

SUBRECIPIENT AND CONTRACTOR DISTINCTIONS

EXECUTIVE SUMMARY

This policy provides the guidance and establishes the procedures regarding the distinction between subrecipients and contractors as well as the roles and responsibilities for all parties of an agreement. This policy applies to all entities contracted with the Employment Development Department (EDD), and is effective on the date of issuance.

This policy contains no state-imposed requirements.

This Directive finalizes Workforce Services Draft Directive *Subrecipient and Contractor Distinctions* (WSD18-177), issued for comment on March 9, 2018. The Workforce Development Community submitted one comment during the draft comment period. A summary of the comment and response is provided as Attachment 6.

Retain this Directive until further notice.

REFERENCES

- Title 2 *Code of Federal Regulations* (CFR) Part 200: “Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards” (Uniform Guidance)
- Title 2 CFR Part 2900: “Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards” (Uniform Guidance)
- Title 20 CFR Chapter V Part 675 (Final Regulations)
- [Memorandum dated June 20, 2018: Executive Office of the President, Office of Management and Budget, “Implementing Statutory Changes to the Micro-Purchase and the Simplified Acquisition Thresholds for Financial Assistance”](#)

The EDD is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities.

BACKGROUND

The Uniform Guidance, effective for federal funds awarded on or after December 26, 2014, provides additional requirements for subrecipients, contractors, and pass-through entities. Depending on the substance of individual contractual agreements, a non-federal entity may simultaneously receive federal awards as a recipient, a subrecipient, and a contractor. The determination of the type of legal relationship (subrecipient or contractor) must be made on a case-by-case basis prior to the creation of each individual agreement. With each determination comes specific requirements for the non-federal entities involved.

POLICY AND PROCEDURES

Definitions

Catalog of Federal Domestic Assistance (CFDA) number – The number assigned to a federal program in the CFDA.

Contract – A legal instrument by which a non-federal entity purchases property or services needed to carry out the project or program under a federal award. The term as used in this part does not include a legal instrument, even if the non-federal entity considers it a contract, when the substance of the transaction meets the definition of a federal award, subaward, or subgrant as defined in this section.

Contractor – An entity that receives a contract as defined above. The Uniform Guidance replaced the word “vendor” with the word “contractor”.

Cooperative agreement – A legal instrument of financial assistance between a federal awarding agency or pass-through entity and a non-federal entity that, 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 federal government, and not to acquire property or services for the federal government or pass-through entity’s direct benefit or use, and does not include a cooperative research and development agreement as defined in [15 U.S.C. 3710a](#); or an agreement that provides only direct federal government cash assistance to an individual, a subsidy, a loan, a loan guarantee, or insurance (Final Regulations Section 675.300). It is distinguished from a “grant agreement” 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.

Data Universal Numbering System (DUNS) – The nine-digit number established and assigned by Dun and Bradstreet, Inc. (D&B) to uniquely identify entities. A non-federal entity is required to have a DUNS number in order to apply for, receive, and report on a federal award.

Grant or Grant Agreement – A legal instrument of financial assistance between a federal awarding agency and a non-federal entity that, is used to enter into a relationship the principal purpose of which is to transfer anything of value from the federal awarding agency to carry out a public purpose authorized by a federal law, and not to acquire property or services for the federal awarding agency’s direct benefit or use. Grant agreement does not include an agreement that provides only direct federal government cash assistance to an individual, a subsidy, a loan, a loan guarantee, or insurance. It 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.

Non-Federal entity – A state, local government, Indian tribe, institution of higher education (IHE), for-profit entity, foreign public entity, foreign organization or nonprofit organization that carries out a federal award as a recipient or subrecipient.

Pass-through entity – A non-federal entity that provides a subaward to a subrecipient to carry out part of a federal program.

Research and Development (R&D) – All research activities, both basic and applied, and all development activities that are performed by non-federal entities. The term research also includes activities involving the training of individuals in research techniques where such activities utilize the same facilities as other research and development activities and where such activities are not included in the instruction function. “Research” is defined as a systematic study directed toward fuller scientific knowledge or understanding of the subject studied. “Development” is the systematic use of knowledge and understanding gained from research directed toward the production of useful materials, devices, systems, or methods, including design and development of prototypes and processes.

Simplified acquisition threshold – Fiscal threshold set by Federal Acquisition Regulation (currently \$250,000 per FAR Subpart 2.1). The threshold is periodically updated based on inflation.

Subaward or Subgrant – 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.

Subrecipient or Subgrantee – A non-federal entity that receives a subaward or subgrant 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 or subgrantee may also be a recipient of other federal awards directly from the federal awarding agency.

Subrecipient and Contractor Distinctions

A non-federal entity recipient of federal funds must determine the relationship with partners and entities on a case-by-case basis prior to entering into a contractual agreement. When determining whether a contractor or subrecipient relationship exists, the substance of the relationship is more important than the form of the agreement (i.e., grant, contract, subgrant, or subcontract). All characteristics related to the type of provider and agreement should be analyzed and no single factor should be taken in isolation. Not all characteristics will be present in every relationship and in rare situations an entity can be considered a recipient, a subrecipient, and a contractor, depending on the substance of each agreement.

Subrecipients are responsible for meeting all programmatic compliance requirements. Contractors are subject to procurement regulations (e.g. Federal Acquisition Regulations [FAR]), but are exempt from programmatic requirements. Contractors may receive payments for goods or services that originate from a federal award but those payments are not considered a federal award.

Subgrants have greater flexibility than contracts. Generally, changes to the scope of work or budget can be changed under subgrants but not under contracts. Contractors are required to present specific deliverables for completion of contract (which, if not completed, can result in non-payment or legal action). Subrecipients, on the other hand, can complete their obligation with an outcome or expenditure closeout report.

Subrecipient

A subrecipient carries out a portion of a federal award and creates a federal assistance relationship with the pass-through entity. The following descriptions are indicative of a non-federal entity in the role of a subrecipient:

- Determines eligibility for the federally funded program
- Performance is measured against the objectives of the federal program
- Maintains programmatic control or independent discretion over work
- Responsible for adherence to applicable federal program compliance requirements (e.g. WIOA)
- Uses federal funds to carry out a program for a specified public purpose as opposed to providing goods or services for a program or pass-through entity
- Directly supports goals of grant

Contractor

A contractor is a vendor, dealer, distributor, merchant, or other seller providing goods or services that are required to conduct a federal program. The following descriptions are indicative of a contractor in a procurement relationship with the non-federal entity disbursing federal funds:

- Provides goods and services to a variety of purchasers within normal business operations
- Operates in a competitive environment
- Provides goods or services that are ancillary to the operation of the federal program
- Not subject to federal compliance requirements of the program resulting from the agreement
- Does not participate in program design
- Holds little or no independent discretion over program work or direction
- Undelivered work will result in non-payment
- Not required to directly support goals of grant

The following chart includes a list of indicators that may be of assistance in distinguishing subrecipients from contractors. This guidance is based in part on the information found in the Uniform Guidance Section 200.330.

Factor	Contractor	Subrecipient
Activity ¹	Sell deliverables (goods/services)	Provide services
Assistance Arrangement	Buyer-seller	Financial assistance to operate a program
Closeout Package	Final invoice	Comprehensive
Control	Control is outcome focused	Control is on process
Development Costs	Absorbed	Controlled
Extent of Flexibility	Bound to adhere to specific contract terms	Latitude to make decision within terms of agreement
Federal Program Rules	N/A	Compliance
On-the-Job Training	Subrecipient developed (direct employer award)	Award to broker
Payment Basis ²	Is paid for specific deliverable	Is paid for services whether expensed as a deliverable or not
Product	Specific outcomes	Operate a program
Performance Measured ³	Against the specific requirements of contract	Against the performance outcomes of the financial assistance award

Product Development	Develops product and delivers from inventory	Controls development
Public Policy	Contract specific clauses	Standard statement of assurances
Purpose of the Award	To provide specific goods or Services	To carry out a program goal
Receipt of Funds	Number of items delivered	Costs incurred
Risk	Risk to contractor	Share risk w/awarding agency
Type of Training Referral	Slotting on an individual referral basis	Filling a class-sized training Program
Type of Market	For sale within normal business operation; existing product tailored to the program	Customized for specific program purposes
Type of Product	Provide specific product or service ancillary to the federal program	Design a program to meet a broader goal such as performance outcomes

¹ There may be instances where it is possible to obtain the same type of services under either a contractor or a subrecipient award.

^{2,3} Federal reform efforts are now shifting emphasis from paying for process to paying for results. Such performance and outcome-based payments are possible under both contractor and subrecipient awards.

Exclusions

A subgrant or contract cannot be entered into with parties listed on the government wide exclusions list in the System for Award Management (SAM). SAM contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority. Exclusion records can be searched on the [SAM](#) website.

Requirements for Awarding to Subrecipients

When a non-federal entity awards federal funds to a subrecipient, the non-federal entity becomes the pass-through entity. It is the responsibility of the pass-through entity to ensure the following information is clearly stated on all subawards:

- Subrecipient’s name (as shown in Data Universal Numbering System (DUNS) registration)
- Federal Award Identification Number (i.e., FAIN)
- Subrecipient’s DUNS number (Uniform Guidance Section 200.32)
- Pass-through entity’s award date
- Grant term dates (period of performance)
- Amount of award (current amount and total committed under award)
- Federal award project description to comply with the *Federal Funding Accountability and Transparency Act (FFATA)*

- Name of federal awarding agency, pass-through entity, and contact information for awarding official of the pass-through entity
- CFDA Number and Name
- Identification of whether the award is considered research and development
- Indirect cost rate, if being charged
- All requirements imposed by the pass-through entity so that the federal award is used in accordance with federal statutes, regulations and the terms and conditions of the federal award
- Any additional requirements that the pass-through entity imposes in order for the pass-through entity to meet its own responsibility to the federal awarding agency including identification of any required financial and performance reports
- A requirement that gives pass-through entity and auditors access to records and financial statements as necessary
- Appropriate terms and conditions concerning closeout

If some information is not available, the pass-through entity must provide the best information available. Any changes or information obtained after execution of the agreement should be included in a modification. For a more detailed list of required items refer to Uniform Guidance Section 200.331.

The pass-through entity is also required to evaluate the risk of noncompliance with federal statutes, regulations, and the terms and conditions of the subgrant. The evaluation should determine the appropriate subrecipient monitoring required. Key areas to investigate include prior experience with similar awards, the results of prior audits, monitoring activities or compliance failures, if the subrecipient has new personnel or new or substantially changed systems and the subrecipients total funding, including other awards being received.

Based upon the level of risk to the federal awards determined, the pass-through entity may impose specific conditions upon a subrecipient. Additional requirements can include the following (Uniform Guidance Section 200.207[b]):

- Requiring payments as reimbursements rather than advance payments
- Withholding authority to proceed to the next phase until receipt of evidence of acceptable performance within a given period of performance
- Requiring additional or more detailed financial reports
- Requiring additional project monitoring
- Requiring subrecipient to obtain technical or management assistance
- Establishing additional prior approvals

If additional requirements are imposed, the pass-through entity must notify the subrecipient of the additional requirements, why the requirements are being imposed and any time frames for meeting the requirements. The actions needed to lift the requirements and a method to

request reconsideration should also be clearly stated. Any specific conditions must be promptly removed once the conditions that prompted them have been corrected.

The pass-through entity is required to monitor the activities of the subrecipient to ensure the proper use of funds and compliance with applicable statutes, regulations and terms. This includes verifying that every subrecipient is audited as required by Subpart F—Audit Requirements. The pass-through entity must review financial and performance reports submitted by the subrecipient and ensure appropriate action is taken on all deficiencies found through audits, on-site reviews or other means. The pass-through entity should also consider whether any findings indicate conditions that necessitate adjustments to the pass-through entity's own records.

In the case of an audit finding, the pass-through entity is responsible to determine if the finding should be sustained and the method to rectify the circumstance as described in Uniform Guidance Section 200.521. The pass-through entity may take actions against noncompliant subrecipients, including the following:

- Temporarily withhold cash payments pending correction of the deficiency
- Disallow (that is, deny both use of funds and any applicable matching credit for) all or part of the cost of the activity or action not in compliance
- Wholly or partly suspend or terminate the federal award
- Initiate suspension or debarment proceedings as authorized under 2 CFR part 180 and federal awarding agency regulations (or in the case of a pass-through entity, recommend such a proceeding be initiated by a federal awarding agency)
- Withhold further federal awards for the project or program
- Take other remedies that may be legally available

There are a number of activities which may prove useful to ensure proper accountability and compliance. These include providing training and technical assistance on program-related matters, the performance of regular on-site reviews, and arranging agreed-upon-procedures engagements as described in Uniform Guidance Section 200.425(c).

Additional Requirements for Contracts

In addition to other provisions required by the federal agency or non-federal entity, all contracts made by the non-federal entity under the federal award must contain provisions covering the following, as applicable (Appendix II to Part 200):

- Contract in excess of the simplified acquisition threshold (currently \$250,000) must address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate
- Contract in excess of \$10,000 must address termination for cause and for convenience by the pass-through entity, including the manner by which it will be effected and the basis for settlement

- Contract in excess of \$150,000 must contain a provision that requires the contract to agree to comply with all applicable standards, orders or regulations issued pursuant to the *Clean Air Act* (42 U.S.C. 7401-7671q) and the *Federal Water Pollution Control Act* as amended (33 U.S.C. 1251-1387)
- Must include the equal opportunity clause provided under 41 CFR 60-1.4(b)
- When required by federal program legislation, all prime construction contracts in excess of \$2,000 awarded by non-federal entities must include a provision for compliance with the Davis-Bacon Act (40 U.S.C. 3141-3144, and 3146-3148) as supplemented by Department of Labor regulations (29 CFR Part 5, “Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction”)
- Contract in excess of \$10,000 that involve the employment of mechanics or laborers must include a provision for compliance with 40 U.S.C. 3702 and 3704, as supplemented by Department of Labor regulations (29 CFR Part 5)

If the federal award meets the definition of “funding agreement” under 37 CFR §401.2 (a) and the recipient or subrecipient wishes to enter into a contract with a small business firm or nonprofit organization regarding the substitution of parties, assignment or performance of experimental, developmental, or research work under that “funding agreement,” the recipient or subrecipient must comply with the requirements of 37 CFR Part 401, “Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements,” and any implementing regulations issued by the awarding agency.

ACTION

Bring this directive to the attention of the appropriate staff.

INQUIRIES

If you have any questions, contact Financial Management Unit at WSBFinancialManagementUnit@edd.ca.gov.

/S/ JAIME L. GUTIERREZ, Chief
Central Office Workforce Services Division

Attachments are available on the internet:

1. [Summary of Comments \(DOCX\)](#)
2. [Errata Chronology \(PDF\)](#)