

16. OTHER GRANTS ADMINISTRATION POLICIES AND REQUIREMENTS

A. Anti-Deficiency Act. The Anti-Deficiency Act (31 U.S.C. 1341) prohibits making or authorizing the making of an expenditure or obligation in excess of amounts available or involving the government in a contract or obligation in advance of an appropriation unless authorized by law. Federal assistance funds may not be awarded by DOC unless the funds are currently available in a DOC appropriation or fund. For awards to be funded with amounts transferred from another agency, the transfer agreement must be complete prior to approval of the award by DOC. Questions concerning the Anti-Deficiency Act should be referred to the OGC General Law Division.

B. Bona Fide Needs Rule. The bona fide needs rule provides that an appropriation which is limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete awards properly made within that period (31 U.S.C. § 1502(a)). For agencies with annual funds, a financial assistance award using those funds must meet a bona fide agency need that arises during that fiscal year. If the project is funded with time limited appropriations and the nature of the award renders it impossible to sever the tasks on an annual incremental basis, the project must be funded wholly at the time of the award. In some cases, the agency's need may be to make an award that fiscal year, even though the work to be performed under the award will not take place until the following fiscal year. No-year funds, which are the majority of DOC financial assistance funds, are not subject to the bona fide needs rule. Questions concerning the bona fide needs rule should be referred to the OGC General Law Division.

C. Checklists. Checklists can be effective tools in assuring that required actions in specific areas have been completed, and they are helpful in the review and analysis of various documents. Use of checklists is encouraged but not required by this Manual.

D. Conflicts of Interest. It is the policy of DOC to maintain high standards of conduct to prevent real or apparent conflicts of interest in connection with awards. A conflict of interest exists when a person participates in a matter which is likely to have a direct and predictable effect on his or her personal or financial interests. A conflict also exists where there is an appearance that a person's objectivity in performing his or her responsibilities is impaired. An appearance of impairment of objectivity could result from an organizational conflict where, because of other activities or relationships with other persons or entities, a person is unable or potentially unable to render impartial assistance or advice to the government. A conflict of interest could also result from non-financial gain to the individual, such as benefit to reputation or prestige in a professional field. Conflicts could inadvertently occur as program officials carry out their responsibilities during the evaluation and selection process, during the review process, and as recipients carry out their responsibilities under awards. Conflicts of interest should be avoided, but if they are discovered, they should promptly be resolved through

disqualification, divestiture, waiver or other appropriate measures. Several requirements are applicable to the activities of individuals and organizations in the context of financial assistance.

1. Federal Employees.

a. Under a criminal statute (18 U.S.C. § 208) and Government-wide Standards of Conduct (5 CFR Part 2635), a Federal employee may not participate in an official capacity in a matter which is likely to have a direct and predictable effect on his or her financial interests. An employee also should not participate in the evaluation or selection process in any circumstance where his/her participation would create the appearance of loss of impartiality, including situations in which one of the parties is, or is represented by, a member of the employee's household, the employee's relative or a person with whom the employee has or is seeking business relations. Any situation which creates an actual conflict or the appearance of a conflict should be brought to the attention of the Program Officer for appropriate action. Depending on the particular circumstance, resolution may consist of disqualification, divestiture, waiver, or other appropriate measures.

b. In addition to these restrictions, Federal employees should not participate in any activities that would result in providing any person or organization a competitive advantage. For example, an employee, other than as part of his or her official duties, should not assist an applicant for a competitive financial assistance program with the preparation of a proposal to be submitted to the employee's agency. Additionally, an employee, other than as part of his or her official duties, may not submit applications for financial assistance to DOC on behalf of any other person or entity.

2. Review Panel Members. In order to ensure the integrity of the application review process, it is essential that reviewers be free from actual or apparent conflicts of interest or appearance of impairment of objectivity. In order to identify the existence of a conflict of interest, program officials must provide each reviewer with a certification form which sets forth standards for determining the existence of a conflict of interest and requires the reviewer to notify the Program Officer of any potential or actual conflicts. A conflict of interest certification form is in Appendix A of this Manual. When a conflict or potential conflict of interest is identified, it must be resolved by the Program Officer through appropriate action, such as disqualification, divestiture, or waiver.

3. Recipient Employees. Financial assistance recipients are required to certify, through the execution of SF-424B, that they will establish safeguards to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest, or personal gain. This assurance is intended to avoid any conflict or appearance of a conflict of interest that might arise between a recipient employee's personal financial and other interests, and his or her duties and responsibilities under a financial assistance award. Costs incurred in violation of conflict of interest assurances contained in the SF-424B may be determined

to be neither reasonable nor in compliance with applicable cost limitations, and hence, unallowable under applicable cost principles.

4. Contracts and Subawards under Grants. Financial assistance recipients are required by 15 CFR § 14.42 and 15 CFR § 24.36(b)(3) to maintain written standards governing the performance of employees engaged in the award and administration of contracts. These standards are intended to prohibit employees, officers and agents from participating in the selection, award or administration of contracts supported by Federal funds if a conflict of interest would be involved. Violation of these procurement requirements could be a basis for suspension or termination of an award, or other appropriate action. Because unresolved conflicts of interest have the potential to undermine the integrity of the financial assistance process, it is important that such conflicts be brought immediately to the attention of the Program Officer for resolution. The DOC applies this requirement to subawardees.

E. Consulting Services. Grants and cooperative agreements are not to be used as legal instruments for consultant services for the purpose of performing in-house organizational studies or other studies for internal government use unless allowed by statute.

F. Coordination with DOC and Other Federal Agencies. In order to avoid duplication of effort in work under DOC awards, projects will be coordinated as appropriate with other Federal agency programs, as well as with other operating units within DOC. Appropriate coordination shall be conducted for any project whose scope of work overlaps, relates to, or duplicates the program mission of another Federal program before an award is approved for funding. The DOC supports interagency programs to provide support for research and other programs. It is, therefore, sometimes necessary to accommodate the requirements of partner agencies in awards. DOC will be as flexible as possible in consideration of partner agency needs for application requirements, review and selection procedures and final award notifications. As long as DOC policies and procedures are followed, the administration of interagency programs involving DOC may include requirement elements from other Federal agencies. In cases where funds are transferred from other Federal agencies, documentation of agreements, including but not limited to, any agreements pursuant to the Economy Act or Memoranda of Understanding/Agreement, must be included in award files.

G. Criminal and Prohibited Activities. Laws are enacted to preserve the integrity of the Federal Government and the public by holding Federal contractors, grantees, and agency employees accountable for any criminal or prohibited activities conducted while participating under a Federal program.

1. The Program Fraud Civil Remedies Act (31 U.S.C. §§ 3801-3812), provides for the imposition of civil penalties against persons who make false, fictitious, or fraudulent claims to the Federal Government for money (including money representing grants, loans or other benefits). Implementing regulations for DOC are published at 15 CFR Part 25.

2. False statements (18 U.S.C. §§ 287 and 1001), provides that whoever makes or presents any false, fictitious, or fraudulent statements or representations or claims against the United States shall be subject to imprisonment of not more than five years and shall be subject to a fine in the amount provided by 18 U.S.C. § 287.

3. The False Claims Act (31 U.S.C. §3729 et seq.), provides that suits under this act can be brought by the government or a person on behalf of the government for false claims under Federal assistance programs.

4. Copeland “Anti-Kickback” Act (18 U.S.C. § 874 and 40 U.S.C. § 276c), prohibits a person or organization engaged in a Federally supported project from enticing an employee working on the project from giving up a part of his compensation under an employment contract.

H. DOC Forms. DOC grants administration forms approved for use with grants and cooperative agreements are listed below and are displayed in Appendix A of this Manual. Operating units must ensure that these are the forms used for their prescribed purposes.

1. Form CD-450 - Financial Assistance Award
2. Form CD-451 - Amendment to Financial Assistance Award
3. Form CD-478 - Federal Assistance Information Sheet
4. Form CD-511 - Certifications Regarding Debarment, Suspension and Other Responsibility Matters; Drug-Free Workplace Requirements and Lobbying
5. Form CD-512 - Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transactions and Lobbying
6. Form CD-346 - Applicant for Funding Assistance
7. Form CD-571 - Reviewer Conflict of Interest and Confidentiality Certification for Non-Governmental Peer Reviewers

I. Federal Assistance Award Data System (FAADS). FAADS is a central collection of selected, computer-based data on Federal financial assistance award transactions, compiled quarterly. FAADS is required by 31 U.S.C. § 6102(a). The DOC portion of FAADS is a compilation of DOC grant, cooperative agreement, loan, and loan guarantee actions. FAADS is not an accounting system. Reporting in FAADS is based on information about the primary recipient and does not include information about subawards and contracts. Grants Officers will provide to OEAM electronic information for FAADS and OEAM will provide the DOC FAADS report to the Bureau of Census on a quarterly basis. FAADS information will be verified for accuracy.

J. Freedom of Information Act (FOIA). The FOIA (5 U.S.C. § 552) generally provides that any person has a right of access to Federal agency records, except to the extent that such records (or portions thereof) are protected from disclosure by exemptions. The DOC regulations implementing the FOIA are found at 15 CFR Part 4, “Public Information,” which sets forth rules for DOC and operating units to make requested materials, information, and records publicly available under FOIA. Unless prohibited by law and to the extent permitted under the FOIA, contents of applications and proposals submitted by successful applicants may be released in response to FOIA requests. In addition, 15 CFR §14.36, Intangible Property, requires that research data relating to published research findings produced under an award that were used by the Federal Government in developing an agency action that has the force and effect of law will be made available to the public through the procedures established under the FOIA.

K. Management and Institutional Grant Reviews.

1. Management Reviews. As deemed appropriate, OEAM will conduct reviews to evaluate the internal grants administration policies and procedures of the operating units, including field or remote locations. At a minimum, the review team should include members from the OGC as well as knowledgeable representatives from the operating unit. The scope of the review will include but not be limited to compliance with applicable public laws, regulations, OMB circulars, this Manual, and internal grants administration policies of the operating unit. The review team’s report will be sent to the operating unit for comment prior to publication.

2. Reviews of Institutional Grant Awards. Each financial assistance program that has been authorized by the Grants Officer to make institutional awards must establish procedures in consultation with the Grants Officer for an independent review and evaluation of the program and/or the institutional awards, the performance of the institutional award recipients, the effectiveness of the program and of the recipients in meeting the objectives and goals of the program. At least once every five years a review must be conducted and the results of the review, including any findings and recommendations, shall be submitted to the Grants Officer in a timely manner, with a copy of the report provided to OEAM, as appropriate.

L. Minimum Notice for Competitive Solicitation. In order to provide the public reasonable notice, there must be a minimum of 30 calendar days between the date of publication of a solicitation for applications in the *Federal Register* and the closing date for receipt of applications (e.g., November 1 publication date and December 1 closing date).

M. Opportunities for Minority Business Enterprises and Women Business Enterprises. EO 12432 (July 1983) requires that each Federal agency identified as having substantial procurement or grant-making authority develop an Annual Minority Business Development Plan to increase minority business participation and report on the progress towards accomplishing this plan. The DOC is strongly committed to these

objectives and will encourage all recipients of grants and cooperative agreements to take positive steps to ensure fairness and equity.

N. Order of Precedence. The following is the order of legal precedence for grants and cooperative agreements. There should be no conflicting guidance but, in the event of a discrepancy, the order of precedence for DOC grants and program officials is listed in descending order: public laws, regulations, applicable notices published in the *Federal Register*, Executive Orders, OMB circulars, DOC ST&Cs, agency standard award conditions (if any), and special award conditions.

[**Note:** Special Award Conditions may take precedence over DOC ST&Cs, on a case-by-case basis, when allowed by the DOC ST&Cs.]

O. Paperwork Reduction Act (PRA) - Collections of Information Conducted under Grants and Cooperative Agreements. The PRA (44 U.S.C. 3501), and its implementing regulations at 5 CFR 1320, “Controlling Paperwork Burdens on the Public,” require an agency to obtain approval from OMB before conducting or sponsoring a “collection of information.” The regulations provide that a collection of information undertaken by a recipient of a Federal grant is considered to be “sponsored” by an agency only if “(1) The recipient of a grant is collecting information at a specific request of the agency; or (2) The terms and conditions of the grant require specific approval by the agency of the collection of information or the collection procedures.”

P. Patents and Intellectual Property Rights.

1. Inventions. The rights to any invention made by a recipient under a DOC financial assistance award are determined by the Bayh-Dole Act, Public Law 96-517, as amended, and codified in 35 U.S.C. § 200 *et seq.* The specific rights and responsibilities are described in more detail in 37 CFR Part 401 and in particular, in the standard patent rights clause in 37 CFR § 401.14.

a. Ownership.

(1) Recipient. The recipient has the right to own any invention it makes (conceived or first reduced to practice) or made by its employees. The recipient may not assign its rights to a third party without the permission of DOC unless it is to a patent management organization (i.e., a university’s research foundation). The recipient’s ownership rights are subject to the government’s nonexclusive paid-up license.

(2) Department. If the recipient elects not to own or does not elect rights or file a patent application within the time limits set forth in the standard patent rights clause, DOC may request an assignment of all rights, which is normally subject to a limited royalty free nonexclusive license for the recipient. DOC owns any invention made solely by its employees but may license the recipient in accordance with the procedures in 37 CFR Part 404.

(3) Inventor/Employee. If neither the recipient nor the Department is interested in owning an invention by a recipient employee, the recipient, with the written concurrence of DOC Patent Counsel, may allow the inventor/employee to own the invention subject to certain restrictions as described in 37 CFR § 401.9.

(4) Joint inventions. Inventions made jointly by a recipient and a DOC employee will be owned jointly by the recipient and DOC. However, DOC may transfer its rights to the recipient as authorized by 35 U.S.C. § 202(e) and 37 CFR § 401.10 if the recipient is willing to patent and license the invention in exchange for a share of “net” royalties based on the number of inventors (e.g., 50-50 if there is one recipient and DOC employee). The agreement will be prepared by DOC Patent Counsel and may include other provisions, such as a royalty free license to the government and certain other entities.

b. Responsibilities. The recipient has responsibilities and duties set forth in the standard patent rights clause, which are not described below. The recipient is expected to comply with all the requirements of the standard patent rights clause and 37 CFR Part 401.

(1) Reporting. Within two months of when the recipient reports the invention, the recipient will send the invention disclosure to DOC Patent Counsel (HCHB Room 4613, Washington, DC 20230, telephone: 202-482-8097) and the appropriate DOC program office.

(2) Electing. Within two years of reporting the invention to DOC, the recipient will notify DOC Patent Counsel of its decision whether or not it wishes to own the invention.

(3) Filing. Within one year of notifying DOC that it wishes to own the invention, the recipient will file a patent application (either a provisional or non-provisional) and promptly send a copy of the application to DOC Patent Counsel. Any foreign or international application must usually be filed within 10 months of the first filed application in the United States. The recipient will ensure that any U.S. application contains the required statement of government support. The recipient will also promptly send the required confirmatory government license to DOC Patent Counsel who shall record that license in the U.S. Patent and Trademark Office. If the recipient decides to discontinue the prosecution of any patent application or not pay a maintenance fee or defend a reexamination, it shall notify DOC Patent Counsel of that fact in sufficient time (but not less than 30 days) for the government to respond to any outstanding requirement or letter from a patent office. However, if the recipient is filing a continuing application, it needs only to notify DOC Patent Counsel of this and provide a copy of the continuing application with the appropriate confirmatory license. Upon issuance of any application, the recipient will promptly provide a copy of the patent to DOC Patent Counsel.

(4) The recipient should send any request for an extension of time to DOC Patent Counsel in advance of the expiration of the time period.

2. Data, Databases, and Software. The rights to any work produced or purchased under a DOC Federal financial assistance award are determined by 15 CFR § 14.36 and 15 CFR § 24.34. Such works may include data, databases or software. The recipient owns any work produced or purchased under a DOC Federal financial assistance award subject to DOC's right to obtain, reproduce, publish or otherwise use the work or authorize others to receive, reproduce, publish or otherwise use the data for government purposes.

3. Copyright. The Federal awarding agency reserves a royalty-free, non-exclusive, and irrevocable license to reproduce, publish or otherwise use, and authorize others to use, for Federal Government purposes: (1) the copyright in any work developed under a grant, subgrant, or contract under a grant or subgrant; and (2) any rights of copyright to which a grantee, subgrantee, or a contractor purchased ownership with grant support. Works jointly authored by DOC and recipient employees may be copyrighted but only the part authored by the recipient is protected because, under 17 U.S.C. § 105, works produced by government employees are not copyrightable in the United States. If the contributions of the authors cannot be separated, the copyright status of the joint work is questionable. Therefore, the Grants Officer should notify the DOC Patent Counsel of any issue concerning a questionable copyright purchased or produced under the award and resolve the status. On occasion, DOC may ask the recipient to transfer to DOC its copyright in a particular work when DOC is undertaking the primary dissemination of the work. Ownership of copyright by the government through assignment is permitted by 17 U.S.C. § 105.

Q. Payments. Payments shall be made by electronic funds transfer in accordance with the Debt Collection Improvement Act of 1996. Advances should be authorized unless there is sufficient adverse information about the recipient in accordance with Chapter 9, subparagraph I.3.c.(2), of this Manual. Advances will be limited to the minimum amounts necessary to meet immediate disbursement needs. Advanced funds not disbursed in a timely manner must be promptly returned to DOC. The DOC may begin using the Department of the Treasury's Automated Standard Application for Payment (ASAP) system. Payments should be monitored to assure that recipients are not holding excess cash on hand.

R. Privacy Act (PA). The PA (5 U.S.C. § 552a) provides an individual with a legal right to access records about herself or himself (subject to exemptions) and the right to request amendment of any record in that individual's PA file that is inaccurate, irrelevant, untimely, or incomplete. The PA also prohibits the unauthorized disclosure of PA protected information. The DOC's regulations implementing the PA are found at 15 CFR Part 4b, "Privacy Act."

S. Recipient Name Change. A recipient organization may decide to change its legal name without changing any other aspect of the award (e.g., there are no asset or ownership changes). In this instance, the Grants Officer must direct the recipient to provide documentation of the name change, such as a copy from the state government of a certificate from a Secretary of State verifying the change for an incorporated party. If

the name change is implemented by common law rather than by legal action, the Grants Officer may instead accept an attestation by the Chief Executive Officer, President, or equivalent official of the organization, stating that the change occurred. The Grants Officer will amend the award to reflect the new name.

T. Requests for Prior Approval. When a recipient is required to obtain approval before taking certain actions with respect to a grant or cooperative agreement, the Grants Office shall provide a decision in writing to the recipient within 30 days of receipt by the awarding agency. If a decision cannot be made within 30 days, the office holding the request must acknowledge receipt and inform the recipient in writing within 30 days when a decision can be expected.

U. Scientific or Research Misconduct. Scientific or research misconduct refers to the fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results. It does not include honest errors or differences of opinion. The recipient organization has the primary responsibility to investigate allegations and provide reports to the Federal Government. Funds expended on an activity that is determined to be invalid or unreliable because of scientific misconduct may result in a disallowance of costs for which the institution may be liable for repayment to the awarding agency. The Office of Science and Technology Policy at the White House published in the *Federal Register* on December 6, 2000, a final policy that addressed research misconduct. The policy was developed by the National Science and Technology Council (65 FR 76260).

V. Statutory Authority. Each financial assistance proposal must be awarded under the proper authorizing statute. Public Law 95-224, "Federal Grant and Cooperative Agreement Act of 1977," as amended (31 U.S.C. §§ 6301-6308) does not provide legislative authority to fund financial assistance awards. It merely provides the basis for selecting the funding instrument.

W. Transfer of Award. In certain circumstances, the Program Officer and the recipient may agree that it would be in the best interests of the government and the recipient for an award to be transferred by DOC to a replacement recipient.

1. When the two organizations, the Program Officer and the Grants Officer agree that it is in the best interests of the Federal Government and the intended beneficiaries of the award to allow the transfer, the Grants Officer will amend the award to transfer it to the new recipient organization. In such cases, the Program Officer must submit a request to the Grants Officer to change recipients. The request shall include documentation attesting to the original recipient's and proposed replacement recipient's consent to the proposed transfer. Such documentation must include a written agreement between the original recipient and the proposed replacement recipient executed by authorized representatives of both parties. In this instance, the organization relinquishing the award will be liable for all programmatic activities and all funds expended under the award prior to the effective date of the transfer. The relinquishing organization will be responsible for all closeout activities, including having an audit performed, if required, for the award

prior to the effective date of the transfer. The organization to which the award is transferred must submit an application (if appropriate) which includes a proposal and detailed budget narrative (a maximum of an original and two copies may be required by the Federal awarding agency). The following forms must also be submitted, as applicable: the SF-424, SF-424A, SF-424B, SF-424C, SF-424D, CD-511, CD-346, SF-LLL, or any other approved program specific forms. The Program Officer will review all documents and make a recommendation as to the applicant's adequacy to meet program requirements which will be forwarded to the Grants Office along with the request. This review will be the same as the review of any new application, including a responsibility check on the applicant, unless that function is performed by the Grants Office. The language in the amendment must clearly delineate the responsibilities of both parties to the transfer.

2. Novation Agreement. A novation occurs when one organization takes over all of the liabilities and responsibilities of another organization. This might occur as a result of a merger, one organization buying another, an organization going out of business and entering into an agreement with another organization to take over its business, or a variety of other reasons.

a. When an organization seeks to transfer an award to another organization as a result of a novation agreement, the two organizations must submit a proposed novation agreement to the Grants Officer, signed by the CEOs, Presidents, or equivalent fiduciary officers of the two organizations. The novation agreement must state that all rights, duties and obligations of the award are transferred without further claim and that the new recipient agrees to accept them. Furthermore, the new recipient must meet statutory and regulatory eligibility requirements. In the case of successor-in-interest organizations, the recipient shall submit relevant documentation reflecting the relationship between the recipient and the successor organization.

b. The Grants Officer will consult with the OGC on the legal merits of the proposed novation. If the novation is determined to be in order, the Grants Officer will request that the proposed new recipient submit an application and an amended proposal (if appropriate) to effect the change in award recipient. The application must include an original proposal and detailed budget narrative (as well as two copies if required by the Federal awarding agency). The following forms must be submitted, as applicable: the SF-424, SF-424A, SF-424B, SF-424C, SF-424D, SF-511, CD-346, SF-LLL, or any other approved program specific forms. The Grants Officer will then obtain a review and written recommendation regarding the proposed novation from the Program Officer as to the programmatic efficacy of the proposed agreement. The Program Officer should examine whether the scope of work has changed or if there are other issues arising that would put the initial competitive selection in jeopardy because of differences between the original and the new recipient and review any related budgetary changes. The Grants Officer must make a responsibility determination regarding the new recipient. If the Grants Officer then determines that the award should continue, he/she will issue an amendment to the award to effect the transfer to the subsuming organization.

X. Transfer of Funds. When other agencies transfer funds to DOC for financial assistance programs, DOC must generally comply with legislative requirements imposed on the transferred funds (e.g., restrictions contained in a transferring agency's appropriation act and/or authorization act). If a statute places specific requirements on funds, those requirements generally remain with the funds upon transfer. When there is a specific limitation or requirement placed on the funds transferred by law of such transferring agency, the DOC award may have to include that limitation or requirement along with DOC terms and conditions, as appropriate. It is also possible that DOC may have legislation or requirements applicable to funds transferred to it and such requirements would need to be noted in standard terms and conditions, as appropriate.

Y. Videos Produced under DOC Financial Assistance Awards. Before production of a video for public viewing is begun, the operating unit must review and approve the production plans and the final video to ensure that it will be of an acceptable quality and appropriately represents the DOC.

Z. Waivers and Deviations. Any request for waivers and/or deviations from the requirements of this Manual must be submitted in writing to the Director, OEAM, by the Head of Operating Unit. The request must include a full explanation of the reason for the request and justification for the deviation or waiver. OEAM will review the request, coordinate its review with OGC and other appropriate offices, and provide a response in accordance with Chapter 4, Paragraph B.11. of this Manual. Requests for waivers and deviations from the requirements will be approved only in extraordinary circumstances and when such approval will be in the best interest of the Federal Government. Proposed deviations from DOC regulations (e.g., uniform administrative requirements) may require that OEAM seek prior approval from OMB.