

CHAPTER 3: POLICIES/DEFINITIONS/ACRONYMS/GUIDANCE

3.1 **Policies**

Policy and guidance on the following subject matter remain outside the scope of this handbook:

Subject	Policy/Guideline
Acquisitions	Title 48 CFR, Chapter 1, Federal Acquisition Regulation
Challenge Cost-Share Program	Director’s Order 27 (presently being written)
Cooperating Associations	Director’s Order 32
Donations and Fundraising	Director’s Order 21
Real Property Leasing	NPS-38
Land Acquisition Policy	NPS-25 (presently under revision)
Land and Water Conservation Fund	NPS-34
Law Enforcement	Director’s Order 9
Public Land Corps Program	Presently being written
Right of Ways and Easements	NPS-53
Special Park Uses	Director’s Order 53
Urban Park & Recreation Recovery Program	NPS-37
Volunteers-In-Parks	Director’s Order 7

Additional guidance follows:

1. **Federal Grant and Cooperative Agreement Act of 1977**

The Federal Grant and Cooperative Agreement Act of 1977 established government-wide criteria for selection of appropriate legal instruments to achieve uniformity in the use by executive agencies of such instruments, a clear definition of the relationships they reflect, and a better understanding of the responsibilities of the parties. (*See Attachment 3.1 for the Federal Grant and Cooperative Agreement Act of 1977 in its entirety.*)

2. **Federal Financial Assistance Management Act of 1999**

The Federal Financial Assistance Management Act of 1999 (P.L. 106.107) directs the Office of Management and Budget (OMB) and executive branch agencies to simplify and consolidate requirements and procedures for the receipt and administration of financial assistance. Federal financial assistance includes grants, cooperative agreements, loans, loan guarantees, scholarships, and other forms of assistance.

3. **Decisions of the Comptroller General**

(a) **Council on Environmental Quality, 65 Comp. Gen. 607, B-218816, June 2, 1986**

This Comptroller General decision discusses a case that illustrates whether a contract or agreement is the appropriate legal instrument to be used based on the Federal Grant and Cooperative Agreement Act of 1977. (*See Attachment 3.2 for the Decision in its entirety.*)

(b) **Energy Conversion Devices, Inc. B-265514, June 16, 1995, 95-2 CPD ¶ 121**

“The primary purpose of the [agreement] was not to acquire property or services for the direct benefit or use of the government, but to advance the state-of-the-art . . .” (*See Attachment 3.3 for the Decision.*)

See also **Hammond v. Donovan**, 538 F. Supp. 1106, 1109-1110, (W.D. Mo. 1982), in which an assistance agreement was found appropriate where the “fruits of these agreements benefit the public at large” versus “the furnishing to a federal agency of supplies or services.”

4. **Partnership Legal Primer**

This document provides a basic introduction to federal law and ethical considerations affecting agreements.
http://www.doi.gov/partnerships/partnership_legal_framework.html.

3.2 **Definitions**

1. **Acquisition** – The general term used when the principal purpose of the transaction is to obtain supplies and/or services for the benefit of the NPS or another federal agency, or to accomplish a federal mission requirement, using appropriated funds (the only kind available to NPS). It is important to understand the distinction between “acquisition” and “assistance.”
2. **Agreement** – A generic instrument used to document a wide range of mutually agreed upon policies, procedures, objectives, understandings, and/or relationships with federal and non-federal entities.
3. **Agreements Technical Representative (ATR)** - The individual who provides technical information, statements of work, and technical assistance for cooperative agreements and other types of agreements, and receives reports and other deliverables. Ensures invoices are reviewed for accuracy and payments are processed in accordance with the terms and conditions of the agreement. National Park Service ATRs responsible for administering agreements must initially attend a 24-hour agreements training course and an eight-hour refresher course every three years thereafter. (*See Chapter 9, Paragraph 9.10 for specific responsibilities*).
4. **Approving Official** – The individual who has the delegated authority to approve payments under an agreement. This individual is the contracting officer or the delegated agreements technical representative.
5. **Assistance** – The general term used when the principal purpose of the transaction is to transfer federal funds, property, services, or other things of value for stimulation or support of a public purpose and authorized by a law of the United States. For the NPS, the primary instrument used is a cooperative agreement. Grants are another form of assistance, but are not within the scope of this handbook since the NPS has only limited grant authority for specific programs.
6. **Catalog of Federal Domestic Assistance** – The *Catalog of Federal Domestic Assistance* (www.cfda.gov) is a government wide compendium of federal programs, projects, services, and activities that provide assistance or benefits to the American public. The compendium contains financial and non-financial programs administered by departments and establishments of the Federal Government. (*See Paragraph 3.5 for more detailed information.*)

7. **Challenge Cost-Share Agreement** – An agreement entered into between the NPS and any cooperator for the purpose of sharing costs or services in carrying out a public purpose with respect to any unit or program of the national park system, any affiliated area, or any designated national scenic or historic trail. Approved projects under the Challenge Cost-Share Program must demonstrate a public benefit and may result in either a cooperative agreement or a procurement contract. An SF-424 is also required.
8. **Challenge Cost-Share Program (CCSP)** – A program established in 1993, seeks to support increased participation by neighboring communities and qualified partners in the preservation and improvement of National Park Service natural, cultural, and recreational resources; and in all other authorized Service programs and activities--both outside or inside park lands, and on national trails as defined under the National Trails System Act (*16 U.S.C. §1241-51*). The maximum Federal share for Regular Projects and National Trails System Projects is \$30,000. The maximum Federal share for Lewis and Clark Projects is \$250,000. An equal amount of eligible and allowable matching share of cash, goods, or services from non-Federal sources is required. See Chapter 8 of the NPS Agreements Handbook.
9. **Common Rule** – A term sometimes used for OMB Circulars A-102 and A-110, as codified by DOI at *43 CFR 12*, Subpart C.
10. **Construction** – Construction, alteration, or repair (including dredging, excavating, and painting) of buildings, structures, or other real property including improvements of all types, such as bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, cemeteries, pumping stations, railways, airport facilities, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, and channels.
11. **Contract** – (*See Procurement Contract.*)
12. **Contracting Officer Warrant Levels** – Contracting officer warrant levels for signature of agreements follow:

Level III with Agreements Training	-	\$1,000,000
Level IV with Agreements Training	-	Unlimited

Warrant levels III, and IV authorize individuals with agreements training to serve as contracting officers for agreements not exceeding these indicated thresholds. Warrant level IIBs with agreements training who received their agreements warrant prior to January 1, 2006 may also sign agreements.

13. **Cooperative Agreement** – A written legal instrument reflecting a relationship between the NPS and a state or local government, tribal government, or other non-federal recipient in which the principal purpose is to transfer money, property, services, or anything of value to the state or local government or other recipient to stimulate or support a public purpose authorized by federal statute. Substantial involvement is anticipated between the NPS and the state or local government or other recipient during performance of the contemplated activity.

A cooperative agreement may be entered into to accomplish various projects or tasks anticipated and initiated over a span of one to five years. Such a cooperative agreement should establish the general scope of the agreement, as well as its essential elements and the estimated funding. Either a bilateral modification or a task agreement would then be issued to authorize specific project commencement and funding.

14. **Cooperator** – Any state or local government, tribal government, public or private agency, organization, institution, corporation, individual, or other entity.
15. **Direct Benefit or Use** – A product or service is considered to be for “direct benefit or use” when it (a) supports the day-to-day operations of the NPS; (b) is a recognized objective or mission of the NPS; or (c) is used to promote the welfare of the general community in situations where the NPS has primary responsibility. The question of which party directly benefits is determined solely by the federal purpose in the relationship and not by the degree to which the Federal Government benefits more than the other party.
16. **Discretionary Assistance** – Most NPS cooperative agreements are considered to be discretionary. Discretionary cooperative agreements are defined as those agreements that lend themselves to competition. All assistance awards are discretionary unless otherwise earmarked by Congress for a particular source. Discretionary assistance awards are made to a limited number of selected recipients based on criteria chosen by an agency for a specific program. Programs with limited eligibility, e.g., Cooperative Ecosystem Studies Units (*CESUs*), and matching or cost-sharing requirements may still be considered discretionary in nature as they contain competitive components.
17. **Expenditure Report** – A report which is required to clear an advance payment under the terms of an agreement. Standard Form 272 – Federal Cash Transaction Report is required for this purpose. (*See Chapter 4, Paragraph 4.5, for more information regarding this reporting requirement.*)
18. **Fedbizopps** – An abbreviation for Federal Business Opportunities, this is the central location where all business opportunities over \$25,000 for procurement contracts are posted electronically on the Internet at <http://www.fedbizopps.gov/>.

19. **Fundraising Agreement** – A type of agreement that documents a relationship between the NPS and an individual, organization, foundation, corporation, business, association, or other entity (partner) regarding a fundraising relationship to benefit the national park system or programs of the NPS. This agreement may (a) authorize the partner to undertake a specific fundraising campaign(s); or (b) in the context of other agreements, establish a relationship between the partner and the NPS to solicit and accept donations for NPS benefit. Specific information regarding donations and fundraising can be found in Director’s Order 21.
20. **Government-Furnished Property** – Government-owned real or personal property (equipment) provided to recipients under an agreement. The transfer of property must be made in accordance with 43 CFR 12.
21. **Grant** – The same type of instrument as a cooperative agreement except that no substantial involvement occurs by the Federal Government during the grant.
22. **Grants.gov** – This is a government web portal for use in electronic collection of data, managed by the Department of Health and Human Services, which allows organizations to electronically locate and apply for competitive opportunities from all Federal grant-making agencies. Grants.gov is the single access point for over 900 grant programs offered by the 26 Federal grant-making agencies.
23. **Instrument** – A legal document setting forth the rights or duties of one party to another. For the purposes of this handbook, the term “instrument” is a general term that may signify cooperative agreement, interagency acquisition agreement, memorandum of agreement, memorandum of understanding, or procurement contract.
24. **Interagency Acquisition Agreement** – A written agreement between two or more federal agencies in which one federal agency (servicing agency) provides goods, property, or services to the other agency (the requesting agency). Such agreements are typically entered into under the authority of the Economy Act. Interagency acquisition agreements also are used for transfers between DOI bureaus and offices. They are governed by FAR Part 17.5 and DIAR Part 1417.5.
25. **Key Officials** – Specifically named individuals, agreed upon by both parties during negotiations, who will carry out specific tasks in an agreement.

26. **Local Government** – Any unit of a government office within a state, county, municipality, city, town, local public authority, special district, intrastate district, council of government, tribal government, sponsor group representative organization, other interstate government entity, or any other instrumentality of local government.
27. **Mandatory Assistance** - Mandatory assistance is mandated by statute for an entire class of recipients, usually according to a specific statutory formula for distribution of the funds. There is generally no competition for funds among eligible entities in mandatory assistance.
28. **Memorandum of Agreement** – A written agreement between the NPS and state and local governments, nonprofit organizations, corporations, individuals, and other federal agencies used to document receipt of funds, goods, and/or services by the NPS from a non-federal party.
29. **Memorandum of Understanding** – A written agreement between the NPS and state and local governments, nonprofit organizations, corporations, individuals, and other federal agencies used to document mutual assistance relationships. A memorandum of understanding does not obligate funds.
30. **Military Departmental Purchase Request (MIPR)** – A tool used by the Department of Defense to transfer funds when the NPS is the performing agency. This is a type of reimbursable work agreement.
31. **Modification** – A written change to the terms and conditions, and/or funding level of an agreement. Modifications must always be in writing and signed by an appropriate NPS official and the cooperator.
32. **OMB Circulars** – The Office of Management and Budget (OMB) leads the development of government-wide policies to ensure that grants and cooperative agreements are managed properly and that federal dollars are spent in accordance with applicable laws and regulations. These policies are issued as OMB Circulars.

OMB Circulars A-110 and A-102 govern administration requirements of grants and cooperative agreements. *OMB Circulars A-21, A-87, and A-122* governs cost principles. *OMB Circular A-133* governs audit requirements.

The purpose of these rules is to establish some degree of standardization governmentwide in order to achieve consistency and uniformity in the development and administration of grants and cooperative agreements.

33. **Other Recipient** – Any person or organization, other than a state or local government, authorized to receive federal assistance agreements, including charitable or educational institutions and international organizations. “For-profit” organizations can also qualify as recipients (except in the case of **16 U.S.C. §1g**). The type of recipient to receive assistance is usually stated in enabling legislation. If not stated, the legislative history and intent of the congressional appropriation should be reviewed for further guidance.
34. **Personal Services Contract** – A relationship that defines or appears to define the contractor or cooperator as a government employee. A personal service contract is illegal without specific legislative authority. (*See Part 37.104, Federal Acquisition Regulation.*)
35. **Procurement Contract** – The correct legal instrument to use when an agency of the Government has a need to **acquire** by purchase, lease, or exchange—property, services, or studies **for the direct benefit of the Federal Government**. The Federal Government uses procurement contracts when to establish quality of work standards, to require compliance, and to have the unilateral right to initiate corrective action when the work is not performed (such as construction projects). Procurement contracts may be terminated for convenience or for default. Methods of contracting include the following: simplified acquisitions (purchase orders, third-party drafts, and the SmartPay purchase card), requests for quotation, sealed bids, requests for proposal, and task or delivery orders placed against existing contracts. Except for purchase card transactions of less than \$2,500, only warranted contracting officers may award procurement contracts. Contracting officers are limited to the dollar amount corresponding to their warrant authority. Director’s Order 20 and this handbook do not include procurement contracts. (*Refer to the Federal Acquisition Regulation and your contracting officer for further guidance on procurement contracts.*)
36. **Procurement Desktop** – A Department wide electronic system that supports the Federal Acquisition and Assistance processes including requisitions, simplified purchases, contract placement, management, and agreements, also known as IDEAS.
37. **Program Manager** – The individual who has overall responsibility for managing the program.
38. **Public Purpose of Support or Stimulation** – Government assistance for which the principal purpose is to promote the general welfare, security, prosperity, or public convenience as authorized by a federal law.

39. **Ratification** – The execution of an agreement by a contracting officer formalizing a commitment of (a) an individual who acted without authority; or (b) a contracting officer who acted beyond his or her delegated authority.
40. **Recipient** – For the purposes of this handbook, signifies cooperator.
41. **Requesting Agency** – A federal agency that has a need for something of value such as goods, property, or services which another federal agency may be able to provide. The requesting agency becomes the recipient of services and provider of funds under an interagency acquisition or reimbursable work agreement.
42. **Servicing Agency** – A federal agency that provides something of value such as goods, property, or services to another federal agency under an interagency acquisition or reimbursable work agreement. The servicing agency accepts funding from the requesting agency.
43. **State Government** – Any of the states of the United States (U.S.), the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any agency or instrumentality of a state, and any multi-state, regional, tribal government, or interstate entity which has governmental functions.
44. **Substantial Involvement** – The significant NPS participation during the performance of a cooperative agreement. Some examples are NPS involvement in program management decisions; NPS collaboration in the accomplishment of the activity; or NPS operational involvement or participation during the project. NPS funding alone does not constitute substantial involvement. (*See Chapter 4, Paragraph 4.1, of this handbook for more on substantial involvement.*)
45. **Task Agreement** – Orders for individual tasks for work within the scope of a cooperative agreement. Task agreements are not stand-alone documents and must always reference the initial agreement. Task agreements should not repeat the terms and conditions of the initial agreement. They should only include information relevant to the specific task.

3.3 **Acronyms**

The following acronyms are used throughout this handbook:

1.	ATR	Agreements Technical Representative
2.	CESU	Cooperative Ecosystem Studies Units
3.	CCSP	Challenge Cost-Share Program
4.	CFDA	Catalog of Federal Domestic Assistance
5.	CFR	Code of Federal Regulations
6.	D&F	Determination and Findings
7.	DOI	Department of the Interior
8.	E.O.	Executive Orders
9.	FAADS	Federal Assistance Award Data System
10.	FAR	Federal Acquisition Regulation
11.	IPAC	Intergovernmental Payment and Collection System
12.	IDEAS	Interior Department Electronic Acquisition System
13.	NPS	National Park Service
14.	OMB	Office of Management and Budget
15.	PD	Procurement Desktop
16.	P.L.	Public Law
17.	SF	Standard Form
18.	U.S.	United States
19.	U.S.C.	United States Code
20.	WASO	Washington Office

3.4 **Instrument Selection Guide and Legal Review Requirements** – The following guide will assist the user in selecting the proper type of instrument needed for a particular requirement:

PURPOSE	NPS ROLE	NPS INVOLVEMENT DURING PERFORMANCE	INSTRUMENT	SOLICITOR REVIEW
Acquire goods and/or services for federal direct benefit or use.	Purchaser-user	No substantial involvement	Procurement Contract	Required over \$500,000
Assistance, monetary or non-monetary, to support or stimulate a public purpose.	Financial supporter and partner or participant	Substantial involvement required	Cooperative Agreement	Required at any dollar level Task agreements and modifications are excluded
Monetary assistance to support or stimulate a public purpose.	Financial supporter or patron	No substantial involvement	Grant	Required
Mutual assistance relationship with federal and non-federal partners.	Partner; no exchange of funds	May include substantial involvement, but not required	Memorandum of Understanding	Optional
Obtaining goods and/or services from non-federal entities as permitted under specific donation, fundraising or contribution authorities.	Recipient of funds, goods, and/or services	May include substantial involvement, but not required	Memorandum of Agreement	Fundraising agreements require legal review. See DO 21. Legal review of other types of agreements is optional, but ensure that appropriate authority exists
Acquire from or provide goods and/or services to other federal agencies.	Servicing agency or receiving agency	No substantial involvement required	Interagency Acquisition Agreement	Review of Economy Act D&F and agreement required over \$500,000
Requirement initiated by another agency.	Servicing agency	May include substantial involvement, but not required	Reimbursable Work Agreement	Not required

3.5 **Catalog of Federal Domestic Assistance**

The *Catalog of Federal Domestic Assistance (CFDA)* is a governmentwide compendium of federal programs, projects, services, and activities that provide assistance or benefits to the American public. The primary purpose of the catalog is to help users obtain general information on Federal assistance programs.

In compliance with Public Law 95-220, it is the policy of the Department to ensure that information on domestic assistance programs and activities that are federally funded and administered by the Department are entered into the *CFDA* and updated on a regular basis to provide current information on programs. Actual funding opportunities for discretionary grants and cooperative agreement programs described in the *CFDA* shall then be posted to grants.gov (*See 505 DM 2.13 and 507 DM*). Exceptions include: a) announcements of funding opportunities for awards less than \$25,000 for which 100 percent of eligible applicants live outside of the United States; and b) the exception cited in the Departmental Manual, Part 505, Section 2.4A pursuant to awards made under the authority of the Indian Self-Determination and Education Assistance Act (P.L. 93-638).

In the *CFDA*, each program is described in terms of the specific type of assistance provided, authorizing legislation, objectives and goals of the program, applicant eligibility requirements, and application and award processing. The names and telephone numbers of persons to be contacted for detailed program information at the headquarters, regional, and local levels are also provided. The *CFDA* includes “Federal domestic assistance programs” which provide assistance or benefits for a State or States, territorial possession, county, city, other political subdivision, grouping, or instrumentality thereof, any domestic profit or nonprofit corporation, institution, or individual other than an agency of the Federal Government.

Only programs that are funded on an annual basis are listed in the *Catalog of Federal Domestic Assistance*. A description cannot be published until the program is funded, the information is submitted by the program manager for inclusion in the catalog and the *CFDA* number is established. To establish the program and number in the catalog, the program manager must complete the *CFDA* application form in Attachment 4.15 and submit it to the regional, center, or grant *CFDA* lead listed in Attachment 4.16. The regional or center lead will transmit the completed application for a program listing and number to the Federal Financial Assistance Communication Liaison in the Contracting Office, WASO. The Liaison will then transmit the application to the Department for entry into the catalog and assignment of a program number. Once the entry has been made, the program office and regional or center *CFDA* lead will be notified of the action.

A *CFDA* number is a unique number created in the *CFDA* database. It tracks all domestically funded Federal programs available to state and local governments (including the District of Columbia); federally recognized Indian tribal governments; territories (and possessions) of the United States; domestic public, quasi-public, and private profit and nonprofit organizations and institutions; specialized groups; and individuals.

Agreements, where appropriate funding is directed by Congress to a specific recipient, are published in the *CFDA*, but are not required to be posted in grants.gov. Agreements identified as one-of-a-kind, unique, or temporary are not published or assigned a catalog number in the *CFDA* and are not posted to grants.gov. Therefore, should an applicant inquire about the inclusion of a *Catalog of Federal Domestic Assistance* number in Block Number 10 of SF-424, “Application for Federal Assistance,” advise the applicant to leave the number blank until a temporary program number is assigned by the contracting office. If you need to assign a new temporary program number, contact the Federal Financial Assistance Communication Liaison in the Contracting Office, WASO to have that temporary program number requested through the Department.

Since *CFDA* numbers are now available from the *CFDA* database in real time, temporary program numbers (previously known as “pseudo codes”) will be granted for limited duration and only in cases of emergency, e.g., fires, natural or national emergency. Upon receipt of written bureau/office financial assistance program requests with justifications, temporary program numbers will be assigned by the Office of Acquisition and Property Management, and must be superseded by a *CFDA* number within 45 days of issuance.

The current *Catalog of Federal Domestic Assistance* can be accessed on the Internet at <http://www.cdfa.gov>. Attachment 4.15 contains a *CFDA* program application form for the program office’s use to request that a new program be entered or updated. For ease of use, some instructions are provided on the form. There is also a link to the NPS current *CFDA* programs and numbers on the last page of this form. Complete procedures and instructions for compiling, preparing and submitting information on programs to be included in the *CFDA* can be assessed at: <http://www.doi.gov/pam/CFDAreferenceManual2005.html>. All new discretionary grant and cooperative agreement opportunities must contain a valid *CFDA* number and must also be posted to grants.gov (www.grants.gov).

FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT OF 1977

PUBLIC LAW 95-224 [H.R. 7691]; Feb. 3, 1978

FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT OF 1977

For Legislative History of Act, see p. 11

An Act to distinguish Federal Grant and Cooperative Agreement relationships from Federal procurement relationship, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act be cited as the Federal Grant and Cooperative Agreement Act of 1977.”

Federal Grant and Cooperative Agreement Act of 1977.*

FINDINGS AND PURPOSE

SEC. 2 (a) The Congress finds that--

(1) there is a need to distinguish Federal assistance relationships from Federal procurement relationships and thereby to standardize usage and clarify the meaning of the legal instruments which reflect such relationships;

(2) uncertainty as to the remaining of such terms as contract, grant, and cooperative agreement and the relationships they reflect causes operational inconsistencies, confusion, inefficiency, and waste for recipients of awards as well as for executive agencies; and

(3) the Commission on Government Procurement has document these findings and concluded that a reduction of the existing inconsistencies, confusion, inefficiency, and waste is feasible and necessary through legislative action.

(b) The purposes of this Act are---

(1) to characterize the relationship between the Federal Government and Contractors, State and local governments, and other recipients in the acquisition of property and services and in the furnishing of assistance by the Federal Government so as to promote a better understanding of Federal spending and help eliminate unnecessary administrative requirements on recipients of Federal awards;

31 U.S.C. 6301-6308

*P.L. 97-258, Sept. 13, 1982 revised and re-codified in 31 U.S.C. 6301-6308

FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT OF 1977

(2) to establish Government-wide criteria for selection of appropriate legal instrument to achieve uniformity in the use by the executive agencies of such instruments, a clear definition of the relationships they reflect, and a better understanding of the responsibilities of the parties;

(3) to promote increased discipline in the selection and use of types of contract, grant agreement, and cooperative agreements and to maximize competition in the award of contracts and encourage, where deemed appropriate, in the award of grants and cooperative agreements; and

(4) to require a study of the relationship between the Federal Government and grantees and other recipients in Federal assistance programs and feasibility of developing a comprehensive system of guideline for the use of grant and cooperative agreements, and other forms of Federal assistance in carrying out such programs.

31 U.S.C. 6302

DEFINITIONS

Sec 3. As used in the Act, the term--

(1) State government means any of the several States of the United States, the District of Columbia, in the Commonwealth of Puerto Rico, any territory or possession of the United States, any agency or instrumentality of State, and any multi-State, regional, or interstate entity which has governmental functions;

(2) local government means any unit of government within a State, a county, municipality, city, town township, local public authority, special district, intrastate district, council of government, sponsor group representative organization, other interstate government entity, or any other instrumentality of local government;

(3) other recipient means any person or recipient other than a State or local government who is authorized to receive Federal assistance or procurement contracts and includes any charitable or educational institution;

(4) an executive agency mean any executive department as defined in section 101 of the title 5, United States Code, a military department as defined in section 102 of title 5, United States Code, an independent establishment as defined in section 104 of title 5, United State Code (except that it shall not include the General Accounting Office), a wholly owned Government corporation; and

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(5) grant or cooperative agreement does not include any agreement under which only direct Federal cash assistance to individuals, a subsidy, a loan guarantee, or insurance is provided.

USE OF CONTRACTS

31 U.S.C. 6303

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 Federal Government; or

(2) whenever an executive agency determines in a specific instance that the use of a type of procurement contract is appropriate.

USE OF GRANT AGREEMENTS

31 U.S.C. 6304

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 performance of the contemplated activity.

USE OF COOPERATIVE AGREEMENTS

31 U.S.C. 6305

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---

Transfers.

FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT OF 1977

(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 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 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.

AUTHORIZATIONS

Sec. 7. (a) Notwithstanding any other provision of 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.

(b) The authority to make contracts, grants, and cooperative agreements for the conduct of basic or applied scientific research at non-profit institutions of higher education, or at non-profit 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 purchase with such funds.

**31 U.S.C. 6306
contracts, grants
or cooperative
agreements**

**Scientific
Research.**

STUDY OF FEDERAL ASSISTANCE PROGRAMS

Sec. 8. The Director of the Office of Management and Budget, in cooperation with the executive agencies, shall undertake a study to develop a better understanding of alternative mean of implementing Federal assistance program, and to determine the feasibility of developing a comprehensive of guidance for Federal assistance programs. Such study includes a thorough consideration of findings and recommendations of the Commission on Government Procurement relating to the feasibility of developing such a system.

Contents.

Consultation.

FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT OF 1977

The director shall consult with and to the extent practicable, involve representatives of the executive agencies, the Congress, the General Accounting office, and State and local governments, other recipients and other interested members of the public. The result of the study shall be reported to the Committee on Government Operations of the House of Representative and the Committee on Governmental Affairs of the Senate at the earliest practicable date, but in no event later than two years after the date of enactment of this Act. The report on the study shall include (1) detailed descriptions of the alternative means of implementing Federal assistance programs and the circumstances in which the use of each appears to be the most desirable, (2) detailed descriptions of basic characteristics and an outline of such comprehensive system of guidance for Federal assistance programs, the development of which may be determined feasible, and (3) recommendations concerning arrangements to proceed with the full development of such comprehensive system of guidance and for such administrative or statutory changes, including changes in the provisions of section 3 through 7 of this Act, as may be deemed appropriate on the basis of the findings of the study.

**Report to
congressional
committees.**

GUIDELINES

31 U.S.C. 6307

Sec. 9. The Director of the Office of Management and Budget is authorized to issue supplementary interpretive guidelines to promote consistent and efficient use of contract, grants agreement, and cooperative agreements as defined in the Act.

REPEALS AND SAVINGS PROVISIONS

Sec. 10. (a) The Act entitled An Act to authorize the expenditure of funds through grants for support of scientific research, and for other purpose, approved September 6, 1958 (72 Stat. 1793; 42 U.S.C. 1891 and 1982), is repealed, effective one year after the date of enactment of this Act.

(b) 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.

FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT OF 1977

(c) Nothing in this Act shall require the establishment of a single relationship between the Federal Government and a State or local government or other recipient on jointly funded project, involving funds from more than one program or appropriation where different relations would otherwise be appropriate for different components of the project.

(d) The Director of the Office of Management and Budget may except individual transactions or programs of any executive agency from the application of the provision 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.

Approved February 3, 1978.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 95-481 (Comm. On Government Operations).

SENATE REPORT No. 95-449 accompanying S. 431 (Comm. On Governmental Affairs).

CONGRESSIONAL RECORD:

Vol. 123 (1977): Sept 27, considered and passed House
Oct 1, consider and passed Senate,
amended, in lieu of S. 431.

Vol. 124 (1978): Jan 19, House agreed to Senate
amendment.

**DECISION OF THE COMPTROLLER GENERAL
[B-218816]**

**Federal Grant and Cooperative Agreement Act of 1977 ---
Compliance---Cooperative Agreements---Procurement v.
Cooperative Agreement---Criteria for Determining**

A proposed study has been developed and submitted by the National Academy of Sciences to the Council on Environmental Quality for funding at the request of the Environmental Protection Agency. The purpose of the study is to provide information on risks and benefits of certain pesticides to help Federal regulatory agencies, such as EPA, in analyzing prospective regulations. The proper funding mechanism should be a procurement contract, rather than a cooperative agreement, as required by 31 U.S.C. 6303 (1982), since the primary purpose of the study is to acquire information for the direct benefit or use of the Federal Government.

**Federal Grant and Cooperative Agreement Act of 1977---
Compliance---Cooperative Agreements**

The Council on Environmental Quality has no authority to use its Management Fund to provide grants or analogous assistance and therefore cannot enter into cooperative agreement, which is a form of assistance under U.S.C. 6305.

**Matter of: Council on Environmental Quality and Office of Environmental
Quality---Cooperative Agreement with National Academy of Sciences, June 2,
1986:**

The Executive Officer of the Council on Environmental Quality and the Office of Environmental Quality has requested a decision on whether the Council has authority to enter into a cooperative agreement with the National Academy of Sciences. According to the submission, the Council received a proposal from the National Academy of Sciences for funding, in order for the Academy to conduct a study on "Analytic Methods for Estimating Pesticide Benefit." The proposed study would be financed via interagency Agreements from the Council's Management Fund. Although such a study clearly comes within the Council's program authority, the Executive Officer was uncertain whether the Council has authority to use a cooperative agreement as the mechanism to fund the proposed study. See 42 U.S.C. §4372(d)(4). The executive Officer also asked whether the Management Fund can accept grant money from another Federal agency and provide assistance with those funds under a cooperative agreement.

As explained, we find that the proper funding vehicle for the proposed study is "contract" rather than a "cooperative agreement."

**DECISION OF THE COMPTROLLER GENERAL
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_____ ¹ The Council on Environmental Quality, 42 U.S.C. §§4341-47, was established by the *National Environmental Policy Act* of 1969, 42 U.S.C. §§4321 et seq., to oversee the Act's implementation. The Office of Environmental Quality was established by the *Environmental Quality Improvement Act* of 1970, 42 U.S.C. §§43371-74. This Act made the Chairman of the Council on Environmental Quality the Director of the Office of Environmental Quality and enunciated as one of the Office's duties the provision of staff and support for the Council. 42 U.S.C. §4372(d)(1). Since its creation, the Council and the Office of Environmental Quality have operated as a single entity under both statutes. Hereinafter, we will refer to these two agencies as "the Council."

There is no problem with the Council entering into a contractual relationship with the National Academy of Sciences for the project as described, as long as applicable Federal procurement regulations are met. However, we find that the Council has no authority to enter into a cooperative agreement with the National Academy of Sciences to carry out the proposed study.

Discussion

The Academy states that the purpose of the project is---

*** to assist regulatory agencies and researchers in developing sound analyses of the economic impact of prospective regulation affecting pesticide use patterns. National Academy of Sciences, National Research Council Board on Agriculture, "A Proposal for a Study on Analytic Methods for Estimating Pesticides Benefits" (Proposal No. 85-224).

The proposed study was developed and submitted to the Council at the request of the Environmental Protection Agency (EPA). EPA bases its pesticide regulatory decisions on a balancing of risks and benefits of particular pesticides and is concerned over existing limitations in methodologies and data for the estimation of comparative benefits of pesticide uses. The key focus of the study will be to develop methods for calculating benefits of chemical and non-chemical pesticides.

DECISION OF THE COMPTROLLER GENERAL
[B-218816]

As mentioned earlier, we have no question about the Council's authority to sponsor this type of study. The scope of its program authority is quite broad. *See* 42 U.S.C. §4372. The only question is whether the Council is free to fund the project via a cooperative agreement or whether it must enter into a contractual relationship with the Academy instead. The *Federal Grant and Cooperative Agreement Act*, 31 U.S.C. §§6301-08 (1982), established the criteria that agencies must follow in deciding which legal instrument to use when entering into a fund relationship with a state, locality, or other recipient for an authorized purposed. Under these criteria, a contract is the proper funding vehicle when the services being acquired for "the direct benefit or use of the United States." 31 U.S.C. §6303.

Grants and cooperative agreements,² on the other hand, reflect a relationship between the United States Government and a State, a local government, or other recipient when---

(1) The principal of the relationship is to transfer a thing of value to the state, 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 of use of the United States Government. 31 U.S.C. §§6304 and 6305.

² The quoted description in paragraph (1) is the same for both grants and cooperative agreements. The principal difference is that a grant does not usually involve substantial participation by the Federal agency (31 U.S.C. §6304). "Substantial involvement" is expected when the cooperative agreements are used. 31 U.S.C. §6305(2). It is customary to refer to both instruments as evidence "assistance relationships."

The results of the proposed study are clearly intended primarily for the direct benefit of the EPA as well as other regulatory agencies concerned in the development of regulatory policy on pesticide use. Therefore, under directives of the *Federal Grant and Cooperative Act*, discussed above the proper funding vehicle for the proposed study is contract and not a cooperative agreement, as proposed. Providing applicable Federal procurement regulations are met, we see no problem with the Council entering into a contractual relationship with the Academy of Sciences to perform the proposed study and financing it through the Management Fund.

The Executive Officer's second question was whether the Council's Management Fund can accept grant money from another agency and "provide assistance with those funds under a cooperative agreement." We assume, for purposes of this question, that the hypothetical study sought to be funded, unlike the National Academy proposal, is one intended primarily to support a public purpose rather than providing goods or services which the Federal Government wishes to procure for its own purposes.

**DECISION OF THE COMPTROLLER GENERAL
[B-218816]**

In general, every agency has inherent power to enter into contracts to provide for its needs. However, we cannot assume that agencies have the power to donate Government funds to assist non-Government entities to accomplish their own purposes, however meritorious, without clear evidence that the Congress intended to authorize such an assistance relationship. B-210655, April 14, 1983. Therefore, in order to provide assistance through a cooperative agreement, there must be some affirmative legislative authorization. *Id.*

We have examined the Council's statutory authority but are unable to find any specific authority for it to enter into a cooperative agreement. The Management Fund of the Council was established by an amendment to the *Environmental Quality Improvement Act*. Pub. L. No. 98-951, 98 Stat. 3093, Oct 30, 1984, to be codified at 42 U.S.C. §4375. By law, the Fund can only participate in: (1) study contracts that are jointly sponsored by the Office and one or more other Federal agencies; and (2) Federal interagency environmental projects (including task forces) in which the Office participates."

With respect to the first authority, we find nothing in the Fund's legislative history that would support a broader interpretation for the words "study contract" than the plain meaning of the words would suggest. Therefore, we think that paragraph (1) merely authorizes the Council to enter into jointly sponsored contracts through the Management Fund.

The second authority, "Federal interagency environmental projects", does not involve the use of a "cooperative agreement" (as the term is defined in the *Federal Grant and Cooperative Agreement Act*), since the intended relationship is between Federal agencies, one more of which may itself conduct the study in question. Fund transfers between Federal agencies are not accomplished by the awarding grants or entering into cooperative agreement. By statute, when an agency wishes to acquire goods or services from another agency, the transaction would be funded under the *Economy Act* (31 U.S.C. §1535) or some other statute on a reimbursable basis. Since the Fund cannot be used to make assistance awards, such as cooperative agreements, even if it receives an order from another agency that has grant assistance authority, it remains limited to act within the scope of its own authority.

**DECISION OF THE COMPTROLLER GENERAL
[B-260514]**

**Matter of: Energy Conversion Devices, Inc.
Comptroller General of the United States
June 16, 1995**

HEADNOTES:

[*1]

Protest against selection of offeror with which to enter into an agreement for research and development with respect to manufacturing technology is denied where there is no showing that a "procurement contract" was required--that is, that the principal purpose of the contemplated transaction was the acquisition of supplies and services for the direct benefit of the federal government; under the Competition in Contracting Act of 1984 and General Accounting Office's (GAO) Bid Protest Regulations, GAO will generally not review protests regarding the award of cooperative agreements or other nonprocurement instruments unless an agency is using a cooperative agreement or other nonprocurement instrument where a procurement contract is required.

COUNSEL:

Robert S. Gardner, Esq., for the protester. Thomas J. Madden, Esq., James F. Worrall, Esq., and Fernand A. Lavalley, Esq., for Materials Research Group, an interested party. Jewel L. Miller, Esq., Advanced Research Projects Agency, for the agency. David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

OPINION:

DECISION

Energy Conversion Devices, Inc. (ECD) protests [*2] the Advanced Research Projects Agency's (ARPA) selection of the ITN Consortium with which to enter into an agreement, under broad agency announcement (BAA) No. 94-42, for the development and demonstration of vapor phase manufacturing technology in the area of thin-film photovoltaics. **n1**

We deny the protest.

DECISION OF THE COMPTROLLER GENERAL
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The BAA sought proposals “to develop and demonstrate cost-effective, large-area, vapor phase manufacturing technology based on emerging methods of intelligent processing (closed-loop, model & sensor-based control) of thin films” in three areas: (1) thin-film photovoltaics; (2) multi-layer turbine engine coatings; and (3) thin-film, high temperature super conducting devices. The solicitation provided proposal preparation instructions and evaluation factors that would be used in selecting proposals for award. Offerors were informed that ARPA “anticipated substantial industrial cost sharing and program funding via contract or agreements authority as applicable.”

ARPA received proposals in the area of thin-film photovoltaics from six offerors, including the ITN Consortium and a consortium [*3] led by ECD. Based upon its evaluation of initial proposals, the agency determined the ITN Consortium’s proposal to be the most advantageous proposal in the area of thin-film photovoltaics and selected it for funding. Upon learning of the selection, ECD filed this protest.

ECD challenges the evaluation of technical and cost proposals and contends that ARPA should have conducted discussions with offerors. In addition, ECD generally challenges the award to ITN on the basis that a procurement contract should have been awarded.

Under the Competition in Contracting Act of 1984 and our Bid Protest Regulations, we review protests concerning alleged violations of procurement statutes or regulations by federal agencies in the award or proposed award of contracts for the procurement of goods and services, and solicitations leading to such awards. 31 U.S.C. §§3551(1), 3552 (1988); 4 C.F.R. §§21.2(a) (1995). We generally do not review protests of the award, or solicitations for the award, of cooperative agreements or other nonprocurement instruments because they do not involve the award of a “contract.” See Federal Grant and Cooperative Agreement Act (FGCA), [*4] 31 U.S.C. §§6303, 6305; Sprint Communications Co., L.P., B-256586; B-256586.2, May 9, 1994, 94-1 CPD P 300; Resource Dev. Program & Servs., Inc., B-235331, May 16, 1989, 89-1 CPD P 471; see generally SBMA, Inc., B-255780, Nov. 23, 1993, 93-2 CPD P 292. We will review, however, a timely protest that an agency improperly is using a cooperative agreement or other nonprocurement instrument, where under the FGCA a “procurement contract” is required, to ensure that an agency is not attempting to avoid the requirements of procurement statutes and regulations. See *id.*; Renewable Energy, Inc., B-203149, June 5, 1981, 81-1 CPD P 451.

n1 The ITN Consortium includes the Materials Research Group and eight other organizations.

DECISION OF THE COMPTROLLER GENERAL
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The FGCA established the general criteria that agencies must follow in deciding which legal instrument to use when entering into a funding relationship with a state, locality, or other recipient for an authorized purpose. 31 U.S.C. §§6301-6308. Under these criteria, a contract is the proper funding vehicle when “the principal purpose of the instrument is to acquire (by purchase, [*5] lease, or barter) property or services for the direct benefit or use of the United States Government.” 31 U.S.C. §6303. Grants and cooperative agreements, on the other hand, reflect:

a relationship between the United States Government and a State, a local government, or other recipient when-- (1) a 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.

31 U.S.C. §§6304 and 6305; see 65 Comp. Gen. 605 (1986); B-257430, Sept. 12, 1994.

Likewise, the Federal Acquisition Regulation (FAR) provides that:

Contracts shall be used only when the principal purpose is the acquisition of supplies and services for the direct benefit of the Federal Government. Grants or cooperative agreements should be used when the principal purpose of the transaction is to stimulate or support research and [*6] development for another public purpose.

FAR §35.003(a).

ARPA maintains that the principal purpose of the BAA and the instrument contemplated here was not to acquire goods and services for the direct benefit and use of ARPA. Rather, the agency reports:

ARPA’s interest is in enhancing the state of the art, demonstrating technology, establishing industrial capabilities, and otherwise advancing national capabilities so that the United States technological base will be capable of supporting the most advanced military systems in the future.

DECISION OF THE COMPTROLLER GENERAL
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Thus, according to the agency:

BAA 94-42 called for a cost-shared, dual-use, multi-party ‘partnership’ arrangement to support technology developments, advance the state of the art, demonstrate technology, transfer technology, and otherwise support and stimulate research and development . . .

Although ECD generally claims that ARPA was required to use a procurement contract, it has not refuted ARPA’s position that the primary purpose of the BAA was not to acquire property or services for the direct benefit or use of the government, but to advance the state-of-the-art by supporting and stimulating research and development. Rather, ECD [*7] focuses on the specific authority cited by ARPA as the basis for the contemplated instrument. Specifically, ARPA relied on the authorization in 10 U.S.C. §2371, as amended, to “enter into transactions (other than contracts, cooperative agreements, and grants) under the authority of this subsection in carrying out basic, applied and advanced research projects.” 10 U.S.C. §2371(a), as amended by the Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355, §1301, 108 Stat. 3243, 3285 (1994). n2 ECD, however, notes that the authority of 10 U.S.C. §2371 is available “only when the use of a standard contract, grant, or cooperative agreement for such project is not feasible or appropriate”; ECD argues that ARPA has not shown that it could not accomplish its goals by use of “a standard contract, grant, or cooperative agreement.” 10 U.S.C. §2371(e)(3).

[*8]

We need not resolve whether ARPA has satisfied the statutory prerequisites to entering into an “other” instrument under section 2371 since the agency’s choice of which nonprocurement instrument or authority to rely on is irrelevant to the question of whether we will consider ECD’s protest. Again, our Office will review only protests concerning the award or proposed award of procurement contracts, or protests that an agency improperly is using a nonprocurement instrument where a “procurement contract” is required. ECD has not shown, nor is it otherwise apparent from the record, that under the FGCA a “procurement contract” is required here--that is, that the principal purpose of the transaction contemplated under BAA No. 94-42 is the acquisition of supplies and services for the direct benefit of the federal government. We find no basis to question ARPA’s position that the principal purpose of the transaction instead is to stimulate or support research and development with respect to vapor phase manufacturing technology in the area of thin-film photovoltaics.

The protest is denied.

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n2 Section 2358 of Title 10 generally authorizes the Secretary of Defense and the Secretary of a military department to “engage in basic research, applied research, advanced research, and development projects” by means of “contract, cooperative agreement, or grant. . . .” 10 U.S.C. ’ 2358 (1994), as amended by FASA, §§1301, 108 Stat. 3243, 3284. According to ARPA, however, use of an “other” instrument as authorized under section 2371 instead was necessary because the cost-shared, dual-use, multi-party partnership’ arrangement for the support of technology development and advancing the state-of-the-art which it contemplates entering into, while not a procurement contract, also is not a traditional cooperative agreement.