A Grant is a Contract but when is a Contract **not** a Grant?

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Do you understand relationship definitions and their related administrative impact for public grants vs contracts?

- Learn the definition and functional differences between various types of relationships that may operate under a federal grant award or federal contract award.

- Learn how the Life Cycle of federal grant administration and the Life Cycle of federal contract administration are alike and are different.

- Learn how emerging federal funding mechanisms may change the way federal funds are distributed in the future.
Grants vs Contracts

**Grants Life Cycle**
- Grant pre-award RFP identification, proposal development through submission
- Grant post-award administration notice of award through audit and/or renewal, close out.
- Partner solicitations, negotiations, agreements, monitoring and close-out.
- Multi-year compliance management and reporting quality assurance.

**Contracts Life Cycle**
- Pre-Award creating/responding to a contract offering: competitive or predetermined
- Type of contract instrument: direct service agreement; fiscal sponsor client; joint services; consultant and service provider
- Ongoing master contractor vs multi-year contractor
- Post-award subcontractor monitoring, audits and close out.
Characteristics of a Grant

- Funding agency involvement typically is none, or limited.

- Exact course of work and outcomes to be achieved are not as precisely defined as a contract and may be flexible, if changes are needed during implementation.

- Benchmarks are not as well defined as contracts nor are timing of results as specifically applied to grant payments.

- Simplicity and clarity of project execution and funds administration is highly valued, mutually desired by awardees and funders.

- Provides opportunity for projects to learn and develop new approaches or interventions to improve well being of a population or geographic area.

- Cooperative grant agreements have the same elements as a grant plus: project not possible without a funder and recipient collaboration; terms & conditions of the collaboration are clearly defined in advance.
Characteristics of a Contract

- Terms & conditions for a specified result are defined and prescribed by the funding agency.

- Parameters and specification of work are determined in advance and must be adhered to by the awardee for the term of the contract period or negative consequences result.

- Portion of effort for projects may be subcontracted.

- Funding agency controls the project objectives, approaches, costs and the work schedule of performance.
Similar in many ways, but very different in execution.

**Contracts**
- A federal government contract is used where “the principal purpose of the instrument is to acquire property or services for the direct benefit or use of the U.S. Government.” (31 USC6303)
- Establishes a quid pro quo relationship. Non-delivery of the product/service under contract may have serious legal and financial impact to the contractor.

**Grants**
- A federal grant is used “to carry out a public purpose of support or stimulation authorized by a law of the U.S. instead of acquiring property or services for the direct benefit or use of the U.S. Government.” (31 USC6304)
- Grants are flexible instruments used to fund achievement of a particular aim. If the aim is not achieved by the grantee, there are usually no significant consequences.
### Primary Execution Comparison

#### Contracts vs Grants

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<thead>
<tr>
<th><strong>Contracts</strong></th>
<th><strong>Grants</strong></th>
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<tbody>
<tr>
<td>Buyer-seller agree to provide goods/services in return for money.</td>
<td>Flexible instrument to provide funds in support of a public purpose.</td>
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<tr>
<td>Federal Acquisition Regulations (FAR) govern these transactions.</td>
<td>Governed by terms of the grant award agreement and Office of Budget Management (OBM) regulations.</td>
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<tr>
<td>Traditionally inflexible (non-negotiable) terms for scope of work, budget and other changes to original agreement.</td>
<td>Typically flexible re: scope of work, budget and other changes to original agreement.</td>
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<tr>
<td>Delivery of promised results, product/services and performance determines the payment.</td>
<td>Emphasis on due diligence of processes and delivery of results with room to adapt the project as needed.</td>
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<tr>
<td>Contractor is held legally and financially responsible for non-delivery or performance consequences.</td>
<td>Less emphasis on delivery of specific results proposed. Payment is awarded whether exact results or level of performance is achieved or not.</td>
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Key Contract Terms

- Force majeure clause
- Contract Termination and Severability specifics
- Scope of work
- Governing law citations
- Pricing and payment terms, conditions and schedule
- Risks and attempts allowed to mitigate risks
- Protection of intellectual property
- Deliverable terms and schedule
Preliminary Contract
Instruments

- A letter contract provides a written preliminary agreement that authorizes a contractor to begin immediately performing their work.

- Letter contracts may be used when:
  - Government’s interests demand the contractor be given a binding commitment so work can legally be started immediately.
  - Negotiating a definitive contract is not possible in sufficient time to meet the requirement.
Memorandums of Understanding
Basic Agreements

- A written instrument of understanding, negotiated between an agency or contracting activity and a contractor that
  1. Contain contract clauses applying to future contracts between parties;
  2. Contemplates separate future contracts.

- Should be used when a substantial number of separate contracts may be awarded during a particular time period and significant recurring negotiating problems have been experienced.
Ordering Agreements

A written instrument of understanding, negotiated between an agency, contracting activity and a contractor that contains:

1. Terms and clauses applying to future contracts (orders) between parties;
2. A description, as specific as practical, of supplies/services provided and;
4. This is not a contract but is a blanket purchase agreement.
What are the basic types and related risks of contract instruments?

**Fixed Price**
- Pricing terms are non-negotiable. The contractor assumes maximum risk and full responsibility for all cost over runs or resulting profit.
- Provides maximum incentive for contractor to control costs and performance financial impact.
- Fixed Price contract types: firm-fixed price; firm-fixed price by level of effort; fixed price w/economic price adjustments; fixed-price redetermination.

**Variations of Fixed Price**
- *Economic price adjustments* revise prices for specific contingencies: change in market prices, unforeseen item cost changes or labor costs to contractor.
- *Incentive contracts* specify target costs, target profit, price ceiling and profit adjustment formulas. If the contractor completes the contracted work and incurs less cost, they receive more profit.
What are the basic types and related risks of contract instruments?

**Cost Reimbursement**
- Payment is provided for allowable incurred costs. Payment is based on a total project cost and established ceilings for cost categories that will not be reimbursed if exceeded.
- Used when contract performance does not permit costs to be estimated with sufficient accuracy for a fixed-price term.
- May not use cost reimbursement type term for acquisition of commercial items.

**Variations of Cost Reimbursement**
- Cost plus incentive fees
- Cost plus award fees
- Time and material contracts for direct labor at specified hourly rates and materials, at cost only. Used when anticipated costs can not be provided with reasonable confidence. Provides no incentive for contractor control of cost of materials and/or labor.
Indefinite Delivery
Indefinite Quantity

An indefinite delivery and/or indefinite quantity (ID/IQ) contract provides terms for an indefinite quantity, within stated limits, of supplies or services during a fixed period.

Contracting officers may use when the government cannot predetermine upper limits above a specified minimum for supplies or services during the contract period. Usually provides a minimum guarantee to contractor.

IDIQ contracts include:

- Delivery Order—supplies
- Task Order—services
- Definite quantity—defined quantity of goods/services with an indefinite schedule for delivery or performance
- Requirements contracts—all required goods/services are purchased for a specific period of time
Competitive vs Noncompetitive Contracts

**Value in competition Philosophy**
- Saves public and private funding sources
- Improves contractor performance
- Promotes quality, objectivity and integrity
- Curbs fraud and promotes accountability for results
- Promotes fairness and openness leading to public trust
- Increases likelihood of efficiencies and innovation

**Competition Methods**
- Sealed bids
- Competitive Proposals
- Competitive Grant opportunities
- Combination of competitive procedures
- Competition based on qualifications
- Pre-Qualification Competitions
- Competition after the Competition (i.e. IDIQ, Master Agreements)
Noncompetitive Contracts

FAR 6.3 Allows, under certain conditions, agencies to use “other than full or open competition” for a noncompetitive negotiation to award a contract. These are also known as sole-source or no-bid contracts.

Noncompetitive Terms

- Used when there is only one responsible source and no other supplies or services will satisfy agency requirements, such as a unique or innovative concept/product.
- There is an unusual or compelling urgency
- For purposes of industrial mobilization, engineering, developmental, research capability or expert services
- Certain situations make it necessary such as:
  - International agreements authorized/required by statute
  - National security public interest
Additional Thoughts…

Over the past 5-years new hybrid federal/local government purchasing methods have emerged…SIB/SIF/PFS.

The federal Social Innovation Fund established two grant programs to “find out what works and make it work for more people.”

It unites public and private investments to identifySCALE innovative, effective evidence-based solutions to local and national challenges in three areas: economic opportunity, youth development and healthy futures.

Will this become the new method of funding federal grants?
Case Studies

- Central Plains Coordinated Transit District – Central Plains Area Agency on Aging
  - Federal Transit Administration **Grant**
  - State Kansas HHS **Grant**
  - Kansas Statute requiring all human service transit operators to form their own Coordinated Transit District (CTD).
  - Rural/Urban 3-county region with representation of county commissioners, transit providers and user representatives.
  - Goal: Encourage and prepare older drivers to retire from driving sooner. Improved coordinated alternative transit options and established a user friendly dispatch service housed in the Wichita metro transit headquarters.
  - Involved 2 grants, several subcontracts, MOU with metro transit agency and 3 unique county CTD agreements for the regional coordination advisory boards.

- Los Angeles County, CA Master **Contract** (LAMA)
  - Utilized when the county desires a list of pre-qualified vendors to perform various services on an as needed basis.
  - Vendors submit their qualifications in response to a solicitation process called a Request for Statement of Qualifications (RFSQ).
  - Vendors who meet the qualifications and accept the terms & conditions of the MA become contractors in their specific category.
  - Work is typically awarded to the highest bidder unless other specified evaluation criteria is included.
  - PHFE currently has 12 active LAMA contracts with a value of $8M through 2017.
Case Scenario Exercise
Grant or Contract?

Grant elements:
- Affordable Care Act law funding source
- Purpose to graduate an increased # of Advanced Practice Nurses over a previous baseline annual # of graduates.

Contract elements:
- This award not on the A-133 list of required OMB grant single audits
- Terms of payment based on performance of students graduated vs baseline # of previous annual graduates
- Annual audits of payments resulting in adjusted future increase/decrease payments for previous year performance: audited vs actual amounts.

Project Characteristics:
- 9-county large urban cross-sector health and education collaborative
- Federal HHS funding source
- Academic partners not eligible; primary awardee must be a healthcare provider with a CMS billing number
- No fixed award amount; actual payment based on performance i.e. number of units delivered with a minimum and maximum range.
- Payment via Medicaid/Medicare reimbursement billing system
Quick Reference Appendix

- Grant Governed by OMB Circulars
  - A-21 Cost Principles for Educational Institutions
  - A-122 Cost Principles for Non-Profits
  - A-110 Uniform Administrative Requirements for Grants and Agreements
  - A-133 Audits of States, Local Governments and Nonprofit Organizations

- Contract
  - Conducted under the Federal Acquisition Regulations (FAR) and applicable supplements, State, Local and other government entities.
Quick Reference Appendix

- OMB Circular A-110 Administration of a Grant
  - Pre-Award (Debarment & Suspension, Representations and Certifications).
  - Post-Award (systems, payments, program income, revisions, non-federal audits, insurance coverage, federal owned property, equipment, code of conduct, competition, cost and price analysis, provisions, financial reporting, record retention, etc.)
- Termination and Enforcement
- Close-out
- Appendix A Contract Provisions (Davis-Bacon, rights to inventions, Clean Air Act, etc.)
Quick Reference Appendix

- Administration of a Contract
  - Public Law 87-653, Truth in Negotiations Act (TINA)
  - Public Law 91-379, Cost Accounting Standards (CAS)
  - Public Law 95-507, Small Business Act
  - FAR Part 31, Contract Cost Principles (Allowable and Unallowable Costs, Pricing contracts)
    - Determination, Negotiation or Allowance of costs
    - “Reasonable-Allocable-Allowable”
    - Far 31.7 Contracts with Non-profit Organizations
Administration of a Contract (cont’d)

FAR Part 52 Solicitation Provisions and Contract Clauses:

- 215-2 Audits and Records—Negotiation
- 219-9 Small Business Contracting
- 230-20 Cost Accounting Standards
- 232-22 Limitation of Cost
- 243-2 Changes—Cost Reimbursement
- 244-2 Subcontracts
- 245-1 Government Property
- 249-5 Termination for Convenience of Government (Educational and other non-profit institutions)
Thank You!

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