under the laws of or having its principal place of business in a foreign country;
- (iii) A natural person who is not a lawful permanent resident, national, or citizen of the United States, and not otherwise affiliated with an entity that qualifies as a foreign entity under (i) or (ii);
or
- (iv) An organization that is owned by, controlled by, or subject to the direction of an entity that qualifies as a foreign entity as described in (i)-(iii).

Are Foreign Entities eligible to submit applications for funding?

Many of the technology areas DOE funds fall in the category of critical and emerging technologies. These critical and emerging technologies are a subset of advanced technologies that are potentially significant to United States national and economic security.¹ Unless DOE issues a waiver, all award recipients and subrecipients must be organized, chartered, or incorporated (or otherwise formed) under the laws of a state or territory of the United States; have majority domestic ownership and control; and have a physical location for business operations in the United States. For specific eligibility requirements and instructions, refer to the specific OCED Notice of Funding Opportunity (NOFO).

¹ See [Critical and Emerging Technologies List Update \(whitehouse.gov\)](https://www.whitehouse.gov).

Can a Foreign Entity participate in an OCED funded project?

Organizations applying for DOE funding which include foreign entities as recipients or subrecipients in their projects and application proposals must submit a written waiver request as part of their application and during the performance of the award, to disclose all foreign entity participation on OCED projects.

Does all work funded under an OCED Notice of Funding Opportunity have to be performed in the United States?

All work for DOE projects is expected to be performed in the United States. Organizations applying for DOE funding which use staff, contractors, or affiliates to conduct project work that takes place outside the United States must submit a written waiver request as part of their application and during the performance of the award.

What are some examples of when a waiver **is** and **is not** required?

Below are some examples of when a waiver **is** and **is not** required. This is not a comprehensive list. Contact your Federal Project Manager if you have questions.

- FEP waiver **is required** for recipients and subrecipients who are foreign companies or U.S. companies who have majority ownership by foreign companies.
 - FEP waiver **is not** required for contractors.
- FEP waiver **is required** for a U.S. based corporation which is owned directly by a foreign parent or where a foreign entity holds a majority interest in the recipient or subrecipient.
 - FW waiver **is not** required in this instance unless the U.S.-based corporation is using foreign affiliates to perform work.
- FW waiver **is required** for all professional and skilled labor outside of the United States for both U.S. and foreign entities.
 - FW waiver **is not** required if a U.S. owned company with international offices chooses to perform less than 10% of the cost of the work attributed to that company in a foreign office owned by that company.

What information is needed in a Foreign Entity Participation/Work Waiver Request?

Foreign Entity Participation Waiver Criteria

A foreign entity seeking to participate in a project must demonstrate to the satisfaction of DOE that:

- A. Its participation is in the best interest of the United States industry and United States economic development;
- B. The project team has appropriate measures in place to control sensitive information and protect against unauthorized transfer of scientific and technical information;
- C. Adequate protocols exist between the United States subsidiary and its foreign parent organization to comply with export control laws and any obligations to protect proprietary information from the foreign parent organization;
- D. The work is conducted within the United States; and
- E. The foreign entity will satisfy other conditions that may be deemed necessary by DOE to protect United States government interests.

A Foreign Entity Participation (FEP) waiver request must include:

- A. Information about the entity: name, point of contact, and proposed type of involvement in the project.
- B. Country of incorporation or place of business; the extent of the ownership/control by foreign entities, whether the entity is privately or publicly held, if it is state owned or controlled in part or whole; a summary of the ownership breakdown of the foreign entity and the percentage of ownership/control by foreign entities, foreign shareholders, foreign state or foreign individual(s). In all cases, the foreign country in question should be clearly identified.
- C. The rationale for proposing a foreign entity participate (must address criteria above).
- D. A description of how the foreign entity's participation is essential to the project.
- E. A description of the project's anticipated contributions to the United States economy:
 - How the project will benefit United States R&D and manufacturing, including contributions to employment in the United States and growth in new markets and jobs in the United States.
 - How the project will promote domestic American manufacturing of products and/or services.
- F. A description of the likelihood of IP being created from the work and the treatment of any such IP.

- G. Countries where the work will be performed. (Note: If any work is proposed to be conducted outside the United States, the applicant must also complete a separate request for foreign work waiver).

DOE may also require:

- A. A risk assessment with respect to IP and data protection protocols that includes the export control risk based on the data protection protocols, the technology being developed, and the foreign entity and country. These submissions could be prepared by the project lead (if not the recipient), but the recipient must make a representation to DOE as to whether it believes the data protection protocols are adequate and make a representation of the risk assessment – high, medium, or low risk of data leakage to a foreign entity.
- B. Additional language be added to any agreement or subagreement to protect IP, mitigate risk, or other related purposes.

A foreign work (FW) waiver request must include:

- A. The name of the entity that would perform the foreign work.
- B. The rationale for performing the work outside the United States (“foreign work”).
- C. A description of the work proposed to be performed outside the United States.
- D. An explanation as to how the foreign work is essential to the project.
- E. A description of the anticipated benefits to be realized by the proposed foreign work and the anticipated contributions to the U.S. economy.
- F. The associated benefits to be realized and the contribution to the project from the foreign work.
- G. How the foreign work will benefit the United States, including manufacturing, contributions to employment in the United States and growth in new markets and jobs in the United States.
- H. How the foreign work will promote manufacturing of products and/or services in the United States.
- I. A description of the likelihood of IP being created from the foreign work and the treatment of any such IP.
- J. The total estimated cost (DOE and recipient cost share) of the proposed foreign work.
- K. The countries in which the foreign work is proposed to be performed.

DOE may require additional information before considering the waiver request. DOE’s decision concerning a waiver request is not appealable.

How do I submit the waiver and to whom?

The waiver request/s must be submitted on your organization's letterhead and signed by your organization's Authorized Organization Representative. Submit the waiver request/s with your application or, if after application, to your Federal Project Manager and Grants and Agreements Officer.

What happens after I submit a Foreign Entity Participation or Foreign Work to OCED?

If you are an applicant, OCED will review your waiver submission prior to selection to determine if the information is satisfactory and that the FEP or FW is in the best interest of the United States and DOE Program objectives. OCED may contact you to request additional information.

If you are a selectee or recipient, your Federal Project Manager will review your waiver submission to determine if the information is satisfactory and that the FEP or FW is in the best interest of the United States and DOE Program objectives. If, in consultation with your Grants and Agreements Officer and OCED security staff, any FEP or FW requires further consideration or mitigation, your Federal Project Manager will contact you to discuss mitigation strategies.

Can DOE's decision concerning Foreign Entity Participation or Foreign Work be appealed?

No. DOE's decision concerning a FEP or FW is not appealable.