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UNITED STATES GOVERNMENT

GENERAL ACCOUNTING OFFICE

Memorandum

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TO : Director, GGD

MILTON SOCOLAR

FROM : General Counsel - Milton J. Socolar



SUBJECT: Interpretation of Federal Grant and Cooperative Agreement Act of 1977 - B-196872-O.M.

The purpose of this memorandum is to expand and clarify our interpretation of the Federal Grant and Cooperative Agreement Act of 1977 (FGCA Act), Pub. L. No. 95-224, 92 Stat. 3, February 3, 1978, 41 U.S.C.A. 501 et seq. This act requires that agencies use the correct legal instrument (grant, cooperative agreement, or contract) when procuring goods or services from or providing assistance to recipient organizations. Because there are very different requirements and consequences which flow from the use of one instrument rather than the other, it is very important to determine whether or to what extent the FGCA expanded each agency's pre-existing authority to enter into particular types of relationships. Since OMB has been given the leading role in the study and explanation of this Act, GAO's role at this time should be one of advising OMB and keeping Congress informed rather than addressing the validity of individual agency actions. We note that the examples used to illustrate certain issues should not be considered final decisions of this Office since we have not had the benefit of the views of the agencies responsible for the program examples nor have we much experience with actual cases that would permit us to test our views. Application of the FGCA Act should be a case-by-case process.

The FGCA Act and Legislative History

The portions of the FGCA Act of primary importance to this memorandum are as follows:

USE OF CONTRACTS

"Sec. 4. Each executive agency shall use a type of procurement contract as the legal instrument reflecting a relationship between the Federal Government and a State or local government or other recipient--"

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"(1) whenever the principal purpose of the instrument is the acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government; or

"(2) whenever an executive agency determines in a specific instance that the use of a type of procurement contract is appropriate.

USE OF GRANT AGREEMENTS

"Sec. 5. Each executive agency shall use a type of grant agreement as the legal instrument reflecting a relationship between the Federal Government and a State or local government or other recipient whenever --

"(1) the principal purpose of the relationship is the transfer of money, property, services, or anything of value to the State or local government or other recipient in order to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition, by purchase, lease or barter, of property or services for the direct benefit or use of the Federal Government; and

"(2) no substantial involvement is anticipated between the executive agency, acting for the Federal Government, and the State or local government or other recipient during performance of the contemplated activity.

USE OF COOPERATIVE AGREEMENTS

"Sec. 6. Each executive agency shall use a type of cooperative agreement as the legal instrument reflecting a relationship between the Federal Government and a State or local government or other recipient whenever --

"(1) the principal purpose of the relationship is the transfer of money, property, services, or anything of value to the State or local government or other recipient to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Federal Government; and

"(2) substantial involvement is anticipated between the executive agency, acting for the Federal Government, and the State or local government or other recipient during performance of the contemplated activity.

AUTHORIZATIONS

"Sec. 7. (a) Notwithstanding any other provision of law, each executive agency authorized by law to enter into contracts, grant or cooperative agreements, or similar arrangements is authorized and directed to enter into and use types of contracts, grant agreements, or cooperative agreements as required by this Act."

In addition to these provisions, section 2 of the Act states congressional findings (subsection (a)) and the purposes of the act (subsection (b)). Section 3 provides definitions, including definitions of "State or local governments" (paragraphs (1) and (2)) and "other recipients" (paragraph (3)), and a definition (paragraph (5)) that excludes from the terms "grant or cooperative agreement":

" * * * any agreement under which only direct Federal cash assistance to individuals, a subsidy, a loan, a loan guarantee, or insurance is provided. "

The language of the FGCA is hardly a model of clarity and interpreting the language of the Act in a consistent manner is difficult. However, the difficulties can be narrowed considerably if the limitations implicit in the apparently broad authority provided by section 7(a) of the Act are understood. If the legislative history concerning section 7(a) is read within the context of the general congressional purposes for the FGCA, it does not appear that Congress intended any wholesale expansion of grant authority allowing agencies to choose to offer grant assistance where there was no authority to enter into such an assistance relationship previously. We believe that the Congress only intended to require agencies to use an instrument that matches the transaction they enter into, regardless of the label used in existing legislation to characterize that transaction. However, the FGCA was not intended to change the nature of the transactions that are authorized.

The legislative findings contained in section 2(a) of the FGCA Act stress the pre-act confusion concerning the choice of legal instruments, and the need to clarify the appropriate use of grants, cooperative agreements, or contracts for specific kinds of relationships in order to promote consistent choices by government agencies. The purposes of the Act in section 2(b) are basically to resolve the problems identified in these findings by characterizing and defining the relationships created by the three instruments, and establishing criteria that would help achieve uniform usage

by agencies in the selection of the proper instrument. As explained in the Senate Committee report, the basic purpose of the Act is to clarify the relationships between the Federal government and non-Federal entities. S. Rep. 95-449 p. 3. The intent of the Act is:

"* * * to require that the legal instruments employed in transactions between Federal agencies and non-Federal recipients of awards reflect the basic character of the relationships established." *Id.* p. 8.

The section-by-section analysis on section 7(a)^x (*id.* pp. 10-11) provides some further clarification:

"Section 7(a) declares that notwithstanding any other provision of law, each executive agency authorized by law to enter into contracts, grants, cooperative agreements, or similar arrangements is authorized and directed to use contracts, grant agreements, or cooperative agreements as required by this bill. The purpose of this authorization is to overcome the problem many agencies now face if their choice of instrument is statutorily restricted to a particular instrument. This authorization will provide the executive agencies with needed flexibility in their efforts to use appropriate legal instruments to reflect the relationships established with non-Federal recipients of contract, grant, or cooperative agreement awards.

"If an agency is presently authorized only to enter into either contracts, grants, cooperative agreements, or other arrangements, this authorization enables that agency to enter into any or all three types of agreements, subject to the criteria set forth in sections 4, 5, and 6. However, if an agency is specifically proscribed by a provision of law from using a type of agreement, this authorization would not affect that prohibition.

"This bill would affect some existing program authorization statutes by superseding provisions, if any, dealing with the required use of particular instruments to implement programs. In addition, this legislation would have another effect. When an agency, complying with the criteria established herein, changed the award mechanism for a particular activity from a type of grant to a type of procurement contract, then the procurement regulations would apply. Conversely, when an agency changed the award mechanism from a type of procurement contract to a type of grant, the regulations and statutes applying to procurement contracts would no longer apply. The regulations and statutes applying to transactions of Federal assistance would apply.

"The proposed legislation does not automatically change the type of instrument authorized by statute but rather authorizes the agencies to use other instruments if appropriate and consistent with this bill. The legislation is not intended to nor will it eliminate specific program or administrative requirements placed by the Congress in individual program statutes. It also will not eliminate specific requirements applying, for example, to grants in such organic statutes as the Work Hours Standards Act. Given the foregoing understanding, it is not practical or necessary to identify all of U.&I. statutes which might be somewhat affected." (Emphasis added.)

me FCGA Act Does Not Expand Agency Authority

Given the limited objectives of the FCGA, it is difficult to accept an interpretation that would give agencies broad new independent authority; rather, the problem apparently addressed by section 7(a) is the enormous housekeeping problem of going through each piece of authorizing legislation and inserting, where appropriate, the words, "grant", "cooperative agreement" or "contract." The Act leaves this task to analysis of each authorizing statute. In this view, to find "grant" or "cooperative agreement" authority in each agency's authorizing statute, where these specific words of authority have not been used, it must be determined what kind of relationships the agency's statute was intended to authorize: i.e., in order to find grant authority, the authorizing legislation must be examined to determine if a grant type of relationship was intended or permitted rather than simply looking for the word "grant." (Even in the past, although we generally applied the axiom that grant authority must be expressly stated, grant authority has often been found in the absence of the specific word "grant"). This interpretation of the FCGA Act was well expressed in a legal memorandum (copy attached) by the Department of Energy's Acting General Counsel:

"Indeed, it seems clear that the FCGAA [sic!] was not intended to permit an agency, in implementing any program, to transcend the discretion which was conferred upon it by the enabling law, but only to carry out the purposes of that law more efficiently. That is, the FCGAA [sic] is not a "bootstrap," and may be relied upon to enhance agency prerogatives only after the objectives of the enabling law have been appropriately characterized, not before. In some instances, it will be difficult to make this characterization, and legislative history and judicial decision may need to be invoked. But in each case, it will be the four corners of the enabling law, and not the FCGAA [sic], which will establish the parameters of the relationship between Federal and non-Federal parties. The FCGAA [sic]

may then be utilized so that the law can be implemented without regard to ill-defined nomenclature in the enabling law which may, for that reason alone, hamper an agency's ability to give effect to Congress' intent." (Footnote omitted.)

It must be conceded, however, that the broad language of section 7(a) and some portions of the legislative history can be used to argue for enlarged agency authority. See, e.g., the second paragraph of the section-by-section analysis, *supra*, and the following language from the Senate report (*id.* 10):

"The agencies do have the flexibility of determining whether a given transaction or class of transactions is procurement or assistance and, if assistance, whether the transaction or class of transactions is to be associated with a type of grant or cooperative agreement relationship. The mission of the agency will influence the agency's determination of which it should be. But the agency's classification of its transactions will become a public statement for public, recipient, and congressional review of how the agency views its mission, its responsibilities, and its relationships with the non-Federal sector."

OMB Guidance

OMB Guidance (43 Fed. Reg. 36860, August 18, 1978) is not as clear as it might be. Note the following excerpt:

"Thus, for example where an agency authorized to support or stimulate research decides to enter into a transaction where the principal purpose of the transaction is to stimulate or support research, it is authorized to use either a grant or a cooperative agreement. Conversely, if an agency is not authorized to stimulate or support research, or the principal purpose of a transaction funding research is to produce something for the government's own use, a procurement transaction must be used."

However, a later paragraph, although reconcilable, confuses the point:

"The determinations of whether a program is principally one of procurement or assistance, and whether substantial Federal involvement in performance will normally occur are basic agency policy decisions. Agency heads should insure that these general decisions for each program

are either made or reviewed at a policy level. A determination that a program is principally one of procurement or assistance does not preclude the use of any of the types of instruments when appropriate for a particular transaction. Congress intended the Act to allow agencies flexibility to select the instrument that best suits each transaction. Agencies should insure that all transactions covered by the Act are consistent with their basic policy decisions for each program." Id. at 36863.

The guidance seems clearer on an agency's authority to make the grant-cooperative agreement distinction than on the procurement-assistance distinction.

"OMB policy on substantial involvement. Agencies should limit Federal involvement in assisted activities to the minimum consistent with program requirements. Nothing in this Act should be construed as authorizing agencies to increase their involvement beyond that authorized by other statutes." Id.

Application of the FGCA Act to Particular Programs.

While the FGCA Act provides the basis for examining whether an arrangement should be a contract, grant or cooperative agreement, determinations of whether an agency has authority to enter into the relationship as spelled out in the instrument, whatever its label, must be found in the agency authorizing legislation, not with the FGCA Act.* The agency's basic legislation must be read to determine whether an assistance or procurement relationship is authorized at all, and if so, under what circumstances and with what restrictions, when awards are made to recipients. If assistance is not authorized, there should be no question of the agency entering into a grant or cooperative agreement. For example, the GSA cannot make a grant to assist landlords to provide space for Federal employees. If assistance is contemplated by the authorizing legislation, it must further be determined to what degree federal involvement in the assistance is authorized. Also, where assistance authority is found, the specific transaction must be reviewed and properly classified since some aspects of carrying out any assistance program remain primarily procurement in nature. An example will illustrate this distinction.

* In order to articulate the difference between the authority flowing from the FGCA Act and the authority from an agency's legislation we have referred to the analysis of agency legislation as first level analysis although we recognize that the interplay between the two statutes need not conform to this order.

Medicaid

The Medicaid program, although the words "grant" or "cooperative agreement" nowhere appear in the legislation, is an assistance program under clause (1) of sections 5 and 6 of the FGCA. The program is described as follows at 42 U.S.C. § 1396 (1976): ✓

"For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and, (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary of Health, Education, and Welfare, State plans for medical assistance."

It is clear that the program is intended to assist States to provide medical services to people in need. The distinction between the ultimate purpose of the assistance (medical assistance for people in need) and the direct recipient of the assistance (States) is clear. There is no authority to make grants directly to providers or even to an individual in need of medical assistance. The assistance is to go to States to carry out their responsibilities to the residents of their States, rather than in fulfillment of a direct Federal responsibility, and the FGCA does not change that basic authorization. However, there are many situations where HEW would have authority to contract for services in connection with its own administration of the program. For example, HEW might contact with a firm to help assess State program compliance. See 42 U.S.C. § 1396c (1976).

CETA

While the Medicaid example seems obvious, it illustrates principles that seem to become elusive in difficult or ambiguous cases. The CETA program (The Comprehensive Employment and Training Act, 29 U.S.C. § 801 (1976) as amended by 95 Pub. L. No. 95-524, 92 Stat. 1912, October 27, 1978) (citations to this program are to the U.S. Code sections as amended by the 1978 Act) is a program with a much more complicated design. The principal purpose of this program, as written since passage of the FGCA Act, are not framed to answer FGCA Act questions as neatly as in the Medicaid example. The 1978 CETA amendments provide, at 29 U.S.C. § 801 as follows:

"It is the purpose of this chapter to provide job training and employment opportunities for economically disadvantaged, unemployed, or underemployed persons which will result in an increase in their earned income, and to assure that training and other services lead to maximum employment opportunities and enhance self-sufficiency by establishing a flexible, coordinated, and decentralized system of Federal, State and local programs. It is further the purpose of this chapter to provide for the maximum feasible coordination of plans, programs, and activities under this chapter with economic development, community development, and related activities, such as vocational education, vocational rehabilitation, public assistance, self-employment training, and social service programs."

There is little doubt, however, from references to a "decentralized system of Federal, State and local programs" in the statement of purpose section, later sections such as 29 U.S.C. § 814. There the requirements of the prime sponsors' comprehensive employment and training plans are spelled out, references in 29 U.S.C. §§ 815 and 816 to "financial assistance under this chapter" and other similar references, that CETA is primarily a program to assist prime sponsors to provide employment and training to eligible trainees. Additionally, the Secretary of Labor is empowered to fund special programs such as a special program of local workshops to train youths and others to be owners and managers of small businesses (29 U.S.C. § 871(g)) and a special program to train personnel to work with and assist the handicapped (29 U.S.C. § 876(b)).

Finally, the Secretary is required to establish an experimental program as follows:

"The Secretary shall establish a program of experimental, developmental, demonstration, and pilot projects, through grants to or contracts with public agencies or private organizations, for the purpose of improving techniques and demonstrating the effectiveness of specialized methods in meeting employment and training problems. Nothing in this subsection shall authorize the Secretary to carry out employment programs experimenting with subsidized wages in the private sector or wages less than wages established by the Fair Labor Standards Act of 1933 for employment subject to that Act. In carrying out this subsection, the Secretary shall consult with such other agencies as may be appropriate. Where programs under this section require institutional training, appropriate arrangements for such training shall be agreed to by the Secretary and the Secretary of Health, Education, and Welfare."

In carrying out his responsibilities for the entire CETA program the Secretary is given broad authority:

"The **Secretary** may **make** such grants, contracts, or agreements, **establish** such procedures and make **such** payments, in **installments** and in **advance** or by **way** of reimbursement, or otherwise allocate or expend funds made available under this chapter, as deemed necessary to carry out the provisions of this chapter * * *." 29 U.S.C. § 828(b). ✓

The question of the correct instrument is difficult to answer as purposes assume close to **equal** weight; for example, a program might be funded to test and demonstrate a particular method by which cities can **train** youth. The transaction is intended to produce a replicable design that the Department of Labor can provide as a model to other cities. See B-195163, 58 Comp. Gen. 676, July 25, 1979. The question of whether the Government in such circumstances is **buying** demonstration results or supporting and stimulating innovation is difficult to answer.

Agency Discretion

Where program authority can justify a choice of **instruments** and it is difficult to say that **assistance** or procurement is the principal purpose of the transaction, agencies have discretion and should exercise the discipline noted in the **legislative** history of the FGCA in their **choice** of instruments. Similar considerations must go into the choice of grant or cooperative agreement based on the extent of **grantor** involvement.

It can be assumed that choices of instruments will be made that rest on **considerations** that include pre-FGCA **grant** assumptions and other considerations not **explicitly** recognized by the Act. Where the recipient is a State or local government, there will be a tendency to use assistance instruments.

It should be kept in **mind**, however, that the **first level** analysis of agency authority to enter into the kind of transaction envisioned is not really a matter of **discretion**--the statutory authority is either there or is not there, regardless of agency preference, although **agency** authority may be difficult to **&**-termine and require the exercise of a substantial amount of judgment (see DOE Acting General Counsel memorandum). Where called upon to decide questions of agency authority, **normal** statutory interpretation rules **still apply**, although in **close** cases we would **give** considerable weight to the administering agency's interpretation of its own authority. The net effect may be to greatly increase the number of grants made by **agencies** in close cases--even in situations which, traditionally **had been** handled as procurements.

The "Third Party" Rule

As illustrated by the Medicaid and CETA examples, program authorities usually indicate a public purpose and identify who **is to carry** it out. While the public **purpose** and the class that may receive the ultimate benefits of a

program may coincide with the organizations that a Federal agency is authorized to assist, they often will not, as was the case in the two examples. For example, the fact that Medicaid's purpose is to facilitate the provision of medical services to people in need or that CETA's prime sponsor program is designed to help in the establishment of an employment and training program for the poor and the under or unemployed does not mean that the Government is authorized to provide direct assistance to people in need of services or of employment or training programs. The ultimate purpose of the program is largely irrelevant in determining whether an assistance or a procurement relationship is authorized for a particular transaction. Medicare (42 U.S.C. § 1395 et seq.) which has similar objectives to Medicaid for a different group of beneficiaries retains responsibility at the Federal level for carrying out the program and does not place the Government in an assistance relationship to another's prime responsibility.

Accordingly, what is of importance in answering the question of whether an assistance relationship is authorized is the determination of who has responsibility for the function at the heart of the program. In the case of Medicaid, the *statute* recognizes the responsibility for carrying out the program to be the States'; under Medicare, the Federal Government retains responsibility. In some program authorities, as in the case of the CETA special programs, there seems to be an option.

With this understanding in mind, the so called "third party" arrangements are easier to understand. A third party situation arises where an assistance relationship to specified recipients is authorized, but the Federal grantor delivers the assistance to the authorized recipients by utilizing another party. An example is where an agency is authorized to provide technical assistance to a certain level of local government, but rather than provide it directly through agency staff, the agency arranges with an organization having the required expertise to provide the assistance for it. This expert organization is the "third party." (The Medicaid relationship between the States and those receiving medical services is not a third party arrangement since the States are the class authorized to be assisted.) Of course the granting agency could provide grant funds to the State or local government to procure its own assistance. This is not the kind of third party-situation with which we were concerned.

In third party situations the question arises as to whether it is possible to make a grant to an organization that, while not a member of the class eligible to receive assistance directly from the Government, performs a function that helps deliver the Federal assistance to an eligible recipient. The argument that agencies may use grants in third party situations depends upon the view that such arrangements are not for the "direct benefit or use of the Federal Government" since third parties are used by agencies to pass on the benefits to recipients. This view is supported by the following excerpt from the legislative history:

"Subsection 4(2) reads, 'whenever an executive agency determines in a specific instance that the use of a contract is appropriate.' This subsection accommodates situations in which an agency determines that specific public needs can be satisfied best by using the procurement process. For example, subsection 4(2) would cover the two-step situation in which a federal agency may procure medicines which it then 'grants' to non-Federal hospitals. This subsection does not allow agencies to ignore sections 5 and 6. Compliance with the requirements of sections 4, 5, and 6 will necessitate deliberate and conscious agency determinations of the choice of instrument to be employed." S. Rep., id at 9.

This position in practice permits grants or cooperative agreements to be used in lieu of traditional procurements and may, in a number of situations, constitute a misuse of grants. However, OMB has been reluctant to come forth with firm guidelines on what would constitute justification for the choice of an assistance instrument. See draft "OMB Report on Federal Systems Management Pursuant to P.L. 95-224," January 14, 1980, at pages 25 and 34. As a result of OMB's position or lack of one--agencies have a choice among instruments in third party situations.

41 USC 503(1)

We believe the issue can be resolved--but should be resolved by OMB. In order to do so, it must be determined whether the "direct benefit or use of the Federal Government" language of section 4(1) of the FGCA Act is applicable to third parties who supply assistance, at the request of the Government, to the agency's statutory beneficiaries. In these situations, an organization is used to assist the Government to carry out its assistance function. Where this is the case, we think it could be argued that the Government is procuring a service for its own use since the provision of assistance as authorized by the program statutes is a governmental function. Assisting the Government to carry out its own functions is not grant "assistance" as contemplated by the FGCA, it is a procurement relationship. Accordingly, the rule may be stated that where the recipient of an award is not an organization that the Federal grantor is authorized to assist, but is merely being used to provide a service to another entity which is eligible for assistance, the proper instrument is a contract. In the context of the FGCA, there appear to be two relationships involved in "third party" situations: first, the contract with the organization that helps the Government provide assistance, and second, the grant or cooperative agreement that provides money, goods or services to those eligible to receive assistance.

The problem with reaching this result is the ambiguity raised by the legislative history on section 4(2) quoted above. The quoted language can be read as an understanding on the part of Congress that section 4(2) was necessary to

41 USC 503(2)

41 USC 503
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allow agencies to use procurement instruments in third party situations. However, this statement so cryptically throws the question back upon the basic framework of sections 4, 5, and 6. The source of this statement in the Committee report can be found in the hearings that the Senate conducted on the 1974 version of the bill (S. 3514, 93rd Congress) that eventually became the FGCA Act. Federal Grant and Cooperative Agreement Act Hearings on S. 3514, Before the Ad Hoc Subcommittee on Federal Procurement and the Subcommittee on Intergovernmental Relations of the Committee on Government Operations, 93d Cong. 105-107, 153-160 (1974). Pertinent excerpts from the hearing are attached. In the course of the hearing the question was raised as to whether it might not be possible to place various programs under any one of the three instruments. The Senators who conducted the hearing used the two step transaction described above in the Committee report to illustrate the problem. Each Senator agreed that two step transactions should be by contract and that if agencies used this provision to award grants or cooperative agreements, it would be contrary to their intent. It was in this light that it was suggested that section 4(1) because of its "direct benefit or use" language may not permit agencies to use a contract in two step situations. As a result, the Senators focused on Section 4(2) because they were not aware that Section 4(1) can be read as requiring a contract. Their comments on the matter reflect a concern that because of the wording of Section 4(2) which seems to give agencies discretion, their views might be overlooked after passage of the act. In this context, it is possible to see the ambiguities contained in the 1977 Senate Committee report language, which is similar to and the apparently comes from the Senate Committee Report on S. 3514, 93rd Congress. S. Rep. 93-1239 at 29.

Given this legislative background, it is possible to summarize congressional intent as follows: if the Act is interpreted as permitting agencies to use grants or cooperative agreements to acquire drugs which are in turn provided to a grantee, Section 4(2) should be understood as an expression of congressional intent that such arrangements should be contracts. Under such a reading, section 4(2) acts as a second line of defense. Accordingly, if the primary authority of Section 4(1) is read to cover the first part of a two step transaction, the intent of Congress is accomplished without resort to the vagaries of Section 4(2). We see no reason to prefer language in a Committee report that seems, when read in isolation, to require an anomalous result, when the language of the act can be read to carry out the basic intent of the statute. There seems very little difference between the two-step situation described in the Committee report where the Government acquires drugs to give to grantees and a situation where it, instead, pays a drug company to provide the drugs to the grantee. Either of these situations meets our definition of a third party situation.

In our recent decisions, Burgos & Associates, Inc., B-194140, 58 Comp. Gen. 785, September 13, 1979, and Bloomsbury West, Inc., B-194229, September 20, 1979, we concluded that both HEW and The Office of Minority Business Enterprise (OMBE) had authority to make grants to organizations that would provide technical assistance to other organizations.

Burgos and Bloomsbury did not go into a first-level analysis of the program authority, as distinguished from the Grant and Cooperative Agreement Act authority, for the use of a grant instrument. In the first case, Burgos, Executive Order No. 11625, October 13, 1971, which established OMBE, the grantor agency, clearly speaks of authority to provide assistance to public and private organizations so that they in turn may render technical and management assistance to minority business enterprises. The Appropriation act, Pub. L. No. 95-431, 92 Stat. 1032, specifically mentions that the funds appropriated are available for grants. However, the decision was satisfied, not on the above grounds, but because the decision to switch to a grant mechanism was authorized by the FGCA. 10/10/78

In the second case, Bloomsbury, the Office of Education is authorized to provide technical assistance to public schools. Section 2000c-2 of Title 20 of the United States Code provides:

"The Commissioner is authorized, upon the application of any school board, State, municipality, school district, or other governmental unit legally responsible for operating a public school or schools, to render technical assistance to such applicant in the preparation, adoption and implementation of plans for the desegregation of public schools. Such technical assistance may, among other activities, include making available to such agencies information regarding effective methods of coping with special educational problems occasioned by desegregation, and making available to such agencies personnel of the Office of Education or other persons specially equipped to advise and assist them in coping with such problems." (Emphasis added.)

There is no suggestion in this provision that technical assistance to school systems is the responsibility of anyone other than the Commissioner of Education, although of course he could contract with private persons to perform his duties for him. Also the provision does not state that the Office of Education is authorized to provide assistance to a public or private organization which in turn may provide technical assistance to the public schools, unlike the situation in the first case. In this instance, our decision construed the FGCA as enlarging an agency's authority to provide grant assistance. In Bloomsbury the absence of any analysis of how an assistance relationship can be found to be authorized by section 2000c-2 leaves it unclear as to what, if any, limit exists on an agency's choice of instruments.

As it stands, Bloomsbury, as well as OMB's position that it cannot resolve the third party problem, in effect adopt by default the argument that section 4(1) requires third party arrangements to be by grant or cooperative agreement with section 4(2) providing the discretionary authority to use a contract. We believe it would be appropriate, given OMB's

*All responsibilities under the act, to provide OMB with the substance of our contrary thinking concerning third party arrangements. We would also acknowledge that an interpretation making third party arrangements subject to section 4(1) of the Act is a matter for its discretion, in view of its authority to issue guidance.

Section 3(5) Exceptions

41 U.S.C. 502(5)

An audit report has raised a question concerning the interpretation of the exception for loans from the definition of grants or cooperative agreements in section 3(5) of the FGCA. See "Better Controls Needed over Cash Resources by the Department of Health, Education, and Welfare," FGMSD-80-6, B-164031. Similar questions may arise concerning the other exceptions in section 3(5) for direct Federal cash assistance to individuals, subsidies, loan guarantees and insurance.

The question raised in the audit report was whether three student loan programs can be called grants or whether they are excepted loans. Under the programs, the National Direct Student Loan Program (20 U.S.C. § 1087aa (1976) et seq.) the Health Professions Student Loan Program (42 U.S.C. § 294m (1976) et seq.), and the Nursing Student Loan Program (42 U.S.C. § 297a (1976) et seq.), HEW contributes money to a college or university fund established by the school to make loans to students. The Federal contributions are called "capital contributions," which are returnable to the Government beginning after a period fixed in the statutes. Repayments are called "capital distributions" and the Government shares in these at the ratio of its contribution to that of the school. However, the total contribution may not be recoverable because it may be diminished, depending on the program, by defaulted student loans, administrative expenses, including collection costs, and student loans cancelled for certain public service by the student.

In concluding that the programs are grant programs rather than loans to the schools for purposes of the FGCA, an HEW Office of General Counsel memorandum said:

"In reaching the conclusion that the payments under the three student loan programs are grants, made pursuant to agreements, I am aware that the statutes authorizing the three programs provide for a distribution to the Government and to the participating institution from each loan fund at the conclusion of the loan programs (NDSL--20 U.S.C. 1087ff; HPSL--42 U.S.C. 294c; NSL--42 U.S.C. 297e). Provision for distribution of the assets from the loan fund does not, however, alter the character of the relationship between the Government and the participating institution. That relationship, as noted above, is an assistance relationship governed by the terms of a grant agreement."

We agree. The HEW conclusion seems a reasonable application of the FGCA to HEW's authority. Our auditor's analysis of the transaction as a loan was based on the conclusion that in order to account for the funds outstanding and potentially recoverable by the Government, it would be necessary to treat the Federal contributions to the schools as loans. There is no reason why a "grant" should not be treated as a loan for accounting purpose if that approach is necessary to adequately account for Government funds and HEW is apparently willing to attempt to do so.

HEW's legal analysis is reached its conclusion without using an argument that may appear in later cases that even if the loan programs were loans in some part, they were not "only" loans. See, section 3(5) of the FGCA Act, quoted above, which suggests that if any of the excepted kinds of programs contains any element of non-excepted assistance, the program must use grant or cooperative agreement instruments.

Summary

Each agency's program authority must be analyzed to identify the type or types of relationships authorized and the circumstances under which each authorized relationship can be entered into without regard to the presence of specific words such as "grant" in their program legislation. Once authority is found, the legal instrument (contract, grant, or cooperative agreement) that fits the arrangement as contemplated must be used, using the definitions in the FGCA for guidance as to which instrument is appropriate.

In determining the extent of agency authority, usual rules of statutory interpretation apply. Where an agency has authority to enter into both a procurement and an assistance relationship to carry out the particular program, it has authority to exercise discretion in choosing which relationship to form in each particular case. However, we should communicate to OMB our view that where the agency is authorized to provide assistance only to a certain class of recipients, the funding of a third-party intermediary to provide the assistance to the authorized recipient of assistance should be by contract.

DERAL GRANT AND COOPERATIVE AGREEMENT ACT OF 1977
Compliance
Grant, etc. agreements y. procurement contracts

(2 digests)