



## Third-Party Determination - Management Guide

---

Document ID: 2020\_WSFR\_001  
Document Type:  Guidance  Interpretation  Briefing  White paper  Best practices  
Date Issued: 05/01/2020  
Date Expires: When updated or superseded by other policy  
Status: NEW  
Contact: Scott Knight, WSFR FASO Division Manager, 703.358.2237  
Lisa E. Van Alstyne, Fish and Wildlife Administrator, WSFR Policy, 703.358.1942

---

**Summary:** This guide supports U.S. Fish and Wildlife Service (Service) recipients in making subrecipient and contractor determinations based on the substance of the relationship.

**Audience:** Service financial assistance recipients

**Program:** Service financial assistance programs

**Background:** On September 30, 2019, the Department of the Interior, Office of Inspector General (OIG) issued [Management Advisory Report No. 2018-CR-064, Issues Identified with State Practices in Subaward Administration for Wildlife and Sport Fish Restoration Program Grants](#). The Management Advisory identified that guidance on whether a non-Federal entity is a subrecipient or a contractor is unclear. Recipient, subrecipient and contractor determinations affect multiple aspects of grant administration, including the roles and responsibilities of all involved parties. The OIG made several recommendations, including that the Service provide guidance to the States clarifying the application of Federal regulations when State recipients pass funds to other non-Federal entities. The Service provides this guidance to our financial assistance programs and their recipients to address that IG recommendation.

**Authorities:** Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, [2 CFR 200](#) (Uniform Guidance)

WSFR Program Authorities are listed in the Service Manual at 518 FW 1.

### Definitions:

The following terms are applicable to this guidance:

*Contract* means a legal instrument by which a recipient purchases property or services needed to carry out the project or program under a Federal award (see also 2 CFR §200.22). A recipient awards a contract for the purpose of obtaining goods and services for their own use and establishes a procurement relationship with the contractor (see also 2 CFR §200.330).

*Contractor* means an entity that receives a contract as defined in 2 CFR 200.22 Contract. (see 2 CFR 200.23)

*Cooperative Agreement* means a legal instrument of financial assistance between either a Federal awarding agency or a pass-through entity and a non-Federal entity that:

(a) is used to enter into a relationship, the principal purpose of which is to transfer anything of value from the Federal awarding agency or pass-through entity to the non-Federal entity to carry out a public purpose authorized by law of the United States (see 31 U.S.C. 6101(3)); and not to acquire property or services for the Federal Government or pass-through entity's direct benefit or use;

(b) Is distinguished from a grant in that it provides for substantial involvement between the Federal awarding agency or pass-through entity and the non-Federal entity in carrying out the activity contemplated by the Federal award (see 2 CFR 200.24).

*Grant (or grant agreement)* means a legal instrument of financial assistance between a Federal awarding agency or pass-through entity and a non-Federal entity that:

(a) Is used to enter into a relationship, the principal purpose of which is to transfer anything of value from the Federal awarding agency or pass-through entity to the non-Federal entity to carry out a public purpose authorized by a law of the United States (see 31 U.S.C. 6101(3)); and not to acquire property or services for the Federal awarding agency or pass-through entity's direct benefit or use;

(b) Is distinguished from a cooperative agreement in that it does not provide for substantial involvement between the Federal awarding agency or pass-through entity and the non-Federal entity in carrying out the activity contemplated by the Federal award (see 2 CFR 200.51).

*Pass-through entity* means a non-Federal entity that provides a subaward to a subrecipient to carry out part of a Federal program (see 2 CFR 200.74).

*Recipient* means a non-Federal entity that receives a Federal award directly from a Federal awarding agency to carry out an activity under a Federal program. The term recipient does not include subrecipients (see 2 CFR 200.86).

*Subaward* means an award provided by a pass-through entity to a subrecipient for the subrecipient to carry out part of a Federal award received by the pass-through entity. It does not include payments to a contractor or payments to an individual that is a beneficiary of a Federal program. (see 2 CFR 200.92) A subaward may be provided through any form of legal agreement, including an agreement that the pass-through entity calls a contract. Just because a State enters into an agreement that it calls a contract, does not make the third-party a contractor.

*Subrecipient* means a non-Federal entity that receives a subaward from a pass-through entity to carry out part of a Federal program; but does not include an individual that is a beneficiary of such program. A subrecipient may also be a recipient of other Federal awards directly from a Federal awarding agency (see 2 CFR 200.93).

*Third-party* means, for the purposes of this guidance, a non-Federal entity that a recipient enters into a relationship with and uses awarded Federal financial assistance funds to support the relationship.

## Guidance:

**A. What characteristics of a relationship should a recipient consider when determining whether a third party is a subrecipient or a contractor?** A recipient may enter into an agreement with a third party, using funds from a Federal award. A recipient must determine, depending on the substance of the relationship with a third party, if they will always be a subrecipient, always be a contractor, or whether a determination must be made as to whether the third party, under the specific circumstances, is serving the role of a subrecipient or a contractor. If a third-party relationship:

- will always be a contractor (i.e. Staples, gravel delivery, equipment purchases), the recipient can always treat them as a contractor;
- will always be a subrecipient (i.e. a marina using pass through funds for a pumpout facility, O&M at a county-owned public target range), the recipient can always treat them as a subrecipient; or
- could possibly fill either role, depending on the circumstances, the recipient must make and document a “case-by-case determination” based on the substance of the relationship for each instance where it enters into a third-party relationship (see 2 CFR 200.330).

At 2 CFR 200.330, *Subrecipient and contractor determinations*, the regulations describe characteristics for a recipient to consider when making case-by-case determinations as to whether a third-party relationship is that of a subrecipient or a contractor. To further support the information described at 2 CFR 200.330, the recipient should consider these characteristics when making a case-by-case determination:

**(1) PUBLIC PURPOSE:** *Is the third party carrying out, in whole or in part, one or more of the authorized or identified public purposes of the Federal financial assistance program?* Those purposes may be listed in the authorizing legislation, Federal regulation, or the notice of funding opportunity. Federal programs also provide a summary description of the program’s purpose in its “Assistance Listing” (formally referred to as the Catalog of Federal Domestic Assistance) at [SAM.gov](https://www.sam.gov).

Subrecipient: In the case where the third party is a subrecipient, it is using Federal award funds that have been passed to it to directly fulfill one or more of the public purposes of the Federal award.

Contractor: In the case where the third party is contractor, it performs no direct activities to fulfill the public purposes of the Federal award. Its role is to provide a good or service that is needed by the recipient or subrecipient in their activities.

Consider what the third-party involvement is benefitting. If it is directly benefitting the Federal award, then it is a subrecipient relationship. If it is benefitting the recipient or subrecipient in fulfilling the purposes of the Federal award, then it is a contractor.

Under guidance from the OIG, public purpose is the primary consideration when making third-party determinations. If the third party will carry out, in whole or in part, an authorized or identified public purpose of the assistance program under the Federal award, it is always a subrecipient. There is a purposeful connection between the Federal award and a subrecipient.

**(2) PROJECT DEVELOPMENT:** *Is the third party developing, or collaborating with the recipient to develop, the*

*recipient's project statement or scope of work that will be fulfilled under their Federal award? Or, is the third party solely providing goods and/or services to the recipient in carrying out their Federal award project?*

Subrecipient: If the recipient gives the third party full authority to develop and fulfill the project, the third party is a subrecipient.

If the recipient expects the third party will be developing the project statement or scope of work, or is collaborating with the third party to do so, this is generally indicative of a subrecipient relationship. For example, if the third party is given the authority to develop (solely or collaboratively) the scope or scientific methodology (e.g. sampling regime, sampling times, sampling frequency) to be used in carrying out the project this is indicative of a subrecipient relationship. A recipient may still have a role in approving the project that the subrecipient develops.

Contractor: If the recipient develops the project statement or scope of work and the third party has no role but to provide goods and/or services to the recipient (or subrecipient), that will use those goods and/or services to assist it in fulfilling the purpose of the Federal award, the third party is a contractor. The contractor may provide expert advice or make decisions specific to the goods or services that will inform and support the recipient or subrecipient in completing the project, but it does not directly make decisions relative to how the project fulfills the purpose of the award.

**(3) PAYMENT:** *As the recipient, how will you track costs and make payments to the third party?*

Subrecipient: If the recipient will reimburse the third party only for actual costs and the third party will not have the option to make a profit from the award, the third party is a subrecipient. The recipient has the right of access to the subrecipient's accounting records or financial statements to verify actual costs incurred (see 2 CFR 200.331(a)(5)).

Contractor: If the recipient will pay a fixed price that the third party charges for goods and/or services and the third party can net a profit, the third party is a contractor. The recipient has no authority to request receipts or to have access to contractor accounting records. The recipient typically does not know the amount of a contractor's profit and the contractor does not know funding details of the Federal award. There may be circumstances where a third party is clearly a contractor as they are only providing goods and/or services, but they do not make a profit (such as some universities). Therefore, the ability to make a profit must not be the sole determining factor for the third-party relationship.

**(4) REPORTING:** *As the recipient, will you require the third party to report to you on actual costs and performance for fulfilling its activities under the Federal award during or at the end of the agreement period?*

Subrecipient: If the recipient will require the third party to provide information that will directly support the Federal award, this is generally an indicator of a subrecipient relationship. Financial reporting, which may be delivered in any manner acceptable to the recipient, is required to monitor costs under the award.

Performance reporting is required to provide information about the actual accomplishments as compared to the stated objectives. The reporting indicates that the third party is fulfilling a public purpose authorized under the Federal program (see 2 CFR 200.331(d)).

Contractor: If the recipient does not need financial or performance information from the third party to support the goals and objectives of the award, but rather just needs to know when the job is done and then pay for it, it is indicative of a contractual relationship. Contractors rarely, if at all, provide a performance report on activities associated with the Federal award. Contractors typically provide the goods and/or services, as specified in their bid, along with an invoice for payment once the recipient (or subrecipient) has received and accepted the goods and/or services. A contractor may report to the recipient on the status of goods and/or services being provided to the recipient, but would not associate its communications with the Federal award.

**(5) COST SHARE:** *Is the third party providing cost sharing or matching funds to the Federal award? Is the third party using a federally recognized, negotiated, or a de minimis indirect cost rate (ICR) to account for costs that are not associated with a specific cost objective (direct cost)?*

If the recipient or subrecipient expects the third party to provide cost share (match) (to include contributions such as cash or donated goods/services) to support the requirements of the Federal award, this is generally indicative of a subrecipient relationship.

If the recipient or subrecipient is procuring goods or services with no expectation that the third party will provide cost share, this is generally indicative of a contractor relationship. A contractor is under no obligation to contribute cost share in support of the Federal award, they are simply providing a good or service to the client (which in the case of financial assistance is the recipient or subrecipient). When a recipient or subrecipient enters into a procurement contract relationship with a contractor, they are required to follow the procurement standards established at 2 CFR 200.317-326. In following these standards, a selected contractor may voluntarily provide donated goods or services to the recipient or subrecipient as long as such donated goods or services meet all of the criteria at 2 CFR 200.306(b) and, in the case of a non-Federal entity that is a State, such donated goods or services complies with all State policies and procedures. The donated goods or services from a contractor may be used by the recipient or subrecipient in any manner it chooses, whether it be to assist with cost share requirements or other purposes.

If a third party is charging indirect costs, this suggests a subrecipient relationship. The indirect costs must be from an approved federally recognized ICR negotiated between the subrecipient and the Federal government or if no such rate exists, either a rate negotiated between the pass-through entity and the subrecipient or a de minimis ICR (see 2 CFR 200.331(a)(4)).

In cases where a third party is willing to voluntarily waive all, or a portion, of the allowable indirect costs charged to the Federal award, such unrecovered indirect costs may be included as part of the recipients or subrecipients cost sharing requirements, but only with the prior approval of the Federal awarding agency (see 2 CFR 200.306(c)).

**B. Can the Service provide examples of types of third parties that recipients must always classify as subrecipients or always classify as contractors?**

No, the Service cannot provide examples of types of third parties that would always be a subrecipient or a contractor because that determination is to be made by recipients, using an established process based on Federal and State rules and processes. The recipient process can clearly distinguish as contractors third parties that always meet the criteria of a contractor (those that only supply goods and services and would never be considered a subrecipient) and clearly distinguish as subrecipients third parties that will always meet the

requirement of a subrecipient (those that will always be actively carrying out the public purpose of the Federal award).

However, some non-Federal entities may enter into several types of relationships and could receive funds from Federal awards as a recipient, a subrecipient, and/or a contractor, depending on the substance of the relationship and its agreements with the Federal awarding agency or recipient (see 2 CFR 200.330). For example, ABC University is a single third party, but will be classified differently depending on their role: 1) ABC University receives a Federal award to conduct a study on CWD (Recipient); 2) The State fish and wildlife agency receives a Federal award and enters into an agreement with ABC University, which has expertise in CWD, to assess trends in spread of the disease and recommend possible methods to reduce the spread (Subrecipient); and 3) The State fish and wildlife agency receives a Federal award and enters into an agreement with ABC University to run samples that State personnel collect for CWD analysis and provide test results (Contractor). The determination depends on the nature of the relationship in fulfilling the Federal award. Recipients must follow the Uniform Guidance and have a process they use in these situations to assess all components of the relationship and make a case-by-case decision on the appropriate instrument for the Federal award (i.e. grant agreement, contract, or cooperative agreement) (see 2 CFR 200.201(a)).

The Service recognizes that recipients may use terminology in its processes that differs from terms in this guidance or the regulations. This guidance describes Federal definitions used in the Federal assistance process. Recipients must align their written processes to account for and follow Federal assistance rules.

The following examples further describe how a single third party may be cast in either a subrecipient or a contractor role, depending on the characteristics of the relationship:

**(1) Universities (institutions of higher education) as subrecipients:** Universities often carry out fish and wildlife conservation and management activities such as research, survey, monitoring, and inventory. For example, a State fish and wildlife agency as the recipient defines the objectives of the Federal award. The agency then enters into a relationship with the university, and according to the agreement, the university defines, in whole or in part, the scope of work and the approach, and makes decisions on the best way to fulfill the objectives of the award. The university is not simply providing a product for the agency's benefit but is assisting to fulfill the public purpose. The university is a subrecipient. The recipient must follow the applicable requirements for pass-through entities in 2 CFR 200.

**(2) Universities as contractors:** Universities often provide specific services that a recipient may use when fulfilling the purpose of the Federal award. For example, a State fish and wildlife agency as the recipient defines the objectives of the award and subsequently collects fish or wildlife samples, but lacks the ability to conduct a particular genetic test. The agency then enters into a relationship with the university to obtain genetic testing services. The university accepts the samples and provides the results to the agency. The agency uses the results provided by the university to make decisions or conclusions to fulfill the purposes of the Federal award. The university is providing a service to the recipient, as the recipient does not have the ability to run the tests. The recipient is still fulfilling the public purpose of the Federal award, not the university. The university is a contractor. To enter such a relationship, the recipient must follow the applicable procurement standards in 2 CFR 200.

**C. What if the recipient interacts collaboratively or is otherwise substantially involved with a third party that is carrying out activities of a project funded by the Federal award?**

A recipient may be substantially involved in carrying out the activities of the project and still determine that the third party is a subrecipient. First, the recipient must make the determination of whether the third party is a subrecipient or a contractor. Once a subrecipient relationship is determined, then the recipient must consider which legal instrument to use in the third-party agreement, a subaward or a cooperative agreement. The only difference between the agreements is that when the recipient is substantially involved in the project, the correct funding instrument is a cooperative agreement (see 2 CFR 200.24 and <https://fawiki.fws.gov/display/WSFR/Cooperative+Agreement>).

The Uniform Guidance does not define “substantial involvement,” but guidance is available at: <https://fawiki.fws.gov/display/WSFR/Substantial+Involvement>. It is important to understand that the determination as to whether a third party is a subrecipient or contractor is made first and is not based on substantial involvement. Recipients that enter into an agreement with a third party should consider the relationship, the project, and the degree to which they intend to be involved. Requesting reports, required preapprovals, and monitoring are not necessarily substantial involvement. Once a recipient determines the third party is a subrecipient, it may choose to be substantially involved if it identifies a higher risk associated with the third party. A recipient may use its discretion in determining the level of involvement and if a cooperative agreement is the correct legal instrument.

**D. How does a recipient demonstrate that the case-by-case subrecipient and contractor determinations it makes are consistent and valid?** Recipients are required to establish internal control over compliance requirements. Recipients establishing relationships with a third party under their Federal award must have a written standard procedure for staff to follow when making such determinations, including documentation of decisions and the requirements for each funding instrument (i.e., subaward terms and conditions or contract provisions).

**E. What standards must recipients and subrecipients follow when entering a procurement relationship (contract) with a third party?**

Recipients and subrecipients must follow the applicable procurement standards at 2 CFR 200.317 - 326 when entering a procurement relationship with a third party. The recipient or subrecipient develops the specifications and requirements for the goods and/or services and based on their standards for selection, enters into a procurement relationship with a contractor. Contractors generally do not participate in the development of bid specifications. Contractors providing goods/services to recipients and subrecipients are subject to the Federal award terms and conditions only to the extent that they are incorporated into the provisions of their contract (e.g., Appendix II to Part 200—Contract Provisions for Non-Federal Entity Contracts Under Federal Awards). The procurement standards are applicable by entity type. States must follow the same policies and procedures it uses for procurements from its non-Federal funds, whether it is a recipient or subrecipient (see 2 CFR 200.317), in addition to complying with §§ 200.322 and 326. All other non-Federal entities are required to follow §§ 200.318 - 326. Recipients may require subrecipients to follow additional procurement standards, but those must not conflict with the requirements under the Uniform Guidance.

**F. What standards must a contractor providing goods/services under a Federal award follow when entering a procurement relationship with a third party (subcontractor)?**

The Uniform Guidance does not prescribe procurement standards for contractors providing goods/services to a recipient or subrecipient under a Federal award to follow when making subcontracts. A prospective contractor responds to the recipient or subrecipient's bid specifications as to whether they can provide the goods and/or services and may subcontract out any portion of its obligations following its own procedures. A State must follow its own laws, regulations, policies and procedures.

**G. Are recipients required to report subawards to the Federal Subaward Reporting System (FSRS), per the requirements of Federal Funding Accountability and Transparency Act (FFATA)?**

Yes. As of October 1, 2010, all prime recipients are required to report to the FSRS all subawards equal to or greater than \$25,000. The recipient is required to file a FFATA sub-award report by the end of the month following the month in which the recipient awards a subaward equal to or greater than \$25,000. This applies to recipients of both mandatory and discretionary Federal funding and to all transactions that meet the definition of a subaward. See <https://www.fsr.gov/> for more information.

**H. Are recipients required to report procurement contracts to the FSRS?**

No. Currently, prime recipients are not required to report on procurement contracts they issue under their Federal award.

**I. When a recipient enters into a subaward relationship with a subrecipient, is the subrecipient bound to the same Federal statutes, regulations, and award terms & conditions that the recipient is bound to?**

Generally, yes. A subrecipient is responsible for following applicable Federal statutes, regulations (program and administrative) and the terms and conditions of the Federal award, unless a section of the Uniform Guidance or the terms and conditions of the Federal award specifically indicate otherwise (see 2 CFR 200.101(b)(1)).

**J. Is a recipient required to accept a subrecipient's approved federally recognized indirect cost rate?**

**(1)** Yes. Pass-through entities (recipients) are required to accept the subrecipient's approved federally recognized indirect cost rate (ICR) negotiated between the subrecipient and the Federal Government (see 2 CFR 200.331 and 2 CFR 200.414) or, if no such rate exists, either a rate negotiated with the subrecipient or a *de minimis* rate as defined in 2 CFR 200.414(f). However, it is not permissible for the recipient to force or entice a proposed subrecipient without a negotiated rate to accept less than the *de minimis* rate (see question 200.331-6 in the Council on Financial Assistance Reform, *Frequently Asked Questions for the Uniform Grants Guidance*, July 2017). The following are a few exceptions to this requirement:

**(a)** If the financial assistance program is governed by Federal legislation or regulation that otherwise prohibits or limits recipient indirect cost rates. In this case, when the amount otherwise allocable as indirect costs exceeds the amount allowable under the award, the excess amount may, if not otherwise prohibited by legislation or regulation, be used to satisfy cost-sharing or matching requirements. However, the difference may not be shifted to another Federal award unless specifically authorized by legislation.



**(b)** If a financial assistance program has received approval from the Department of the Interior to deviate from recipient negotiated rates for a program or class of awards. The only Department programs with rate deviation approval are the Cooperative Fish and Wildlife Research Unit Program and the Cooperative Ecosystem Studies Unit Network. Only those projects with a subrecipient agreement funded under/in support of these two programs qualify for the approved indirect cost rate deviation. If a recipient enters into a subrecipient agreement with the same entity under any other program, the recipient must honor the subrecipient's approved, federally recognized indirect cost rate.

**(c)** If the subrecipient voluntarily attributes some or all of its allowable indirect costs as voluntary committed cost-share to satisfy cost-sharing or matching requirements (see 2 CFR 200.99).

**(d)** If the subrecipient voluntarily charges less than the full amount of indirect costs allowed under the award. The election must be voluntary; non-Federal pass-through entities must not require or otherwise solicit such a reduction. To document the voluntary nature of the lower rate, the recipient should require the subrecipient to submit a written statement, signed by the official having the authority to negotiate indirect cost rates for the subrecipient organization, providing notice that the organization voluntarily accept a reduced indirect cost rate. This statement should specify to which award(s)/project(s) the reduced rate applies. The recipient should maintain a copy of the subrecipient's statement in the official award file for every award to which the rate is applied.

**(2)** For all deviations to the ICR, including statutory, regulatory, programmatic, and voluntary, the basis of direct costs against which the indirect cost rate is applied must be either:

**(a)** The same base identified in the subrecipient's Federal negotiated indirect cost rate agreement, if they have one; or

**(b)** The Modified Total Direct Cost (MTDC) base described in 2 CFR 200.68, in cases where the subrecipient does not have a Federally negotiated indirect cost rate agreement or with prior approval of the Federal awarding agency.

**(3)** A relationship with a contractor will not include an ICR and will not need to follow any of the guidance in 2 CFR 200 pertaining to ICRs. A contract must not apply cost share benefits associated with indirect costs as described at 2 CFR 200.306(c).

**K. What are the recipient's responsibilities for monitoring subrecipients?** Recipients passing funds through to subrecipients are subject to all requirements described in 2 CFR 200.331, which include responsibilities for monitoring subrecipient performance. A recipient must monitor the subrecipient's activities as necessary to ensure that the subaward is used for its authorized purposes and in compliance with Federal statutes, regulations, and terms and conditions of the award (see 2 CFR 200.331(d)). This includes monitoring that is required by program regulations and may extend beyond the term of the agreement.

**L. Where can I find more information and support for making third-party determinations?** The Wildlife & Sport Fish Restoration Program provides further information to assist States at:

<https://fawiki.fws.gov/display/WSFR/Subrecipient+vs+Contractor+Determination>. Please subscribe to: [LIST SERVE?] for updates to this site.