

issues to the extent possible. See §§ 2200.204 and 2200.205. (2) The use of a transcript is optional. The Judge's summary will serve as the record of the oral proceedings unless a party disagrees with the summary. See § 2200.208. (3) The Federal Rules of Evidence do not apply.

#### § 2200.201 Application.

The rules in this subpart shall govern proceedings before an administrative law judge when (1) the case is eligible for simplified proceedings under § 2200.202, and (2) all parties who have filed a notice of contest or petition for modification of abatement period request simplified proceedings.

#### § 2200.202 Eligibility for simplified proceedings.

A case is eligible for simplified proceedings unless it concerns an alleged violation of section 5(a)(1) of the Act (29 U.S.C. 654(a)(1)) or an alleged failure to comply with a standard listed in table A.

TABLE A

All standards listed are found in title 29 of the Code of Federal Regulations.

|                                                                                                              |               |
|--------------------------------------------------------------------------------------------------------------|---------------|
| § 1910.94                                                                                                    | § 1910.96     |
| § 1910.95                                                                                                    | § 1910.97     |
| §§ 1910.1000 to 1910.1045, and any occupational health standard that may be added to subpart Z of part 1910. |               |
| § 1926.52                                                                                                    | § 1926.55     |
| § 1926.53                                                                                                    | § 1926.57     |
| § 1926.54                                                                                                    | § 1926.800(c) |

#### § 2200.203 Request for simplified proceedings.

(a) *Who may request simplified proceedings.* A party who files a notice of contest or a petition for modification of abatement period may request simplified proceedings.

(b) *When to request.* After the Commission receives a notice of contest or petition for modification of abatement, the Executive Secretary issues a notice indicating that the case has been docketed. A request for simplified proceedings, if any, shall be filed within 10 days after the notice of docketing is received, unless the notice of docketing states otherwise.

(c) *How to request.* A simple statement is all that is necessary. For example, "I request that the proceedings in this case be simplified" will suffice. The request must be filed with the Executive Secretary and served in the manner prescribed for notices of contest in § 2200.7.

(d) *Effect of the request.* For those cases eligible under § 2200.202, simplified proceedings are in effect when:

(1) A notice of contest is filed by only one party and that party requests simplified proceedings;

(2) Notices of contest are filed by two or more parties and all such parties request simplified proceedings; or

(3) A petition for modification of abatement is filed and the filing party requests simplified proceedings.

#### § 2200.204 Filing of pleadings.

(a) *Complaint and answer.* There shall be no complaint or answer in simplified proceedings. If the Secretary has filed a complaint under § 2200.33, a response to an employee contest under § 2200.35, or a response to a petition under § 2200.34, the complaint or response shall be disregarded.

(b) *Statement of affirmative defenses.* A party may raise affirmative defenses. If a party is represented by counsel and wishes to raise affirmative defenses, the party shall file a statement describing the defense within 15 days after the request for simplified proceedings is filed. The statement shall be filed and served in accordance with § 2200.7.

(c) *Motions.* A primary purpose of simplified proceedings is to eliminate, as much as possible, motions and similar documents. A motion will not be viewed favorably if the subject of the motion may be adequately discussed during the conference-hearing or has not been first discussed among the parties.

#### § 2200.205 Discussion among parties.

Within a reasonable time before the conference-hearing, the parties shall meet, in person or by telephone, and discuss the following: Settlement of the case; the narrowing of issues; an agreed statement of issues or facts; witnesses and exhibits; and any other pertinent matter.

#### § 2200.206 Conference-hearing.

(a) The judge shall schedule and preside over a conference-hearing. At the conference-hearing, the parties shall report to the judge the agreements they have reached and the status of their discussion. The judge may hear oral testimony and receive other evidence. Each party shall have a right to conduct cross-examination.

(b) *Evidence.* Oral or documentary evidence may be received, but the judge may exclude irrelevant or unduly repetitious evidence.

(c) *Oral and written argument.* Each party may present oral argument. Written argument may not be filed unless the judge is notified by a party at the conference-hearing that written argument will be filed. Upon notification,

the judge shall set a schedule for the prompt filing of written argument.

#### § 2200.207 Reporter present; transcripts.

A reporter shall be present at the conference-hearing to record the proceeding. An official transcript of the proceeding shall not be prepared unless it is requested by the judge, or unless a party orders the transcript from the reporter at the party's own expense.

#### § 2200.208 Summary of oral proceedings.

After the conference-hearing, the judge shall promptly prepare a summary of the oral proceedings. The summary shall be issued to the parties for their proposed corrections and additions. The summary shall be the record of the oral proceedings unless proposed corrections and additions are filed within 10 working days of the date of issuance or a period set by the judge. If the parties are unable to agree upon corrections and additions, the disputed portions of the conference-hearing shall be transcribed and filed as an appendix to the judge's decision. The summary and the parties' proposed corrections and additions shall be included in the official record.

#### § 2200.209 Decision of the judge.

At the conference-hearing the judge may announce a tentative decision. After the conference-hearing, the judge shall issue a written decision.

#### § 2200.210 Miscellaneous.

(a) *Discovery.* Discovery, including requests for admissions, shall not be allowed except by order of the judge as a result of a prehearing conference.

(b) *Interlocutory appeals not permitted.* Appeals to the Commission of a ruling made by a judge which is not the judge's final disposition of the case are not permitted.

(c) *Applicability of subparts A through G.* Sections 2200.6, 2200.33, 2200.34(d)(4), 2200.35, 2200.36, 2200.38, 2200.72, 2200.75, and 2200.76 shall not apply to simplified proceedings. All other rules contained in subparts A through G of the Commission's rules of procedure shall apply when consistent with the rules in this subpart governing simplified proceedings.

Signed this 14th day of August 1978.

TIMOTHY F. CLEARY,  
Chairman.

FRANK R. BARNAKO,  
Commissioner.

BERTRAM R. COTTINE,  
Commissioner.

[FR Doc. 78-23203 Filed 8-17-78; 8:45 am]

FRIDAY, AUGUST 18, 1978  
PART V



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**OFFICE OF  
MANAGEMENT  
AND BUDGET**

**IMPLEMENTATION OF  
FEDERAL GRANT AND  
COOPERATIVE  
AGREEMENT ACT OF  
1977 (PUB. L. 95-224)**

**Final OMB Guidance**

**Registered  
Product**

[3110-01]

# OFFICE OF MANAGEMENT AND BUDGET

## IMPLEMENTATION OF FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT OF 1977 (PUB. L. 95-224)

### Final OMB Guidance

**AGENCY:** Office of Management and Budget.

**ACTION:** Notice of final OMB guidance for Federal agency use in implementing the Federal Grant and Cooperative Agreement Act of 1977.

**SUMMARY:** The Federal Grant and Cooperative Agreement Act distinguishes between procurement and assistance relationships and mandates that Federal agencies use contracts for procurement transactions:

Sec. 4. Each executive agency shall use a type of procurement contract as the legal instrument reflecting a relationship between the Federal Government and a State or local government or other recipient (1) whenever the principal purpose of the instrument is the acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government; or (2) whenever an executive agency determines in a specific instance that the use of a type of procurement contract is appropriate.

and grants or cooperative agreements for assistance transactions:

Sec. 5. Each executive agency shall use a type of grant agreement as the legal instrument reflecting a relationship between the Federal Government and a State or local government or other recipient whenever (1) the principal purpose of the relationship is the transfer of money, property, services, or anything of value to the State or local government or other recipient in order to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government; and (2) no substantial involvement is anticipated between the executive agency, acting for the Federal Government, and the State or local government or other recipient during the performance of the contemplated activity.

Sec. 6. Each executive agency shall use a type of cooperative agreement as the legal instrument reflecting a relationship between the Federal Government and a State or local government or other recipient whenever (1) the principal purpose of the relationship is the transfer of money, property, services, or anything of value to the State and local government or other recipient to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government; and (2) substantial involvement is anticipated between the executive agency, acting for the Federal Government, and the State or local government or other recipient during performance of the contemplated activity.

Federal agencies must implement sections 4, 5, and 6 by February 3, 1979. OMB's intent in issuing guidance is to promote consistent implementation of the Act.

Section 8 of the Act requires OMB to conduct a study of Federal assistance relationships and provide a report to Congress no later than February 1980. This will focus on developing a better understanding or alternative means for implementing Federal assistance programs and on determining the feasibility of developing a comprehensive system of guidance for Federal assistance programs. In undertaking the study, OMB is required by the act to consult and, to the extent practicable, involve representatives of the executive agencies, Congress, General Accounting Office, State and local governments, other recipients, and interested members of the public. A draft plan outlining the proposed scope of the study was published in the *FEDERAL REGISTER* on June 23, 1978, for comment. Comments on the draft plan are due to OMB by August 23, 1978.

### FOR FURTHER INFORMATION CONTACT:

Thomas L. Hadd, Intergovernmental Affairs Division, Office of Management and Budget, Room 9026, NEOB, Washington, D.C. 20503, telephone 202-395-5156.

DAVID R. LEUTHOLD,  
Budget and Management  
Officer.

### SUMMARY OF MAJOR COMMENTS ON THE DRAFT GUIDANCE AND THE OMB RESPONSE

The Act authorizes the Director of OMB to issue supplementary interpretative guidelines to promote consistent and efficient use of contracts, grants, and cooperative agreements. On May 19, 1978, OMB published a proposed draft of the guidance in the *FEDERAL REGISTER* for comment.

Numerous comments were received from Federal agencies and others. The majority of the comments suggested ways for improving the clarity of the draft and many of these improvements are reflected in the final guidance. Some comments dealt with aspects or potential effects of the Act itself that are beyond the scope of this guidance. There were also comments or suggestions that could not be used in revising the guidance, but which will be considered during the study.

A summary of the more important substantive comments about specific parts of the draft proposal along with the OMB response to them follow:

#### A. OMB interpretation of the Act.

##### 1. General purposes of the Act.

*Comment.* One agency pointed out that there are a number of types of

transactions that are not covered by the Act, such as the sale, lease, license, and other authorizations to use Federal property, when not for the purpose of support or stimulation.

*Response.* The guidance was amended to reflect this fact.

#### A. 3. Interpretation of specific provisions of the Act.

*Comment.* There were several comments about the clarity of the guidance in interpreting subsection 4(2) of the Act, which allows the use of contracts "whenever an executive agency determines in a specific instance that the use of a type of procurement contract is appropriate." Most of the comments related to the possible use of "assistance contracts."

*Response.* The guidance was revised by including a direct quote from the legislative history, and by stating that in all transactions based on this subsection of the Act, procurement contracts must be used.

*Comment.* One comment was received expressing the opinion that subsection 7(a) of the Act, which authorizes agencies to use procurement contracts, grants, and cooperative agreements as provided for in the Act unless otherwise prohibited, should be interpreted as replacing the Grants Act. The Grants Act provided general authority to use grants for funding research.

*Response.* OMB cannot agree with this interpretation, since Pub. L. 95-224 specifically repeals the Grants Act and requires that the selection of the appropriate legal instrument be based on the character of the specific transaction (i.e., procurement or assistance) rather than on a functional activity or class of recipient.

#### B. Distinguishing between procurement and assistance.

##### 1. Basic determinations.

*Comment.* Although a major purpose of the Act is to distinguish between procurement and assistance, several observers indicated they did not feel the OMB draft guidance was in sufficient detail. One comment was made that the guidance should stress the principal purpose of a transaction as being the most important determinant. Two comments requested that agencies be guided to use grants for research funding.

*Response.* In most cases, agencies will have no trouble distinguishing between procurement and assistance. Where the distinction is hard to make, OMB believes that the agency mission and intent must be the guide, and that more detailed criteria would not be useful. The suggestion that emphasis be placed on the principal purpose was followed. The request to guide the agencies to use grants to fund research is not consistent with the Act. OMB will continue to work with the agen-

cies to promote consistency in agency determinations on procurement and assistance distinctions.

**B. 2. Assistance awards to for-profit organizations.**

*Comment.* Some of the comments indicated confusion over whether the Act authorizes assistance awards to for-profit organizations.

*Response.* A subsection was added that indicates assistance awards may be made to for-profit organizations if the awards are consistent with sections 4, 5, and 6 of the Act.

**C. Characterization of grants and cooperative agreements.**

*Comment.* Many comments were received on this section. Most of them indicated a need for clarifying the guidance or suggested ways of doing it.

*Response.* The entire section has been rewritten for clarification. One additional provision was added to indicate that transactions that include very precise Federal requirements and provisions for intense monitoring of these requirements may properly be classified as cooperative agreements.

**C. 2. OMB policy on substantial involvement.**

*Comment.* There were several expressions of concern that cooperative agreements, as a new class of assistance instruments, might lead to greater Federal involvement, particularly in research projects.

*Response.* The guidance has been revised to state that nothing in this Act can be interpreted as a basis for increasing Federal involvement beyond that authorized by program statutes.

**D. Agency decision structure for selection of instruments.**

*Comments.* It was pointed out that the guidance, as drafted, would not apply to the organization and processes of some agencies.

*Responses.* The guidance was rewritten to convey the original intent but to be less restrictive on how agencies should follow it.

**E. Administrative requirements for grants and cooperative agreements.**

*Comment.* There were a number of comments about whether or not these requirements should apply to cooperative agreements. It was also pointed out that some of these requirements do not now apply to some classes of recipients, such as for-profit organizations.

*Response.* The legislative history specifically indicates that OMB Circular A-102 is part of the existing system of guidance, and the creation of the cooperative agreement instrument should not lead to a bypass of this initial step. The point about the limited applicability of some of the administrative requirements has been included in the final guidance. OMB will consider the question of administrative requirements as they relate to

grants and cooperative agreements during the study required by section 8 of the Act.

**F. Specific guidelines for grants.**

**1. Distinction between grants and subsidies.**

*Comments.* Several comments were received that the draft guidance on this point was inadequate.

*Response.* The distinction between grants, which are covered under section 5 of the Act, and subsidies, which are not, will have to be included in the section 8 study. Accurate coverage is not possible at this time, so this paragraph has been removed from the guidance.

**L. Agency records and M. OMB reporting requirements.**

*Comment.* There were numerous comments that both of these sections impose a considerable burden on the agencies.

*Response.* One purpose of the Act is to provide Congress with more information on the operations of Federal assistance programs. OMB is trying to keep the burden to a minimum, consistent with this purpose. These sections are to give the agencies an early indication of the type of information that will be needed.

**GUIDANCE TO THE FEDERAL AGENCIES**

The transmittal memorandum from the Director of OMB to the heads of Federal agencies and the attached guidance follow.

EXECUTIVE OFFICE OF THE PRESIDENT,  
OFFICE OF MANAGEMENT AND BUDGET,  
Washington D.C. August 15, 1978.

**MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES**

From: James T. McIntyre, Jr.  
Subject: OMB Guidance for Implementing the Federal Grant and Cooperative Agreement Act.

The Federal Grant and Cooperative Agreement Act of 1977 (Pub. L. 95-224) requires that by February 3, 1979, Federal agencies use procurement contracts to acquire property or services for the direct benefit or use of the Federal Government and grants or cooperative agreements to transfer money, property, services, or anything of value to recipients to accomplish a Federal purpose of stimulation or support authorized by statute.

The act authorizes the Office of Management and Budget to issue supplementary interpretative guidelines to promote consistent and efficient use of contracts, grants, and cooperative agreements as defined in the act. It is hoped that the attached OMB guidance will not only promote consistent and orderly implementation of the act, but also aid in minimizing potential disruptions resulting from possible revisions to procedures and application materials.

A draft of this guidance was published in the May 19, 1978, FEDERAL REGISTER for agency and public comment. While we received a number of suggestions for improving and clarifying specific sections, relatively few basic policy issues that could be treated in the guidance were brought to our at-

tention. The attached guidance reflects, to the extent practicable, comments provided in response to the public notice. Agency representatives assisted in revising the draft and bringing it to its final form. This guidance will appear as a Notice in the FEDERAL REGISTER in the near future.

OMB is authorized to except individual transactions or programs from provisions of the act until February 3, 1981. Exception policy and procedures are included in the guidance. In the meantime, OMB is required to conduct a study to develop a better understanding of alternative means for implementing Federal assistance programs and to determine the feasibility of developing a comprehensive system of guidance for Federal Assistance programs. Many of the issues addressed in the OMB guidance will also be the subject of further review in the study. A draft plan for the study was published in the June 23, 1978, FEDERAL REGISTER for a 60-day public comment period. A report on the study is to be submitted to Congress no later than February 1980.

**OMB GUIDANCE TO AGENCIES FOR IMPLEMENTING THE FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT**

(Pub. L. 95-224)

*Introduction.* The Federal Grant and Cooperative Agreement Act of 1977 (Pub. L. 95-224), signed February 3, 1978, requires executive agencies to distinguish procurement relationships from assistance relationships. A major objective of the act is to achieve consistency in the use of legal instruments by agencies for procurement and assistance transactions. This is a preliminary step toward a broad review of the administration of Federal assistance programs and the relationships created by the terms and conditions of legal assistance instruments. Section 4 of the act requires the use of procurement contracts for all agency acquisition activity. Sections 5 and 6 require the use of grants or cooperative agreements for specified types of assistance relationships. Section 9 authorizes the Director of the Office of Management and Budget to issue supplementary interpretative guidelines to promote consistent and efficient implementation of sections 4, 5, and 6. Subsection 10(d) authorizes the Director to except individual transactions or programs from the act's provisions.

In addition, section 8 of the act requires OMB to conduct a study of Federal assistance relationships and submit a report to Congress in 2 years. The guidelines that follow are based on OMB authorizations under sections 8, 9, and 10(d).

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- A. OMB interpretation of the Act.
- B. Distinguishing between procurement and assistance.
- C. Characterization of grants and cooperative agreements.

- D. Agency decision structure for selection of instruments.
- E. Administrative requirements for grants and cooperative agreements.
- F. Specific guidelines for grants.
- G. Specific guidelines for cooperative agreements.
- H. Assistance transactions involving only non-monetary transfers.
- I. OMB exception policy.
- J. OMB exception procedures.
- K. Joint funding under grants and cooperative agreements.
- L. Agency records.
- M. OMB reporting requirements.

#### GUIDANCE

##### A. OMB INTERPRETATION OF THE ACT

1. *General purposes of the Act.* OMB views the Federal Grant and Cooperative Agreement Act as an important opportunity to review, improve, and simplify the broad array of Federal assistance relationships. It sees the Act's objective of Federal consistency for various types of relationships coinciding with the President's goal of making Federal program actions more understandable and predictable. Agencies should give serious consideration to the policy implications of the Act's provisions, particularly Sections 4, 5, and 6, pertaining to the use of contracts, grants, and cooperative agreements as these involve the essence of the way agencies perform fundamental functions.

This Act does not cover all possible relationships that may exist between Federal agencies and others. For example, the sale, lease, license, and other authorizations to use Federal property, when not for the purpose of support or stimulation, are not within the scope and intent of Pub. L. 95-224 or this guidance.

2. *Orderly implementation of sections 4, 5, and 6.* These sections of the Act require agencies to use contracts for all procurement actions, and grants or cooperative agreements to transfer money, property, services, or anything of value to recipients to accomplish a Federal purpose of stimulation or support authorized by statute. Subsection 10(b) says:

Nothing in this Act shall be construed to render void or voidable any existing contract, grant, cooperative agreement, or other contract, grant, or cooperative agreement entered into up to one year after the date of enactment of this Act.

The legislative historic clearly indicates that Congress intended this provision to provide one year for orderly implementation of sections 4, 5, and 6. The Act was signed February 3, 1978. Agencies have until February 3, 1979, to implement these sections in accordance with the OMB guidelines.

3. *Interpretation of specific provisions of the Act.* To promote consistency, agencies should interpret subsections

4(2), 7(a), and 7(b) of the Act as follows:

a. Subsection 4(2) allows the use of contracts "whenever an executive agency determines in a specific instance that the use of a type of procurement contract is appropriate." The Senate Report on the Act says:

"This subsection accommodates situations in which an agency determines the specific public needs can be satisfied best by using the *procurement process*. For example, subsection 4(2) would cover the two-step situation in which a Federal agency may procure medicines which it then "grants" to non-Federal hospitals. This subsection does not allow agencies to ignore sections 5 and 6. Compliance with the requirements of sections 4, 5, and 6 will necessitate deliberate and conscious agency determinations of the choice of instruments to be employed. (Italics added.)

Until the Federal Acquisition Regulation is published, the Federal Procurement Regulation, the Armed Services Procurement Regulation, and other procurement regulations authorized by law govern policy and procedures regarding procurement contracts awarded under the authority of this subsection. Section M of this guidance includes a reporting requirement for procurement transactions based on subsection 4(2).

b. Subsection 7(a) says:

Notwithstanding any other provision of the law, each executive agency authorized by law to enter into contracts, grant or cooperative agreements, or similar arrangements is authorized and directed to enter into and use types of contracts, grant agreements, or cooperative agreements as required by this Act.

If, prior to the passage of the Act, an agency was authorized to use one or more of the three instruments—procurement contracts, grants, or cooperative agreements—and is not prohibited from using any of them, this provision enables it to enter into any of the three types of arrangements, subject to the criteria set forth in sections 4, 5, and 6.

c. Subsection 7(b) says:

The authority to make contracts, grants, and cooperative agreements for the conduct of basic or applied research at nonprofit institutions of higher education, or at nonprofit organizations whose primary purpose is the conduct of scientific research shall include discretionary authority, when it is deemed by the head of the executive agency to be in furtherance of the objectives of the agency, to vest in such institutions or organizations, without further obligation to the government, or on such other terms and conditions as deemed appropriate, title to equipment or other tangible personal property purchased with such funds.

The Act repeals the Grants Act, Pub. L. 85-934, which authorized the use of grants for scientific research. This provision continues the authority of the Grants Act to vest title to

equipment purchased with Federal funds in a nonprofit organization. It expands this authority to other classes of property and applies to procurement contracts and cooperative agreements as well as grants.

##### B. DISTINGUISHING BETWEEN PROCUREMENT AND ASSISTANCE

1. *Basic determinations.* While one of the major objectives of the Act is to distinguish between procurement and assistance relationships, neither term is specifically defined. Section 4 requires use of a procurement contract when the principal purpose is acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government. Sections 5 and 6 require the use of grants or cooperative agreements when the principal purpose is the transfer of money, property, services, or anything of value to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use by the Federal Government.

Agencies should interpret the language of sections 5 and 6 which call for the use of grants or cooperative agreements to "accomplish a public purpose of support or stimulation authorized by Federal statute" as including but not restricted to traditional assistance transactions. Thus, for example, where an agency authorized to support or stimulate research decides to enter into a transaction where the *principal purpose* of the transaction is to stimulate or support research, it is authorized to use either a grant or a cooperative agreement. Conversely, if an agency is not authorized to stimulate or support research, or the *principal purpose* of a transaction funding research is to produce something for the government's own use, a procurement transaction must be used. Until the Federal Acquisition Regulation is published, the Federal Procurement Regulation, the Armed Services Procurement Regulation, and other procurement regulations authorized by law govern policy and procedures regarding procurement contracts.

2. *Assistance awards to for-profit organizations.* Subject to the requirements of sections 4, 5, and 6 of the Act, assistance awards may be made to for-profit organizations when deemed by the agency to be consistent with legislative intent and program purposes.

3. *When to decide on the use of procurement or assistance instruments.* Any public notice, solicitation, or request for applications or proposals should indicate whether the intended relationship will be one of procurement or assistance.

4. *What to do if the distinctions between procurement and assistance do not apply to a specific class of transactions.* Agencies should make every effort to ensure their relationships conform with those specified in the Act. If, however, there are major individual transactions or programs which contain elements of both procurement and assistance, but which cannot be characterized as having a *principal purpose* of one or the other, an OMB exception should be requested. Sections I and J deal with OMB exceptions.

#### C. CHARACTERIZATION OF GRANTS AND COOPERATIVE AGREEMENTS

1. *Anticipated substantial involvement during performance.* The basic statutory criterion for distinguishing between grants and cooperative agreements is that for the latter, "substantial involvement is anticipated between the executive agency and the recipient during performance of the contemplated activity" (emphasis added). To insure consistent determinations, all agencies should use only this criterion when deciding to use either a grant or a cooperative agreement.

a. Anticipated substantial Federal involvement is a relative rather than an absolute concept. The examples that follow in "b" and "c" are not meant to be a checklist or to be considered as individual determinants. Rather, they are to illustrate the general policy that:

(1) When the terms of an assistance instrument indicate the recipient can expect 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, substantial involvement is not anticipated.

(2) When the instrument indicates the recipient can expect agency collaboration or participation in the management of the project, substantial Federal involvement is anticipated.

b. As a guide to making these determinations, anticipated substantial involvement during performance does not include:

(1) Agency approval of recipient plans prior to award.

(2) Normal exercise of Federal stewardship responsibilities during the project period such as site visits, performance reporting, financial reporting, and audit to insure that the objectives, terms, and conditions of the award are accomplished.

(3) Unanticipated agency involvement to correct deficiencies in project or financial performance from the terms of the assistance instrument.

(4) General statutory requirements understood in advance of the award such as civil rights, environmental protection, and provision for the handicapped.

(5) Agency review of performance after completion.

(6) General administrative requirements, such as those included in OMB Circulars A-21, A-95, A-102, A-110, and FMC 74-4.

c. Conversely, anticipated involvement during performance would exist and, depending on the circumstances, could be substantial, where the relationship includes, for example:

(1) Agency power to immediately halt an activity if detailed performance specifications (e.g., construction specifications) are not met. These would be provisions that go beyond the suspension remedies of the Federal Government for nonperformance as in OMB Circulars A-102 and A-110.

(2) Agency review and approval of one stage before work can begin on a subsequent stage during the period covered by the assistance instrument.

(3) Agency review and approval of substantive provisions of proposed subgrants or contracts. These would be provisions that go beyond existing policies on Federal review of grantee procurement standards and sole source procurement.

(4) Agency involvement in the selection of key recipient personnel. (This does not include assistance instrument provisions for the participation of a named principal investigator for research projects.)

(5) Agency and recipient collaboration or joint participation.

(6) Agency monitoring to permit specified kinds of direction or redirection of the work because of interrelationships with other projects.

(7) Substantial, direct agency *operational involvement* or *participation* during the assisted activity is anticipated prior to award to insure compliance with such statutory requirements as civil rights, environmental protection, and provision for the handicapped. Such participation would exceed that normally anticipated under (b)(4), above.

(8) Highly prescriptive agency requirements prior to award limiting recipient discretion with respect to scope of services offered, organizational structure, staffing, mode of operation, and other management processes, coupled with close agency monitoring or operational involvement during performance over and above the normal exercise of Federal stewardship responsibilities to ensure compliance with these requirements.

2. *OMB policy on substantial involvement.* Agencies should limit Federal involvement in assisted activities to the minimum consistent with program requirements. Nothing in this Act should be construed as authorizing agencies to increase their involvement beyond that authorized by other statutes.

3. *How technical assistance and guidance relate to substantial involvement.* The practice of some agencies of providing technical assistance, advice, or guidance to recipients of financial assistance does not constitute substantial involvement if:

a. It is provided at the request of the recipient, or;

b. The recipient is not required to follow it, or;

c. The recipient is required to follow it, but it is provided prior to the start of the assisted activity and the recipient understood this prior to the financial assistance award.

4. *What to do if grants or cooperative agreements do not fit program requirements.* There may be a few cases of assistance programs covered by section 5 or 6 of the Act where neither a grant nor a cooperative agreement is suitable. In such cases, an OMB exception should be requested in accordance with sections I and J below.

5. *Competition for assistance awards.* Consistent with the purposes of Pub. L. 95-224, agencies are encouraged to maximize competition among all types of recipients in the award of grants or cooperative agreements, in consonance with program purposes.

#### D. AGENCY DECISION STRUCTURE FOR SELECTION OF INSTRUMENTS

The determinations of whether a program is principally one of procurement or assistance, and whether substantial Federal involvement in performance will normally occur are basic agency policy decisions. Agency heads should insure that these general decisions for each program are either made or reviewed at a policy level. A determination that a program is principally one of procurement or assistance does not preclude the use of any of the types of instruments when appropriate for a particular transaction. Congress intended the Act to allow agencies flexibility to select the instrument that best suits each transaction. Agencies should insure that all transactions covered by the Act are consistent with their basic policy decisions for each program.

#### E. ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND COOPERATIVE AGREEMENTS.

Present administrative requirements such as OMB Circulars A-95, A-102, and A-110 apply to both grants and cooperative agreements involving the transfer of Federal funds. Some of these administrative requirements apply to specific classes of recipients such as State and local governments. This guidance does not extend the coverage of these requirements to instruments with other recipient classes such as for-profit organizations. These

administrative requirements will not apply to General Revenue Sharing or Anti-Recession Fiscal Assistance Grants administered by the Treasury Department.

Each assistance instrument must provide that the head of the assisting agency and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any books, documents, papers, and records of the recipient and their subgrantees which are pertinent to the transaction for the purpose of making audits, examination, excerpts, and transcripts.

#### F. SPECIFIC GUIDELINES FOR GRANTS

1. *Increasing Federal involvement during a grant period.* At times an agency may find it necessary to increase the involvement in a grant-funded project during the period of time covered by the grant. This could happen, for example, when standard grant reports or monitoring indicates some sort of problem. If this occurs, agencies should not view the Act as restricting their authority to intervene as necessary to bring the project into conformance with original intentions. Agencies should not, however, seek to become substantially involved in a long term or ongoing grant-funded activity without converting the grant instrument to a cooperative agreement following negotiation with the recipient.

#### G. SPECIFIC GUIDELINES FOR COOPERATIVE AGREEMENTS

1. *Alternative uses of cooperative agreements.* In all cases, the determination of when to use cooperative agreements will be based on the need for substantial Federal involvement in the assisted activity.

a. Some programs now using grants will require the use of cooperative agreements exclusively. This determination should be based on statutory requirements or policy level determinations of substantial Federal involvement in the performance of the assisted project.

b. Other programs may use grants or cooperative agreements, depending on the nature of the project or the abilities of the recipients. For example:

(1) Some projects may start out as cooperative agreements in the first year and be converted to grants after recipient capacity has been established.

(2) Other projects, initially funded as grants, may have to be renewed or continued for subsequent budget periods as cooperative agreements if there is a need to revise the project, upgrade recipient capacity, or protect the Federal interest.

2. *Statement of Federal involvement.* Each cooperative agreement should in-

clude an explicit statement of the nature, character, and extent of anticipated Federal involvement. These statements must be developed with care to avoid unnecessarily increasing Federal liability under the assistance instrument.

#### H. ASSISTANCE TRANSACTIONS INVOLVING ONLY NONMONETARY TRANSFERS

1. *Types of assistance included.* Sections 5 and 6 apply to transactions that transfer "property, services, or anything of value," which could include consultation, technical services, information, and data. This section of the guidance applies to agencies and programs that provide such types of nonmonetary assistance apart from fund transfers.

2. *Applicability of administrative standards.* Section E above stated that existing administrative standards (e.g., OMB Circulars A-95, A-102, A-110) apply to grants and cooperative agreements involving the transfer of funds.

Agencies are encouraged, however, to use these standards where appropriate, and in some cases, their use is required for nonmonetary transfers. For example, a donation of a substantial parcel of land to a local government is the type of Federal action covered by Part II of A-95, but other administrative standards may not apply.

3. *OMB exception for nonmonetary assistance.* OMB exempts programs and transactions providing nonmonetary assistance from the provisions of section 5 of the Act. Existing agency practices for providing nonmonetary assistance where no Federal involvement in the assisted activity is anticipated should continue. Thus a formal grant instrument is not required to provide surplus property, consultation, or data. Where substantial Federal involvement in the assisted activity is anticipated, however, a cooperative agreement is required as indicated in section 6 of the Act. Agencies engaged in the provision of nonmonetary assistance will be asked to report on these activities under section M below.

#### I. OMB EXCEPTION POLICY

1. *General.* Section 10(d) authorizes the Director of OMB to:

Except individual transactions or programs of any executive agency from the application of the provisions of this Act. This authority shall expire one year after receipt by the Congress of the study provided for in section 8 of this Act.

Agencies are advised that, unless otherwise indicated, OMB exceptions will run through January 1981.

2. *Exceptions provided in this guidance.* Section H 3 of this guidance exempts nonmonetary grants.

3. *Other exceptions under the Act.* Agencies are required to conform with sections 4, 5, and 6 of the Act. Where

severe disruption to a program or serious consequences to recipients would result, a request for exceptions should be made to OMB. OMB intends to grant additional exceptions only on the basis of agency requests that include strong justifications and an indication of the harm that will result if an exception is not granted. Section J below indicates the procedures agencies should follow in requesting exceptions.

4. *Waiver of administrative standards.* OMB is responsible for most of the administrative standards that apply to assistance programs. Agencies should follow these standards. The circulars that establish these standards presently provide procedures for granting of waivers. If the standards appear unsuitable to a particular situation, requests for waivers should be sent to the OMB office responsible for the circular or the responsible agency if not OMB (e.g., for GSA uniform relocation provisions). Requests for waivers to financial management circulars administered by OMB should be addressed to John Lordan, Chief, Financial Management Branch, OMB, Room 6002, NEOB, Washington, D.C. 20503.

#### J. OMB EXCEPTION PROCEDURES

A request for an OMB exception under this Act should be addressed to Deputy Associate Director for Intergovernmental Affairs, Room 9025, NEOB, Washington, D.C. 20503. It should include:

1. A statement on whether the exception is requested for a complete program or an individual transaction.

2. An explanation of why an exception is requested, including statutory, agency policy, or other reasons.

3. A statement of what the agency will do if an exception is not granted and what the implications would be if this action were taken.

4. An indication of how the agency will handle the situation if the OMB exception expires before there are any changes to either this Act or agency statutes.

#### K. JOINT FUNDING UNDER GRANTS AND COOPERATIVE AGREEMENTS

Subsection 10(c) of the Act specifically provides for projects funded under the Joint Funding Simplification Act that include more than one type of assistance relationship. Thus a project with some components funded by grants and others by cooperative agreements is entirely permissible. Agencies should view this Act as providing the opportunity and authority to participate in joint funded projects in any number of funding relationships to serve the best interests of the participating agencies programs.

## L. AGENCY RECORDS

Both Congress and OMB view this Act as a preliminary step toward long-range overhaul of Federal assistance activities. The requirement for agencies to implement sections 4, 5, and 6 in one year is, in large part, to begin the systematic gathering of data about Federal assistance relationships. Agencies should anticipate that congressional committees, the General Accounting Office, and OMB will be asking extensive questions about the effects of implementing these sections. While the questions may vary from agency to agency, they can reasonably be expected to deal with operating experience for a year or more after full implementation. Agencies should develop systems of records that would allow them to answer questions such as:

1. How many financial grants have been awarded in accordance with section 5 of the Act? What was the dollar volume and what classes of recipients were involved (e.g., State governments, universities, hospitals, individuals)?
2. For which programs did the agency decide to use grants exclusively? Why?
3. How many financial assistance cooperative agreements have been awarded in accordance with section 6 of the Act? What was the dollar volume and what classes of recipients were involved?
4. For which programs did the agency decide to use cooperative agreements exclusively? What are the nature and reason for the agency involvement?
5. For which programs were both grants and cooperative agreements used? What were the criteria for determining the instrument used?
6. What types of nonmonetary assistance transfers were made as grants? What types as cooperative agreements?
7. What was the agency's experience in implementing sections 4, 5, and 6? How did it contribute to improved projects, management, or intergovernmental relations? What problems has the Act presented that can be expected to continue?

## M. OMB REPORTING REQUIREMENTS

The experience of the agencies in making decisions necessary to imple-

ment sections 4, 5, and 6 of the Act will be important to the study required by section 8. In addition, to the more general questions about the feasibility of a comprehensive system of guidance for assistance activities, the report to Congress must include a summary of the effects of sections 4, 5, and 6. For these reasons, agencies are to provide by March 1, 1979, a report to OMB that includes the following:

1. Distinguishing between procurement and assistance:
  - a. For what types of activities did the agency have trouble making the distinction between procurement and assistance? Why?
  - b. On what basis were the issues resolved?
2. Use of procurement contracts:
  - a. What activities formerly funded through grants or other assistance instruments will now be handled with procurement contracts?
  - b. What is the anticipated dollar volume of these procurement contracts?
  - c. What is expected to be the impact of this shift on the agency?
  - d. Who will be the principal recipients of these contracts?
  - e. What is expected to be the impact on the recipients?
  - f. What use was made of the subsection 4(2) procurement provisions? Explain any uses other than those following the two-step example in the legislative history.
3. Agency decisions on when to use grants or cooperative agreements:
  - a. Describe the process by which the agency decided which programs would use:
    - (1) Only grants.
    - (2) Only cooperative agreements.
    - (3) Both grants and cooperative agreements.
  - b. Which programs, as listed in the Catalog of Federal Domestic Assistance, will fall into each of the above three categories? For those in category 3 what is the expected mix in terms of total dollars and numbers of transactions?
  - c. What programs not listed in the Catalog of Federal Domestic Assistance will fall into each of the three categories? For those in category 3 what is the expected mix in terms of total dollars and numbers of transactions?
  - d. What is the anticipated first-year

dollar volume of the programs in each of the three categories?

- e. What types of Federal involvement in the assisted activity led to the identification of programs that would use only cooperative agreements?
- f. What are the anticipated reactions of the recipients of programs using only cooperative agreements?
- g. What are the anticipated liability, accountability, and other implications for the programs using only cooperative agreements?
- h. What are the agency guidelines on the selection of instruments for programs that may use either grants or cooperative agreements.
- i. What is the anticipated dollar volume of grants and cooperative agreements to be awarded under these programs?
- j. How will the opportunity to use either grants or cooperative agreements improve administration of these programs?
- k. What negative effects are anticipated from the requirement to make a choice of instruments?
  1. What programs will use assistance instruments that formerly used contracts and what is the dollar volume of these new uses of assistance instruments?
4. Nonmonetary assistance transfers:
  - a. What were the types and dollar value of nonmonetary transfers made by the agency using grant instruments?
  - b. How do these grant instruments compare with monetary grant instruments?
  - c. What were the types and dollar value of nonmonetary transfer made under the OMB exception that did not use grant instruments?
  - d. How would the agency have treated these transfers had not OMB granted the exception?
  - e. What were the types and dollar value of nonmonetary transfers made through cooperative agreements?
  - f. What was the agency's experience with this use of cooperative agreements?
5. Overall evaluation of the Act:
  - a. What elements of the Act are contributing to improved program performance and administration?
  - b. What elements of the Act are particularly troublesome? Why?
  - c. What proposals would the agency make for revising the Act?

[FR Doc. 78-23260 Filed 8-17-78; 8:45 am]



Registered  
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FRIDAY, AUGUST 18, 1978  
PART VI



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## THE PRESIDENT

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EXECUTIVE ORDERS  
12072-12075  
AND  
PROCLAMATIONS  
4585 AND 4586

FRIDAY, AUGUST 15, 1975  
PART VI



THE PRESIDENT

EXECUTIVE ORDERS  
12072-12075  
AND  
PROCLAMATIONS  
4583 AND 4584

[3195-01]

## Title 3—The President

Executive Order 12072

August 16, 1978

### Federal Space Management

By the authority vested in me as President of the United States of America by Section 205(a) of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 486(a)), and in order to prescribe appropriate policies and directives, not inconsistent with that Act and other applicable provisions of law, for the planning, acquisition, utilization, and management of Federal space facilities, it is hereby ordered as follows:

#### 1-1 *Space Acquisition.*

1-101. Federal facilities and Federal use of space in urban areas shall serve to strengthen the Nation's cities and to make them attractive places to live and work. Such Federal space shall conserve existing urban resources and encourage the development and redevelopment of cities.

1-102. Procedures for meeting space needs in urban areas shall give serious consideration to the impact a site selection will have on improving the social, economic, environmental, and cultural conditions of the communities in the urban area.

1-103. Except where such selection is otherwise prohibited, the process for meeting Federal space needs in urban areas shall give first consideration to a centralized community business area and adjacent areas of similar character, including other specific areas which may be recommended by local officials.

1-104. The process of meeting Federal space needs in urban areas shall be consistent with the policies of this Order and shall include consideration of the following criteria:

(a) Compatibility of the site with State, regional, or local development, redevelopment, or conservation objectives.

(b) Conformity with the activities and programs of other Federal agencies.

(c) Impact on economic development and employment opportunities in the urban area, including the utilization of human, natural, cultural, and community resources.

(d) Availability of adequate low and moderate income housing for Federal employees and their families on a nondiscriminatory basis.

(e) Availability of adequate public transportation and parking and accessibility to the public.

1-105. Procedures for meeting space needs in urban areas shall be consistent with the policies of this Order and shall include consideration of the following alternatives:

(a) Availability of existing Federally controlled facilities.

(b) Utilization of buildings of historic, architectural, or cultural significance within the meaning of section 105 of the Public Buildings Cooperative Use Act of 1976 (90 Stat. 2507, 40 U.S.C. 612a).

(c) Acquisition or utilization of existing privately owned facilities.

(d) Construction of new facilities.

(e) Opportunities for locating cultural, educational, recreational, or commercial activities within the proposed facility.

1-106. Site selection and space assignments shall take into account the management needs for consolidation of agencies or activities in common or adjacent space in order to improve administration and management and effect economies.

1-2. *Administrator of General Services.*

1-201. The Administrator of General Services shall develop programs to implement the policies of this Order through the efficient acquisition and utilization of Federally owned and leased space. In particular, the Administrator shall:

(a) Select, acquire, and manage Federal space in a manner which will foster the policies and programs of the Federal government and improve the management and administration of government activities.

(b) Issue regulations, standards, and criteria for the selection, acquisition, and management of Federally owned and leased space.

(c) Periodically undertake surveys of space requirements and space utilization in the executive agencies.

(d) Ensure, in cooperation with the heads of Executive agencies, that their essential space requirements are met in a manner that is economically feasible and prudent.

(e) Make maximum use of existing Federally controlled facilities which, in his judgment, are adequate or economically adaptable to meeting the space needs of executive agencies.

(f) Annually submit long-range plans and programs for the acquisition, modernization, and use of space for approval by the President.

1-202. The Administrator is authorized to request from any Executive agency such information and assistance deemed necessary to carry out his functions under this Order. Each agency shall, to the extent not prohibited by law, furnish such information and assistance to the Administrator.

1-203. In the process of meeting Federal space needs in urban areas and implementing the policies of this Order, the Administrator shall:

(a) Consider the efficient performance of the missions and programs of the agencies, the nature and function of the facilities involved, the convenience of the public served, and the maintenance and improvement of safe and healthful working conditions for employees.

(b) Coordinate proposed programs and plans for facilities and space with the Director of the Office of Management and Budget.

(c) Consult with appropriate Federal, State, regional, and local government officials and consider their recommendations for and objections to a proposed selection site or space acquisition.

(d) Coordinate proposed programs and plans for facilities and space in a manner designed to implement the purposes of this Order.

(e) Prior to making a final determination concerning the location of Federal facilities, notify the concerned Executive agency of an intended course of action and take into account any additional information provided.

1-204. In ascertaining the social, economic, environmental and other impacts which site selection would have on a community, the Administrator shall, when appropriate, obtain the advice of interested agencies.

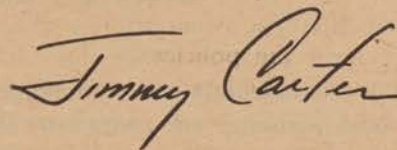
1-3. *General Provisions.*

1-301. The heads of Executive agencies shall cooperate with the Administrator in implementing the policies of this Order and shall economize on their use of space. They shall ensure that the Administrator is given early notice of

new or changing missions or organizational realignments which affect space requirements.

1-302. Executive agencies which acquire or utilize Federally owned or leased space under authority other than the Federal Property and Administrative Services Act of 1949, as amended, shall conform to the provisions of this Order to the extent they have the authority to do so.

1-303. Executive Order No. 11512 of February 27, 1970, is revoked.



THE WHITE HOUSE,  
August 16, 1978.

[FR Doc. 78-23438 Filed 8-17-78; 11:38 am]

EDITORIAL NOTE: The President's remarks of Aug. 16, 1978, on signing Executive Order 12072, are printed in the Weekly Compilation of Presidential Documents (vol. 14, no. 33).



[3195-01]

Executive Order 12073

August 16, 1978

## Federal Procurement in Labor Surplus Areas

By the authority vested in me as President by the Constitution of the United States of America, and in order to strengthen the economic base of our Nation, it is hereby ordered as follows:

*1-1. Procurements in Labor Surplus Areas.*

1-101. Executive agencies shall emphasize procurement set-asides in labor surplus areas in order to strengthen our Nation's economy.

1-102. Labor surplus area procurements shall be consistent with this Order and, to the extent funds are available, the priorities of Section 15 of the Small Business Act, as amended by Public Law 95-89 (15 U.S.C. 644).

*1-2. Administrator of General Services.*

1-201. The Administrator shall coordinate with and advise State and local officials with regard to Federal efforts to encourage procurements in labor surplus areas with the aim of fostering economic development in labor surplus areas.

1-202. The Administrator shall establish specific labor surplus area procurement targets for Executive agencies in consultation with the heads of those agencies.

1-203. In cooperation with the heads of Executive agencies, the Administrator shall encourage the use of set-asides or other appropriate methods for meeting procurement targets in labor surplus areas.

1-204. The Administrator shall report every six months to the President on the progress of the agencies in achieving the procurement targets.

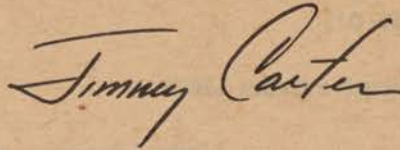
*1-3. Agency Responsibilities.*

1-301. The Secretary of Labor shall classify and designate labor markets which are labor surplus areas. The Secretary shall provide labor market data to the heads of agencies and State and local officials in order to promote the development of business opportunities in labor surplus areas.

1-302. The heads of Executive agencies shall cooperate with the Administrator in carrying out his responsibilities for labor surplus area programs and shall provide the information necessary for setting procurement targets and recording achievement. They shall keep the Administrator informed of plans and programs which affect labor surplus procurements, with particular attention to opportunities for minority firms.

1-303. In accord with Section 6 of the Office of Federal Procurement Policy Act (41 U.S.C. 405), the Administrator for Federal Procurement Policy

shall be responsible for the overall direction and oversight of the policies affecting procurement programs for labor surplus areas.



THE WHITE HOUSE,  
August 16, 1978.

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EDITORIAL NOTE: The President's remarks of Aug. 16, 1978, on signing Executive Order 12073, are printed in the Weekly Compilation of Presidential Documents (vol. 14, no. 33).