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Nuts and Bolts of Subgrant Agreements

Attorney Network Webinar

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Agenda

- Subrecipient vs. contractor determination
- Managing subawards
 - Obligations of the pass-through entity
 - Applicable rules governing subaward agreements
- Sample Subaward Agreement
 - Elements of a subaward agreement

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Recipient vs. Subrecipient vs. Contractor

- A non-federal entity (e.g., CAA) may receive federal awards as a **recipient**, **subrecipient** or **contractor** (2 C.F.R. § 200.330)
- **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 (2 C.F.R. § 200.86)
 - Does not include “subrecipients”

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Subrecipient vs. Contractor

- **Subrecipient** means a non-federal entity that receives a subaward from a pass-through entity to carry out part of a federal award received by the pass-through entity (2 C.F.R. § 200.92)

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Subrecipient vs. Contractor

- **Contract** means a legal instrument by which a non-Federal entity purchases property or services needed to carry out a project or program under a Federal award (2 C.F.R. § 200.22)
- **Contractor** means an entity that receives a contract as defined in § 200.22 - Contract (2 C.F.R. § 200.23)
 - Note: The Uniform Guidance replaced “vendor” with “contractor”

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Subrecipient vs. Contractor

Subrecipient (Subaward)	Contractor (Procurement contract)
Purpose is to carry out a portion of the Federal award	Purpose is to obtain goods and services for the non-Federal entity's own use
Determines eligibility for assistance	Provides goods and services within normal business operations
Performance measured according to Federal program objectives	Provides similar goods and services to many different purchasers
Responsible for program decision-making	Normally operates in a competitive environment
Must comply with Federal program requirements	Is not subject to compliance requirements of the Federal program as a result of the agreement
Funds used to carry out the Federal program, rather than providing goods or services	Provides goods or services that are ancillary to the operation of the Federal program <i>2 C.F.R. § 200.330</i>

Subrecipient vs. Contractor

- **Substance of the relationship** is more important than the form of the agreement.
 - Not all characteristics will be present in every relationship
- Pass-through entity should **use judgment** in classifying each agreement as a subaward or a procurement contract

2 C.F.R. § 200.330

Early Head Start-Child Care Partnerships

Subrecipient or Contractor Determination: An Analysis Tool

The following tool will assist in determining whether a partner should appropriately be classified as a contractor or subrecipient

For each of the following, check the box under the entity that is responsible for the activity noted in your partnership arrangements:	Grantee	Partner
Determines whether children are eligible to receive Early Head Start partnership services.	<input type="checkbox"/>	<input type="checkbox"/>
Develops long-range program goals and short-term program and financial objectives as described in ACF-IM-HS-14-02.	<input type="checkbox"/>	<input type="checkbox"/>
Can unilaterally make important decisions impacting the delivery of services, such as the length of the service day.	<input type="checkbox"/>	<input type="checkbox"/>
Receives the Notice of Award and must assure compliance with standard and special terms and conditions associated with the award.	<input type="checkbox"/>	<input type="checkbox"/>
Has responsibility for assuring that the program delivers high-quality, comprehensive services to low-income infants, toddlers, and their families.	<input type="checkbox"/>	<input type="checkbox"/>
Add up the number of checks in each column. If most checks are in the Grantee column, the partner is likely to be a contractor. If most checks are in the Partner column, the partner is likely to be a subrecipient.	Total	Total
For each of the following, check yes/no to indicate if this information describes you (Grantee) or your partner:	Yes	No
Did the partner provide child care services to other customers or partners prior to becoming a partner?	<input type="checkbox"/>	<input type="checkbox"/>
Does the partner provide similar child care services to other customers or partners?	<input type="checkbox"/>	<input type="checkbox"/>
Does the partner compete with other child care providers in the local community?	<input type="checkbox"/>	<input type="checkbox"/>
The services provided by the partner cover only some aspects of comprehensive services to EHS-enrolled children and their families.	<input type="checkbox"/>	<input type="checkbox"/>
Programmatic compliance and oversight of partnership funds and property are the responsibility of the grantee.	<input type="checkbox"/>	<input type="checkbox"/>
Add up the number of checks in each column. If most checks are in the Yes column, the partner is likely to be a contractor. If most checks are in the No column, the partner is likely to be a subrecipient.	Total	Total

Subrecipient or Contractor Determination: An Analysis Tool

- Provided by the Office of Head Start in EHS-CC Partnership orientations to help grantees determine whether partner is a subrecipient or a contractor
- Overlays the requirements of 45 CFR Part 75 with requirements of the EHS-CC Partnership awards

Managing Subawards

- Identify and select partners
- Understand the rules applicable to subawards
- Evaluate costs and review budget
 - Discuss cost allocation and indirect cost treatment
- Draft subaward agreement
- Administer and manage award
 - Provide appropriate financial and technical assistance
 - Pre-award risk assessment
 - Manage payments
- Meet reporting requirements
- Plan for closeout of subaward

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Obligations of Pass-Through Entity

- Determine contractor vs. subrecipient relationship
- Include certain specified information (including applicable indirect cost rate) in the subaward
- Conduct pre-award risk assessment to determine the appropriate monitoring level
- Consider imposing specific subaward conditions
- Monitor subrecipients' activities to ensure:
 - Subaward is used for authorized purposes
 - Subaward performance goals are achieved
- Verify subrecipient is audited according to Single Audit
- Consider taking enforcement actions against noncompliant subrecipients

2 C.F.R. § 200.331

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Rules Applicable to Subawards

- Federal award agreement
- Authorizing statute and regulations of Federal award
- Federal appropriations act
- Uniform Guidance
 - Codification by Federal awarding agency (e.g., HHS's codification is 45 C.F.R. Part 75)
- Any other statutes, rules, regulations, or other laws incorporated by reference in the above
 - E.g., regs for faith-based orgs, Davis-Bacon Act, restrictions on lobbying, etc.

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Elements of a Subaward Agreement

Recitals

- a. General statement of purpose of the subaward
- b. Identify the federal awarding agency, prime award, award authorizing statute and implementing regulations
- c. Identify the award as a *subaward*
- d. Consider referencing the award identification data required by the Uniform Guidance (2 C.F.R. § 200.331)

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Elements of a Subaward Agreement

Required award identification information from 2 C.F.R. § 200.331

- a. Subrecipient name
- b. Subrecipient Unique Entity Identifier (DUNS #)
- c. Federal Award Identification Number (FAIN)
- d. Federal award date
- e. Subaward period of performance start and end dates
- f. Amount of federal funds obligated by this action by the pass-through entity to the subrecipient
- g. Total amount of federal funds obligated to the subrecipient by the pass-through entity including the current obligation
- h. Total amount of the federal award committed to the subrecipient by the pass-through entity
- i. Federal award project description
- j. Name of federal awarding agency, pass-through entity and contact information for awarding official
- k. CFDA number and name
- l. Whether the award is R&D
- m. Indirect cost rate for federal award (including if using de minimis rate)

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Indirect Costs

- Indirect costs
 - Pass-through **must** (2 C.F.R. § 200.331; COFAR FAQ .331-6):
 - Honor subrecipient's federally negotiated indirect cost rate; or
 - Use a 10% MTDC de minimis rate; or
 - Negotiate a rate with the subrecipient (can't force a subrecipient to accept less than the 10% de minimis rate)
 - Statutory caps on administrative costs
 - Non-federal entities are not required to establish indirect cost rates (2 C.F.R. § 200.331)
 - May continue to use cost allocation plan

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Elements of a Subaward Agreement

1. Term
2. Scope of Services; Budget
3. Compensation; Payment Methods
4. Financial Accountability and Grant Administration
 - Financial management system/records
 - Indirect cost rate
 - Financial and other reports
 - Audits
 - Closeout

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Elements of a Subaward Agreement

5. Monitoring and Evaluation
6. Record Retention and Access
7. Independent Contractor Relationship
8. Compliance with Grant Agreement and Applicable Laws
 - Prime award and subaward
 - Approved scope of services and budget
 - Laws applicable to subaward agreement

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Elements of a Subaward Agreement

9. Employment Laws and Policies
10. Confidentiality; Protection of Personally Identifiable Information
11. Publicity; Public Announcements
12. IP Rights
13. Indemnification
14. Insurance
15. Termination
 - For cause and for convenience

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Elements of a Subaward Agreement

16. General Provisions
 - Governing Law
 - No Assignment
 - Notices
 - Amendments

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Elements of a Subaward Agreement

- List of Exhibits
 - Exhibit A: Notice of Prime Award
 - Exhibit B: Subaward Data
 - Exhibit C: Approved Services
 - Exhibit D: Approved Budget
 - Exhibit E: Required Contract Provisions
 - Exhibit F: Certification Regarding Lobbying

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Questions

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