

Contracts v. Grants

By Henry Flood

Federal contracts and federal grants have more in common today than they did in the past. In fact, they share so many attributes that it's sometimes hard to distinguish them—leading to some confusion about the obligations that each entails.

Both are:

- Authorized by law.
- Regulated by program or procurement regulations.
- Competitively awarded (although some contracts and some grants are "set-asides").
- Awarded subject to available appropriations.
- Based on a solicitation and a response of some kind.
- Awarded to responsible parties judged best able to meet government need based on a bid, a negotiation or a proposal that address a particular set of criteria.
- Likely to have standard as well as special terms and conditions, with sanctions for non-compliance.

For all of their similarities, however, federal grants and federal contracts do differ. Grants are:

- Awarded almost exclusively to states, local governments, colleges and universities and nonprofit organizations.
- Designed to accomplish a public purpose, advance a national objective, address a public problem or stimulate a particular activity desired by the awarding agency.
- More flexible as to the scope of work required and easier to amend when changes are necessary.
- Renewable in some cases.

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Contracts are:

- More rigorous as to their terms and conditions.
- Designed to acquire goods and services--with a significant premium placed on delivery or performance.
- Awarded largely to commercial enterprises, although nonprofits and state or local governments may respond to a bid or negotiated solicitation.
- Sometimes set aside for minorities or special classes of competitors.
- Sometimes set aside for small businesses, thereby precluding nonprofits and state or local governments from competing.
- More heavily regulated and more likely to carry legal and financial risk.

Under the terms of the Federal Grant and Cooperative Agreement Act of 1977 (31 USC 6301-6308), a grant is defined as "the transfer of money or property to accomplish a public purpose of support or stimulation as authorized by Federal statute." In order to issue grant solicitations and award grants, a federal agency must meet each of the following criteria:

- It must have statutory program authority.
- It must have money to spend for the program (appropriations authority).
- The award must transfer money or property to accomplish a public purpose of support or stimulation.

A contract, in contrast, is essentially a procurement instrument, used by the federal government when it wishes to acquire supplies or services for its direct benefit and use as a purchaser. The federal government's legal authority to contract for goods and services derives from the inherent sovereignty of the United States and the spending clauses of the Constitution. The actual system for making purchases through contracts is based on the federal acquisition laws contained in Title 10 (military procurement) and Title 41 (civilian procurement). These laws are implemented through a massive set of rules comprising the Federal Acquisition Regulation (FAR), codified in Title 48 of the Code of Federal Regulations. Every federal agency that has contracting authority may

augment the FAR with its own supplemental regulations, referred to as FAR Supplements, and codified as separate chapters of the FAR system.

To be legal, a federal contract must meet each of the following criteria:

- The federal agency must have contracting authority.
- The acquisition of goods or services must be necessary and for the benefit of the purchasing agency.
- The purchase must be backed by agency or special appropriations.
- The purchase must not be prohibited by law.
- Absent specified exceptions, bid and negotiated purchases must be accomplished by "full and open competition."
- Every purchase must be authorized by an individual with actual authority to contract. (Those who accept purchases from unauthorized agents may not be paid for goods and services rendered.)
- Every purchase must be implemented through the formal issuance of a purchase order or a solicitation award instrument signed by a contract officer.

Penetrating the System

Despite the complexity of the federal procurement system, some things about it are quite straightforward. The vast majority of federal purchasing transactions are for small purchases (\$25,000 and under) and small acquisitions (generally \$100,000 and under), although these thresholds may vary from agency to agency. Many individuals and nonprofits do quite nicely selling their goods and services through this relatively efficient system.

Most of these purchases are carried out by purchase orders, with purchase descriptions and standard contract terms. \$25,000-and-under contracts are based on market research and competitive quotations. Bargaining between the government and the contractor is relatively informal and the paperwork burdens are fairly modest.

Small acquisitions (\$100,000 and under) are generally accomplished through streamlined solicitation procedures, with either a competitive bid or an abbreviated negotiation process. The paperwork associated with a small acquisition is moderate since, as a vendor or prospective contractor, you must respond to a streamlined bid or prepare a proposal in response to a negotiated purchase.

Other government purchases are made from vendors who are part of the "schedule purchase system," something akin to a large catalog with standard pricing that agencies use to make purchases quickly, efficiently and with little paperwork involved. Both the vendor and the federal agency benefit from the inherent efficiencies of this program.

Large Bid and Negotiated Acquisitions

Large acquisitions (generally \$100,000 and higher) must conform to the full requirements of the Federal Acquisition Regulation. There must be "full and open competition" in compliance with Title 48, Part 6 of the FAR. Exceptions must be documented. Small-business and minority-business acquisitions must still be competitive, but there are special policies that apply in these cases (see Part 19 of the FAR). A solicitation is issued. Bidders respond. Bids are opened and evaluated. Non-responsive bids are disqualified and an award is made (without discussion) to the lowest responsible and responsive bidder.

Large acquisitions are mainly accomplished in one of two ways. Goods and supplies are acquired through competitive bidding procedures as specified in Title 48, Part 14 of the FAR. Services are usually purchased through competitive negotiation procedures as specified in Title 48, Part 14 of the FAR. A solicitation is issued calling for proposals. Bidders respond to the solicitation with proposals, which are then evaluated. A competitive range is established based on the agency's estimate, and the agency may or may not call for oral discussions of a proposal. Non-responsive proposals and proposals out of the competitive range of the government estimate are disqualified. You may be asked to submit a "best and final offer" following oral or written negotiations. Thereafter the government agency will award the contract to that bidder whose offer is most responsive to its need and best meets its criteria, price, and conditions.

Federal contractors—especially when large awards are being considered—must be determined to be financially and ethically responsible. The criteria

for such determinations are contained in Title 48, Part 9 of the FAR. Awards cannot be made to debarred and suspended parties.

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