



ADS Chapter 304

Selecting Between  
Acquisition and Assistance (A&A)  
Implementing Instruments

Partial Revision Date: 12/30/2011  
Responsible Office: M/OAA/P  
File Name: 304\_123011

**ADS 304 – Selecting Between Acquisition and Assistance (A&A) Implementing Instruments**

## **Table of Contents**

<u>304.1</u>	<u>OVERVIEW</u> .....	<u>2</u>
<u>304.2</u>	<u>PRIMARY RESPONSIBILITIES</u> .....	<u>2</u>
<u>304.3</u>	<u>POLICY DIRECTIVES AND REQUIRED PROCEDURES</u> .....	<u>3</u>
<u>304.3.1</u>	<u>Criteria for Selecting the Appropriate Instrument</u> .....	<u>3</u>
<u>304.3.2</u>	<u>Guidelines for Identifying the Intended Purpose of the Award</u> .....	<u>4</u>
<u>304.3.3</u>	<u>Determining Whether an Assistance Instrument Should be a Grant or a Cooperative Agreement</u> .....	<u>6</u>
<u>304.3.4</u>	<u>Factors to Avoid when Determining the Type of Instrument</u> .....	<u>6</u>
<u>304.3.5</u>	<u>Final determination on the type of instrument to be issued</u> .....	<u>8</u>
<u>304.4</u>	<u>MANDATORY REFERENCES</u> .....	<u>8</u>
<u>304.4.1</u>	<u>External Mandatory References</u> .....	<u>8</u>
<u>304.4.2</u>	<u>Internal Mandatory References</u> .....	<u>9</u>
<u>304.5</u>	<u>ADDITIONAL HELP</u> .....	<u>9</u>
<u>304.6</u>	<u>DEFINITIONS</u> .....	<u>10</u>

## **ADS 304 – Selecting the Appropriate Acquisition and Assistance (A&A) Implementation Instrument**

### **304.1 OVERVIEW**

Effective Date: 01/29/2010

This chapter prescribes the policy directives and required procedures for selecting the proper implementation instrument for USAID direct awards, in accordance with the [Federal Grant and Cooperative Agreement Act \(FGCAA\)](#).

The FGCAA establishes governmentwide criteria for determining the appropriate legal instrument for funding an activity. Fundamentally, it distinguishes between acquisition and assistance based on the principal purpose of the legal relationship between U.S. Government agencies and non-Federal parties. Congress passed the Act primarily because the failure of Federal agencies to distinguish among procurement and various assistance relationships had resulted in the inappropriate use of grants to avoid competition and other legal requirements applicable to procurement contracts. Conversely, Congress was also concerned that legitimate assistance awards should not be burdened by the formalities of procurement contracts.

There is a wide range of implementing instruments available. USAID primarily implements activities via acquisition (procurement contracts) or assistance instruments (grants or cooperative agreements) it awards directly to non-governmental implementing organizations, even if the activities are part of a bilateral assistance agreement with a cooperating country.

**This chapter assumes that the decision has already been narrowed down to either USAID direct acquisition or assistance.** It does not address factors considered when choosing from the larger pool of available implementing instruments. Operating Units (OU) should consult the Contracting Officer/Agreement Officer (CO/AO) and legal counsel for advice and guidance for using implementing instruments other than USAID direct contracts, grants, and cooperative agreements.

This chapter does not discuss grants to foreign governments and public international organizations, and other agreements, such as implementation letters, loan agreements, and commodity import agreements, which the ADS covers in other chapters.

### **304.2 PRIMARY RESPONSIBILITIES**

Effective Date: 01/29/2010

- a.** The **Agency Senior Procurement Executive** makes the final instrument determination when there is disagreement between the Contracting Officer/Agreement Officer and the Operating Unit.

**b.** The **Bureau for Management, Office of Acquisition and Assistance, Policy Division (M/OAAP)**, develops and interprets Agency policy for both acquisition and assistance implementation instruments.

**c.** The **Operating Unit (OU)** describes the proposed activity in sufficient detail for the Contracting Officer (CO)/Agreement Officer (AO) to identify its purpose and the intended nature of the legal relationship between USAID and the awardee in accordance with the FGCAA. In presenting the information to the CO/AO to make the implementation instrument selection, the OU may make a recommendation for the choice of the instrument.

**d. Contracting Officers/Agreement Officers (COs/AOs)**

- Review the Operating Unit's description of the proposed activity and any recommendation for the choice of implementing instrument,
- Determine and document the appropriate instrument type in accordance with all applicable statutes and regulations, and
- Solicit proposals or applications, and make the award to the non-governmental party.

**304.3 POLICY DIRECTIVES AND REQUIRED PROCEDURES**

Effective Date: 01/29/2010

**304.3.1 Criteria for Selecting the Appropriate Instrument**

Effective Date: 01/29/2010

USAID has no preference for acquisition instruments over assistance instruments or vice versa. The Contracting Officers/Agreement Officers (CO/AOs) must determine the appropriate instrument for each award in accordance with the principal purpose of the award as required by the FGCAA and the guidance in this chapter.

Operating Units (OUs) recommend and CO/AOs must select the instrument for award based on the following criteria:

**a. Acquisition**

In accordance with the FGCAA, USAID must use a contract or order against a contract when:

- 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 USAID or another U.S. Government (USG) entity. In order to determine who directly benefits from the proposed award, the CO/AO must look at the purpose of the immediate

relationship between USAID and the awardee rather than any indirect or subsequent benefits to the public or other parties.

- The use of a type of procurement contract is appropriate in a specific instance.

The Government has some latitude in determining that a procurement instrument would be appropriate in a specific circumstance, but the instrument selection must not be arbitrary in this regard. Examples of when the Agency should determine that procurement is appropriate include when:

- The purpose of the award involves implementing program activities which the USG has committed to provide under a treaty or other international agreement (this does not refer to or include bilateral or multilateral assistance agreements between the USG and a cooperating country), or
- USAID must be actively directing the awardee's performance.

NOTE: For more information on contracts, see [ADS 302, USAID Direct Contracting](#). When choosing between procurement instruments, the CO should also look to [FAR Part 16, Types of Contracts](#), for guidance on selecting the contract type.

b. Assistance

In accordance with the FGCAA, USAID must use a grant or cooperative agreement when the principal purpose of the relationship is the transfer of money, property, services, or anything of value to the recipient in order to carry out a public purpose of support or stimulation authorized by Federal statute.

NOTE: For more information on grants and cooperative agreements, see [ADS 303, Grants and Cooperative Agreements to Non-Governmental Organizations](#).

### **304.3.2 Identifying the Intended Purpose of the Award**

Effective Date: 01/29/2010

In order for the Contracting Officer/Agreement Officer (CO/AO) to determine the appropriate instrument, he or she must determine the nature of the relationship between USAID and the awardee, and the intended purpose.

It is important to note that the principal purpose of the award is not based on whether the award will ultimately benefit a public purpose. Rather, it depends on the Agency's purpose in establishing the relationship with the awardee. All Agency program implementation awards, whether acquisition or assistance, ultimately intend to benefit a public purpose and support the achievement of the Agency's results, so too much focus on the ultimate public purpose is not helpful in this analysis. CO/AOs must examine the purpose of the immediate relationship between USAID and the awardee.

For grants and cooperative agreements, the Agency's purpose is to financially (or otherwise in the case of in-kind grants) support the recipient in its accomplishment of a public purpose. This means that the relationship is a "transfer" of funds from the Agency to the awardee.

In acquisition, the Agency's purpose is to obtain goods or services from the awardee. This means that the relationship is an "exchange" of Agency funds for the contractor's goods or services.

Indications that the award is for USAID's benefit or use, and thus requires a contract, include situations when USAID

- Acquires goods or services for its use or the use of another Federal department or agency;
- Acquires goods or services as part of the Agency's direct assistance to beneficiaries, e.g., the purchase of commodities or consulting or professional services to be provided by the USG or on behalf of the USG to a third party;
- Acquires surveys, studies, and research which provide specific information to USAID for its direct activities;
- Defines or determines project specifications; or
- Intends to exercise a considerable amount of operational control, i.e., performing day-to-day oversight and providing technical direction which would be inappropriate under an assistance instrument.

Indications that the intent of the award is to transfer something of value to carry out a public purpose of support or stimulation, and thus requires a grant or cooperative agreement, include situations when

- The awardee performs the project for its own purpose.
- USAID supports or stimulates the awardee's project with financial or other assistance.
- The direct beneficiaries of the program are individuals, organizations, or institutions in the countries where the program is being implemented.
- The funded activities complement USAID's mission but the awardee will not implement the program as agents of the U.S. Government (USG), i.e. the USG is supporting the program but is not running it.
- The program objectives are best met by having an independent entity implement them, and to not do so as agents of the USG.

### **304.3.3 Determining Whether an Assistance Instrument Should be a Grant or a Cooperative Agreement**

Effective Date: 01/29/2010

If an Agreement Officer (AO) determines that the appropriate instrument is one of assistance (i.e., the principal purpose of the relationship is the transfer of money, property, services, or anything of value to the recipient in order to carry out a public purpose of support or stimulation), the [Federal Grant and Cooperative Agreement Act](#) requires that the AO determine whether it is anticipated that there would be substantial involvement (i.e., USAID's active involvement in certain programmatic elements of the project as discussed in [ADS 303.3.11](#)), between USAID and the recipient during the performance of the proposed activity. This determines the appropriate assistance instrument as follows:

- If the Operating Unit and the AO determine that USAID substantial involvement during the administration of an award is necessary for the achievement of the program's objectives, then a cooperative agreement is the appropriate assistance instrument.
- If substantial involvement is not anticipated between USAID and the recipient during performance of the proposed program, then a grant is the appropriate assistance instrument.

AOs should review ADS 303.3.11 for further guidance on the use and limitations of substantial involvement when selecting between a grant and a cooperative agreement.

### **304.3.4 Factors that should not be a Primary Consideration in Selecting the Type of Instrument**

Effective Date: 01/29/2010

Operating Units (OUs) recommend and Contracting Officers/Agreement Officers (COs/AOs) must select the appropriate implementation instrument based on the [Federal Grant and Cooperative Agreement Act](#), namely the principal purpose of the relationship being created by the specific transaction, as described in **304.3.1**.

While some of the factors below may be considered, COs/AOs should not determine the type of instrument solely based on the following:

#### **a. Type of Implementing Organization**

There are no restrictions regarding what type of organization (e.g., private voluntary organization, profit-making firm, or non-profit organization) may receive an acquisition or assistance award. The type of organization involved is not a criterion for determining the type of instrument. When the correct instrument is a contract, acquisition rules apply even if the implementing organization is a non-profit organization. Similarly,

commercial organizations may receive grants and cooperative agreements, although assistance awards do not allow profit.

Significant focus on the implementing organization type is a flawed approach in determining the appropriate instrument type. The planning phase (where the choice of the instrument is made) is for identifying the activity, not the type of organization. Market research may indicate that the preponderance of expertise in the proposed activity rests with a particular type of organization. This may be a supporting factor in the determination, but should not be the primary consideration in determining the appropriate instrument.

b. Follow-on Activities

AOs/COs should not automatically select the same instrument type for follow-on activities. The appropriate instrument type must be determined for each individual award based on the criteria in **304.3.1**. When the prior selection of an instrument was inappropriate, the same instrument type is not appropriate for use with any follow-on activity unless the nature of the activity has changed. Likewise, the instrument type for a follow-on activity where the previous award's instrument type was appropriate, should be changed only if the nature of the activity has changed.

c. Effect on USAID Resources

At some times, acquisition instruments may be considered more labor intensive than assistance instruments, requiring more direct and substantial USAID involvement in a project. While it may take fewer USAID resources to manage an assistance instrument, the CO/AO must not use this as the criterion for determining the appropriate implementation instrument.

Similarly, the experience level of the CO/AO's Technical Representative is not a factor in determining the instrument type.

d. Political Considerations

The CO/AO should avoid determining the instrument type based on political considerations. Examples of the sort of political considerations that should not be allowed to influence the instrument determination include the preference of influential parties or other U.S. Government entities, or familiarity with a particular implementing organization.

However, certain considerations, particularly those arising from the country context, particularly USAID's relationship with the host country, may have some influence on the choice of instrument. The political context or environment in which the proposed activity will be implemented may be discussed to help inform the intended relationship between USAID and the non-Federal party. While this context may be a supporting factor in the

determination, it should not be the primary consideration in determining the appropriate instrument type.

e. **Operational Control and Programmatic Involvement**

The desire on the part of the Agency for control of the details of project implementation is not an acceptable instrument selection criterion. It may, however, be an indication that the Agency has a requirement for goods or services to accomplish its own purposes, which would require the Agency to provide technical direction to interpret the technical requirements. COs/AOs and OUs should closely examine their perceived need for control to determine whether it is an indication that the purpose of the award is to acquire goods or services for the Agency or whether it is just a general preference that should have no role in choosing between acquisition and assistance.

Substantial involvement under a cooperative agreement allows for USAID involvement in certain programmatic elements of an assistance award. However, it does not allow for the Agency to direct or control performance under the cooperative agreement. COs/AOs and OUs should closely examine the level of involvement needed under an assistance award, as the Agency can be programmatically involved to a certain degree but it cannot apply procurement rules or unique administrative practices to assistance.

**304.3.5 Final Determination of the Type of Instrument to be Used**

Effective Date: 01/29/2010

The Contracting Officer/Agreement Officer (CO/AO) must document the selection of an implementing instrument with his or her written determination, including the rationale based on the requirements of the [Federal Grant and Cooperative Agreement Act](#). This documentation must be completed prior to issuing a solicitation or initiating communications with a potential sole source awardee.

When the Operating Unit (OU) does not agree with the CO/AO's decision on the type of instrument to be used in implementing a particular USAID program requirement, it may request that the Procurement Executive make the final determination. The CO/AO will coordinate with the OU in preparing an action memorandum making this request.

**304.4 MANDATORY REFERENCES**

Effective Date: 01/29/2010

**304.4.1 External Mandatory References**

Effective Date: 01/29/2010

a. [Foreign Assistance Act of 1961, as amended, Sections 621 and 635\(B\)](#)

- b. [Federal Grant and Cooperative Agreement Act of 1977](#)
- c. [OMB Guidance "Implementation of Federal Grant and Cooperative Agreement Act of 1977, 8/18/78"](#)

**304.4.2 Internal Mandatory References**

Effective Date: 01/29/2010

- a. [ADS 302, USAID Direct Contracting](#)
- b. [ADS 303, Grants and Cooperative Agreements to Non-Governmental Organizations](#)
- c. [ADS 308, Grants and Cooperative Agreements with Public International Organizations](#)
- d. [ADS 350, Grants to Foreign Governments](#)

**304.5 ADDITIONAL HELP**

Effective Date: 01/29/2010

*We provide the following selection of Comptroller General decisions to assist COs/AOs in understanding how the [FGCAA](#) has been interpreted.*

- a. [GAO Case B-196872 – O.M. March 12, 1980. Interpretation of Federal Grant and Cooperative Agreement Act of 1977.](#) GAO expands and clarifies its interpretation of the FGCAA.
- b. [GAO Case B-257430 – September 12, 1994.](#) GAO found that the primary purpose of the Office of Personnel Management's (OPM) arrangement with the recipient to conduct customer satisfaction surveys of FEHB enrollees was to enable OPM to obtain services in direct support of its statutory functions. Therefore, OPM should have structured the arrangement as a procurement contract.
- c. [B-218816, 65 Comp. Gen. 605, June 2, 1986.](#) GAO found that where purpose of project was to assist regulatory agencies in developing analyses of regulation impacts, the Government was acquiring information for its direct benefit and a procurement contract was the proper mechanism.
- d. [B-310741, Rocketplane Kistler, January 28, 2008.](#) GAO found that the principal purpose of the announcement was to stimulate a public purpose authorized by law, despite congruent furthering of the agency's policies and purposes where a non-procurement instrument is used to encourage, support and stimulate the development

of a commercial market for space transportation, from which NASA could potentially acquire orbital transportation services.

e. [B-311005, Strong Environmental, Inc., March 10, 2008](#). GAO denies the protest of the use by the Library of Congress (LOC) of a cooperative agreement instead of a contract for the disposal and recycling of cassette tape players where the applicable regulations do not require use of a contract and the relationship was for the transfer of goods from the LOC without LOC having to pay for the “disposal” services.

f. [B-227084.5, Oct 15, 1987, 67 Comp. Gen. 13](#), upheld on reconsideration by [B-227084.6, Dec 19, 1988](#). The Maritime Administration (MARAD) awarded a cooperative agreement for the operation of its Computer Aided Operations Research Facility (CAORF). GAO found that because the operation of the CAORF principally served MARAD’s needs, the proper instrument for this type of relationship is a contract, not a cooperative agreement, under the FGCAA,

## 304.6

### DEFINITIONS

Effective Date: 01/29/2010

#### **Agreement Officer**

A person with the authority to enter into, administer, terminate and close out assistance agreements and make related determinations and findings on behalf of USAID. An Agreement Officer can only act within the scope of a duly authorized warrant or other valid delegation of authority. The term "Agreement Officer" includes persons warranted as "Grant Officers." It also includes certain authorized representatives of the Agreement Officer acting within the limits of their authority as delegated by the Agreement Officer. (Chapters [303](#), [304](#))

#### **contract**

A mutually binding legal instrument in which the principal purpose is the acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government, or in the case of a host country contract, the host government agency that is a principal, signatory party to the instrument. (Chapters [302](#), [304](#), [305](#), [621](#))

#### **Contracting Officer**

A person representing the U.S. Government through the exercise of his or her delegated authority to enter into, administer, and terminate contracts and make related determinations and findings. This authority is delegated by one of two methods: to an individual by means of a "Certificate of Appointment", SF 1402, as prescribed in FAR 1.603-3, including any limitations on the scope of authority to be exercised, or to the head of each contracting activity (as defined in AIDAR 702.170), as specified in AIDAR 701.601. (Chapters [302](#), [304](#), [331](#), [535](#))

**cooperative agreement**

A legal instrument used when the principal purpose is the transfer of money, property, services, or anything of value to a recipient in order to accomplish a public purpose of support or stimulation authorized by Federal statute and when substantial involvement by USAID is anticipated. (Chapter **304**)

**grant**

A legal instrument used when the principal purpose is the transfer of money, property, services or anything of value to a recipient in order to accomplish a public purpose of support or stimulation authorized by Federal statute and when substantial involvement by USAID is not anticipated. (Chapters **304**, [591](#), [595](#))

**implementation instrument**

A binding relationship established between USAID and an outside party or parties to carry out USAID programs, by authorizing the use of USAID funds or nonfinancial resources for (1) the acquisition of services or commodities, or (2) assistance that provides support or stimulation to accomplish a public purpose. Examples of such instruments include contracts, grants, and cooperative agreements. (Chapter **304**)

**non-Federal party**

Entities such as quasi-public and private non-profit organizations, for example, research institutes and educational associations, public and private institutions of higher education, public and private hospitals, and commercial organizations.

**Operating Units**

USAID Missions, regional entities, and Bureaus and Independent Offices that expend funds to support Agency program objectives. This definition in particular includes Operating Units performing the functions of formulating policy, strategic and budgetary planning, achieving results, procurement, personnel management, financial management, and meeting statutory requirements. (Chapters [200-204](#), [260](#), [623](#))

**Procurement Executive**

The USAID official who is responsible for the management direction of USAID's assistance and acquisition ("A&A") system, as so delegated and more fully described in [ADS 103.5.10f](#). (Chapters [302](#), [304](#))

304\_123011