
Chapter III

Framework of Relationships

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The Grant and Cooperative Agreement Act establishes criteria for the use of contracts, grants, and cooperative agreements so that these legal instruments reflect the underlying relationships between executive agencies and non-Federal parties. We considered in the previous section the implications of distinguishing assistance relationships as a class from procurement relationships without reference to the specific means the Act employs for making this distinction. As recommended by the Procurement Commission, the Act also distinguishes between different types of assistance relationships. For each relationship distinguished, the Act requires that a specific legal instrument be employed to reflect that relationship.

The framework of relationships thereby established is intended to provide a first step toward the development of a more consistent and effective set of practices for the administration of Federal assistance. Recognizing that it is only a first step, the Act mandates a 2-year comprehensive study of Federal assistance to be conducted by the Director of OMB. We therefore pose issues important to consider in this study.

Choice of Legal Instruments

The Procurement Commission examined the administration of different assistance programs by various agencies. It found that the enabling and appropriation statutes often are inconsistent in specifying the circumstances for using grants. Furthermore, the agencies' perceptions of what is required to effectively administer programs are often incompatible with the statutes' requirements. Agencies generally prefer to use grants for transactions that require little involvement or participation during performance. However, the statutes often require the use of grants for programs that the agencies believe require substantial agency participation during performance.

The Commission also found that some agencies use grants for procurement purposes and procurement contracts for assistance purposes.

The situation is further confused by the lack of any precise meaning for the terms "grant" or "grant-in-aid," which cover a range of transactions from the simple to the complex. The Procurement Commission sought ways to draw operationally significant distinctions between grant-type transactions. However, it found that on an operational level none of the usual distinctions, such as discretionary grant vs. mandatory grant, formula grant vs. project grant, or categorical grant vs. block grant, proved adequate. Similarly, it found distinctions based on factors such as cost-sharing or the type of recipient to be inadequate operational distinctions.

To bring greater consistency and effectiveness to the administration of Federal assistance, the Commission recommended distinguishing between three basic relationships and restricting the use of each legal instrument to one of these underlying relationships. The three basic relationships distinguished provide broad operational definitions for the roles and responsibilities of the executive agency and the non-Federal party. The Grant and Cooperative Agreement Act embodies this recommendation with one exception.

The first type of relationship is that of procurement. Here the "executive agency is ultimately responsible for assuring performance. The agency must therefore establish the specific requirements to be met, judge the acceptability of the product or service against those standards, monitor the work, and be involved to the extent necessary to assure timely and satisfactory performance. It has the right to unilaterally change the work and terminate it for default, if necessary. The Act requires that only **contracts** be used for procurement relationships.

The second type of relationship is an assistance relationship where the executive agency has

little or no need for involvement during performance of the activity assisted. The agency's responsibility lies in defining the scope of the work and in such monitoring as may be necessary to assure that the work is performed within the agreed-upon scope. It is the recipient who ultimately is responsible for assuring performance and expending funds within this agreed-upon scope, as in a basic research grant. The Act requires that a type of **grant** be used to reflect this relationship. The scope of the work to be performed may be either broadly or narrowly defined. The central point is that the ultimate responsibility for assuring performance lies with the recipient, not the agency. Although grants currently account for the great bulk of assistance relationships, it should be noted that existing grants frequently do not conform to this description.

The third type of relationship also is an assistance relationship, but one in which the agency is substantially involved during performance. In this case, responsibility for assuring performance is shared by the agency and the recipient. Correspondingly, defining the performance roles of the respective parties also is a shared responsibility. Examples of this type of relationship are provided in large, project-type assistance awards where executive agencies are actively involved during performance because of technical or managerial complexity, a need for coordination with other federally supported projects, or a need for involvement to launch a new activity. The Act requires that a type of **cooperative agreement** be used to reflect these relationships.

One exception to these three basic relationships should be noted. Section 4(2) of the Act provides that a type of procurement contract shall be used in specific instances where an executive agency determines it would be appropriate. Thus, a type of procurement contract could be used for an assistance relationship in specific instances. For example, in a two-step transaction, a Federal agency could first obtain medicines through a procurement contract, and then provide the medicines to non-Federal hospitals through grants.

¹*Report of the Committee on Governmental Affairs*, U.S. Senate, S.431, Federal Grant and Cooperative Act of 1977, 95th Congress, U.S. Government Printing Office, Washington, D. C., 1977, p. 9.

Table 1 presents a comparison of the three basic relationships and the legal instruments used to reflect them. It describes the Federal and non-Federal roles, responsibilities, involvement, and rights in both procurement and alternative assistance relationships. All of these alternative relationships can be used within a single program. This point is well illustrated by the hypothetical scenario constructed in appendix B.

The Act excludes from the definition of grant or cooperative agreement any agreement which would provide only direct Federal cash assistance to individuals, a subsidy, a loan, a loan guarantee, or insurance.

Use of Cooperative Agreements

Federal assistance often has been equated with the provision of financial assistance alone. However, the cooperative agreement reflects a relationship where substantial agency involvement during performance of the assisted activity is an integral part of the assistance.

Before passage of the Grant and Cooperative Agreement Act, DOE already had the authority to use cooperative agreements. Although DOE has little operating experience with this important new instrument, it is instructive to briefly consider the approach taken toward its use. The following excerpt from the Energy Research and Development Administration (ERDA) *Federal Assistance Manual* emphasizes the central role of negotiation in arriving at a mutual understanding of the roles and responsibilities of the parties to a cooperative agreement:

. . . . under a cooperative agreement it is the partner/joint venture relationship itself which in each case is the subject of negotiation. Rather than having a host of non-negotiable terms and conditions, the rights of the parties are the subject of negotiation. The object of the negotiation of a cooperative agreement is to establish a "business agreement" which carefully defines the performance responsibilities of the parties, and describes the proper allocation of rights appropriate to the parties involvement and investment.²

²U.S. Energy Research and Development Administration, *Federal Assistance Manual* (fifth draft), March 1977, p. 503.

Table 1.—A Context for Federal Transactions*

	Procurement contract	Cooperative agreement	Grant
Federal role	"Purchaser"	"Partner" or "active supporter"	"Patron" or "passive supporter"
Primary responsibility	Federal	Shared	Recipient
Type of Federal involvement	Whatever involvement is necessary, consistent with Federal procurement regulations	Substantial management or technical involvement during performance on specific decisions, standards, provision of guidance or technical assistance, collaboration	Federal delegation or devolution of decisions and approvals
Right to redirect or change within scope	Unilateral Federal right to change or redirect	Recipient right to change or redirect, subject to Federal advice, assistance, persuasion, or concurrence	Recipient right to change or redirect

● Modified version of table in: Robert D. Newton, "Contracting Under Grants: The Need to Define the Federal Role," *Public Contract Law Journal*/ 9:1 (June 1977), pp. 35-44.

As in a joint venture between two private parties, the whole range of factors affecting the venture and its outcome are the subject of negotiation. These include performance responsibilities, cost-sharing and cost recoupment, data and patent rights, termination rights and procedures, cost-accounting, subcontracting, and liability and indemnification. Although cost-sharing is a common feature of cooperative agreements, as it is with grants, it should be noted that the criteria established by the Act for the use of these instruments does not require cost-sharing.

Much attention has been given to the question of patent rights for the products of Government-supported R&D, and there is as yet no uniform, Government-wide patent policy. The approach reflected here is to treat patent rights merely as one among many items to be negotiated between an agency and a non-Federal party. Such flexibility is consistent with the fact that the public benefits from the support of R&D come only from the widespread deployment of the products of that R&D in the civil sector. Since experience clearly indicates that there is no assurance of realizing such benefits from Federal support of R&D, it is not apparent that the attention given to patents is fully warranted. In part, this attention may derive from the focus on utilizing federally supported R&D, as opposed to fostering technological innovation in the civil sector. In the former perspective, the R&D is perceived as something of public value. In the latter perspective, public benefits are perceived as deriving from the widespread deployment of socially beneficial technol-

ogies, and Federal ownership rights are no more important than a number of other issues to be negotiated in seeking an accommodation of public and private interests. However, all agencies do not have the statutory latitude to deal with patent rights in this manner. The explicit focus on Federal assistance established by the Grant and Cooperative Agreement Act may provide an opportunity for Congress to reconsider this question in the light of assistance objectives.

Flexibility in negotiating such matters as cost-sharing and data and patent rights presupposes a clear understanding on the part of an executive agency of its objectives and priorities. It further presupposes an understanding of the risks and rewards for the non-Federal parties. Such factors provide the necessary context for an agency to negotiate the terms of a joint-venture relationship.

In testimony before Congress on this legislation, the Department of Health, Education, and Welfare objected that the cooperative agreement is unnecessary since any degree of Federal agency involvement in an assistance relationship could be assured simply by adding the necessary provisions onto a grant.³ However, it should be

³Hon. John R. Ottina, in Hearings before the Ad Hoc Subcommittee on Federal procurement and the Subcommittee on Intergovernmental Relations of the Committee on Government Operations, U.S. Senate, on S.3514, Federal Grant and Cooperative Agreement Act of 1974, 93d Congress, U.S. Government Printing Office, Washington, D. C., 1974, p. 64.

emphasized that the principal motivation in establishing the Government-wide authority to use cooperative agreements is not some unique property inherent in this legal instrument as opposed to a grant or contract. Rather, the Procurement Commission believed that assistance relationships involving substantial agency involvement constituted an operationally significant class of relationships which should be distinguished by a separate legal instrument. It was felt that formally recognizing this class of relationships would protect the integrity of the procurement contract, on the one hand, and the traditional grant, on the other. Both instruments, especially the grant, were being undermined by their use in inappropriate circumstances.

Coordinating the activities of the various institutions that need to be involved in technological innovation is likely to provide much of the basis for the substantial Federal involvement that characterizes the cooperative agreement. Where these institutional linkages are already in place, and there is a tradition of drawing upon R&D to better meet user needs, technological innovation proceeds without direct Federal support or stimulation, so long as the necessary incentives are not substantially altered. Such institutional environments already draw effectively upon the science and technology knowledge base. In these cases, the Federal Government can ensure the satisfaction of unmet civil sector needs through directing adequate resources to the enrichment and expansion of that knowledge base. However, in the absence of the necessary linkages between users, suppliers, and R&D performers, technological innovation in the civil sector cannot proceed.

This situation is fundamentally different than in procurement relationships. The Federal Government has very effectively utilized procurement relationships to draw upon a wide range of R&D performing institutions —Government-owned, contractor-operated laboratories; universities; nonprofit institutions; and commercial firms. However, fostering technological innovation requires more than matching technological opportunities to user needs. It also requires the commitment of resources. Without engaging those non-Federal parties who have the incentive and

the resources necessary for making technological change actually happen, there is no purposeful fostering of such change. Thus, R&D-performing institutions must be effectively linked to those institutions that actually produce and deliver goods and services, whether in the public or private sector, if the assistance of innovation is to be effective. Forging the necessary linkages where they do not exist is likely to require substantial involvement on the part of executive agencies. A hypothetical example of such involvement, to aggregate a local government market, is presented in appendix B.

OMB Study

The effectiveness of the Grant and Cooperative Agreement Act in stimulating technological innovation depends entirely on how well it is implemented. Consequently, the OMB study of Federal assistance is of central importance.

Purposes of the study are to develop a better understanding of alternative means of implementing Federal assistance programs and determine the feasibility of developing a comprehensive system of guidance for such programs. To the extent practicable, the study is to involve representatives of the executive agencies, the Congress, the General Accounting Office, State and local governments, other recipients, and interested members of the public.

The Procurement Commission already has offered a number of suggestions on how this study might proceed, as a means of improving the management of Federal assistance. The Commission proposed focusing attention on generalizing management methods applicable to whole categories of assistance programs.⁴ This proposed focus contrasts with the current focus on achieving the objectives of hundreds of individual programs. The Commission believed such generalizations would contribute not only to greater simplicity and consistency in the administration of Federal assistance, but to greater program effectiveness as well. In developing such generaliza-

⁴*Report of Commission on Government Procurement*, op. cit., Vol. 3, Part F, pp. 168-171.

tions, the Commission recommended considering the whole range of program inputs which determine or influence program outputs. These inputs include both formal and informal interactions between Federal agencies and non-Federal parties before, during, and after the activity assisted. This empirical approach would reflect not only the state of current practice, but indicate opportunities for improvement as well.

Although the approach of the present report has been primarily at the conceptual, rather than the descriptive level, it is also aimed at defining opportunities for improvements in current practice. The following issues are important to consider in the OMB study:

1. **Program Categories.** -In civilian-oriented R&D programs, it is important to distinguish between categories of programs aimed primarily at generating new knowledge, on the one hand, and fostering technological innovation, on the other. Distinguishing the latter as a separate category would focus attention on the important differences between innovation goals and R&D goals. It also would focus attention on the administrative practices most effective in achieving innovation goals.
2. **Non-Federal Involvement.** -To help ensure that the innovation process, once initiated, continues beyond the stages of Federal support, non-Federal users, suppliers, and other interested parties should be involved in the development of a programmatic strategy. Guidelines for their effective involvement need to be developed to ensure that information is developed about risks, costs, markets, and the capacity and incentive of non-Federal participants to carry through with the innovation process to the point where widespread public benefits ensue.
3. **Alternative Approaches.** -The involvement of non-Federal parties also helps to ensure that alternative approaches are considered in defining a basis for effective Federal/non-Federal cooperation in achieving a common objective. Thus, for example, if the principal barrier to bringing about

a desired innovation is perceived by non-Federal decisionmakers as being nontechnical in nature, Federal support for developing the technology would generally be ineffective in stimulating the desired innovation. If the nontechnical barrier were removed, Federal support for developing the technology might become unnecessary. The point is that the full range of alternative approaches toward attaining a desired innovation are far more likely to be identified and adequately assessed with non-Federal participation.

The formal methods used for evaluating alternative approaches in major systems acquisitions provide a provocative analogy in this regards. Obviously, any formal methods for evaluating alternative approaches toward meeting assistance objectives would have to be specifically developed to meet the unique needs of cooperative Federal/non-Federal efforts. Nonetheless, their consideration emphasizes the Federal responsibility in managing a strategic approach for making technological change actually happen.

4. **Competitive Assistance Awards.** -The need for a strategic approach also is apparent in considering competitive assistance awards to commercial firms along the lines discussed in the previous section. Both DOE and the National Science Foundation have developed procedures for making assistance awards on a competitive basis through program opportunity notices, program research and development announcements, and program solicitations.⁶ These methods are suitable for selecting among alternative proposals on the basis of their scientific or technical merit. However, for fostering the adoption and widespread

⁵*Report of Commission on Government Procurement*, op. cit., Vol. 2, Part C.

⁶Energy Research and Development Administration, *Federal Assistance Manual* (sixth draft), April 1977, Sections 211 and 301; National Science Foundation, *Grant Policy Manual*, Section 202, FR 42:20, January 1977.

diffusion of a new technology, the use of such methods presumes that Federal officials possess the knowledge of market factors that govern a technology's rate of adoption and diffusion. Since this generally would not be the case, there is a need to develop procedures for making competitive assistance awards in which non-Federal parties who do possess this knowledge would be involved in setting the terms for the awards. There is an obvious need for executive agencies to assure that the terms for such openly competitive awards be set in a public manner with all important stakeholders represented. The point to be emphasized here is that it would be easier to strike an adequate balance between equity and effectiveness if such awards were an integral part of a recognized, well-articulated strategy for achieving a desired objective.

5. **Negotiating Cooperative Agreements.**—The guidelines established for negotiating cooperative agreements will set

the framework within which broad public interests and the particular interests of non-Federal partners in a cooperative agreement can be accommodated. Negotiating prerequisites for executive agencies are: 1) a clear understanding of public policy objectives; 2) the steps necessary to attain those objectives; 3) the risks and awards involved for the non-Federal party; and 4) how a particular transaction fits into the larger programmatic strategy. Within this context, the need for flexibility in negotiating such matters as cost-sharing and data and patent rights should be carefully assessed.

6. **Personnel Policy.**—Effective implementation of the Grant and Cooperative Agreement Act depends heavily on the capabilities and attitudes of Federal personnel. It is therefore essential to have adequate incentives for Federal personnel to become effectively engaged in cooperative efforts with non-Federal parties to stimulate technological innovation.