

GUIDANCE ON USING A TRANSACTION DETERMINATION TEMPLATE FOR FINANCIAL ASSISTANCE AGREEMENTS

(Grant and Cooperative Agreements)

PURPOSE:

The purpose of this transaction determination template (see attachment) for financial assistance agreements (Grant and Cooperative Agreements) is to serve as a guide to assist program and procurement representatives on how to conduct a meaningful analysis in selecting the appropriate instrument type to execute programs, that is, a procurement contract or a financial assistance agreement before release of a funding opportunity announcement or solicitation. Of course, there may be instances where this transaction determination template may be used for financial assistance agreements (Grant and Cooperative Agreements) not awarded by a funding opportunity announcement or solicitation.

BACKGROUND:

In accordance with the [Federal Grant and Cooperative Agreement Act \(FGCAA\)](#), codified at [31 U.S.C. §§ 6301 to 6308](#), the decision whether to use a procurement contract or a financial assistance agreement is 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. The Contracting Officer/Grants Officer (CO/GO) has the flexibility to award a procurement contract no matter the principal purpose of the award in accordance with [31 U.S.C. § 6303](#).

Per [31 U.S.C. § 6304 and 6305](#), financial assistance agreements (grants and cooperative agreements) are used when “the principal purpose of the relationship is to transfer a thing of value to the State or local government or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government.” Additionally, substantial involvement is not expected for grants and is expected for cooperative agreements when carrying out the activity contemplated in the agreement.

Thus, the primary beneficiary under a financial assistance agreement is the general public, as opposed to the United States Government which is the primary beneficiary in a procurement contract. Per [31 U.S.C. § 6303](#), procurement contracts are used 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) the agency decides in a specific instance that the use of a procurement contract is appropriate.”

The CO/GO may, however, decide in specific instances as described below but not limited to that use of a procurement contract is appropriate, even if the overall purpose of the agreement is to accomplish a public purpose of support or stimulation.

INSTANCES WHEN A PROCUREMENT CONTRACT MAY BE REQUIRED OR CONSIDERED APPROPRIATE (other than acquisition of property or services for the direct benefit of the government):

There may be instances when the CO/GO may be required to award a procurement contract as the appropriate legal instrument to use even if the purpose of the award is to accomplish a public purpose of support or stimulation. Instances when a procurement contract may be required or appropriate are as follows, but not limited to:

1. When the work is classified. Classified work is never funded through financial assistance awards since financial assistance awards carry out a public purpose of support or stimulation and the results of the awards are intended to be made public.
2. If the project or subprojects involve national security.
3. When the CO/GO and the cognizant program officials determine -- the project or subprojects:
 - a. Involve sensitive technologies; or
 - b. Require security of sensitive data, research and results; or
 - c. Contain or require other pertinent factors that indicate the project and/or subproject(s) require higher levels of Federal oversight and control than afforded by financial assistance awards; or
 - d. May have other security considerations/requirements that apply.

When any of the above potential risks cannot be completely mitigated through special award terms and conditions, a procurement contract may be required.

The protection of the results and data from certain research and development is key to economic growth and national security.

INSTANCES WHEN A TRANSACTION DETERMINATION MAY NOT APPLY (unless otherwise determined by the CO/GO):

There may be instances when a Transaction Determination Template may not apply (unless otherwise determined by the CO/GO) when any of the following instances may exist below:

- The award is for basic and/or fundamental research and is expected to be shared widely within the research, academic, scholarly, or scientific communities, and there is no potential risk to DOE. Risks increase with the technology readiness level (TRL) of the research and development to be done.
- The award is for the Small Business Innovative Research (SBIR) and Small Business Technology Transfer (STTR) programs and DOE's funding is providing financial assistance in compliance with Congress' intent to "aid and assist small businesses" in accordance with [15 U.S.C. 631 \(b\)\(1\)](#), and there is no potential risk to DOE.

SUMMARY:

The use of a procurement contract is required for projects or subprojects involving classified work and national security. A procurement contract shall also be considered for projects or subprojects when the above identified risks, but not limited to, cannot be mitigated to ensure that the appropriate safeguards (e.g. FAR/DEAR security clauses) are available to protect the Department of Energy.

For more information on how to select the appropriate award type instrument, go to the “Department of Energy Guide to Financial Assistance,” located at: [Department of Energy - Guide to Financial Assistance](#), and refer to Chapter 2 Pre-Award, Section 2.1 Planning, Section 2.1.1, Selecting the Appropriate Award Instrument: Procurement Contract or Financial Assistance Agreement.

Attachment

TRANSACTION DETERMINATION TEMPLATE FOR FINANCIAL ASSISTANCE AGREEMENTS (for Grant and Cooperative Agreements)

Each transaction determination made for a financial assistance agreement shall set forth enough facts and circumstances to clearly justify the determination. At a minimum, each transaction determination for a financial assistance agreement shall include the following information:

- (a) Identification of the program and procurement representatives entering into this financial assistance determination document.
- (b) Nature and/or description of the program/project/subprojects/funding opportunity announcement/award.
- (c) Citation of the appropriate program authorization. *(Notes: Identify the appropriate section of the statute. If confronted with conflicting statutory language, consult with legal counsel to determine the appropriate course of action.)*
- (d) If the project or subproject involves classified work or national security, it must be awarded as a procurement contract. Does the project or subproject involve classified work or national security?
- (e) Describe the findings to support the determination to use a financial assistance agreement as opposed to a procurement contract when the project or subprojects: (1) involve sensitive technologies; or (2) require security of sensitive data, research, and results; or (3) contain or require other pertinent factors that indicate the project and/or subproject(s) require higher levels of Federal oversight and control than afforded by financial assistance awards; or (4) may have other security requirements that apply.
- (f) Discuss the findings how any of the risks identified above will be completely mitigated through special award terms and conditions for project or subprojects. When any of the risks identified above cannot be completely mitigated through special award terms and conditions for projects or subprojects it must be awarded as a procurement contract.

Notes for Contracting Officer/Grants Officer:

1. *The program and procurement representatives must ensure that an analysis has been performed to identify and protect if any project or subprojects: (1) involve sensitive technologies; or (2) require security of sensitive data, research or results; or (3) contain or require other pertinent factors that indicate the project and/or subproject(s) require higher levels of Federal oversight and control than afforded by financial assistance awards; or (4) may have other security requirements that apply.*

2. *The analysis must ensure that projects and subprojects are not implemented under a financial assistance agreement when DOE's interests are better protected under a procurement contract.*
- (g) Necessary supporting documentation shall be obtained from appropriate requirements and technical personnel, if applicable.
- (h) A determination, based on the findings, that the proposed financial assistance action is justified under the applicable statute or regulation and no property or services are being acquired.

The signature of the Program Official who initiates this action and the signature of the Contracting Officer/Grants Officer who will approve this action entering into this financial assistance determination document.