

ARTICLES

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FEDERAL GRANT AND CONTRACT NEWS FOR NONPROFITS - AUGUST 2014

As is an annual tradition in Washington, the month of August is relatively quiet. However, the Court of Federal Claims (COFC) did issue a recent decision that provided guidance on how to distinguish a grant or cooperative agreement from a contract. The opinion furthers the discussion of what tools nonprofits can use to determine whether their subawards are contracts or grants/cooperative agreements, each requiring a different set of provisions and a different standard of administrative oversight.

On July 25, 2014, the Court of Federal Claims issued its decision in *Jay Hymas d/b/a Dosmen Farms v. The United States*. In this case, the plaintiff protested the failure of the Fish and Wildlife Service (FWS) to award a cooperative farming agreement, arguing that the failure to award violated the Competition in Contracting Act (CICA), the Federal Grant and Cooperative Agreement Act (FGCAA), and the Administrative Procedure Act. The government moved to dismiss the case by arguing that the COFC did not have jurisdiction under the Tucker Act [28 U.S.C. § 1491(b)(1)] to review the FWS's use of cooperative agreements to promote wildlife conservation.

The government moved to dismiss the case for lack of jurisdiction on five bases, all of which the COFC rejected. In sum, the government argued that:

- . The cooperative agreement at issue was not a "procurement" as defined by the U.S. Court of Appeals for the Federal Circuit, and therefore the jurisdiction could not attach via the Tucker Act;
- . The FGCAA did not govern the cooperative agreements at issue because the statute specifically precluded such application;
- . The National Wildlife Refuge System Improvement Act, one of the governing statutes of the FWS, specifically authorizes the FWS to enter into cooperative agreements (rather than procurements) to conduct refuge projects, thereby rendering the Tucker Act and the accompanying COFC jurisdiction inapplicable;
- . Prior case law [specifically *360Training.com, Inc. v. United States*, 104 Fed. Cl. 575 (2012)] neither applied nor mandated that cooperative agreements were akin to procurements; and
- . The cooperative agreements at issue have since been rendered moot.

In the court's lengthy opinion, Judge Susan Braden discarded the government's position on each point and found in favor of the plaintiff.

Judge Braden's decision further refines and guides nonprofits on how to classify cooperative agreements/grants and procurements/contracts, particularly those nonprofits who are large grantees that routinely issue subawards under those grant agreements. Judge Braden held that the FWS "use[d] cooperative farming agreements to obtain the services of farmer-cooperators to feed migratory birds and wildlife on the Refuges. In the court's judgment, that activity is a procurement." A distinguishing feature of a procurement contract was that the agreement was "used to obtain services from third-parties, not to provide assistance to them." "Providing assistance" was a characteristic of a cooperative agreement. To determine what the assistance was for, the court first examined who the intended beneficiaries were. In this case, Judge Braden found that "the intended beneficiaries are the migratory birds and wildlife on the refuges. The farmer-cooperators are intermediaries [and t]he Administrative Record demonstrates that the Service contracted with farmer-cooperators, not to benefit them financially, but to obtain their services to provide food for migratory birds and wildlife, in exchange for the farmers' personal use of public-owned lands." Given that the agreements between the FWS and the farmers were procurements, they were, in fact, subject to the Tucker Act, and the jurisdiction of the COFC was proper.

AUTHORS

Dismas Locaria
Melanie Jones Totman
Jeffrey S. Tenenbaum

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Under the court's most recent guidance, nonprofits issuing subawards should document who the intended beneficiaries of that procurement are to determine whether the nonprofit is (i) obtaining services from the beneficiary (necessitating a contract), or (ii) providing assistance to the beneficiary (necessitating a cooperative agreement or grant). Nonprofits must keep these distinctions top of mind in their long-term planning for a particular award. For example, contracts require "full and open competition" and a solicitation that details the work and evaluation process, whereas subgrants have no such requirements.

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For more information, please contact [Dismas Locaria](#), [Melanie Jones Totman](#), or [Jeffrey Tenenbaum](#).

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