

5. RELATIONSHIPS WITH OUTSIDE ENTITIES

A. Overview

1. DOC has a diverse mission that is accomplished through both in-house activities and financial assistance given to non-Federal organizations, using instruments such as a grant, cooperative agreement, procurement contract, or other type of agreement, as appropriate. These instruments are different in purpose and create different relationships between DOC and outside parties.

2. The Federal Grant and Cooperative Agreement Act of 1977 31 U.S.C. §§ 6301-6308, (the Act) requires executive branch agencies to distinguish procurement relationships from financial assistance relationships with non-Federal entities and provides guidance on helping make these distinctions. The Act requires the use of procurement contracts for all agency acquisition activity and directs agencies to select the appropriate instrument for specific types of Federal financial assistance within the limits of the applicable legal authorities.

3. This chapter summarizes and augments the guidance in the Act on distinguishing between situations in which a procurement contract, a grant, a cooperative agreement, or other type of agreement may be the appropriate instrument.

B. Grant

A grant or grant agreement is a legal instrument of financial assistance reflecting a relationship between DOC and a recipient or between a pass-through entity and a subrecipient when: (a) the principal purpose of the relationship is to transfer anything of value in order to accomplish a public purpose of support or stimulation authorized by a Federal statute, and (b) substantial involvement is not anticipated between DOC and the recipient during the performance of the contemplated activity.

C. Cooperative Agreement

A cooperative agreement is a legal instrument of Federal financial assistance reflecting a relationship between DOC and a recipient or between a pass-through entity and a subrecipient, when: (1) the principal purpose of the relationship is to transfer 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 and 2 CFR § 200.1 (Definitions – Cooperative agreement). Cooperative agreements are subject to the same laws; regulations; and 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, *Implementation of Federal Grant and Cooperative Agreement Act of 1977* (43 FR 36860 issued August 18, 1978), describe the characteristics of the factors each Grants Officer should consider in deciding whether there will be substantial involvement of the operating unit in the performance of activities under the award.

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.

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) Notification of changes to 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 statutory requirements.

(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 2 CFR Part 200 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 when: (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 other types of agreements under which DOC can enter into a relationship with outside entities. The Grants Officer, OGC (FALD, Contract Law, and GLD), and OAM can offer advice and assistance with respect to the appropriate type of agreement to be used in a specific set of circumstances. A Memorandum of Understanding (MOU) is an example of a type of agreement. Programs should not engage in MOU discussions or enter into MOUs if financial assistance is anticipated for an activity or program; instead, in most cases 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 or noncompetitive justification for awarding procurement contracts or financial assistance. The cognizant Grants Officer, OGC (FALD and GLD), and OAM should be contacted in situations involving an agreement pursuant to the Economy Act (31 U.S.C. § 1535) 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 OGC and OAM. Additional guidance on other types of agreements may be found in the “Final U.S. Department of Commerce Agreements Handbook” (November 2011). 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, as amended (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, CRADA does not authorize the contribution of financial assistance funding to a non-Federal party. An operating unit’s Technology Transfer Office or the Office of the Chief Counsel for NIST 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’s GLD provides legal advice on agreements pursuant to the Economy Act. For Economy Act transactions that may involve the transfer of funds for the subsequent financial assistance award, the cognizant Grants Officer and OGC (FALD and GLD) should be contacted prior to approval of the agreement.

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.

When DOC provides Federal funds to another Federal agency that is administering a collaborative project with DOC, the agreement governing that transfer of funds must stipulate that DOC funds shall not be used to pay for management fees in excess of costs or profits in a financial assistance award, unless statutorily authorized. *See also* Chapter 9 of this Manual.

3. Joint Project Agreement. DOC's Joint Project Authority is set forth in 15 U.S.C. § 1525. This authority permits DOC to engage on an equitable basis and under certain conditions in joint projects on matters of mutual interest with non-profit, research, or public organizations such as state and local governments. OGC's GLD must 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 Grants Officer should be contacted with respect to fellowship programs that are funded with Federal financial assistance.

5. Other Transaction Agreement (OTA). OTAs are legally binding agreements that are not contracts, grants or cooperative agreements. However, they typically include the concepts of offer, acceptance, terms and conditions, and negotiations. They are authorized by statute to fulfill an express purpose as "other transaction authority" which is generally granted at the Secretary level of a federal agency. OGC's GLD and FALD must be consulted for advice and clearance on the use of OTAs and the necessity to delegate the authority to a lower level to which it was granted in the relevant statute.