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TO: Cabinet Secretaries and Local Government Federal Award Recipients

FROM: Department of Finance and Administration, Infrastructure Planning and Development Division

CC: Dorothy Mendonca, Director of State Purchasing Division, General Services Department; State agency Administrative Services Division Directors

DATE: July 15, 2024

RE: **Guidance for Federal Award Recipient when Electing to Engage a Subrecipient or Contractor**

When carrying out a federal funding award, such as a grant or cooperative agreement, a recipient¹ may engage with a third party on either a contractual basis or on a subrecipient basis. The decision to engage a third party as a subrecipient² or contractor³ depends on the goals, abilities, and circumstances of the recipient.

Either choice is generally acceptable. Choosing whether to engage a subrecipient or a contractor depends on the terms of the federal award and the abilities and constraints of the recipient. Working with a subrecipient or a contractor provides both advantages and disadvantages, and the best choice will be fact-specific and pursuant to the best interests of the federal award recipient.

Specifically, if a recipient chooses to engage a third party as a subrecipient, there may be more flexibility in distributing the federal award, but the ongoing oversight and administration costs can be substantial. On the other hand, procuring the goods and services from a third party contractor may be more burdensome up front, but without ongoing monitoring and oversight responsibilities.

In order to help New Mexico recipients understand the differences between these two options and improve the efficiency and execution of federal awards in the state, the New Mexico Department of Finance and Administration has prepared this guidance. This guidance is organized in three sections and provides a step-by-step review to assist the recipient in determining which choice is best suited to fulfilling the purpose of the federal award.

¹ In the context of this guidance, a recipient is a **pass-through entity** such as a state agency, i.e., a non-federal entity that receives federal funds and will rely on a third party for part of the program or project performance.

² A **subrecipient** is a non-federal entity that receives a subaward from a pass-through entity to carry out a part of a federal program. See 2 CFR 200.1.

³ A **contractor** enters into a contract with the federal award recipient to provide property (i.e., goods) or services to carry out a project or program under a federal award. See 2 CFR 200.22.

- Section 1, Determining the Nature of the Relationship, presents a series of general characteristics for the recipient to consider that distinguishes a subrecipient from a contractor.
- Section 2, Compliance Requirements, will help recipients determine applicable compliance requirements.
- Section 3, Benefits to Consider, will help Recipients review the benefits of utilizing either a subrecipient or a contractor.

Section 1: Determining the Nature of the Relationship

Subrecipient	Contractor
<ul style="list-style-type: none"> <input type="checkbox"/> Will have the authority to make decisions about the delivery of the program funds that it has been granted, in accordance with federal regulations. <input type="checkbox"/> Will have the authority to determine who is eligible for the program it is administering, in accordance with federal regulations. <input type="checkbox"/> Will use funds to carry out a public project and/or provide a public service. <p>Recipients generally select subrecipients based on an announcement that funding is available.</p> <p>- Subrecipient must follow federal and scope of work requirements specified in the subaward.</p> <p>- Subrecipient performance will be measured against the goals and objectives of the federal program or project as outlined in the federal award letter.</p>	<ul style="list-style-type: none"> <input type="checkbox"/> Provides goods or services that are ancillary to the operation of the federal program. <input type="checkbox"/> Provides similar goods and services to many different purchasers within the normal business operations. <input type="checkbox"/> Operates in a competitive environment, i.e., competes with other organizations to provide a similar good or service. <p>Recipient generally selects the contractor based on procurement law subsequent to a request for quotes (or request for proposals).</p> <p>- Contractor performance will be measured against whether it meets specific contract deliverables rather than the program outcomes.</p> <p>- Contractor assumes all financial risk if it fails to deliver the agreed upon goods and services.</p>

Section 2: Compliance Requirements

Subrecipient	Contractor
<ul style="list-style-type: none"> <input type="checkbox"/> Recipient must assess the risk beforehand when selecting subrecipient(s). <input type="checkbox"/> Recipient must flow down the requirements of the grant to the subrecipient(s). <input type="checkbox"/> Recipient must adequately monitor subrecipient(s). <input type="checkbox"/> Recipient must acquire expenditure and encumbrance data from the subrecipient(s). <input type="checkbox"/> Recipient must audit the subrecipient(s). <input type="checkbox"/> Recipient must disclose potential violations of Federal criminal law including but not limited to fraud, bribery, or conflict of interest, gratuity violations potentially affecting the Federal award. 	<ul style="list-style-type: none"> <input type="checkbox"/> Receipt and payment of goods and services must be procured in accordance with the New Mexico Procurement Code.⁴ <input type="checkbox"/> Contractor must comply with contractual responsibilities. <input type="checkbox"/> Recipient must direct and oversee the Contractor's work and manage the contract in accordance with the Procurement Code. <input type="checkbox"/>

Section 3: Benefits to Consider

Benefits of Using Subrecipient	Benefits of Using Contractor
<ul style="list-style-type: none"> <input type="checkbox"/> Subrecipient can be a partner to recipient when providing deliverables in accordance with federal regulations. <input type="checkbox"/> No legal damages for subrecipient failure to succeed in carrying out the grant provided all terms of the grant are followed. <input type="checkbox"/> Recipient can draft and tailor subrecipient agreements to include legal recourse against a non-performing subrecipient. <input type="checkbox"/> Recipient can use the federal awarding agency to initiate debarment proceedings against a subrecipient. <input type="checkbox"/> Payment can be made either through disbursement or reimbursement, as determined by the recipient when executing the subaward. 	<ul style="list-style-type: none"> <input type="checkbox"/> Contractor performance is measured relative to a scope of work, against specific contract deliverables, rather than the program outcomes. <input type="checkbox"/> Contractor assumes all financial risk if it fails to deliver the agreed upon goods and service. <input type="checkbox"/> Contract relationship creates legal liability for the contractor that allows the Recipient to enforce performance or remedies in the case of breach or for non-performance. <input type="checkbox"/> Payment is made after the contractor's performance.

⁴ Under New Mexico law, the Procurement Code applies to every expenditure by state agencies and local public bodies for the procurement of items of tangible personal property, services and construction. Under New Mexico law, procurement means purchasing, renting, leasing, lease purchasing, or otherwise acquiring items of tangible personal property, services, or construction and all procurement functions, including but not limited to preparation of specifications, solicitation of sources, qualification or disqualification of sources, preparation and award of contract and contract administration. Under New Mexico regulations, contract means any written binding agreement for the procurement of items of tangible personal property, services, or construction. A purchase order alone can be a binding contract.

Conclusion

This guidance provides a brief overview of the criteria that a recipient may consider when choosing to engage a third party as either a subrecipient or a contractor to carry out a federal award.

As stated above, both options are generally permissible and the best fit for any particular federal award will depend on the limitations/specifications of the federal award combined with the considerations in this guidance. If you represent a state agency or local public body recipient of a federal award and you prefer to work with either subrecipient or contractor, you may wish to discuss the federal award allowances and constraints with the federal agency before applying for the federal grant and/or before finalizing the grant or cooperative agreement after being notified of selection for the federal award.

The specific rules that govern subrecipients and contractors are found in [2 C.F.R. § 200, Uniform Administrative Guidance, Subpart D, Post Federal Award Requirements](#).

For further assistance, please do not hesitate to [contact](#) the Federal Grants Management Bureau at the Infrastructure Planning and Development Division, Department of Finance and Administration.