

Guidance in Distinguishing Between Sub-Awards and Contracts

Distinctions between Subawards and Contracts

The basis for distinguishing between subawards and contracts.

Five Characteristics Indicative of a Subaward Per OMB Circular A-133:

- (1) The subrecipient determines who is eligible to receive what Federal financial assistance.
- (2) The subrecipient has its performance measured against whether the objectives of the Federal program are met.
- (3) The subrecipient has responsibility for programmatic decision making.
- (4) The subrecipient has responsibility for adherence to applicable Federal program compliance requirements.
- (5) The subrecipient uses the Federal funds to carry out a program of the organization as compared to providing goods or services for a program of the pass-through entity.

Five Characteristics Indicative of a Procurement Per OMB Circular A-133:

- (1) The contractor provides the goods and services within normal business operations.
- (2) The contractor provides similar goods or services to many different purchasers.
- (3) The contractor operates in a competitive environment.
- (4) The contractor provides goods or services that are ancillary to the operation of the Federal program.
- (5) The contractor is not subject to compliance requirements of the Federal program.

Use of judgment in making determination. There may be unusual circumstances or exceptions to the listed characteristics. In making the determination of whether a subrecipient or contractor relationship exists, the substance of the relationship is more important than the form of the agreement or the profit or non-profit status of the parties. It is not expected that all of the characteristics will be present, and judgment should be used in determining whether an individual or entity is a subrecipient or contractor. *However, for-profit organizations operate in a competitive environment, provide goods and services on commercial terms to many different purchasers, and are rarely responsible for complying with Federal program requirements. Consequently, EPA generally does not allow recipients to make subawards to for-profit organizations. Transactions between recipients and for-profit organizations including individual consultants are, in almost all cases, subject to the competitive procurement requirements of EPA's grant regulations.*

The remainder of this Appendix provides a series of examples illustrating the OMB characteristics of subawards and procurements listed above.

- (1) Indicative of a subaward: The subrecipient determines who is eligible to receive what Federal financial assistance.

Subaward

Assume hypothetically that EPA's appropriations act includes authority and funds to provide direct assistance to households to eliminate mold from houses damaged by a flood. EPA awards a grant for this purpose to a State agency that in turn will award funds to a local agency that will distribute assistance to eligible households. If the local agency determines the eligibility to receive the assistance, the transaction between the State and the local agency would be characteristic of a subaward even if the state's agreement with the local government establishes criteria for determining eligibility.

Contract

On the other hand, if the households apply directly to the State, the State determines which households would be eligible, and the local government merely distributes the assistance and monitors how the assistance is used, the transaction between the State and local agency would be characteristic of a contract.

- (2) Indicative of a subaward: The subrecipient has its performance measured against whether the objectives of the Federal program are met.

Subaward

If a non-profit organization issues a call for research papers to be presented at an assistance-funded conference, funding provided to a university for development of papers and travel to the conference would be characteristic of a subaward as long as the subject of the papers forwards the purpose of the grant. This would be true even if a profit making organization proposed to present a research paper at the conference and the non-profit provided the for-profit organization with a subaward to develop the paper and attend the conference. Any "profit" the company made would be an unallowable grant cost and the for-profit's costs would be subject to Part 31 of the Federal Acquisition Regulation.

Contract

If the transaction is to produce 1,000 copies of the proceedings, the transaction would be a contract, because the services the contractor provided have the characteristics of a commercial transaction, and performance would be measured on the number and quality of documents delivered - not the accomplishment of the program objective -- which is to further environmental research. This would be true even if the non-profit recipient provided funds to another non-profit or a university to produce the copies of the proceedings.

- (3) Indicative of a subaward: The subrecipient has responsibility for programmatic decision making.

Subaward

If University A provides funds to University B to conduct an independent research project, the agreement would be characteristic of a subaward, because the subrecipient, University B, would be responsible for designing the research and determining how to carry out that research. Please note that Subrecipient University B's research areas must be consistent with the scope of work that EPA approved for University A.

Contract

If University A enters into an agreement with University B to simply review and summarize scientific articles that University A selects, the relationship would be characteristic of a contract because University B is not making programmatic decisions.

- (4) Indicative of a subaward: The subrecipient has responsibility for adherence to applicable Federal program compliance requirements.

Subaward

If a State issues an award to a local agency for collection and analysis of water quality samples and the local agency is responsible for complying with federal water quality requirements, the transaction would be characteristic of a subaward.

Contract

If a State water pollution control agency issues an award to a laboratory to collect and analyze water samples within its coastal areas, and the state agency is responsible for complying with federal water quality requirements in the sampled areas, the transaction is characteristic of a contract.

- (5) Indicative of a subaward: The subrecipient uses the Federal funds to carry out a program of the organization as compared to providing goods or services for a program of the pass-through entity.

Subaward

An award by non-profit Organization A to non-profit Organization B under which non-profit Organization B will conduct training for its own membership using non-profit Organization A's training materials would be characteristic of a subaward.

Contract

If non-profit Organization A awarded funds to non-profit Organization B to develop training materials that non-profit Organization A would use to train its own members and the general public, the transaction between non-profit Organization A and non-profit Organization B would be characteristic of a contract.

- (1) Indicative of a procurement: The contractor provides the goods and services within normal business operations.

Subaward

Assume Non-profit Organization A needs environmental treatises for one of its training courses. In its normal course of business, Non-profit organization B produces environmental law treatises and sells them on the internet and in book stores. If non-profit Organization A funds new research by non-profit organization B, and non-profit Organization B retains programmatic decision making responsibility for the research, the transaction is more characteristic of a subaward. This is so because Non-profit Organization B would not conduct this particular research within its normal business operations.

Contract

On the other hand, if non-profit Organization A purchases 100 copies of one of those treatises that is for sale and uses it in non-profit Organization's A's training courses, the transaction is characteristic of a contract.

- (2) Indicative of a procurement: The contractor provides similar goods or services to many different purchasers.

Subaward

An award by a national association of architects to a local chapter of the association to make local arrangements for a conference being conducted by the national association under an EPA grant would be indicative of a subaward, because the local chapter doesn't provide a similar service to many different purchasers. Similarly, an award to a chapter of an association of architects to provide travel scholarships for its student members to attend a "Green Buildings" conference that the national association is co-sponsoring with EPA would be indicative of a subaward.

Contract

An agreement with a travel agent to make hotel arrangements for a conference would be indicative of a contract, because the travel agent provides this service to many different purchasers.

- (3) Indicative of a procurement: The contractor operates in a competitive environment.

Subaward

Contract

In the example directly above, the award from the national association of architects to the local association is indicative of a subaward, because the local association of architects doesn't operate in a competitive environment when providing travel services -- providing travel services is not their normal course of business.

In the example directly above, the travel agent's arrangement is indicative of a contract, because the travel agent operates in a competitive environment, i.e., they compete with other travel agents to provide travel services.

- (4) Indicative of a procurement: The contractor provides goods or services that are ancillary to the operation of the Federal program.

Subaward

A transaction with a non-profit sub-recipient to design and demonstrate a paperless payroll system for the use of other organizations (both for-profit and non-profit) in order to further the program goal of reducing paper waste would be indicative of a subaward.

Contract

An award to an organization to provide payroll services is indicative of a contract, because the award provides support to the organization in carrying out the program, but is not itself directly related to the federal program.

- (5) Indicative of a procurement: The contractor is not subject to compliance requirements of the Federal program.

Subaward

Thus, in a previous example, the award from a State to a local agency for collection and analysis of water quality samples was characteristic of a subaward because the local agency was responsible for complying with federal water quality requirements.

Contract

In the same example, an award by a State water pollution control agency to a laboratory for the collection and analysis of water samples in the State's coastal areas would be characteristic of a contract, because the State retains the responsibility for adhering to Federal water quality standards.