




NAVAJO NATION DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

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MEMORANDUM

TO: Elizabeth Begay, Acting Controller, Office of the Controller
Tom Platero, Director, Navajo Nation Fiscal Recovery Fund Office
Emerson Horace, ARPA Supervisor, Office of the Controller
Jeremy Ben, Manager, Purchasing, Office of the Controller
Germaine Jones, Deputy Contracting Officer, Office of Management and Budget

FROM: 
Kristen A. Lowell, Principal Attorney
Tax & Finance Unit

DATE: December 22, 2022

SUBJECT: **Whether to Use a Services Contract or a Subrecipient Agreement When the Nation Disburses Fiscal Recovery Funds under ARPA/FRF**

When the Navajo Nation disburses Fiscal Recovery Funds (“FRF”) under the American Response Plan Act (“ARPA”), the Navajo Nation will enter into an agreement with the entity receiving the funds. The form of the agreement will be either a subrecipient agreement, or the Navajo Nation’s standard professional services contract. This memorandum discusses the differences between contractors (previously called vendors) and subrecipients, and when to use a subrecipient agreement versus a professional services contract.

Subawards and Subrecipients

The Code of Federal Regulations (“CFR”) provides that “a subaward is for the purpose of carrying out a portion of a Federal award and creates a Federal assistance relationship with the subrecipient.” 2 CFR 200.331(a). A subaward is “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.” 2 CFR 200.1.

The purpose of a subrecipient agreement is to carry out the reason for the federal funding and the characteristics of **subrecipients** may include the following:

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- (1) when the entity receiving the federal funds determines who is eligible to receive what Federal assistance;
 - (2) when the entity receiving the federal funds has its performance measured in relation to whether objectives of a Federal program were met;
 - (3) when the entity receiving the federal funds is responsible for programmatic decision-making;
 - (4) when the entity receiving the federal funds is responsible for adherence to applicable Federal program requirements specified in the Federal award; and
 - (5) In accordance with its agreement, the entity receiving the federal funds uses the federal funds to carry out a program for a public purpose specified in authorizing statute, as opposed to providing goods or services for the benefit of the pass-through entity.
- 2 CFR 200.331(a).

In contrast, the purpose of a services contract is to obtain good or services for the benefit of the pass-through entity. As such, the characteristics of **contractors** may include the following:

- (1) when the entity receiving the federal funds provides the goods and services within normal business operations;
 - (2) when the entity receiving the federal funds provides similar goods or services to many different purchasers;
 - (3) when the entity receiving the federal funds normally operates in a competitive environment;
 - (4) when the entity receiving the federal funds provides goods or services that provide support to, rather than being the primary focus of, the operation of the Federal program; and
 - (5) when the entity receiving the federal funds is not subject to compliance requirements of the Federal program as a result of the agreement, though similar requirements may apply for other reasons.
- 2 CFR 200.331(b).

These characteristics are meant to guide you in determining whether an entity should be treated as a contractor or a subrecipient, but you will need to exercise good judgment when making the determination. According to the CFR, not all characteristics need to be present when making a determination whether a funding recipient is a subrecipient or a contractor. Additionally, “the substance of the relationship is more important than the form of the agreement.” 2 CFR 200.331(c).

As mentioned above, a subaward is intended to carry out the purpose for which federal funding was given to the pass-through entity, in this case the Navajo Nation. For FRF purposes, the funds were awarded to the Navajo Nation for the purposes of (1) responding to the far-reaching public health and negative economic consequences of the pandemic, (2) providing premium pay

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for eligible workers (3) replacing lost government revenue, and (4) investing in water, sewer, broadband infrastructure.

Another way to look at this is who will be the ultimate beneficiary of the services. If it is the Navajo Nation government, you should likely be entering into a services agreement. If the beneficiary of the services are Navajo Nation members or residents, however, you should most likely be entering into a subrecipient agreement.

Example:

1. Project: ARPA-FRF dollars will be disbursed to ABC Company to construct homes for veterans.
2. Eligibility Category: The project was determined eligible under category 2.15 Long-term housing security: affordable housing.
3. ABC Company constructs homes as part of its business and works in a competitive environment.
4. NN Veterans Administration made the decision on the design of the homes and where the homes will be constructed, so ABC Company does not have programmatic discretion.

In this example, ABC Company is a subrecipient. While ABC Company meets three of the five characteristics to be a contractor, but only two of five as a subrecipient, and the characteristics alone may point to classifying ABC Company as a contractor, the determinative factor is ABC Company's purpose in spending the federal funding, which is to fulfill the purpose of the federal funding. Moreover, treating ABC Company as a subrecipient is consistent with the definition of a subaward as referenced in 2 CFR 200.1, above. Given ABC Company's *purpose* in spending the federal funding, **ABC Company is a subrecipient, and the Navajo Nation will use a subrecipient agreement.**

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Attachments:

1. Checklist to Determine Subrecipient or Contractor Classification
2. 2 CFR 200.331(a)-(c)

xc: Doreen N. McPaul, Attorney General, Office of the Attorney General
Kimberly A. Dutcher, Deputy Attorney General, Office of the Attorney General
Assistant Attorney Generals, Department of Justice

CHECKLIST TO DETERMINE CLASSIFICATION - SUBRECIPIENT OR CONTRACTOR

DEFINITIONS FROM UNIFORM GUIDANCE (2 CFR, PART 200):

Subrecipient:

§200.93 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.

Contractor:

*§200.23 Contractor means an entity that receives a contract as defined in §200.22 Contract.
 §200.22 Contract means 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.*

INSTRUCTIONS: Complete sections one and two of the checklist by marking all characteristics that apply to the outside entity.

NAME OF OUTSIDE ENTITY: _____

SECTION 1 - SUBRECIPIENT

A subaward is for the purpose of carrying out a portion of a Federal award and creates a Federal assistance relationship with the subrecipient. Characteristics which support the classification of the non-Federal entity as a subrecipient include when the non-Federal entity:

- 1. Determines who is eligible to receive what Federal assistance;
- 2. Has its performance measured in relation to whether objectives of a Federal program were met;
- 3. Has responsibility for programmatic decision making;
- 4. In accordance with its agreement, uses the Federal funds to carry out a program for a public purpose specified in authorizing statute, as opposed to providing goods or services for the benefit of the pass-through entity.
- 5. In accordance with the agreement between it and the Navajo Nation, uses the federal funds to carry out a program for a public purpose specified in an authorizing statute rather than simply providing goods or services for the benefit of the Navajo Nation government.

Entities that include these characteristics are responsible for adherence to applicable Federal program requirements specified in the Federal award.

SECTION 2 - CONTRACTOR

A contract is for the purpose of obtaining goods and services for the non-Federal entity's own use and creates a procurement relationship with the contractor. Characteristics indicative of a procurement relationship between the non-Federal entity and a contractor are when the contractor:

- 1. Provides the goods and services within normal business operations;
- 2. Provides similar goods or services to many different purchasers;
- 3. Normally operates in a competitive environment;
- 4. Provides goods or services that are ancillary to the operation of the Federal program.
- 5. Is not subject to compliance requirements of the Federal program as a result of the agreement, though similar requirements may apply for other reasons.

Entities that include these characteristics are not subject to compliance requirements of the Federal program as a result of the agreement, though similar requirements may apply for other reasons.

SECTION 3 - USE OF JUDGMENT

Description: *In determining whether an agreement between a pass-through entity and another non-Federal entity casts the latter as a subrecipient or a contractor, the substance of the relationship is more important than the form of the agreement. All of the characteristics listed above may not be present in all cases, and the pass-through entity must use judgment in classifying each agreement as a subaward or a procurement contract.*

Explanation of Use of Judgment Determination:

FINAL DETERMINATION:

SUBRECIPIENT **CONTRACTOR**

Prepared By: _____

Date: _____

SERVICES CONTRACT OR SUBRECIPIENT AGREEMENT WHEN USING FISCAL RECOVERY FUNDS UNDER ARPA

2 CFR 200.331 ([eCFR :: 2 CFR 200.331 -- Subrecipient and contractor determinations.](#))

[§ 200.331 Subrecipient and contractor determinations.](#)

The non-Federal entity may concurrently receive Federal awards as a recipient, a subrecipient, and a contractor, depending on the substance of its agreements with Federal awarding agencies and pass-through entities. Therefore, a pass-through entity must make case-by-case determinations whether each agreement it makes for the disbursement of Federal program funds casts the party receiving the funds in the role of a subrecipient or a contractor. The Federal awarding agency may supply and require recipients to comply with additional guidance to support these determinations provided such guidance does not conflict with this section.

(a) ***Subrecipients.*** A subaward is for the purpose of carrying out a portion of a Federal award and creates a Federal assistance relationship with the subrecipient. See definition for *Subaward* in [§ 200.1 of this part](#). Characteristics which support the classification of the non-Federal entity as a subrecipient include when the non-Federal entity:

- (1) Determines who is eligible to receive what Federal assistance;
- (2) Has its performance measured in relation to whether objectives of a Federal program were met;
- (3) Has responsibility for programmatic decision-making;
- (4) Is responsible for adherence to applicable Federal program requirements specified in the Federal award; and
- (5) In accordance with its agreement, uses the Federal funds to carry out a program for a public purpose specified in authorizing statute, as opposed to providing goods or services for the benefit of the pass-through entity.

(b) ***Contractors.*** A contract is for the purpose of obtaining goods and services for the non-Federal entity's own use and creates a procurement relationship with the contractor. See the definition of *contract* in [§ 200.1 of this part](#). Characteristics indicative of a procurement relationship between the non-Federal entity and a contractor are when the contractor:

- (1) Provides the goods and services within normal business operations;
- (2) Provides similar goods or services to many different purchasers;
- (3) Normally operates in a competitive environment;
- (4) Provides goods or services that are ancillary to the operation of the Federal program; and
- (5) Is not subject to compliance requirements of the Federal program as a result of the agreement, though similar requirements may apply for other reasons.

(c) ***Use of judgment in making determination.*** In determining whether an agreement between a pass-through entity and another non-Federal entity casts the latter as a subrecipient or a contractor, the substance of the relationship is more important than the form of the agreement. All of the characteristics listed above may not be present in all cases, and the pass-through entity must use judgment in classifying each agreement as a subaward or a procurement contract.