

CHAPTER 2-100

USING CONTRACTS, GRANTS AND COOPERATIVE AGREEMENTS

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2-100-00 What does this chapter do?

- A. This chapter explains how we, the Office of Surface Mining Reclamation and Enforcement (OSM), determine whether we should use a contract, a grant, or a cooperative agreement to pay out Federal funds.
- B. This chapter also defines procurement and assistance, and explains the differences between them.
- C. This chapter does not cover intra-agency or interagency agreements or memoranda of understanding. It also does not apply to licenses, sale documents, leases and special use permits unless they are for purposes of public support or stimulation.

2-100-10 Where do these requirements come from?

- A. The Federal Grant and Cooperative Agreement Act of 1977, as amended (31 USC 6303), establishes the distinctions between Federal assistance relationships, and Federal procurement relationships.
- B. The Interior Departmental Manual, Part 505, Chapter 2, *Procurement Contracts, Grant and Cooperative Agreements*, has more information on these requirements.

2-100-20 Why does it matter whether we use a contract, grant or cooperative agreement?

Federal law establishes different legal requirements for procurement and assistance relationships. If we select the wrong instrument, we will be in violation of the law. Department of Interior Inspector General audits have repeatedly found serious problems with misuse of contracts, grants and cooperative agreements. OSM offices must treat the selection of the appropriate type of agreement with care.

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2-100-30 What is the difference between procurement and assistance?

- A. The main purpose of a procurement action is to acquire property or services by purchase, lease, or barter for the use or direct benefit of the Federal government. We use a contract as the legal instrument to award a procurement action.
- B. The main purpose of an assistance action is to transfer money, property, services, or anything of value to the recipient in order to accomplish a public purpose of support or stimulation. The agency must have legal authority to award assistance agreements for this purpose. We use either grants or cooperative agreements to award assistance funds.

2-100-40 What transactions should be contracts?

- A. We must use a procurement contract when our main purpose is to get services or property by purchase, lease, or barter, for our use or direct benefit.
- B. We may also use a contract in a specific instance if we determine that an emergency project contract is appropriate. This allows us to determine when we can satisfy specific public needs best by using the procurement process. However, we cannot use this provision to circumvent the legal requirements for use of procurement or assistance instruments. This authority must be used only in extraordinary circumstances, with the approval of the Assistant Director, Program Support (AD,PS) in coordination with the Assistant Director, Finance and Administration (AD,FA).
- C. We would normally use contracts for the following purposes.
 - 1. To assess the performance of Federal programs or projects or recipient activity. This does not include research of an evaluative character unless we initiate the request for its performance.
 - 2. To provide professional or technical support services for us or any third party. This does not include services rendered by a state or local government, Indian Tribe, or professional group to its own constituency or members.
 - 3. To conduct surveys, studies, and research to provide specific information for our use or for public release.
 - 4. To conduct training where we select the individuals or groups to be trained or specify the content of the curriculum (not applicable to fellowship awards).
 - 5. To publish or produce materials in any media, except for the results of research projects, or the proceedings of scientific conferences, which are not for our use.

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6. To design or produce items for our use, or subject to our specifications.
7. To conduct conferences on our behalf.
8. To develop plans, management information, or other data for OSM use.

2-100-50 What transactions should be grants or cooperative agreements?

- A. We will normally use grants or cooperative agreements for the following purposes:
 1. General financial assistance to eligible recipients for a public purpose of support or stimulation under specific authorizing legislation.
 2. Financial assistance for a public purpose to a specific program activity eligible for such assistance under specific authorizing legislation.
- B. We use a grant when no substantial involvement is anticipated between us and the recipient during the performance of the proposed assistance activities.
- C. We use a cooperative agreement when substantial involvement is anticipated between us and the recipient during program performance.
- D. We will decide whether to use a cooperative agreement or a grant for a specific award based on the need for us to have substantial programmatic involvement in the activity.
- E. Some programs require the use of cooperative agreements exclusively, such as the Watershed Cooperative Agreement Program. We make this determination for the entire program based on statutory requirements or policy level determinations that program performance will require substantial Federal programmatic involvement. Other programs may use a mix of grants and cooperative agreements, depending on the nature of the project or the abilities of the recipient. For example, we may start out a project with a cooperative agreement, but use grants in later years if the project no longer needs our substantial involvement.

2-100-60 What is substantial OSM involvement during program performance?

- A. We may consider the following activities as substantial involvement in program performance, depending on the specific circumstances.
 1. We have an option to halt an activity immediately (for example, if construction specifications are not met).
 2. Requiring you to get our approval of one stage of program activity before you can begin

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work on a subsequent stage within the performance period of the assistance agreement. However, this example does not suggest the use of cooperative agreement when we reserve the right to approve or disapprove a subsequent grant, provided each grant is a separate instrument.

3. Approving, or helping you select, recipients of contracts or subgrants you award under the assistance instrument, if this level of involvement is required by law or authorized by waiver.
 4. Helping you select your key personnel. However, a research project which provides in the award for the participation of a named principal investigator would not by itself justify use of a cooperative agreement.
 5. Collaborating or participating jointly with you to perform the program activities.
 6. Monitoring performance to provide specific direction or redirection of the work.
 7. Setting requirements before the award limiting your discretion over the scope of services offered, organizational structure, staffing, mode of operation, and other management processes. Closely monitoring or working with you to ensure compliance with these requirements beyond the exercise of normal Federal stewardship.
- B. We do not consider the following activities to be substantial involvement in program performance.
1. Approving your plans before we award the agreement.
 2. Performing normal Federal stewardship responsibilities during performance to ensure that the objectives, terms and conditions of the award are accomplished. This could include site visits, and reviewing and responding to your program, financial, and audit reports.
 3. Reviewing your performance after the project is completed.
 4. Enforcing legal requirements such as civil rights, environmental protection, and provisions for the disabled.
 5. Enforcing general fiscal and administrative requirements such as those included in OMB regulations.
 6. Becoming more involved than we expected because of problems in your program or financial performance.
- C. We do not consider providing technical assistance, advice, or guidance to you as substantial involvement during performance, if any of the following conditions are met.

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1. We provide the assistance at your request.
2. We do not require you to follow the advice.
3. We do require you to follow our guidance, but we provide it before the project starts and we informed you of this requirement before we awarded the agreement.

2-100-70 What procedures will we follow when we determine whether to use a contract, grant or cooperative agreement?

- A. Any program announcement, public notice, solicitation, or request for applications or proposals must show whether the relationship will be procurement or assistance and whether the agreement will be a contract, grant or cooperative agreement. For cooperative agreements, the announcement must include an explicit statement of the anticipated Federal programmatic involvement.
- B. Decisions on whether to use a contract, grant or cooperative agreement must be justified and documented in the official file. Our written determinations must contain complete information on the nature of the relationship between us and the recipient to justify the selection of the award instrument.
- C. If major individual transactions or programs contain elements of both procurement and assistance in such a way that they cannot be characterized as having a principal purpose of one or the other, the awarding office should seek initial guidance from the AD,PS.
- D. We will request guidance from the Solicitor as needed. Upon request, the Solicitor may review new programs or policies, or a proposed cooperative agreement or grant which is of such complexity or novelty that it raises issues justifying legal review. Cooperative agreements and grant awards issued under well-established programs should not require Solicitor review.

2-100-80 Can a single assistance agreement include both grant and cooperative agreement components?

Yes, it is acceptable for an agreement to include more than one type of assistance relationship, so that some components are funded by grants and others by cooperative agreements. For example, a Regulatory Administration & Enforcement grant includes funding for a state's regulatory program and also its Federal lands cooperative agreement. Joint funding agreements are appropriate to simplify application and award requirements or efficient administration of the project, or to serve the best interests of the programs. The Joint Funding Simplification Act, P.L. 97-258 provides the opportunity and authority to participate in jointly funded projects in any number of funding relationships.

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2-100-90 Can we get an exception to this policy?

- A. Yes, we may request an exception from OMB in very rare instances. The Federal Grant and Cooperative Agreement Act allows the Director of the OMB to exempt individual transactions or programs from the Act. OMB grants exceptions only on the basis of agency requests that include strong justification based on severe disruption to a program or serious consequences to a recipient.
- B. A request for an exception should be sent from the Regional Director (RD) to the AD,PS and then to the Director of OSM. The request must answer the following questions.
 - 1. Is the exception requested for a whole program, a group of awards, or for an individual award?
 - 2. Why are we requesting an exception?
 - 3. What will we do if an exception is not granted, and how will this harm the program or recipients?
 - 4. What are the legal or program policy implications of the request?
 - 5. What will we do if the exception expires before there are any changes to the law?
- C. OSM must send the exception request through the Department following the procedures in Departmental Manual Part 505, Chapter 2. The Director, in coordination with the Office of the Solicitor, must submit requests through the Assistant Secretary, Land and Minerals Management, and the Director, Office of Acquisition and Property Management, to the Assistant Secretary, Policy, Management and Budget.

2-100-100 Can we award an assistance agreement to a single source without competition?

- A. Yes, a funding opportunity may be specifically directed to a single known recipient. This single source recipient may either be named in legislation, or determined by OSM based on demonstrable criteria such as unique expertise or capacity.
- B. We rarely award Federal funds in a single source assistance agreement with no competition. If we decide to make a single source award, the decision must be able to withstand scrutiny. We must demonstrate in the award file that the award protects the public interest, and is in accordance with legal requirements and OSM's priorities and objectives.
- C. An award without competition must fit one or more of the following standards.

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1. An unsolicited proposal, representing a unique or innovative idea, method or approach, not the subject of a current or planned assistance award, which will benefit program objectives.
 2. A continuation or completion of an activity presently being funded, if competition would significantly harm the activity.
 3. Legislative intent, demonstrated in law or legislative history, clearly indicating Congress' intent to restrict award to a particular recipient or purpose.
 4. A uniquely qualified applicant for the activity to be performed based upon demonstrable factors such as technical expertise, location, voluntary support capacity, cost-sharing ability, or other unique qualifications.
 5. An emergency situation with insufficient time available for competitive procedures, due to a substantial danger to health or safety or a compelling and unusual urgency
- D. We must complete the following actions before awarding a single source award for \$25,000 or more.
1. Announce a notice of intent to make the award. The announcement may be published on Grants.gov, the *Federal Register*, or any medium which will provide transparency.
 2. Put a written justification in the award file explaining why competition is not practicable, including a statement of which of the above criteria apply and why.