Legal Standards Governing Agency "Choice of Instrument" Determinations in the "Third Party Situation"

by Robert Nichols[1]

This Paper explores the legal standards that govern choice-of-instrument decisions—that is, whether a Federal agency must or should use an acquisition instrument (*i.e.*, a procurement contract) or an assistance instrument (*i.e.*, a grant or cooperative agreement) for a transaction with a third party to assist in carrying out a statutorily-authorized program. In particular, it surveys the law in this area as it pertains to a particular variety of transaction referred to as the "third party situation," when an agency provides funding to the third-party intermediary (*i.e.*, not the intended recipient of Federal assistance) to help the agency in implementing its program.

- First, the Paper sets forth the relevant provisions of the Federal Grant and Cooperative Agreement Act of 1977 (FGCAA) and its legislative history.

- Second, it covers the 1978 guidance issued by the Office of Management and Budget (OMB) to agencies implementing the FGCAA.

- Third, it details guidance and bid protest decisions from the Government Accountability Office (GAO) applying the FGCAA to choice-of-instrument determinations involving the "third party situation."

- Finally, the Paper explores in detail two recent decisions by the U.S. Court of Appeals for the Federal Circuit applying the FGCAA to specific agency choice-of-instrument determinations.

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Read together, these sources of law establish clear standards for choice-of-instrument determinations—at least in the classic "third party situation." However, as recent case law shows, there are situations other than the "classic" situation where the choice of instruments is not clear-cut. This paper seeks to identify the reasons for the ambiguity and discuss the different ways judges have analyzed it in order to help illuminate the legal underpinnings of the brewing USAID debate.

I. The FGCAA of 1977 and Its Legislative History

In 1972, the congressionally-mandated Commission on Government Procurement recommended the enactment of legislation to clarify when to use procurement contracts versus assistance agreements.[2] Based on the Commission's findings, the Senate Committee on Governmental Affairs (now the Senate Committee on Homeland Security and Governmental Affairs) observed in a 1977 report:

> No uniform statutory guideline exists to express the sense of Congress on when executive agencies should use either grants, cooperative agreements or procurement contracts. Failure to distinguish between procurement and assistance relationships has led to both the inappropriate use of grants to avoid the requirements of the procurement system, and to unnecessary red tape and administrative requirements in grants.[3]

Congress enacted the FGCAA[4] the next year to "prescribe criteria for executive agencies in selecting appropriate legal instruments to achieve (A) uniformity in their use by executive agencies; (B) a clear definition of the relationships they reflect; and (C) a better understanding of the responsibilities of the parties to them."[5] It also wished to "promote increased

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[2] *See generally* 3 Report of the Commission on Government Procurement, chs. 1–3 (Dec. 31, 1972).

[3] S. Rep. No. 95-449, at 6 (1977).

[4] Pub. L. 95-224, 92 Stat. 3 (Feb. 3, 1978).

[5] 31 U.S.C. § 6301(2)(b), as amended by Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 1004.

discipline in selecting and using procurement contracts, grant agreements, and cooperative agreements, maximize competition in making procurement contracts, and encourage competition in making grants and cooperative agreements."[6]

The statute contains three sections defining the instruments and setting forth criteria that agencies must apply in choosing among them. Section 4, codified at 31 U.S.C. § 6303, governs the use of procurement contracts and states:

> [a]n executive agency shall use a procurement contract . . . when (1) the principal purpose of the instrument is to acquire . . . property or services for the direct benefit or use of the United States Government; or (2) the agency decides in a specific instance that the use of a procurement contract is appropriate.[7]

Section 5, codified at 31 U.S.C. § 6304, governs the use of grants and states:

> [a]n executive agency shall use a grant agreement . . . when (1) the principal purpose of the relationship is to transfer a thing of value to the . . . recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring . . . property or services for the direct benefit or use of the United States Government; and (2) substantial involvement is not expected between the executive agency and . . . recipient when carrying out the activity contemplated in the agreement.[8]

Section 6, codified at 31 U.S.C. § 6305, governs the use of cooperative agreements and is identical to Section 5, except for subsection (2):

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[6] *Id*.

[7] *Id*. § 6303.

[8] *Id*. § 6304.

> [a]n executive agency shall use a cooperative agreement . . . when (1) the principal purpose of the relationship is to transfer a thing of value to the . . . recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring . . . property or services for the direct benefit or use of the United States Government; and (2) substantial involvement is expected between the executive agency and the . . . recipient when carrying out the activity contemplated in the agreement.[9]

In 1981, the Senate amended the FGCAA in ways irrelevant to this analysis, but the legislative history of that amendment *is* relevant here.[10] Senate Report No. 97-180, published by the Senate Committee on Governmental Affairs, stated in relevant part:

> The choice of instrument for an intermediary relationship depends solely on the principal federal purpose in the relationship with the intermediary. The fact that the product or service produced by the intermediary may benefit another party is irrelevant. What is important is whether the federal government's principal purpose is to acquire the intermediary's services, which may happen to take the form of producing a product or carrying out a service that is then delivered to an assistance recipient, or if the government's principal purpose is to assist the intermediary to do the same thing. Where the recipient of an award is not receiving assistance from the federal agency but is merely used to provide a service to another entity which is eligible for assistance, the proper instrument is a procurement contract.[11]

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[9] *Id*. § 6305.

[10] *See* Pub. L. 97-162, 96 Stat. 23 (Apr. 1, 1982).

[11] S. Rep. No. 97-180, at 3 (1981).

II. OMB Guidance to Executive Agencies Implementing the FGCAA

In 1978, OMB issued guidelines interpreting the FGCAA "to promote consistent and efficient use of procurement contracts, grant agreements, and cooperative agreements . . . " (OMB Guidance).[12] The guidance provides that an agency choose the appropriate instrument by applying the FGCAA criteria to the *primary purpose of the transaction.* 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.

The OMB Guidance labels this latter situation—when an agency procures goods or services to assist in performing its statutory mission and programs—as the "two-step situation" because the agency is hiring another entity to produce something for its own use. OMB indicates that the Senate drafters of the FGCAA specifically envisioned this situation as requiring the use of a procurement contract. The OMB Guidance states, "[i]n most cases, agencies will have no trouble distinguishing between procurement and assistance." However, "[w]hen such determinations are hard to make, the agency has discretion and should be guided by its mission."[13]

III. GAO's Interpretation and Application of the FGCAA

For the past 36 years, GAO has treated choice-of-instrument decisions under the FGCAA as a legal issue rather than a policy issue. GAO's interpretation of the statute and of the OMB Guidance is found in GAO's

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[12] OMB Guidance to Agencies for Implementing the Federal Grant and Cooperative Agreement Act, 43 Fed. Reg. 36860-61 (Aug. 18, 1978).

[13] *Id*.

internal memorandum, a publicly-issued report, bid protest case law, and the *GAO Redbook.*[14] This section summarizes these sources.

A. The GAO Memorandum

In 1980, the GAO General Counsel issued an internal memorandum (GAO Memorandum) interpreting the FGCAA and the OMB Guidance.[15] The General Counsel's analysis went into great detail about the "two-step situation," which he referred to as the "third party situation." It provided an example "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 GAO Memorandum interprets Section 4(1) of the statute, 31 U.S.C. § 6303(1), and the OMB Guidance as directing an agency to use a procurement contract, rather than a grant or cooperative agreement, in this "third party situation." This is because the third-party intermediary is "not a member of the class eligible to receive assistance directly from the Government," and "the principal purpose of the instrument is to acquire . . . property or services for the direct benefit or use of the United States Government." That is, the agency "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."[16]

The GAO Memorandum next observed subsection 4(2) of the statute, 31 U.S.C. § 6303(1), and stated that an agency shall use a procurement

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[14] *Principles of Federal Appropriations Law*: Third Ed., Vol, II, Ch. 10, GAO-06-382SP, Feb. 1, 2006. The *Red Book* is GAO's view on how Congress has exercised its constitutional power of the purse, as well as GAO's role in ensuring that agencies comply with appropriations law. GAO publishes the *Red Book* as a "teaching manual" that describes existing authorities; it is not an independent source of legal authority.

[15] Interpretation of Federal Grant and Cooperative Agreement Act of 1977, B-196872 O.M. (Mar. 12, 1980).

[16] *Id.*

contract when "the agency decides in a specific instance that the use of a procurement contract is appropriate."[17] The GAO General Counsel considered whether this language affords an agency discretion *not to use a procurement contract* when it deems a grant or cooperative agreement to be more appropriate to the circumstances. He resolved this question by reference to the legislative history of the statute, specifically the Committee report from the hearings that the Senate conducted for the 1974 version of the bill (S. 3514, 93rd Congress):

> 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 the 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. . . .
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> 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.[18]

Thus, the GAO Memorandum confirmed Congress' intent that an agency must use a procurement contract when it transacts with a third party, that the third party is not itself eligible for the Federal assistance, and the principal purpose of the instrument is to have the third party provide the

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[17] 31 U.S.C. § 6303.

[18] B-196872 O.M. (*citing* 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, Cong. 105-107, 158-160 (1974)).

goods or services to the agency or to an authorized recipient on the agency's behalf.[19]

B. The GAO Report

Shortly thereafter, GAO's Comptroller General published a report entitled *Agencies Need Better Guidance for Choosing Among Contracts, Grants, and Cooperative Agreements* (GAO Report).[20] The Report criticized the OMB Guidance as "vague and incomplete."[21] It stated, "In analyzing the act and its history, and after frequent discussions with OMB and congressional staff, we have developed an interpretation that we believe yields results consistent with congressional purposes."[22]

The Comptroller General opined on the agency's authority to use assistance agreements:

> only when an agency has statutory authority to support or stimulate someone else can it use a grant or cooperative agreement, and then, only for the recipients and purposes authorized. This constitutes the scope of the responsibilities. Basically, except where this kind of authority is present, the agency is responsible for performing all other actions itself or through procurement contract and other arrangements authorized by law.[23]

The Report observed that an analysis by each agency of its program legislation is an essential first step in determining which instrument it chooses. Such an analysis often will include key information—*i.e.*, whether the agency is to conduct a program itself or help someone else perform the activity, determine who are the eligible recipients, and what the funds can be used for—that will ease the task of choosing between procurement and

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[19] *Id*. (*citing* S. Rep. 95-449 p. 9).

[20] GGD-81-88 (Sep. 4, 1981).

[21] *Id*. at 7.
[22] *Id*. at 8.
[23] *Id*. at 11.

assistance. The Report also addressed the degree of discretion afforded an agency in choosing among instruments in light of the FGCAA:

> Although an analysis of program authorizations to determine what type of relationship the Congress intended should resolve many of the current problems in selecting instruments, there are authorizations which permit agencies to exercise broad discretion in designing relationships to achieve particular objectives. Therefore, if in reviewing its enabling legislation an agency determines that its authorization is broad, it then becomes necessary to determine which of the instruments authorized by the [FGCAA] most closely match the agency's purpose in a proposed transaction.
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> [W]here a 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 [FGCAA] in their choice of instruments.[24]

Relevant to the analysis of this Paper, the Report specifically focused on Congress' intent regarding the "third party situation," stating:

> Our interpretation of the act is that the choice of instrument for an intermediary relationship depends solely on the Federal purpose in the relationship with the intermediary since it is the recipient of the Federal award. The fact that the product or service produced by the intermediary pursuant to the Federal award may flow to and thus benefit another party is irrelevant. What is important is whether the Federal Government's

[24] *Id*. at 21-22.

> purpose as defined by program legislation is to acquire the intermediary's services, which happen to take the form of producing the product or carrying out the service that is then delivered to the assistance recipient, or if the Government's purpose is to assist the intermediary to do the same thing. In other words, where the recipient of an award is not an organization that the Federal agency is authorized to assist, but is merely being used to provide a service to another entity assistance, the proper instrument is a procurement contract.[25]

C. GAO Bid Protests

Moreover, since 1982, GAO declared that it "will review the propriety of assistance awards when . . . an agency is using a grant or cooperative agreement to avoid statutory and regulatory requirements for competition." Its first review following this declaration came in 61 Comp. Gen. 637 (1982). In that case, GAO considered whether a transaction by the Department of Housing and Urban Development (HUD) with an nonprofit organization should use an assistance agreement or a procurement contract. GAO found that the principal purpose of HUD's transaction was to hire the nonprofit organization to provide technical assistance to certain block grant recipients, so the transaction must be treated as a procurement contract.

Since then, several GAO bid protest decisions have found several instances of agencies appropriately selecting grants and cooperative agreements. However, GAO has found these instruments to be improper where the transaction involves the "third party situation."

- In 67 Comp. Gen. 13 (1987), *aff'd upon reconsideration*, B-227084.6, Dec. 19, 1988, GAO found that the Maritime Administration should have used a procurement contract rather than an assistance agreement for a transaction for the operation of research and training programs, because this outsourced operation directly benefited the agency in performing its statutory duty.

[25] *Id*. at 10-11.

- In B-257430, Sept. 12, 1994, GAO ruled that the Office of Personnel Management should have used a procurement contract to obtain survey services, because it directly benefited from the services by providing assistance in performing the agency's statutory duty.

- In B-262110, Mar. 19, 1997, GAO determined that the Environmental Protection Agency had improperly used a cooperative agreement to acquire conference support services; a procurement contract was required because the support services were a direct benefit to the agency.

D. The GAO Redbook

Finally, in 2006, GAO summarized its interpretation of the FGCAA in the third edition of its *GAO Red Book*. That publication states that the FGCAA requires agencies to consider the principal purpose of each transaction as the "basic criterion" in determining whether to use a procurement contract or an assistance arrangement:

> If the federal agency's primary purpose is to acquire goods or services for the direct benefit or use of the government, then a procurement contract must be used. On the other hand, the act calls for use of a grant or a cooperative agreement when the agency's primary purpose is to provide assistance for the recipient to use in order to accomplish a public objective authorized by law. Thus, procurement contracts differ from either grants or cooperative agreements in terms of their basic purpose.[26]

The *GAO Redbook* cites the 1980 GAO Memorandum and 1981 Senate hearing for its application of the FGCAA to the "third party situation":

> The agency's relationship with the intermediary should normally be a procurement contract if the intermediary is not itself a member of a class

[26] *Id*. at 10-15.

> eligible to receive assistance from the government. In other words, if an agency program contemplates provision of technical advice or services to a specified group of recipients, the agency may provide the advice or services itself or hire an intermediary to do it for the agency. In that case, the proper vehicle to fund the intermediary is a procurement contract. The agency is "buying" the services of the intermediary for its own purposes, to relieve the agency of the need to provide the advice or services with its own staff. Thus, it is acquiring the services for "the direct benefit or use of the United States Government," which mandates the use of a procurement contract under the Federal Grant and Cooperative Agreement Act.[27]

In contrast, the *GAO Redbook* recognizes that grants and cooperative agreements may be used where a program purpose "contemplates support to certain types of intermediaries to provide consultation or other specified services to third parties."[28] An example of this can be seen in B-207112, 61 Comp. Gen. 428 (1982). In that case, GAO observed that the U.S. Department of Energy had properly selected a cooperative agreement to fund a research project pursuant to the Solar Energy Research, Development, and Demonstration Act of 1974 (Solar Energy Act).[29] The use of a cooperative agreement was appropriate because the research would directly benefit the government, but the transaction was with the type of organization intended to benefit from the funding of the Solar Research Act.

IV. Recent Federal Circuit Decisions Interpreting and Applying the FGCAA

Two recent cases decided by the Court of Appeals for the Federal Circuit have confirmed the proper treatment of the "third party situation."

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[27] *Id*. at 10-19, 10-20 (emphasis added).

[28] *Id*. at 10-20.

[29] Pub. L. 93-473, 88 Stat. 1431 (1976).

A. The *CMS* Case

The first case is *CMS Contract Mgmt. Servs. v. United States*.[30] At issue was whether the decision by the Department of Housing and Urban Development (HUD) to use cooperative agreements, rather than procurement contracts, was permissible for a transaction with a third-party intermediary to assist in flowing Section 8 Housing Program funds to the intended beneficiary. HUD chose to use cooperative agreements because of the public benefit of the Section 8 program—and also believing that use of cooperative agreements would permissibly avoid full and open competition and application of the Federal Acquisition Regulation. As described below, HUD ultimately was found to have made the wrong choice of instrument, but not before three different reviewing bodies reached divergent decisions.

1. Background

The Housing Act of 1937 authorized HUD to provide rental subsidies to low-income tenants of designated housing projects. The statute, as amended, allowed HUD to enter into housing assistance program contracts (HAP Contracts) directly with owners of the housing projects as a means of conveying the subsidies. Pursuant to this authority, HUD entered approximately 21,000 HAP Contracts directly with the owners of housing projects.

In 1974, Congress authorized HUD to begin utilizing municipal public housing agencies (PHAs) as intermediaries to assist in implementing the Section 8 Program. Pursuant to this authority, HUD entered into annual contributions contracts (ACCs) with the PHAs, and the PHAs in turn entered into the HAP Contracts directly with project owners. This intermediary relationship assisted HUD in providing the Section 8 subsidies for the benefit of the low-income tenants.

By 1997, HUD was administering *both* the 21,000 HAP Contracts and the ACC Contracts with the PHAs, but had suffered budgetary and staffing cuts that impeded its internal capabilities. Congress authorized HUD to outsource the administration of the HAP Contracts in order to release HUD staff from those duties that only the government can perform and to increase accountability for subsidy payments. In 1999, HUD issued a solicitation for

[30] 745 F.3d 1379 (Fed. Cir. 2014), *cert. denied*, 135 S. Ct. 1842 (2015).

contract administration services and dubbed the role as "Performance Based Contract Administrators" (PBCAs). HUD chose procurement contracts as the instrument for the transactions; it offered an administrative fee and an incentive fee tied to performance and dubbed the instruments "performance based annual contribution contracts" (PBACCs). HUD awarded 37 PBACCs to PBCAs to administer the 21,000 HAP Contracts.

In 2011, HUD issued a new PBACC solicitation to re-compete the PBACCs for the purpose of ensuring it was receiving the best value from PBCAs. This time, HUD awarded PBACCs to fewer PBCAs that could cover a broader geographic region. Several disappointed offerors protested the award decisions to GAO. HUD sidestepped these protests by notifying GAO that it would terminate the awards and take corrective action.

In 2012, HUD issued a replacement PBACC solicitation with a nearly-identical scope of work to the 2011 solicitation, designating cooperative agreements rather than procurement contracts as the instrument for the transaction, and restricting the competition to selected offerors. The excluded offerors filed a new round of protests at GAO to challenge HUD's choice of instrument and their exclusion from the competition. This time HUD defended its decisions.

HUD argued to GAO that the Housing Act and Section 8 Program authorized it to use assistance agreements to fulfill its mission of "address[ing] the shortage of housing affordable to low-income families." According to HUD, this specific authorization obviated the need to apply the FGCAA. GAO's opinion glossed over that argument, however, and instead turned directly to the application of the FGCAA.[31]

Next, HUD argued that its selection of cooperative agreements complied with the FGCAA because the principal purpose of the PBACCs was to "assist" the PHAs by providing *them* funding to address the affordable housing shortage. GAO began its analysis by recognizing that the FGCAA "gives agencies considerable discretion" in choice-of-instrument decisions, and GAO will not disturb such determinations unless they are unreasonable in the circumstances, disregard statutory and regulatory guidance, or the agency lacks authority to enter into the particular relationship. GAO also observed that the "principal purpose of the relationship" between the agency

[31] *Assisted Housing Servs. Corp., et al.*, B-406738 et al., Aug. 15, 2012, 2012 CPD ¶ 236.

and the other entity is not always clear, particularly where the federal government provides assistance to specified recipients by using an intermediary.

With that foundation, GAO found that "the circumstances here most closely resemble the intermediary or third party situation," "where the recipient of an award [*i.e.*, a PBCA] is not receiving assistance from the federal agency but is merely used to provide a service to another entity which is eligible for assistance." As such, HUD's use of cooperative agreements in this circumstance was unreasonable and violated the FGCAA. GAO recommended that HUD cancel the solicitation and reissue it to result in the award of procurement contracts.

In an unusual move, HUD disregarded GAO's findings and recommendations and proceeded with the 2012 solicitation using cooperative agreements. The disappointed protesters filed a new protest at the U.S. Court of Federal Claims (COFC) seeking an enforceable legal ruling to the same effect as GAO's findings and recommendations. The COFC agreed with HUD that the PBACCs are properly categorized as cooperative agreements—both under the standards set forth in the FGCAA and because HUD's use of cooperative agreements was "[c]onsistent with the policy goals set forth in the Housing Act."[32]

The protesters sought further review at the Federal Circuit Court of Appeals.

2. Federal Circuit Decision

The Federal Circuit ruled that the FGCAA required HUD to treat the PBACCs as procurement contracts and not cooperative agreements.[33] Central to the appellate court's ruling were the following findings:

- HUD's authorizing statutes did not specifically provide for the agency to use cooperative agreements to carry out its programmatic duties.
- The issue of whether a transaction is a procurement contract or an assistance agreement is a question of law that courts are to review *de*

[32] *CMS Contract Mgmt. Servs. v. United States*, 110 Fed. Cl. 537 (2013).

[33] 745 F.3d 1379.

novo.[34]

- Under the FGCAA, the single criterion for choice of instrument is the "primary purpose" *of that particular transaction*, not the broader program under which the transaction is occurring.

- While the broad objectives of the Housing Act and the Section 8 program are to provide public assistance, this does not dictate the primary purpose of the PBACCs.

- The PHAs are not intended recipients of the assistance programs and do not receive assistance from HUD.

- HUD created an intermediary relationship with the PHAs to procure their assistance in providing benefits to the property owners. HUD consistently described the PBCA's role as "support" for HUD's staff. The solicitation said that HUD would evaluate the proposals "to determine which offerors represent the best overall value . . . *to the Department*."

- The housing assistance payments HUD makes to PHAs are not a "thing of a value" under Section 6 of the FGCAA, 31 USCA § 6305. Transferring funds to the PHAs to transfer to the project owners gives nothing of value to the PHAs, which have no rights to, or control over, those funds. The administrative fee paid to the PHAs also does not constitute a "thing of value" either. Money can be a "thing of value" under § 6305 in some circumstances, but the administrative fee here covers only the operating expenses of administering HAP contracts for HUD.

- The agreements with the PHAs are therefore procurement contracts, and HUD must comply with procurement statutes and regulations in awarding the contracts.

[34] A *de novo* review of a prior decision affords the least deference possible; that is, the court reviews the evidence as though considering the matter for the first time, allowing the court to substitute its own judgment about the application of the law to the facts to determine whether the earlier decision maker acted correctly.

3. Significance of the *CMS* Case

The Solicitor General of the United States filed a petition for *certiorari* to the United States Supreme Court, which denied the petition and left intact the Federal Circuit's opinion. As one commentator noted:

> [A]gencies no longer have the luxury of merely reclassifying procurements as cooperative agreements to escape the requirements of federal procurement law. Instead, regardless of how the agency classifies such an agreement, CICA and the FAR apply if the agreement actually constitutes a "procurement contract." Thus, *CMS* will provide a much-needed check on agency overreach on the use of cooperative agreements to achieve procurement goals, particularly in situations involving intermediary contractors performing administrative functions for agencies that provide assistance programs.[35]

As it turns out, however, the Federal Circuit would revisit the FGCAA just ten months later, to address whether and to what extent an agency has flexibility in its choice-of-instrument determinations.

B. The *Hymas* Case

The second Federal Circuit case to apply the FGCAA to the "third party situation" is *Hymas v. United States*.[36] In *Hymas*, the 3-judge panel was divided 2-1 over whether the U.S. Fish and Wildlife Service (Service) had properly chosen cooperative agreements, rather than competitive procurement contracts, when entering agreements with farmers to manage public lands for the conservation of migratory birds and wildlife. The Majority opinion distinguished *CMS* on its facts by finding that the farmers were *both* intermediaries providing services for compensation on behalf of the government *and* intended beneficiaries in their own right—a scenario that is not addressed in the FGCAA and is not the pure "third party situation"

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[35] Kyle R. Jefcoat, "The Federal Circuit's 2014 Government Contract Decisions," 64 *Am. U. L. Rev*. 807, 882-83 (Apr. 2015) (footnotes omitted).

[36] 810 F.3d 1312 (Fed. Cir. 2016).

found in *CMS*—and upheld the agency's choice of instrument. The dissenting judge, purporting to follow *CMS*, would have held that the FGCAA required the agreement to be a competed procurement contract. The division in views, lacking analyses by both the Majority and Dissent in *Hymas*, and nuanced differences between *CMS* and *Hymas* leave a number of open questions.

1. Background and Procedural History

Decades ago, the Service entered into cooperative farming agreements (CFAs) that permitted a cooperating farmer to farm specific parcels of public land with specific crops that benefit wildlife. The Service did not pay the farmers; rather, the farmers typically retained 75 percent of the crop yield for their efforts, and the remaining 25 percent was left to feed migratory birds or other wildlife. Throughout the agreement term, the Service was involved by advising on decisions such as crop selection and farming methods. Because the CFAs were not subject to open competition, the Service awarded CFAs based upon a priority selection system that gave preference to farmers who had previously and successfully farmed in the refuge. Farmer John Hymas had not previously farmed refuge lands, was not selected, and filed a bid protest at the COFC.

Mr. Hymas claimed that the Service should have been awarding the transactions as procurement contracts rather than cooperative agreements, because their principal purpose was to obtain services from farmer-cooperators for the benefit of the government in assisting the wildlife, not to provide assistance to the farmers themselves. The Service responded that it had special statutory authority—pursuant to the Fish and Wildlife Act of 1956 (FWA), as amended, and the Fish and Wildlife Coordination Act of 1934 (FWCA), as amended—to use cooperative agreements to carry out the purposes of those acts. It also argued that the FGCAA afforded the agency discretion in choosing cooperative agreements in this situation because the farmer-cooperators were designated beneficiaries for the assistance.

The COFC rejected the Service's position that its authorizing statutes allowed it to enter into cooperative agreements with farmer-cooperators.[37] Citing *CMS*, the COFC also held that the requirements of the FGCAA are mandatory and necessitated that the CFAs are procurement contracts.

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[37] *Hymas v. United States*, 117 Fed. Cl. 466, 486 (2014), *vacated and remanded*, 810 F.3d 1312 (Fed. Cir. 2016).

> [T]he agreements were used to obtain services from third-parties, not to provide assistance to them. In this case, the intended beneficiaries are the migratory birds and wildlife on the refuges. The farmer-cooperators are intermediaries. The 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. The fact that farmer-cooperators may profit from this arrangement does not change their status as intermediaries. As such, the cooperative farming agreements in this case are procurements . . .[38]

2. Federal Circuit Decision

a) The Majority Opinion

Rather than starting with an analysis of the "principal purpose of the instrument" pursuant to the FGCAA, the Majority started with the agency's authorities under the FWA and the FWCA.

The Majority observed that the FWCA, as amended, authorized the Service "to provide assistance to, and cooperate with, Federal, State, and public or private agencies and organizations" in fulfilling its goals and to carry out "other measures necessary to effectuate the purposes of this Act." The Act required that areas made available to the Service "shall be administered" either "directly" or pursuant to "cooperative agreements." Because the Act did not define "public or private agencies and organizations," the Service issued regulations allowing the Service to enter into cooperative agreements on a refuge with any "person," defining "person" to include individuals, associations, and corporations. The Majority applied *Chevron* deference[39] to

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[38] *Id*. at 487 (footnote and citations omitted).

[39] *Chevron* deference is a principle of administrative law requiring courts to defer to interpretations of statutes made by those government agencies charged with enforcing them, unless such interpretations are unreasonable. Under this principle, a court must defer to the agency's reasonable interpretation, even if the court finds that another interpretation is reasonable or even better than the agency's interpretation.

this interpretation, finding it a permissible construction of an ambiguous statute.

Next, the Majority considered the FWA, as amended, which authorized the Service to enter into cooperative agreements with partner organizations, academic institutions, State or local government agencies, or other persons to implement projects or programs for refuges in accordance with the purposes of the Act. "Projects or programs" include efforts to "promote the stewardship of resources of the refuge through habitat maintenance, restoration, and improvement, biological monitoring, or research"; and (2) "support the operation and maintenance of the refuge through constructing, operating, maintaining, or improving the facilities and services of the refuge[.]" In the Majority's view, the statute "unambiguously" permits the service to negotiate and enter into cooperative agreements like the CFAs with farmers.

Having determined that the overarching statutory schemes permitted the Service to use cooperative agreements, the Majority then asked whether the Service properly construed the CFAs as cooperative agreements under Section 6 of the FGCAA, or should have considered them procurements contracts under Section 4 of that act. The Majority recognized that Section 4 says that the agency "shall" use a procurement contract when its criterion is met (*i.e.*, the principal purpose of the instrument is to acquire property or services for the direct benefit or use of the U.S.), and Section 6 says that the agency "shall" use a cooperative agreement when its criteria is met (*i.e.*, the principal purpose of the relationship is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by law). Therefore, neither section would appear to trump the other in terms of its prescriptive effect.

The Majority then interpreted the primary purpose of the CFAs. It recognized that, under the overarching statutory scheme, there could be "no serious dispute that assisting private farmers to promote wildlife conservation is the *sine qua non* of the CFAs." The Majority opinion held, "the Service principally intended the CFAs to transfer a thing of value (*i.e.*, the

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Reasonableness turns, in part, on whether Congress left the statute "silent or ambiguous" on an issue for the agency to fill the gap. A permissible agency interpretation is one that is not "arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984).

right to farm specific refuge lands and retain a share of the crop yield) to carry out a public purpose authorized by law (*i.e.*, to conserve wildlife on the refuges)."

Furthermore, while the CFAs indirectly benefit the Service since the farmers' activities advance the agency's overall mission, "that is true for nearly all cooperative agreements." The CFAs could *not* be procurement contracts insofar as the Service did not directly benefit from the farming services because (1) it did not receive payment from the farmers pursuant to the arrangements and (2) refuge crop shares are all used by wildlife in the field or retained by farmers so there is no excess crops for disposition by the Service. But as the Dissent points out, that is not a compelling distinction—overall the CFAs appear to be a negotiated *quid-pro-quo*, in which farmers receive the amount of land they need for their business purposes in exchange for a percent of their yield—much like the negotiated service arrangement in *CMS.*

The Majority could have stopped there, simply said the mandatory provisions of Section 6 apply, and affirmed the Service's interpretation of the CFAs as cooperative agreements. But the Majority instead took an extra step that seems to muddy the waters and will need to be clarified in later decisions. The Majority considered whether the FGCAA is mandatory *at all* or rather permits agency *flexibility* in choosing among instruments.

The Majority noted that the 1978 OMB Guidance, which remains in effect, stated "that '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' and that 'Congress intended the [FGCAA] to allow agencies flexibility to select the instrument that best suits each transaction.'"[40] The Majority then expanded on OMB's interpretation and inexplicably intertwine this agency flexibility with *Chevron* deference that would not normally apply to government-legislation.

> Congress intended the FGCAA to provide federal agencies with the "flexibility" to determine "whether a given transaction or class of transactions is procurement or assistance and, if assistance, whether the transaction or class of

[40] *Id*. at 1325.

> transactions is to be associated with a type of grant or cooperative agreement relationship." S. Rep. No. 95–449, at 10 (1977); *see also id*. (stating that "the mission of the agency will influence the agency's determination" and that "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 nonfederal sector"). Because Congress did not require the use of particular instruments in particular situations, it left a gap for agencies to fill, and the Supreme Court has stated that filling such gaps "involves difficult policy choices that agencies are better equipped to make than courts." Courts should exercise caution before determining that any such decisions go beyond the policy making realm that rests within the agency's purview.[41]

Finally, the Majority sought to distinguish the different facts in *Hymas* from the "third party situation" in *CMS*.

> In *CMS*, we found that "the proper instrument is a procurement contract" when a federal agency has "created an intermediary relationship with" a third party. However, the court based that fact-specific determination on its finding that the intermediary did "not receiv[e] assistance from the federal agency," but rather "provide[d] a service to another entity which is eligible for assistance." The situation here is quite different.[42]

b) The Dissenting Opinion

The Dissent is short and simple. It found that the clear language of the FGCAA belies the Majority's conclusion that "Congress did not *require* the use

[41] *Id*. at 1325-26.
[42] *Id*. at 1312 (footnotes and citations omitted).

of particular instruments in particular situations."[43] The FGCAA unambiguously makes mandatory when each type of instrument should be used, including the use of procurement contracts in the "third party situation." Furthermore, contrary to the Majority's view, the FGCAA "does not grant agencies flexibility in determining when to use a particular instrument in government contracting," and Congress did not leave "'a gap for agencies to fill' in when determining what legal instrument to use."[44] The Service, therefore, is entitled to no deference when it interprets and applies the FGCAA to its transaction.

The FGCAA requires one to begin by asking whether the principal purpose of the instrument at issue is to acquire property or services for the direct benefit or use of the United States government, or to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by law. Here, the Service was using CFAs to obtain farming services so that wildlife, which the Service is obligated to protect, would be fed. Indeed, the record showed that if the Service did not contract with farmers, it may have done so itself. The bargain was essentially a farm-for-compensation, *quid-pro-quo* arrangement that could just as easily have been transacted for a fee instead of a land concession (as the Service could also have done had it chosen, presumably as a procurement). The farmers, therefore, were no more than third-party intermediaries, just like the municipal governments in *CMS.*

In the Dissent's view, this was a classic "third party situation." Consequently, the FGCAA compelled the Service to use procurement contracts for the CFAs.[45] Notably, the Dissent did *not* discuss how the FWCA and the FWA might have impacted this analysis—which was the heart of the Majority opinion.

3. Significance of the *Hymas* Case

There is an alluring clarity and simplicity to the *Hymas* Dissent's view that the FGCAA unambiguously tilts the needle toward competitively-awarded procurement contracts when there is a *quid-pro-quo* between the

[43] *Id.* at 1332 (*citing* 31 U.S.C. § 6303).

[44] *Id.* at 1333 (*citing* Maj. Op.).

[45] *Id*.

agency and the other party. The Majority's opinion is nearly five times as long, and correspondingly more complex, because it considers other statutes and principles of law to be relevant and ultimately controlling. As the Majority's opinion shows, however (and as the Dissent did not address) the farmers here were *both* intermediaries providing services-for-compensation on behalf of the government *and* (as the Majority interpreted the overarching statutes) intended recipients of the "thing of value" "to carry out a public purpose" in their own right. This is *not* the pure "third party situation" that was the subject of *CMS* and did not fit squarely in the longstanding position of the GAO.

V. Conclusion

It has been 39 years since the Senate Committee on Governmental Affairs observed "[f]ailure to distinguish between procurement and assistance relationships has led to both the inappropriate use of grants to avoid the requirements of the procurement system, and to unnecessary red tape and administrative requirements in grants." It has been 38 years since Congress enacted prescriptive standards governing agency choice-of-instrument determinations. Over that period, GAO has found that contracts are the required choice of instrument for the "third party situation," when the agency provides funding to an intermediary (*i.e.*, not the intended recipient of the assistance) to assist the agency in implementing its statutorily-authorized program.

The Federal Circuit in *CMS* upheld the GAO's longstanding position regarding the "third party situation." The *Hymas* majority added a new consideration when it ruled that it is essential to analyze agency's overarching legislation to understand whether a transaction truly is a "third party situation," and held that agencies have flexibility in their choice of instrument—at least when the transaction is with an organization that is *both* delivering goods or services for the direct benefit of the government *and* an intended recipient under the agency's authorizing statutes. Given the nuanced differences between *CMS* and *Hymas*, as well as the division of views in *Hymas* and the lacking analysis of both the Majority and Dissent opinions in *Hymas*, it is reasonably certain that the federal courts have not given the final word on the application of the FGCAA.

The questions remaining open after *Hymas*—and which sow the seeds for future clarifications—include:

- How uncommon is the situation in *Hymas* here the third party is *both* providing services-for-compensation on behalf of the government *and* a statutorily-intended recipient of the "thing of value" "to carry out a public purpose?"

- Will future courts agree that Congress did not intend for the FGCAA to prescribe only one choice of instruments on any set of facts (as the mandatory language in Sections 4, 5, and 6 suggests) "to achieve uniformity in their use by executive agencies" as expressly stated in the "Purposes" section of the law,[46] or rather that Congress intended to grant agencies some flexibility in that choice in some instances?

- If agencies have some flexibility, the *Hymas* majority locates the source of that flexibility in the overarching statutory scheme. In that case, how exactly might statutory language authorizing an agency to enter into assistance agreements with certain persons trump mandatory language in the FGCAA that might otherwise compel the use of a procurement agreement? What rules of statutory construction, *Chevron* deference, and preemption apply?

- For example, when an agency transacts with an intermediary to provide a *quid-pro-quo* to assist the government (like the farmers in *Hymas*, per the dissent) but the overarching statute is ambiguous as to whether the intermediary is also an intended recipient (like the farmers in *Hymas* per the Majority), will the court construe the statute *de novo* or grant the agency *Chevron* discretion for its interpretation as the *Hymas* Majority does?

- And if the court defers to the agency's decision that its authorizing statute allows it to enter into assistance agreements with certain kinds of persons, does it follow that in a particular transaction the agency must be afforded *Chevron* deference in its choice of instrument? The *Hymas* majority gave *Chevron* deference to allow the agency "flexibility." *Chevron* deference, however, is generally afforded to an agency's interpretation of its own governing statute, while here the FGCAA is a statute of general applicability, governing all agencies.

[46] 31 U.S.C. § 6301(2)(b), as amended by Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 1004.

- Although neither the Majority or Dissent focused much attention on this, did Congress intend any distinction in selecting the word "instrument" for Section 4 of the FGCAA (*i.e.*, the principal purpose of the *instrument* is to acquire property or services for the direct benefit or use of the U.S.) and the word *relationship* for Section 6 of the law (*i.e.*, the principal purpose of the relationship is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by law)? This different use of words may create an inherent ambiguity and tension in that both statutes seem to impose mandatory duties on the agency, but based either on the nature of the instrument versus the nature of the transaction.

Regardless of how those questions are answered, or at least until they are answered, Federal agencies daily must determine how to apply the FGCAA, the GAO viewpoints, and *CMS* and *Hymas* in making their own choice of instrument decisions. Agencies can take comfort that the use of a procurement contract in the classic "third party situation," when there is no other option in the overarching statutory scheme, is settled in the case law. Where there is a possibility that the instrument/relationship is with a person or organization that also may be an intended recipient, the Majority decision in *Hymas* indicates that the agency should analyze the authorizing legislation for the particular program. Of course, Congress can always clarify its intent regarding the FGCAA or any particular agency authorization as it sees fit.