

5. RELATIONSHIPS WITH OUTSIDE ENTITIES

A. Overview

1. The DOC has a diverse mission which is accomplished via both in-house activities and non-Federal organizations, using instruments reflecting either a financial assistance, procurement, or other agreement. These instruments are different in purpose and create different relationships between the Department and outside parties.

2. The Federal Grant and Cooperative Agreement Act of 1977, as amended, 31 U.S.C. § 6301-6308, (the Act) requires executive agencies to distinguish procurement relationships from assistance relationships with non-Federal parties and provides some general guidance on helping make these distinctions. The Act requires the use of procurement contracts for all agency acquisition activity, and the use of assistance instruments (grants and cooperative agreements) for specified types of assistance relationships.

3. This chapter summarizes and augments the guidance in the Act on distinguishing between those situations in which a procurement contract, an assistance instrument (grant or cooperative agreements), or other type of agreement is the appropriate instrument.

B. Grants A grant is the legal instrument reflecting a relationship between DOC and a recipient whenever: (a) the principal purpose of the relationship is to transfer money, property, services, or anything of value in order to accomplish a public purpose of support or stimulation authorized by Federal statute, and (b) no substantial involvement is anticipated between DOC and the recipient during the performance of the contemplated activity. The term "grant," as used in this manual, refers to both a grant(s) and cooperative agreement(s), unless specifically stated otherwise. See 31 U.S.C. § 6304.

C. Cooperative Agreements A cooperative agreement is the legal instrument reflecting a relationship between DOC and a recipient whenever: (1) the principal purpose of the relationship is to transfer money, property, services, or anything of value to accomplish a public purpose of support or stimulation authorized by Federal statute, and (2) substantial involvement (e.g., collaboration, participation, or intervention by DOC in the management of the project) is anticipated between DOC and the recipient during performance of the contemplated activity. See 31 U.S.C. § 6305. Cooperative agreements are subject to the same laws, OMB, Treasury, and other Federal directives as grants. The following information may be helpful in deciding whether there is substantial involvement in the scope of work of a proposed award.

1. Sections C. and G. of the OMB Guidelines of August 18, 1978, describe the characteristics of the factors which each Grants Officer should consider in deciding whether there will be substantial involvement of the organization unit in the performance of activities under the assistance instrument.

2. Listed below are examples of involvement which may be substantial depending upon the circumstances, and examples of situations which would not be considered substantial. The

examples are not meant to be a checklist nor does the presence of a single factor necessarily constitute substantial involvement. Rather, they illustrate concepts that, in varying degrees or combinations, could suggest the use of either a grant or a cooperative agreement. For more detailed examples, see the OMB guidelines, Implementation of Federal Grant and Cooperative Agreement Act of 1977 (43 FR 36860).

a. The following are examples of requirements that would demonstrate substantial involvement if they were included in the terms and conditions of a financial assistance award:

- (1) Authority to halt immediately an activity if detailed performance specifications (e.g., construction specifications) are not met.
- (2) Stipulation that the recipient must meet or adhere to specific procedural requirements before subsequent stages of a project may continue.
- (3) Approval by an appropriate DOC official of substantive provisions of proposed subawards.
- (4) Involvement in the selection of key recipient personnel.
- (5) Requirement that the appropriate DOC official (1) collaborate with the recipient by working jointly with a recipient scientist or technician, in carrying out the scope of work, (2) train recipient personnel, or (3) detail Federal personnel to work on the project effort.
- (6) Specify direction or redirection of the scope of work due to inter-relationships with other projects, such as requiring recipients to achieve a specific level of cooperation with other projects.
- (7) DOC operational involvement during the project to ensure compliance with such statutory requirements as civil rights and environmental protection.
- (8) Limitation on recipient discretion with respect to scope of work, organizational structure, staffing, mode of operations and other management processes, coupled with close monitoring of operational involvement during performance.

b. The following are examples of circumstances that would demonstrate non-substantial involvement:

- (1) Award follows normal procedures as set forth in 15 CFR Part 14 or 15 CFR Part 24 concerning Federal review of recipient's procurement standards and sole source procurements.
- (2) The DOC program and grants administration offices become involved in the project solely to correct deficiencies in project or financial performance.
- (3) DOC performs a pre-award survey and requires corrective action to enable the recipient to account for Federal funds.

D. Procurement Contracts A legal instrument reflecting a relationship between DOC and a business, organization or individual whenever: (a) the principal purpose of the relationship is the acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government, or (b) it is determined in a specific instance that it is appropriate to use a type of procurement contract. Such a contract is governed by the Federal Acquisition Regulation. See 31 U.S.C. § 6303.

E. Other Types of Agreements There are transactions and agreements other than grants, cooperative agreements, and procurement contracts under which DOC can enter into a relationship with outside entities. The Grants Officer, OGC (FALD, Contract Law, and General Law Divisions), Program Counsel, and OAM can offer advice and assistance with respect to the appropriate instrument to be used in a specific set of circumstances. Some of these agreements are referred to as Memoranda of Understanding (MOUs). Programs should not engage in MOU discussions or enter into MOUs if financial assistance is anticipated for an activity or program; instead, a competition should be planned. The MOU format is not appropriate as a substitute for procurement contracts or financial assistance awards and is not to be used as a sole source justification for award of procurement contracts or financial assistance. The cognizant Grants Officer and FALD, or OAM should be contacted in situations involving an agreement pursuant to the Economy Act, or other funds transfer authority that results in the award of financial assistance. In addition, questions about specific types of agreements may be referred to the contact offices listed. Additional guidance on other types of agreements may be found in the “Department of Commerce Interim Interagency and other Special Agreements Handbook (April 2004)”. Examples of other types of agreements include, but are not limited to, the following:

1. Cooperative Research and Development Agreement (CRADA) The Technology Transfer Act of 1986 (15 U.S.C. § 3710a) authorizes legal instruments that provide for cooperative research, licensing of patents obtained under a CRADA, and the transfer of technology from DOC to another party or from another party to DOC. However, this Act does not authorize the contribution of financial assistance funding to a non-Federal party. The Office of the Chief Counsel for Technology should be consulted to determine if a CRADA is the appropriate instrument in a given situation.

2. Economy Act Agreement The Economy Act, 31 U.S.C. 1535, authorizes agencies to place orders with other Federal agencies for goods or services and to pay the actual or estimated costs of the goods or services, when certain conditions are met. The OGC General Law Division provides legal advice on agreements pursuant to the Economy Act. For Economy Act transactions which may involve the transfer of funds for the subsequent award of financial assistance funds, the cognizant Grants Officer and FALD should be contacted prior to approval of the agreement.

[**Note:** There are instances when DOC operating units receive and/or transfer funds under an Economy Act transaction from or to other Federal agencies to make awards of financial assistance. Agencies may also have specific statutory authority to receive or transfer funds for particular programs. In those circumstances, both the DOC operating unit and the other agency must possess the requisite grant-making and mission-related authorities to carry out the work under the award. In addition, established financial assistance procedures must be followed in making any award. An MOU may also be used to memorialize a relationship where there is no direct exchange of funds between the parties. Activities under the MOU, however, may be carried out through the award of financial assistance when established procedures (including competition) for financial assistance awards are followed.]

3. Joint Project Agreement. DOC's Joint Project Authority is set forth in 15 U.S.C. § 1525 in the second paragraph. This authority permits DOC to engage on an equitable basis in joint projects on matters of mutual interest with non-profit, research, or public organizations such as state and local governments under certain conditions. The OGC General Law Division should be consulted for advice and clearance concerning joint project agreements.

4. Fellowship. Fellowships in the federal assistance context are made to pursue studies, research, and/or professional development (often of an academic nature) authorized by statute. Fellowship programs are most often conducted under DOC grants or cooperative agreements made to institutions of higher education or non-profit organizations. Fellowships made directly to students are not always made under grants or cooperative agreements in DOC. The cognizant Grants Officer should be contacted with respect to fellowship programs that are funded with grants and cooperative agreements.