



Third-Party Determination - Management Guide

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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)

Pittman-Robertson Wildlife Restoration Act, [16 U.S.C. 669](#)

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).

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; 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 (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 (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 (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 (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. A subaward may be provided through any form of legal agreement, including an agreement that the pass-through entity considers a contract (2 CFR 200.92).

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 (2 CFR 200.93).

Third-party means, for the purposes of this guidance, a non-Federal entity that a recipient is entering into a relationship with and using 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 third party may, depending on the substance of its relationships with a recipient, concurrently receive Federal funds from the recipient as a subrecipient and a contractor. Therefore, a recipient "must make case-by-case determinations" based on the substance of the relationship for each

instance where it enters into a third-party relationship (2 CFR 200.330). At 2 CFR 200.330, *Subrecipient and contractor determinations*, the regulations describe attributes 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:

(1) PUBLIC PURPOSE: *Is the third party carrying out, in whole or in part, one or more of the authorized 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).

If the recipient determines that the third party will carry out, in whole or in part, an authorized or identified public purpose of the assistance program, the third party is a subrecipient.

(2) PROJECT DEVELOPMENT:

(a) *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?*

If the recipient gives the third party full authority to develop and fulfill the project, the third party is a subrecipient. If the third party is developing the project statement or scope of work, or collaborating with the recipient to do so, this is generally indicative of a subrecipient relationship. For example, 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.

(b) *Alternatively, is the third party solely providing goods and/or services to the recipient in carrying out their Federal award project?*

If the third party does not develop the scope of work, but rather provides goods and/or services to a 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.

(3) PAYMENT: *As the recipient, how will you track costs and make payments to the third party? Will you reimburse the third party for actual costs? Or will you pay them a set, agreed-upon amount (i.e., fee-for-service)?*

If you will reimburse the third party only for actual costs and the third party will not make a profit, 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 (2 CFR 200.331(a)(5)).

If the third party charges a fixed price for goods and/or services that will net it 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.

(4) REPORTING: *As the recipient, will you require the third party to provide financial and performance reporting on activities associated with your Federal award during or at the end of the agreement period?*

If so, this is generally an indicator of a subrecipient relationship. Financial reports are required to monitor costs under the award. Performance reports are 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 (2 CFR 200.331(d)).

In the case 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 to account for costs that are not associated with a specific cost objective (direct cost)?*

If the third party is providing cost share or matching funds to support the requirements of the Federal award, the third party is a subrecipient. A contractor is under no obligation to contribute anything in support of the Federal award – it is just providing a good/service to the client, which is the recipient.

If the third party is a subrecipient using, the recipient is required to honor the subrecipient's federally recognized indirect cost rate (200.331). If a subrecipient chooses to accept a lesser indirect cost rate, unrecovered indirect costs may be applied only as match to an award (2 CFR 200.306(c)).

There may be exceptions where a contractor voluntarily donates goods and/or services that may be used toward non-Federal match, but generally non-Federal match is only provided by the recipient or subrecipient.

B. Can the Service provide examples of third parties that recipients must classify as subrecipients?

No. The Service cannot provide an example of a type of third party that would always be a subrecipient because non-Federal entities may concurrently receive Federal awards as a recipient, a subrecipient, and a contractor, depending on the substance of its agreements with the recipient (2 CFR 200.330). The determination depends on the nature of the relationship in fulfilling the Federal award. Recipients must follow the Uniform Guidance 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, cooperative agreement, or contract) (2 CFR 200.201(a)). However, we can state conclusively that if the third party is responsible for carrying out the public purpose of the Federal award, they are a subrecipient. The following examples demonstrating 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) often carry out fish and wildlife conservation and management activities such as research, survey, monitoring, and inventory. For example, the recipient defines the objectives of the Federal award and enters into a relationship with the university, and 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. In this case, the university is a subrecipient. To enter into such a relationship, the recipient must follow the applicable requirements for pass-through entities in 2 CFR 200.

(2) Universities also often provide specific services that a recipient may use when fulfilling the purpose of the Federal award. For example, a recipient collects fish or wildlife samples, but lacks the ability to conduct a particular genetic test. The university has staff, resources, and expertise to conduct the genetic test. The recipient enters into a relationship with the university to obtain their genetic testing services. The university provides the results to the recipient, and then the recipient uses the results to make decisions or conclusions to fulfill the purposes of the Federal award. In this example, the university is simply providing a service to the recipient. The recipient is still fulfilling the public purpose of the Federal award, not the university. In this case, the university is a contractor. To enter into 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. The determination of whether the third party is a subrecipient or a contractor should be made first. Once a subrecipient relationship is determined, then the recipient must consider which legal instrument to use in the third party agreement. When the recipient is substantially involved in the project, the correct funding instrument is a cooperative agreement (see 2 CFR 200.24).

Cooperative agreements, grant agreements, and subawards are all legal instruments under Federal financial assistance. Administratively, these three legal instruments function the same and are governed by the Uniform Guidance, but may differ in application according to the non-Federal entity type. The only difference between a cooperative agreement and a grant agreement or subaward is that the Federal awarding agency or pass-through entity that enters into a cooperative agreement with a third party is “substantially involved” in the project (2 CFR 200.24). When the Federal awarding agency or pass-through entity enters into a grant agreement or subaward with a third party, there is no substantial involvement.

The Uniform Guidance does not define “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. A recipient 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. The Service considers activities that qualify as substantial involvement to include:

- (1)** Participating or collaborating with a recipient in carrying out the scope of work.
- (2)** Reviewing and approving one stage of work before the next stage work may begin.
- (3)** Prior to awarding, reviewing and approving proposed modifications or further sub-awards.
- (4)** Assisting with the selection of project staff or trainees.
- (5)** Directing or redirecting work because of interrelationships with other projects.
- (6)** Reserving the right to immediately halt an activity if detailed performance specifications are not met.

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 into a procurement relationship with a third party?

Recipients and subrecipients must follow the applicable procurement standards at 2 CFR 200.317 through 200.326 when entering into a procurement relationship with a third party. The recipient or subrecipient develops the specifications and requirements for the goods and/or services and 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 (2 CFR 200.317), in addition to complying with § 200.322 and § 200.326. All other non-Federal entities are required to follow §§ 200.318 through 200.326. 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 into 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 or not they are able to provide the goods and/or services, and may subcontract out any portion of its obligations following its own 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. This applies 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 to follow applicable Federal statutes, regulations (program and administrative) and the terms and conditions of the Federal award, unless a particular section of the Uniform Guidance or the terms and conditions of the Federal award specifically indicate otherwise (2 CFR 200.101(b)(1)).

I. 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 negotiated between the subrecipient and the Federal Government (2 CFR 200.331) 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 (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 Federal negotiated indirect cost rate, 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.

J. 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 (2 CFR 200.331(d)). This may include monitoring that extends beyond the term of the agreement.