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A Grant Is A Contract

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Is a grant a contract? This, no doubt, is an issue on which Federal assistance practitioners have heard entirely enough. However, a recent decision of the United States Court of Federal Claims adds another chapter to the analysis of this issue.

In the case of *Thermalon Industries, Ltd. v. U.S.*, 34 Fed Cl. 411 (1995), the National Science Foundation (NSF) argued that grants were not contracts under the Tucker Act (28 U.S.C. §1491), which provides the jurisdictional basis for the Court of Federal Claims (the "court") to try breach of contract suits against the United States. Many of us thought that this issue was already settled (see, e.g., 2 *United States General Accounting Office, Principles of Federal Appropriations Law 10-5* (2d ed. 1992) and the cases cited in the footnotes therein. However, NSF's unsuccessful effort to relitigate this question resulted in an opinion that provides a clear explanation of what is required for a grant to be considered a contract, breach of which is recoverable in that court. In the process, the court sets forth a useful summary of the differences between "agreements",

"contracts" "procurement contracts" and "grants".

FACTS:

The facts of the case are straightforward. Thermalon, in response to an NSF solicitation, submitted a proposal and received a grant to conduct research under NSF's authority to promote scientific activities (42 U.S.C. § 1861 *et seq.*). The award contained the usual terms and conditions. Thermalon commenced performance and submitted invoices for payment. NSF Office of Inspector General audited the invoices and questioned the allowability of a substantial portion of the claimed costs. Thermalon suspended work pending the final results of the audit and NSF terminated the grant. After unsuccessfully seeking relief with NSF, Thermalon filed suit. The government filed a motion to dismiss, contending that the grant was "an agreement intended to effectuate the sovereign obligations of the United States", and thus fell outside the scope of the court's jurisdiction under the Tucker Act. The court's opinion was issued in support of its decision to deny this motion and order the case to proceed.

COURT'S ANALYSIS:

The Tucker Act provides the court “shall have jurisdiction to render judgment upon any claim against the United States, founded . . . upon any express or implied contract with the United States,” 28 U.S.C. § 1491 (a)(1). The court began its analysis by finding that plaintiff had demonstrated the elements of a binding contract, namely, a mutual intent to contract, including an offer, acceptance and consideration passing between the parties, and that the government representative had authority to bind the United States in contract. It found that issuance of the award was either acceptance of the plaintiff’s offer or a counter offer which plaintiff accepted when it commenced work on the grant. (While it was not relevant to the courts analysis, the question of whether the government accepted the grantee’s offer or issued a counter offer can be important in deciding when funds are actually obligated – see Vol. 3 of *It’s The Law* “Obligation of Federal Assistance Funds”.)

Traditionally, grants were not considered to meet the requirement of consideration because the benefit from the agreement flows to a third party rather than to the government. However, consistent with a number of previous cases, the court found mutual consideration in NSF’s obligation to pay and Thermalon’s commitment to publish research results, transfer title to government funded equipment, and provide royalty-free license to resulting intellectual property. Finally, there was no issue raised regarding authority to contract.

The “sovereign” (ignoring constitutional issues) is immune, unless it has

specifically consented, from law suits challenging its actions or seeking damages which resulted from its actions. The Tucker Act is a specific waiver of immunity which provides the court with jurisdiction to decide cases covered by its terms. The principal thrust of NSF’s arguments in this case was that the Tucker Act was intended solely to cover procurement contracts, *i.e.* situations where the sovereign steps off the throne and engages in transactions such as private parties engage in among themselves, while the grant in question involved an agreement pertaining to sovereign obligations, *i.e.* accomplishment of a general public welfare objective.

The court, while conceding that not all “agreements” were “contracts” under the Act, rejected this argument and concluded that the Act covered more than just procurement contracts. The opinion points out that the purchase and sale of goods and sovereign actions are not mutually inconsistent categories, and that all actions of the United States are sovereign actions, some narrowly focused and others broadly aimed at the public welfare in general. With either, however, the government may exercise its authority either unilaterally or bilaterally, such as through a contract. Following a useful analysis of the Federal Grant and Cooperative Agreement Act of 1977, 31 U.S.C. § 6301 *et seq.*, and its legislative history, the court found that classification of an agreement as a grant (or a cooperative agreement) does not resolve whether the arrangement is a contract enforceable under the Tucker Act. Rather, the traditional standards for finding mutual intent to contract (including offer,

acceptance and consideration) are determinative.

CONCLUSION:

The final section of the court's analysis brings the grant/contract issue into sharp focus. The penultimate paragraph of the final section states:

“As described above, contracts enforceable under the Tucker Act result only if there is a mutual intent to contract, including an offer, acceptance, and consideration. Therefore, the government always has the choice when designing a grant scheme to select a scheme that does or does not involve contracts. Moreover, the choice of a contract scheme ordinarily should limit an agency's exercise of discretion in only minor ways because the government can insist on whatever contract terms it chooses including, for example, a restrictive standard for court review (e.g., finding will be reviewed in court under an arbitrary and capricious standard) and even a limitation of the issues that may be contested in court. In addition, the choice of a contract scheme potentially brings important benefits to the government. A contract scheme not only enables the government to secure an independent forum in which to enforce the terms of an agreement but also encourages participation in grant programs by ensuring that grantees may secure review by an independent decision maker in the event the

government fails to fulfill its obligations under the agreement.”

Thus a grant can be a contract, if the government so chooses. By following the applicable OMB Circulars and established procedures it seems clear that Department of Commerce grants and cooperative agreements are contracts since there is: an offer of grant; acceptance by the recipient; consideration, in the recipient's performance, the government's commitment to pay allowable costs, and the mutual obligation to conform to the terms and conditions of the award.

However, as the above quoted language makes clear, a few simple changes and they are contracts no longer. Before anyone begins a push to change the language in our awards to eliminate Tucker Act coverage, consider the following two points. First, uniformity in Federal assistance procedures is an important issue. In this regard, please review Vol. 6 of *It's The Law*, “Say What You Mean”. Second, as the court point out, the government also receives important benefits by having the Tucker Act apply.