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Advanced Technical

# GRANT VS CONTRACT

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Gowling WLG's in-house lawyer community

# INTRODUCTIONS

## ALEXI MARKHAM

Partner

T +44 (0)20 3636 7821

M +44 (0)7740 592698

[alexi.markham@gowlingwlg.com](mailto:alexi.markham@gowlingwlg.com)

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## CHRIS BRENNAN

Legal Director

T +44 (0)121 393 0431

M +44 (0)7841 322716

[Christopher.Brennan@gowlingwlg.com](mailto:Christopher.Brennan@gowlingwlg.com)

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# AGENDA

1. Key differences between a grant and a public contract
2. Contract or grant? Payment and performance provisions
3. Why does it matter? Legal risks of getting it wrong
4. So it's a grant...
5. Some examples
6. Update on the Procurement Bill

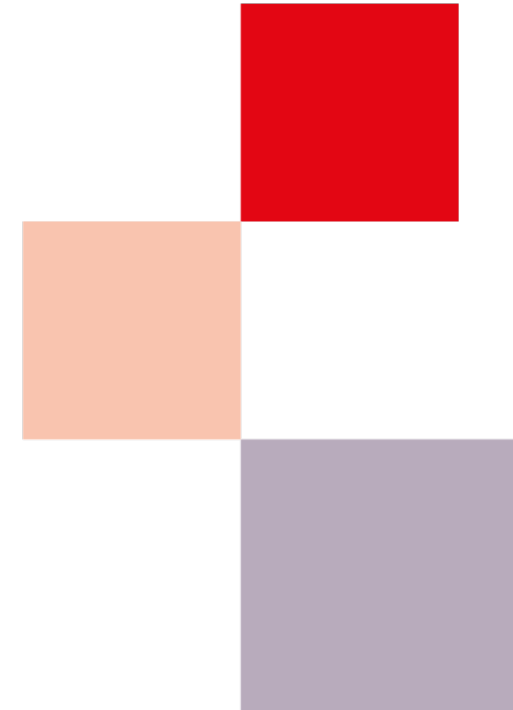
# KEY DIFFERENCES BETWEEN GRANT AND PUBLIC CONTRACT (1)

Grant	Public contract
<p>Funding to enable an eligible recipient to carry out a project or activity that will benefit the wider community or achieve a policy objective</p>	<p>“Contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services” (Public Contracts Regulations 2015, reg. 2(1))</p>
<ul style="list-style-type: none"><li>• Must be justified based on activity provided, and the benefit</li><li>• Subject to cross-government standards</li><li>• Competition must be considered</li></ul>	<ul style="list-style-type: none"><li>• The “default” route</li><li>• Subject to procurement rules</li><li>• Competition mandatory above thresholds</li></ul>

# KEY DIFFERENCES BETWEEN GRANT AND PUBLIC CONTRACT (2)

Factors pointing towards **a grant**:

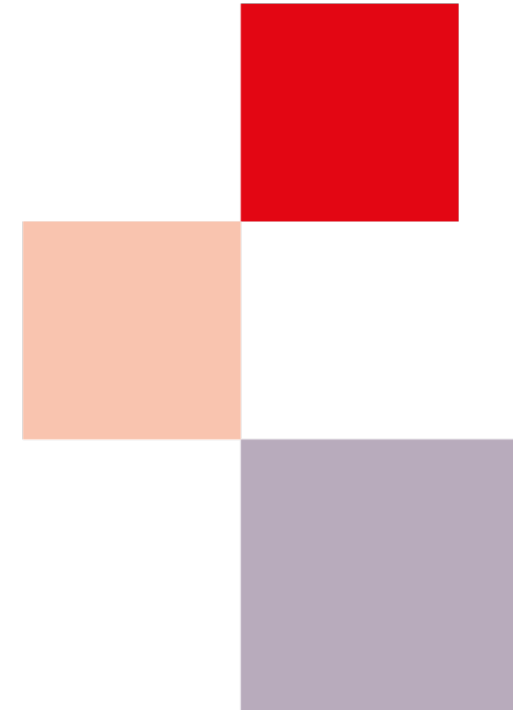
1. Authority not directly benefitting from the project/activity (which it must not do)
  2. The absence of factors pointing towards a contract (see next slide)
  3. The payee being required to *apply the sums* in a particular way
  4. Absence of a particular *requirement* to supply services
  5. Outputs being provided free to the public
  6. Clawback in the event of misappropriation or subsidy
- NB – an authority awarding a grant must have the legal power to do so



# KEY DIFFERENCES BETWEEN GRANT AND PUBLIC CONTRACT (3)

Factors pointing towards **a public contract**:

1. A *direct economic benefit* accruing to the Authority
2. Performance obligations being *imposed* on the payee, to which the payee would not be subject if merely in receipt of a grant
3. A *direct link* between the services provided and the money given – thereby characterising the money as *consideration* for services rendered
4. The activity being *commercial* in nature
5. The payer being able to *sue for breach of contract* if services aren't provided



# CONTRACT OR GRANT?

## PAYMENT PROVISIONS

	CONTRACT	GRANT
Profit	Provider may make profit on activities	Funding only intended to cover costs
Clawback	Surplus to be retained by provider	Surplus funds may be clawed back. Can also clawback misused fund.
Payment	Payment in arrears/ by results. Supplier to “invoice”	Payment may be made in advance. Supplier can “draw down / claim”
Funding risk	Supplier has funding/ delivery risk	Authority retains funding/delivery risk
Permitted use	Provider may use its payment freely	Provider may only use the funding for the objectives of the project

# CONTRACT OR GRANT?

## PERFORMANCE OBLIGATIONS

	CONTRACT	GRANT
Clarity of output	Clear specific outputs to be delivered	Focused on supporting a policy objective or a general outcome. May be subject to conditions
KPIs	Often service levels with service credits attached	May be reporting requirements
Management	Authority actively manages the outputs	Authority may influence project but has limited control
Benefit	Direct economic benefit to the Authority (e.g. goods, direct access to specialists, IPR, provision of services Authority would usually provide)	Authority does not receive a direct economic benefit
Enforcement	Authority can sue if not delivered	Authority's has no remedy for failure to achieve objective



# WHY DOES IT MATTER?

- **Tax** - Grants fall outside the scope of VAT
- **Procurement** – Grants fall outside of public procurement regulations
- **Enforceability** - Grants are generally unenforceable against the funder unless executed as a deed

# LEGAL RISKS OF GETTING IT WRONG

- **VAT claim**
- **Public procurement risk** – “public contracts” over the thresholds to be competitively tendered to ensure fairness, equal treatment, transparency and value for money
- **Judicial review** – on the grounds of **procedural impropriety** for failure to follow the proper decision-making procedure and departing from the Cabinet Office Grant Standards
- **Subsidy control** - To be classed as a subsidy, a **grant** would need to classify as financial assistance which: (a) is given, directly or indirectly, from public resources by a public authority; (b) confers an economic advantage on one or more enterprises; (c) benefits one or more enterprise over one or more other enterprises with respect to the production of goods or the provision of services; and (d) has, or is capable of having, an effect on: (i) competition or investment within the UK; (ii) trade between the UK and a country or territory outside the UK; or (iii) investment between the UK and a country or territory outside the UK.

# DOES THE AUTHORITY HAVE THE LEGAL POWER TO MAKE A GRANT?

- Authority must have a legal power to award a grant
- Common powers used are:
  1. Local Government Act 2003, s31
  2. Charities Act 2006, s70
  3. Housing Grants, Construction and Regeneration Act, s126

# SO IT'S A GRANT.....

## CABINET OFFICE GRANTS FUNCTIONAL STANDARD

<b>1. Named SRO</b>	<b>2. Approval Process</b>	<b>3. Complex Grants Advice Panel</b>	<b>4. Robust Business Case</b>	<b>5. Competed by default</b>
<ul style="list-style-type: none"><li>• Delegated levels of authority</li><li>• Included in Government Grants Information system (GGIS)</li></ul>	<ul style="list-style-type: none"><li>• Robust awards process</li><li>• All schemes and awards on GGIS</li></ul>	<ul style="list-style-type: none"><li>• Promote CGAP to business</li><li>• Submit proposals to CGAP</li></ul>	<ul style="list-style-type: none"><li>• Must include; purpose, context, options, affordability, VFM and management</li></ul>	<ul style="list-style-type: none"><li>• Direct awards must be approved</li><li>• Different options considered</li><li>• Justification recorded in BC</li></ul>
<b>6. Robust Grant agreements</b>	<b>7. Due diligence and fraud risk</b>	<b>8. Outputs and outcomes</b>	<b>9. Reviewed annually</b>	<b>10. Core training</b>
<ul style="list-style-type: none"><li>• Cabinet Office Template</li><li>• Standards compliant</li></ul>	<ul style="list-style-type: none"><li>• Due Diligence checks</li><li>• Fraud risk assessment</li></ul>	<ul style="list-style-type: none"><li>• Defined outputs/longer term outcomes</li><li>• Measureable with regular review</li></ul>	<ul style="list-style-type: none"><li>• Monitoring report completed by org</li><li>• Recorded on GGIS</li><li>• Multi-year approvals</li></ul>	<ul style="list-style-type: none"><li>• Grants Policy certificate</li><li>• CSL</li><li>• GCOE</li><li>• GH intranet page</li></ul>

# SO IT'S A GRANT.....

## MR 2 & 4. ROBUST BUSINESS CASE AND APPROVALS PROCESS

### 2. Approval Process

- Robust awards process
- All schemes and awards on GGIS

### 4. Robust Business Case

- Must include purpose, context, options, affordability, VFM and management

#### Business case requirements:

Grants below £100k and Low Risk	Grants £100k - £5million and/ or High Risk	Grants above £5million
Approved by the organisation's Financial Business Unit.	Approved by senior finance business partner and any other internal regulations, with input from CGAP if appropriate.	Approved by HMT.
Specific requirements: <ul style="list-style-type: none"> <li>• Named SOR/ Central approvals board;</li> <li>• Rationale/ strategic purpose;</li> <li>• Review of the scope;</li> <li>• Basic individual/ legal entity checks;</li> <li>• Financial viability;</li> <li>• Payment model/ treatment of assets;</li> <li>• Value for money;</li> <li>• Subsidy controls.</li> </ul>	Further requirements: <ul style="list-style-type: none"> <li>• Allocative efficiency assessment;</li> <li>• Affordability;</li> <li>• Fit with strategic context;</li> <li>• Economic appraisal;</li> <li>• Optimism bias;</li> <li>• Sensitivity analysis;</li> <li>• Benefits realisation.</li> </ul>	Further requirements: <ul style="list-style-type: none"> <li>• Green Book based business case, requiring more robust evidence.</li> </ul>

# SO IT'S A GRANT.....

## MR 5. COMPETED BY DEFAULT

### 5. Competed by default

- Direct awards must be approved
- Different options considered
- Justification recorded in BC

- Direct awards by approval only – need to demonstrate value for money, transparency and fairness
- Could be justified – e.g. if sole provider, extreme urgency, market failure
- Prospectus to explain how applications will be assessed
- Must apply the evaluation criteria consistently

# SO IT'S A GRANT.....

## MR 6. ROBUST GRANT AGREEMENT

### 6. Robust Grant agreements

- Cabinet Office Template
- Standards compliant

- A clear description of expenditure
- Payment
- Financial and delivery-based reporting
- Counter fraud policy
- Audit and assurance
- Subsidy compliance
- Payment suspension, claw back and grant termination clauses
- Impact evaluation
- Data sharing and data protection

# CONTRACT OR GRANT?

1. Local Authority providing funding to plant trees
2. Funding for running IT workshop in a disadvantaged area
3. Funding to create COVID symptom app
4. Funding for a museum and visitor information centre



# CONCLUSIONS

Not 'black and white' but use the framework to classify. Consider:

1. How specific are the outcomes that you want to achieve?
2. Will the outcomes directly benefit the Authority?
3. What remedies/recourse do you want if the provider fails to deliver the intended results?
4. Do you have the legal power to spend public money?
5. What do you know about potential delivery partners? Are these likely to be commercial entities or not-for-profit?

# UPDATE ON THE PROCUREMENT BILL

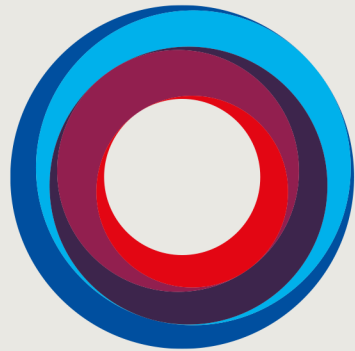
# UPDATE ON THE PROCUREMENT BILL

- Cabinet Office aim to implement the regime in 2024
- 6-month transition from the old regime anticipated
- Not known when the Bill will receive Royal Assent, but the Bill is still in the HC Report stage
- If there are any amendments following the 3<sup>rd</sup> reading, expect the Bill to go back to the Lords to be approved



QUESTIONS





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