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Financial Assistance or Procurement – Which To Pick?

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INTRODUCTION

A recent lawsuit (TMC, Inc. v. United States Department of Commerce) pertaining to a cooperative agreement reminds us once again how important it is to choose the correct funding instrument. The plaintiff, an unsuccessful offeror for a subcontract competed under a cooperative agreement with a nonprofit organization, successfully sustained jurisdiction in support of its challenge to the subcontract. Plaintiff claimed that the bureau circumvented procurement laws and regulations and used the cooperative agreement as a ruse. In responding to one element of the suit, the Department of Commerce determined that the work to be done under the subcontract was primarily fulfilling a bureau program need and therefore should have been issued as a direct bureau procurement contract. This memorandum discusses circumstances in which different funding instruments are to be used.

A. Federal Grant and Cooperative Agreement Act

The Federal Grant and Cooperative Agreement Act¹ (FGCAA) establishes standards that agencies are to use in selecting the most appropriate funding vehicle – a procurement contract, a grant, or a cooperative agreement. According to the FGCAA, various relationships exist between an agency and a state, local government, university or other organization, depending on the principal purpose of the agreement. The principal or primary purpose determines the appropriate legal instrument to be used to effect the rights and obligations of the parties. The FGCAA, however, does not provide authorizing legislation for an agency to make a grant or cooperative agreement. Each agency must have specific statutory authority to make a financial assistance award which includes grants and cooperative

¹ 31 U.S.C. 6301 – 6308. The Department of Commerce has additional authority to support projects that is sometimes confused with financial assistance: joint project authority under 15 U.S.C. 1525. This authority permits the Department of Commerce to collaborate with other entities on projects of mutual interest. In these instances the Department would pay its share of total project costs. This is not financial assistance, however, because funds are not being transferred to the outside entity to carry out the work.

agreements. This may be provided in its authorizing legislation or within its appropriation act. Financial assistance is an award of Federal appropriations provided as an exercise of Congressional spending powers under the Constitution and therefore must be clearly authorized by an Act of Congress. Procurement contracts, however, are inherently authorized fulfilling the agency's mission expressed in its organic act. Under the FGCAA:

- An agency must use a procurement contract when the “principal purpose: of the relationship “ is to acquire (by purchase, lease, or barter) property or service for the direct benefit or use of the Unites States Government.”²
- An agency must use a grant agreement when the “principal purpose” of the relationship “is to transfer a thing of value to the State or local government or other recipient to carry out a public purpose of support or stimulation” and “substantial involvement” by the agency is not expected.³
- An agency must use a cooperative agreement when the “principal purpose” of the relationship is the same as the purpose for using a grant agreement but the agency expects to be substantially involved with the other party in carrying out the activities specified in the agreement.⁴

² 31 U.S.C. §6303.

³ 31 U.S.C. §6304.

⁴ 31 U.S.C. §6305.

The agency also has the discretion to use a procurement contract instead of a grant or cooperative agreement. The FGCAA stipulates that an agency may decide in a specific instance that the use of a procurement contract is appropriate.⁵ Moreover, the FGCAA stipulates that an agency may use more than one type of funding instrument when different relationships would otherwise be appropriate for different parts of the project.⁶

Federal agencies have broad discretion to choose the appropriate funding instrument, and the determination will only be overturned where found to have no rational basis.⁷ Choosing the appropriate funding instrument is often difficult and requires fine “line drawing”, especially for agencies whose missions serve some public benefit. The appropriate consideration is whether it is the government's principal purpose to acquire the goods and services for the government's benefit or to stimulate or support their production by another organization.⁸

While Federal agencies are given discretion in choosing the appropriate instrument, it should be kept in mind that a federal agency's decision to use a grant

⁵ 31 U.S.C. §6303(2).

⁶ 31 U.S.C. §6308.

⁷ *Bloomsbury West, Inc.*, B-194229, 79-2 CPD, 205 (See Infra at footnote 15); Administrator, National Aeronautics and Space Administration, 51 Comp. Gen 272 (1971); *Rudolph F. Matzer 7 Associates v. Warner*, 348 F. Supp. 991 (M.D. Fla. 1972).

⁸ *Matter of: Electronic Space Systems Corporation*, 61 Comp. Gen. 428 (1982); *Civic Action Institute*, 61 Comp. Gen. 637 (1982); Chairman Jack Brooks of the Legislation and National Security Subcommittee, House Committee on Government Operations, 67 Comp. Gen. 13 (1987).

or cooperative agreement rather than a procurement contract may be protested to the Comptroller General. One of the circumstances in which the Comptroller General will review a protest of a federal assistance award is when “there is a showing that an agency is using a grant or cooperative agreement to avoid the statutory and regulatory requirements that would apply to a procurement.”⁹ In particular, the Comptroller General will be concerned with violations of the Competition in Contracting Act.¹⁰ The TMC litigation demonstrated that unsuccessful subcontractors have standing to sue the government if an activity is inappropriately carried out as a subcontract under a grant or cooperative agreement.

B. Examples of Procurement Contracts

The following are examples of activities the funding of which should be covered by procurement contracts:

- A federal agency has records that are stored on a deteriorating medium (such as microfilm) and need to be copied to a more permanent medium. Paying an organization to accomplish the transfer should be done as a procurement contract since the government is acquiring a service for its direct benefit or use.
- A federal agency wants to develop software that would permit data stored in an outdated mainframe computer system to be transferred to a format that is

easier to use. This should be done as a procurement contract, since the agency is improving its internal data-handling ability.

- A federal agency needs to purchase furniture for use by federal employees, to obtain guard services for its buildings, to rent off-site space for an agency reading room, and to monitor air quality in its buildings. All these activities require procurement contracts, since they are for the direct benefit of the agency.

C. Examples of Grants or Cooperative Agreements

The following are examples of activities the funding of which should be covered by grants or cooperative agreements:

- A federal agency wants to promote economic development in a community that has been ravaged by natural disasters. It intends to do this by working with local organizations that have expertise in business development. In this case, the agency’s principal goal is to promote the public purpose of economic development, and use of a cooperative agreement is appropriate, provided the requisite statutory authority exists.
- A federal agency wants to bring together users of environmental data to provide their ideas on how the agency, which collects those data, could archive, catalog, and disseminate this

⁹ *Civic Action Institute*, 61 Comp. Gen. at 637.

¹⁰ *Maritime Administration Award*, B-227084, B-227084.6 (1988) (unpublished).

information to best meet the needs of end users. In this case, the agency's principal purpose in transferring funds is to advance the public goal of enhancing the usefulness of the data to the user community as authorized by statute.

- Congress authorizes a federal agency to assist a consortium of universities that are carrying out research in fisheries management. In this situation, a cooperative agreement is appropriate, because the agency's principal goal is to advance the public purpose of enhancing the nation's fisheries, as authorized by statute.

D. Is Research Always Financial Assistance?

Many program officials assume that a grant or cooperative agreement is the appropriate funding instrument for research or research and development activities, particularly when a university or nonprofit organization is carrying out the work. That assumption is incorrect. This point was specifically addressed by the Office of Management and Budget in guidance on the FGCAA, issued in 1978:

Comment. One comment was received expressing the opinion that subsection 7(a) of the Act, . should be interpreted as replacing the Grants Act. The Grants Act provided legal 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.¹¹

Agencies have traditionally used contracts for research and development to accomplish a variety of research and development programs furthering the agency mission. These procurements, like other types of acquisitions, are subject to the procurement laws and regulations, notably the Competition in Contracting Act of 1984, (CICA) 41 U.S.C. §§251 *et. seq.*, the Federal Property and Administrative Services Act of 1949, (FPASA) Pub. L. No. 81-152, 63 Stat. 377 (1949), and the Federal Acquisition Regulation, (FAR) 48 C.F.R. Ch. 1. Although research and development contracting may be accomplished using a fixed-price agreement, it is far more common to employ a cost-type contract which places risk of performance largely on the Government and assures the contractor recovery of its legitimate expenses. Cost sharing contracts may also be used under 48 CFR 16.303.

Conclusion

Because of the differences of law and regulation and internal processing requirements that pertain to financial assistance and procurement, program and grants officers should address as early as possible the appropriate legal instrument to use in awarding federal funds. The TMC lawsuit has brought into clear view possible consequences to the government if the wrong legal instrument is execute.

¹¹ Implementation of Federal Grant and Cooperative Agreement Act of 1977 (Pub. L. 95-244), 43 Fed. Reg. 36,860 (1978).

