



HEADQUARTERS POLICY FLASH

POLICY FLASH 2004-22

DATE: August 04, 2004
TO: Procurement Directors
FROM: Office of Procurement and Assistance Policy, ME-61
Office of Procurement and Assistance Management

SUBJECT: Financial Assistance Letter Number 2004-05, Selecting the Appropriate Award Instrument.

SUMMARY: This Policy Flash distributes Financial Assistance Letter No. 2004-05, Selecting the Appropriate Award Instrument and cancels FAL 2001-03 on the same topic.

POLICY FLASH

2004-22

This FAL provides similar guidance to that provided in FAL 2001-03. In addition, the FAL provides examples of substantial involvement and no substantial involvement in assistance awards and explains when a Contracting Officer may select a procurement contract even though the principal purpose of the award is to accomplish a public purpose of support or stimulation.

The guidance has been drafted as a Financial Assistance Guide Chapter. The FAL will remain in effect until the new Financial Assistance Guide is issued.

Questions concerning this Flash should be directed to Trudy Wood at (201-) 287-1336.

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Michael P. Fischetti, Acting Director
Office of Procurement and
Assistance Policy

Attachment

cc:
FAAC



**Department of Energy
Financial Assistance Regulation**

**No. 2004-05
Date 08/03/04**

FINANCIAL ASSISTANCE LETTER

Financial Assistance Letter is issued under the authority of the Procurement Executives of DOE and NNSA

Subject: SELECTING THE APPROPRIATE AWARD INSTRUMENT

What is the purpose of this Financial Assistance Letter (FAL)?

This FAL provides Contracting Officers and other grants personnel guidance on selecting the appropriate award instrument.

How will this change my work processes?

This FAL does not change any of your work processes. It merely provides additional guidance on selecting the appropriate award instrument.

When is this FAL effective?

This FAL is effective 10 days after the date of issuance. It supercedes and cancels FAL 2001-03, dated 10/12/2001.

When does this FAL expire?

This FAL remains in effect until the new Financial Assistance Guide is issued or until it is canceled.

Who is the Point of Contact?

Contact Trudy Wood of the Office of Procurement and Assistance Policy by telephone at (202) 287-1336 or by email at trudy.wood@hq.doe.gov.

What is the background?

Congress enacted the Federal Grant and Cooperative Agreement Act of 1977 to, among other things, distinguish Federal procurement relationships from Federal assistance relationships and to standardize usage and clarify the meaning of the terms "contract," "grant," and "cooperative agreement" and the relationships they reflect. The purpose of this guidance is to achieve consistency in the use of legal instruments by DOE awarding activities for procurement and assistance transactions. This guidance supplements the guidance in the statute and the DOE financial assistance regulations. In addition to the guidance provided in FAL 2001-03, this FAL provides examples of substantial involvement and no substantial involvement in assistance awards and explains when a Contracting Officer may select a procurement contract even though the principal purpose of the award is to accomplish a public purpose of support or stimulation.

This guidance has been drafted as a Financial Assistance Guide Chapter and will be included in the new Financial Assistance Guide when it is issued.

Guidance Included in this Financial Assistance Letter

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GUIDE CHAPTER 2

2.11 Selecting Appropriate Award Instrument: Procurement Contract or Financial Assistance Agreement

2.12 Selecting Type of Financial Assistance: Grant or Cooperative Agreement

GUIDE CHAPTER 2
Sections 2.11 and 2.12

2.11 Selecting Appropriate Award Instrument: Procurement Contract or Financial Assistance Agreement

- (a) Responsibility: The Contracting Officer, based on input from the program official pertaining to the purpose of the award, is responsible for selecting the appropriate award instrument. This decision is significant because the laws and policies governing procurement generally differ from those governing financial assistance.
- (b) Basis of Decision. In accordance with the Federal Grant and Cooperative Agreement Act (FGCA) as codified in 31 U.S.C. §§ 6301 to 6308, the decision whether to use a contract or a financial assistance agreement must be based on the principal purpose of the award, including its intended primary beneficiary. The type of recipient (e.g., university, non-profit, or for-profit organization) or a requirement for cost sharing are not factors in determining the appropriate award instrument.

- 1. Contract. The Contracting Officer should use a procurement contract when: (1) the principal purpose of the instrument is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; or (2) he/she decides in a specific instance that the use of a type of procurement contract is appropriate. If DOE/NNSA provides specifications for the project, is having the project completed based on its own identified needs, or will directly use the report or results of the project to support its mission objectives, then, in most cases, the principal purpose is to acquire property or services for the direct benefit or use of DOE/NNSA and the award instrument should be a contract.

31 U.S.C. § 6303 provides agencies the flexibility to select a procurement contract after a deliberate determination that it is more appropriate, even if the purpose of the award is to accomplish a public purpose of support or stimulation. For example, a Contracting Officer should select a procurement contract if the work is classified, even if the work serves a public purpose of support, to ensure that the appropriate FAR/DEAR security clauses are included in the award since the DOE financial assistance regulation does not include security requirements. Also, a Contracting Officer should select a procurement contract if the award has the characteristics of a contractual relationship and includes contract requirements such as: (1) technical direction, except when such direction is necessary to redirect the work because of the interrelationship of the project to other projects (See 2.12(f)(3)); (2) monthly reporting requirements, except when special award conditions are needed for high risk recipients; and (3) fee, except for SBIR/STTR awards or in accordance with JO CFR 605.15.

2. Financial Assistance Instrument (i.e., grant or cooperative agreement). The Contracting Officer should use a grant or cooperative agreement whenever the principal purpose of the relationship is the transfer of a thing of value to a recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring property or services for the direct benefit or use of the United States Government. The primary beneficiary under a grant or cooperative agreement is the general public, as opposed to the United States Government. However, there may be situations where the Department expects to derive some use or benefit from the project activities. If the project will produce a benefit or use to DOE/NNSA that is only indirect or incidental in nature, a grant or cooperative agreement may be used.
3. Decision Process. To ensure that the appropriate instrument is selected, the Contracting Officer should ask the following questions:
 - A. Is the primary purpose of the award to acquire goods or services that will directly benefit or be used by the Department to further a specific DOE/NNSA mission or requirement? If the answer to this question is "yes," then the award instrument should be a contract. If the answer is "no," then the Contracting Officer should use a grant or cooperative agreement.
 - B. Is the work to be performed by the recipient primarily for its own purposes in the furtherance of the public good, and DOE/NNSA is merely supporting this effort with financial or other assistance? If the answer to this question is "yes," then the award instrument should be a grant or cooperative agreement. If the answer is "no," then the award instrument should be a contract.
- (c) Statutory Language Affect on Instrument Selection. A statute authorizing or providing appropriations for a program or activity occasionally may specify the use of a particular award instrument, notwithstanding the fact that, under the guidance provided in the 31 U.S.C. Chapter 63, the purpose of the award would necessitate the use of a different type of instrument. In these situations, the Contracting Officer must attempt to harmonize the language of the two statutes. Unless the authorization or appropriation act provides that a particular award instrument will be used notwithstanding the provisions of the 31 U.S.C. Chapter 63, the principles articulated in that statute and this guide generally should be applied to determine the appropriate award instrument. When confronted with conflicting statutory language, the Contracting Officer should consult with legal counsel to determine the appropriate course of action.
- (d) Examples of Ambiguous Circumstances.
 1. Conferences. The appropriate instrument for funding conferences should be determined based on the statutory criteria (i.e., the principal purpose of the conference, including the intended primary beneficiary). For example, a conference whose primary purpose is to exchange and disseminate information to the public should be funded using a grant. While the awarding office may benefit from information exchanged at the conference, the principal

intent of the award is to stimulate dissemination of knowledge to benefit the public. If, however, a conference is being conducted to benefit a Federal agency, funding should be provided under a contract. For example, a conference to provide specialized training to grantees that would otherwise be provided by Federal agency personnel should be funded by a contract. In this example although the recipients of the training benefit from the conference, the principal purpose of the award is for the government to procure training services in lieu of conducting its own training program, thus meeting the FGCA contract standard of directly benefiting the Federal agency.

2. Evaluations or studies. Evaluations or studies are other activities that, depending on the circumstances, can be appropriately awarded as either a financial assistance instrument or a contract. For example, a study to assess the benefits of solar energy for State and local communities should be funded using a grant if the primary beneficiaries are the State and local communities. However, if the study is being conducted to assist DOE in planning and forecasting its solar energy budget requirements or to prepare a mandated report for Congress, then a contract should be used. While the Federal Government might benefit from the information obtained from the study in the first scenario, the primary beneficiaries are the State and local communities. In the second scenario, the study is for the direct use of DOE, even though it may be disseminated to the general public and may be used by other organizations and governments in their own solar energy efforts.

2.12 Selecting Type of Financial Assistance: Grant or Cooperative Agreement

- (a) Responsibility: The Contracting Officer, based on input from the program official on the extent of Federal involvement in the project, is responsible for selecting the appropriate financial assistance instrument.
- (b) Differences. The primary distinguishing feature between a grant and cooperative agreement is that under a cooperative agreement substantial involvement is anticipated between the DOE/NNSA program office and the recipient during performance of the funded activity. As a general rule, a cooperative agreement has the same characteristics as a grant; however, cooperative agreements also involve the following features that are not typical of a grant:
 1. Substantial Federal involvement in and contribution to the technical aspects of the effort are necessary for its accomplishment. This involvement may include collaboration, participation in the management of the project, or intervention in the activity and is over and above the exercise of federal stewardship responsibilities (See paragraph 2.12 (e)).
 2. The nature of the collaboration is clearly defined and specified in a special award condition entitled "Statement of Substantial Involvement."
- (c) OMB Policy on Substantial Involvement. Agencies should limit Federal involvement in cooperative agreement activities to the minimum consistent with program requirements.

- (d) Decision Process. Anticipated substantial Federal involvement is a relative rather than an absolute concept. The determination to use a cooperative agreement, as opposed to a grant, should be based primarily on "programmatic" considerations as differentiated from management considerations. A cooperative agreement should not be used solely as a means of exercising greater control over a recipient or the project than would be the case under a grant. The proposed Federal involvement must provide programmatic benefits that the recipient would not otherwise have available to it in carrying out the project. The general policy is:
1. Substantial involvement is not anticipated if the recipient is expected to run the project without agency collaboration, participation, or intervention as long as it is run in accordance with the terms of the assistance instrument.
 2. Substantial involvement is anticipated if the project would not be possible without Federal collaboration or participation in the management of the project.
- (e) No Substantial Involvement. Substantial involvement does not include the exercise of normal Federal stewardship responsibilities such as:
1. Approving recipient plans prior to award.
 2. Providing technical assistance prior to the start of the activity and the recipient understood this prior to award, and/or if requested by the recipient.
 3. Providing technical assistance to correct deficiencies in project or financial performance when reports or monitoring indicates some sort of problem.
 4. Performing site visits.
 5. Reviewing financial, performance, and audit reports.
 6. Performing technical reviews to determine whether to continue funding the next budget period.
 7. Reviewing performance to ensure that the objectives, terms, and conditions of the award are accomplished.
 8. Providing general administrative requirements, such as prior approvals required by the financial assistance regulations and/or OMB Circulars.
 9. Reviewing performance after completion.
- (f) Substantial Involvement. Federal involvement would exist and, depending on the circumstances, could be substantial, if such involvement includes, for example:

1. Review and approval of one stage before work can begin on a subsequent stage. Such review and approval is in addition to the exercise of the normal Federal stewardship responsibility to determine whether to continue funding the next budget period, which does not constitute substantial involvement. (See 2.12(e) for examples of no substantial involvement.)
 2. Collaboration or joint participation in the project, for example, sharing facilities and personnel or if a jointly authored report or education curriculum product is anticipated.
 3. Additional monitoring to permit specified kinds of direction or redirection of the work because of interrelationships with other projects.
 4. Substantial direct operational involvement or participation is anticipated to ensure compliance with statutory requirements such as environmental protection. Such participation must be over and above the normal exercise of Federal stewardship responsibilities. (See paragraph 2.12(e) for examples of no substantial involvement.)
 5. The power to immediately halt an activity if detailed performance specifications (e.g., construction specifications) are not met. In this case, the "Substantial Involvement Statement" must include provisions that go beyond the normal suspension remedies available to the Federal Government for nonperformance.
- (g) Award Provision – Statement of Substantial Involvement. The program official must prepare a "Statement of Substantial Involvement" for each cooperative agreement, which explicitly describes the nature, character, and extent of anticipated Federal involvement. Merely stating that "DOE will be substantially involved in the project" is not sufficient. These statements must be developed with care, such as ensuring that the Government's responsibilities are described with sufficient specificity, to avoid unnecessarily increasing the Department's liability under the award. The Contracting Officer is responsible for ensuring that the involvement is substantial (i.e., over and above the normal stewardship responsibilities identified in paragraph (e)), and that the award provision clearly describes the nature and extent of the anticipated involvement.
- (h) Program Announcement. If the Contracting Officer determines that only cooperative agreements will be awarded under a specific program announcement, the announcement must include a Statement of Substantial Involvement as a proposed award term. If the Contracting Officer determines that either a grant or a cooperative agreement may be awarded under the program announcement, the announcement must specify that either grants or cooperative agreements may be awarded and that cooperative agreements will include a Statement of Substantial Involvement to be determined prior to award.