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IN FOCUS

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Government Contracts: Basic Legal Principles

The term "contract" can describe any written or oral agreement between two or more parties which creates obligations that are enforceable or otherwise recognizable at law. *See* BLACK'S LAW DICTIONARY 365 (9th ed. 2009). Each year, the federal government enters myriad contracts, as this term is generally understood.

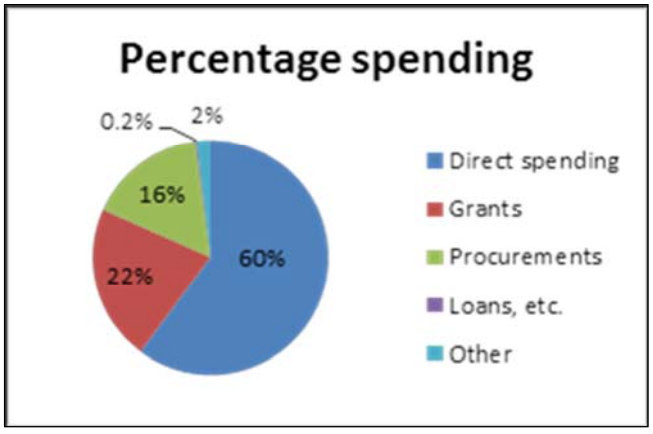
Some of these are procurement contracts. However, many others are not and can instead be characterized in other terms, including as concession contracts, public-private partnerships, and intergovernmental agreements. Cooperative and grant agreements could potentially also be seen as contracts for certain purposes. Regardless of their type, all contracts are generally subject to the same interpretative conventions, which can differ from those generally applied when construing statutes and regulations.

This "In Focus" provides an overview of key types of contracts entered into by the federal government, as well as major canons in contract interpretation.

Procurement Contracts

"Procurement contracts"—or contracts whereby the government acquires supplies or services for its own "direct benefit or use"—are often treated as the prototypical federal contracts. *See* 31 U.S.C. §6303(1). Procurement contracts represented over 15% of reported federal spending in FY2014, as **Figure 1** illustrates.

Figure 1. Spending on Procurement Contracts as a Percentage of Total Federal Spending



Source: Prime Award Spending Data: Federal Spending FY2014, USASpending.gov, *available at* http://www.usaspending.gov/index.php?q=node%2F3&fiscal_year=2014&tab=By+Agency.

Most federal procurement spending—including the spending in **Figure 1**—is by executive branch agencies, which are generally subject to the Federal Acquisition Regulation (FAR) when acquiring supplies and services. There is a common misconception that the FAR governs all government contracts. This is untrue. The FAR only applies to the procurement contracts of "executive branch agencies," as that term is defined by the FAR, when those agencies are not expressly exempted from the FAR or particular provisions thereof. It is also important to note that the FAR's definition of "supplies" expressly excludes "land or interest in land." *See* 48 C.F.R. §2.101. This means that agencies are not subject to the FAR even when they are acquiring leasehold interests in real property (as distinct from conveying leasehold interests in real property, which would not constitute an "acquisition" in any case).

See generally CRS Report R42826, *The Federal Acquisition Regulation (FAR): Answers to Frequently Asked Questions*, by Kate M. Manuel et al.; CRS Report R43443, *Authorization of General Services Administration Real Property Projects: Current Process and Proposed Legislation*, by Garrett Hatch.

Non-Procurement Contracts

The total extent of the federal government's non-procurement contracts is not known, in part because of the various forms these contracts can take. As previously noted, non-procurement contracts are not subject to the FAR. However, particular types of non-procurement contracts could be subject to other governing regulations which are analogous (if not identical) to the FAR. *See, e.g.*, 48 C.F.R. Part 570. Also, in some cases, particular statutory requirements that are implemented, in part, through the FAR could be found to apply to non-procurement contracts because of the provisions of the underlying statute. *See, e.g.*, The Argos Group, B-406040 (January 24, 2012).

Examples of key types of non-procurement contracts are noted below.

Other Transactions

So-called "other transactions" are non-procurement contracts that authorized agencies may use for research and/or development of prototypes. Several agencies, including the National Aeronautics and Space Administration (NASA) and the Department of Defense (DOD), have the requisite authority to enter into other transactions.

See generally CRS Report RL34760, *Other Transaction (OT) Authority*, by Elaine Halchin.

Concession Contracts

Concession contracts are contracts between vendors and government agencies that give the vendor the right to operate a specific business on government owned or controlled property, subject to certain conditions. The National Park Service makes use of concession contracts, as do certain non-appropriated fund instrumentalities (e.g., military exchanges), among others. *See, e.g.*, 36 C.F.R. Part 51, Army Regulation 215-4.

Public-Private Partnerships

As used here, a "public-private partnership" (sometimes referred to as a "PPP" or "P3") is an agreement whereby a nonfederal entity acquires the right to use real property owned or controlled by a federal agency—typically through a long-term lease—in exchange for redeveloping or renovating that property (or other property). In many cases, the agency and the nonfederal entity share the net cash flow or savings that result from the agreement.

See generally CRS Report R43337, *Public-Private Partnerships for Purposes of Federal Real Property Management*, by Garrett Hatch and Kate M. Manuel.

Intergovernmental Agreements

Intergovernmental agreements, or intergovernmental service agreements (IGSAs), govern certain aspects of the relationship between two governmental entities, often a federal agency and a state, local, or other government. Perhaps the best known federal intergovernmental agreements are those providing for state or local entities to detain persons charged or convicted of federal offenses, including violations of federal immigration law. However, such agreements also address a range of other topics.

Certain Cooperative and Grant Agreements

Cooperative agreements are used when the "principal purpose" of the relationship between a federal agency and a non-federal entity is to "transfer a thing of value" to the non-federal entity "to carry out a public purpose of support or stimulation authorized by a law," and "substantial involvement is expected" between the agency and the non-federal entity in carrying out the activity contemplated by the agreement. *See* 31 U.S.C. §6305. Such agreements are sometimes seen to constitute contracts, in the broadest sense, for at least certain purposes of federal law.

Some grant agreements could be similarly seen to constitute contracts, as broadly defined, for certain purposes. Grant agreements are akin to cooperative agreements, in that their "principal purpose" is also to "transfer a thing of value" to a non-federal entity to carry out an authorized "public purpose of support or stimulation." However, grant agreements may be used only when "substantial involvement" between the federal agency and non-federal entity is *not* expected. 31 U.S.C. §6304. It is important to note, though, that grant agreements that are seen to involve "gifts or gratuities" are generally not treated as contracts.

Key Principles of Contract Interpretation

The rights and responsibilities of the parties to a contract are generally determined by the terms of the contract (although courts have recognized certain implied terms, such as a duty of good faith and fair dealing). However, obtaining a copy of the contract does not necessarily suffice to determine who may be at fault for specific problems in the performance of the contract. This is, in part, because of the canons of contract interpretation, some of which can differ from the general principles applied in construing statutes and regulations.

Focus on the Parties' Intent

The "plain language" of the agreement serves as the starting point for interpreting a contract. However, a court or other tribunal will not give the words of the agreement their ordinary meaning when it is clear that the "parties mutually intended and agreed to an alternative meaning." Harris v. Dep't of Veterans Affairs, 142 F.3d 1463, 1467 (Fed. Cir. 1998). For example, a contract that denominated itself a fixed-price contract could potentially be found to be a cost-reimbursement contract because other provisions of the contract clearly evidence the parties' intent that the government should reimburse the contractor for costs incurred in performing the contract.

Contracts Construed Against the Drafter

Any ambiguities in contracts are generally construed against the contract's drafter under an interpretative principle sometimes referred to as *contra proferentem* rule. *See, e.g.*, HPI/GSA-3C, LLC v. Perry, 364 F.3d 1327, 1334 (Fed. Cir. 2004). The federal government is typically viewed as the drafter when it is a party to a contract, and certain ambiguous provisions in its contracts could thus be resolved in the contractor's favor/against the government.

Course of Dealings, Course of Performance

Interpretation of a contract can also be shaped by the "course of dealings" of the parties, or how they have previously conducted themselves under the terms of the contract. The "course of performance"—or the parties' behaviors over the entirety of their business relationship, not just the contract in question—could also play a role.

Waivers and Modifications

In addition, a party to a contract could potentially be seen to have "waived" certain requirements by expressly relinquishing particular rights, or by engaging in conduct that warrants an inference that the right has been relinquished. The contract could similarly have been subject to oral modifications (either express or implied) so that its actual terms are different from those of the written text.

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