

Escambia County Restore Advisory Committee

Procedures for Procurement and Distribution of Funds:

Direct Component

Federal Procurement Overview

- Federal Procurements for RESTORE Act Direct Component Funds Governed by:
 - County Procurement Procedures
 - Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards: 2 CFR Chapter 1, Chapter 2, Part 200, et al.
 - RESTORE Act: Subtitle F of Public Law 112-141
 - Treasury RESTORE Act Financial Assistance Standard Terms and Conditions and Program-Specific Terms and Conditions
- Procurement Topics of Interest
 - General procurement provisions (mandatory and permissive)
 - Minority and Small Business requirements and recommendations
 - 2 CFR Part 200 v. RESTORE Act requirements and recommendations
- Money Flow and Distinction between Contractors and Sub-recipients
 - Flow to contractors versus flow to subrecipients
 - Factors influencing determination between contractors and sub-recipients
 - Other Treasury guidance or federal interpretation providing clarity on this distinction
 - Where select entities fall along distinction line (Universities, Chambers of Commerce and Non-profits)

Important 2 CFR Part 200 Definitions

Section	Title	Important Provisions
200.23	Contractor	An entity that receives a contract (legal instrument to purchase property/services to carry out the project under award) ➤ <u>Example</u> : Engineering/construction firm hired to replant seagrass
200.69	Non-Federal Entity (“NFE”)	A state, local government , Indian tribe, institution of higher education, or nonprofit organization that carries out Federal award as a recipient or sub-recipient ➤ <u>Example</u> : County receiving the grant funds from federal awarding agency
200.74	Pass-through Entity	A non-Federal entity that provides a subaward to a subrecipient to carry out part of a Federal program ➤ <u>Example</u> : County receives grant funds from federal awarding agency; County makes grant to another entity to carry out part of award; County is pass-through entity (federal award “passes through” County)
200.92	Subaward	An award provided by a pass-through entity to a sub-recipient for the sub-recipient to carry out part of a Federal award received by the pass-through entity <ul style="list-style-type: none"> • Does not include payments to a contractor or payments to a beneficiary of program (e.g. payments to an entity benefitting from performance of grant activities (e.g. attendee at a grant funded conference)) • Subawards may be provided through any form of legal agreement, including agreement that pass-through entity considers a contract ➤ <u>Example</u> : Grant awarded from County (part of larger RESTORE award) to subrecipient to carry out portion of project
200.93	Subrecipient	A non-Federal entity that receives a subaward from a pass-through entity to carry out part of Federal program <ul style="list-style-type: none"> • Does not include a beneficiary of such program ➤ <u>Example</u> : Non-profit organization awarded subaward to carry out portion of project

2 CFR Part 200 Procurement Guidelines

Section	Title	Important Provisions
200.305	Payment	<ul style="list-style-type: none"> • For <u>states</u>, payments are governed by Treasury-State CMIA agreements and default procedures • For <u>non-states</u>, payment methods must minimize time between transfer of funds from Treasury or pass-through entity and disbursement to NFE <ul style="list-style-type: none"> • NFE must be paid in advance, provided its willing to maintain written procedures to minimize disbursement delays <ul style="list-style-type: none"> • Advance payments must be limited to minimum amount needed and time of actual need (match immediate cash needs) • NFE must make timely payments to contractors in accordance with contract provisions • Advance payments must be consolidated to cover anticipated cash needs • Reimbursement is preferred method when time lapses cannot be minimized, awarding agency mandates, or the NFE requests • If NFE cannot meet criteria for advance payments and awarding agency determines that reimbursement is not feasible, cash can be provided on a working capital advance basis (e.g cash payments to NFE to cover its estimated disbursement needs for an initial period) • NFEs must maintain advance payments of federal awards in interest bearing accounts
200.317	Procurement by States	<ul style="list-style-type: none"> • When procuring property and services, a state <u>must</u> follow its policies and procedures for procurements non-Federal funds • All other NFEs, including sub-recipients of a state, will follow § 200.318 – 200.326
200.318	General Procurement	<ul style="list-style-type: none"> • NFE must use own documented procurement procedures • NFE must maintain oversight and ensure contractors performance • NFE must maintain written standards of conduct • NFE's procurement procedures must avoid acquisition of unnecessary or duplicative items • NFE is encouraged to enter into intergovernmental/inter-entity agreements • NFE is encouraged to use federal excess/surplus property • NFE is encouraged to use value engineering in construction contracts • NFE must award contracts only to responsible, able contractors • NFE must maintain records sufficient to detail history of procurement • NFE may use time & material contracts only if no other suitable type • NFE alone is responsible for settlement of all procurement issues
200.319	Competition	<ul style="list-style-type: none"> • All procurement transactions must provides for full and open competition • NFE procurements cannot impose state/local geographic preferences in evaluation of bids or proposals <ul style="list-style-type: none"> • <u>Exceptions</u>: federal statute expressly allows; contracting for architectural/engineering services • NFE must have written procedures for procurement transactions • NFE must ensure current prequalified lists of persons, firms, products are used

2 CFR Part 200 Procurement Guidelines

Section	Title	Important Provisions
200.320	Methods of Procurement	<ul style="list-style-type: none"> • NFE <u>must</u> use one of these methods of procurement: <ol style="list-style-type: none"> 1. Procurement by micro-purchase (amount < \$3,000 or \$2,000 for acquisitions for construction; can be awarded without competitive bid if NFE considers price to be reasonable) 2. Procurement by small purchase procedures (informal method of securing services, supplies or property if costs lower than \$150,000; NFE must obtain quotes from adequate number of qualified sources) 3. Procurement by sealed bid (publicly solicited and a fixed price contract awarded to lowest bidder; preferred method for procuring construction) 4. Procurement by competitive proposals (normally for more than one source submitting an offer) 5. Procurement by non-competitive proposals (from only one source, only allowed in certain circumstances)
200.321	Small, Minority, Women's Enterprises, Labor Supply Firms	<ul style="list-style-type: none"> • NFE <u>must</u> take all necessary affirmative steps to assure that these business types are used <ul style="list-style-type: none"> • Affirmative steps <u>must</u> include: <ul style="list-style-type: none"> • Placing these business types on solicitation lists • Assuring that these business types are solicited whenever they are potential sources • Dividing total requirements into small tasks/quantities to permit maximum participation • Establishing delivery schedules that encourage participation by these businesses • Using services/assistance of Small Business Administration and Minority Business Development Agency • Requiring prime contractors, if subcontractors are to be let, take same affirmative steps
200.323	Contract Cost & Price	<ul style="list-style-type: none"> • NFE <u>must</u> perform a cost price or price analysis for every procurement action over \$150,000 • NFE <u>must</u> negotiate profit as separate element for each contract where no competition and all cases where cost analysis is performed

2 CFR Part 200 Procurement Guidelines

Section	Title	Important Provisions
200.331	Pass-through Entity Requirements	<ul style="list-style-type: none"> • All pass-through entities <u>must</u>: <ul style="list-style-type: none"> • Ensure every subaward is clearly identified to a subrecipient include specific information • Evaluate each subrecipient’s risk of noncompliance with federal statutes, regulations, and terms and conditions to determine appropriate monitoring • Consider imposing specific subaward conditions on subrecipients • Monitor activities of subrecipient to ensure subaward is used for authorized purposes, is in compliance with applicable laws and regulations, and that subaward goals are achieved • Depending risk posed by subrecipient, use monitoring tools to ensure accountability/compliance • Verify that every subrecipient is audited (if over auditing threshold) • Consider whether results of subrecipient’s audits, onsite reviews, or other monitoring indicate conditions that necessitate adjustments to the pass-through entity’s own records • Consider taking enforcement action against noncompliance subrecipients
200.330	Subrecipient and Contractor Determination	<ul style="list-style-type: none"> • NFE’s can concurrently receive awards as either recipients, sub-recipients or contractors • So, a pass-through entity <u>must</u> make case-by-case determinations whether the agreement it makes casts the party receiving the funds in the role of a subrecipient or a contractor • In making this determination, <i>the substance of the relationship is more important than the form of the agreement</i> • Several factors are provided in making this determination (see next slide)
200.332	Fixed Amount Subawards	<ul style="list-style-type: none"> • With prior written approval from federal awarding agency, a pass-through entity may provide subawards based on fixed amounts up to the Simplified Acquisition Threshold (\$150,000) if subawards meet the requirements for fixed amounts awards, cooperative agreements and contracts

2 CFR Part 200 Factors for Determining Between Subrecipient or Contractor

Characteristic indicative of Subrecipient/Subaward relationship, when NFE:

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

Characteristics indicative of Procurement/Contractor relationship, when NFE:

- Provides the goods and services within normal business operations
- Provides similar goods and services to many different purchasers
- Normally operates in a competitive environment
- Provides goods or services that are ancillary to the operation of the federal program
- Is not subject to compliance requirements of the federal program as a result of the agreement

Subaward v. Contract Examples

Subaward	Contract
<p>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 to the State agency for this purpose, who will in turn award funds to local agency to distribute to eligible households. If local agency determine household eligibility, then it is a subaward.</p>	<p>If households apply directly to the State and State determines which are eligible, then local government is only distributing and monitoring awards. This would be a contractor relationship with local agency since no eligibility determination by local agency.</p>
<p>Non-profit issues call for research papers to be presented at assistance-funded conference, with funding provided to a university for development of papers and travel to conference. This would be a subaward so long as subject of papers fulfills purpose of grant.</p>	<p>If transaction is to produce 1,000 copies of the proceeding, transaction would be a contract because services of the contractor have characteristics of a commercial transactions and performance is in total copies delivered, not accomplishment of a program objective.</p>
<p>University A provides funds to University B to conduct independent research project, agreement would be a subaward because University B is responsible for designing the research and determining how to carry out the research.</p>	<p>University A enters into an agreement with University B to simply review and summarize scientific articles that University A selects, would be a contract because University B is not making programmatic decisions.</p>
<p>State issues an award to a local agency for collection and analysis of water quality samples, with local agency responsible for complying with federal water quality requirements. Transaction is a subaward because compliance with federal requirements transfers to local agency.</p>	<p>State water pollution control agency issues an award to a laboratory to collect and analyze water samples within coastal area, with state agency responsible for complying with federal water quality requirements. Transaction is a contact since control over compliance remains with State agency, not laboratory.</p>

Subaward v. Contract Examples Continued

Subaward	Contract
<p>Award by non-profit A to non-profit B under which non-profit B will conduct training for its own membership using non-profit A's training materials. Would be subaward since using non-profit A's training materials.</p>	<p>Award by non-profit A to non-profit B to develop training materials that non-profit A would use to train its own members and the public. Transaction would be a contract since providing service of developing materials.</p>
<p>Non-profit A needs environmental treatises for an upcoming training course. In normal course of business, non-profit B produces environmental law treatises and sells them. If non-profit A funds non-profit B and B retains programmatic decision making responsibility for research, transaction would be a subaward since non-profit B would not normally conduct this type of research during normal business.</p>	<p>If non-profit A purchase 100 copies of a treatise that is for sale by non-profit B and uses it in its training course, transaction would be a contract since non-profit B generated as part of normal business.</p>
<p>Award by national architect association to a local chapter to make local arrangements for a conference being conducted by the national organization under an EPA grant. Would be a subaward because the local chapter does not provide a similar service to many different purchasers.</p>	<p>Agreement with a travel agent to make hotel arrangements for a conference would be a contract since the travel agent provides this service to many different purchasers.</p>
<p>Transaction with a non-profit subrecipient to design and demonstrate a paperless payroll system for the use of other organizations in order to further the goal of reducing paper waste. Would be a subaward since service is ancillary to operation of federal program.</p>	<p>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 directly related to the federal program.</p>

RESTORE Act Procurement Guidelines

Section	Important Provisions
§ 1603(1)(E)(iii)	<ul style="list-style-type: none"><li data-bbox="453 339 2372 422">• To receive funds, a state <u>must</u> certify that the project and awarding of a contract are consistent with standard procurement rules/regulations governing comparable projects in that State, including competitive bidding and audit requirements
§ 1603 (1)(K)	<ul style="list-style-type: none"><li data-bbox="453 578 2308 661">• Allows local preference to individuals and companies that reside in, are headquartered in, or are principally engaged in business in the State of project execution
	<ul style="list-style-type: none"><li data-bbox="453 796 1493 832">• No small business or minority business reference in RESTORE Act

Treasury Regulation Procurement Requirements

Section	Title	Important Provisions
IFR § 34.305	Use of Funds – Direct Component	<ul style="list-style-type: none"> Allows a Gulf Coast State, coastal political subdivision, or coastal zone parish to issue subawards for eligible activities Recipients proposing to issue subawards must demonstrate ability to conduct sub-recipient monitoring/management
Standard Terms and Conditions § C(9)	Subawards	<ul style="list-style-type: none"> If recipient is permitted to make subawards under their award, recipient must execute a legally binding written agreement with subrecipient incorporating all terms and conditions of the award. Recipient must perform all responsibilities required of a pass-through entity per 2 CFR Part 200. Recipient <u>must</u> evaluate and document each subrecipients risk of noncompliance with federal statutes, regulations, terms and conditions Recipient <u>must</u> monitor subrecipients use of federal funds through reporting, site visits, regular contact or other means Recipient <u>must</u> provide training and technical assistance to subrecipient as necessary Recipient <u>must</u>, if necessary, take appropriate enforcement action against non-compliant subrecipients If lower tier subawards are authorized, recipient <u>must</u> ensure subrecipient who makes a subaward applies terms and conditions of award Recipient <u>must</u> maintain written standards of conduct governing the performance of employees involved in executing the award and administration of subawards
Standard Terms and Conditions § H	Award Disbursements	<ul style="list-style-type: none"> Unless specified otherwise in a Special Award Condition, Treasury will make advance payments Reimbursement basis payments will be required if Treasury: <ol style="list-style-type: none"> determines that Recipient does not meet financial management system standards Recipient has not established procedures to minimize time elapsing between transfer of funds and disbursement Recipient is in non-compliance with RESTORE Act, regulations, terms and conditions and reimbursement is appropriate remedy Reimbursement will be paid by Treasury within 30 calendar days of billing (barring no error in request)
Standard Terms and Conditions § S	Procurement	<ul style="list-style-type: none"> When recipient makes a subaward to subrecipient that it authorized to enter into contracts, recipient must require subrecipient to comply with these procurement requirements <u>Recipients that are states</u>: when executing procurement, recipient must follow policies and procedures it uses for procurements from non-federal fund. Every purchase order and contract must contain clauses required by federal statutes and implementing regulations <u>Recipients that are not states</u>: follow all procurement requirements from 2 CFR 200.318-324. All contracts executed by the recipient to accomplish the approved scope of work must contain clauses required by federal statutes and implementing regulations. Recipient, sub-recipient, contractor and/or subcontractor must not sub-grant or sub-contract any part of the approved project to an agency of Treasury or other federal department without prior written approval of Treasury

RESTORE Project Procurement Scenarios

Scenario	Resulting Relationships	Entity Requirements
A. County decides to implement a RESTORE project itself.		
<p>Scenario A-1: County will do entire project in house with county staff.</p>	<ul style="list-style-type: none"> County is non-federal entity 	<ul style="list-style-type: none"> No procurement is required. No contractors or other entities hired to complete any project tasks.
<p>Scenario A-2: County will need to contract out various entities to complete specific tasks within the overall project. County awards a project to a <u>not-for-profit</u> organization.</p>	<ul style="list-style-type: none"> County is non-federal entity Not-for-profit organization is a contractor 	<ul style="list-style-type: none"> Substance of the agreement for the scope of services contracted out determines whether classified as a contract or subaward (regardless of what County refers to it as) – see 200.330 factors to ensure contractor designation County must use own procurement procedures and 2 CFR 200.320 in making procurement to not-for-profit County maintains all oversight/monitoring responsibility over not-for-profit Not-for-profit is subject to same terms and conditions as the County under the federal award Audit requirements apply and cost (direct and indirect) limitations applicable per 200.413(f) and 200.414 Not-for-profit can further subcontract the work to other contractors
<p>Scenario A-3: County will need to contract out various entities to complete specific tasks within the overall project. County awards a project to a <u>for-profit</u> entity.</p>	<ul style="list-style-type: none"> County is non-federal entity For-profit entity is a contractor 	<ul style="list-style-type: none"> Substance of the agreement for the scope of services contracted out determines whether classified as a contract or subaward (regardless of what County refers to it as) – see 200.330 factors County must use own procurement procedures and 2 CFR 200.320 in making procurement to for-profit entity County maintains all oversight/monitoring responsibility over for-profit entity For-profit entity is subject to same terms and conditions as the County under the federal award 2 CFR 200 Subparts A-E apply to for profit entity For-profit entity can further subcontract the work to other contractors

RESTORE Project Subaward Scenarios

Scenario	Resulting Relationships	Entity Requirements
<p>B. County has awarded a RESTORE project to a not-for-profit organization</p>		
<p>Scenario B-1: The not-for-profit organization will manage all aspects of the project, and project will be implemented and completed by the not-for-profit, all in-house.</p>	<ul style="list-style-type: none"> • County is non-federal entity and pass-through entity • Not-for-profit organization is sub-recipient with a subaward 	<ul style="list-style-type: none"> • County must ensure requirements of § 200.331 are met • County, as pass-through entity, can impose additional requirements on the subrecipient • County has oversight responsibility over not-for-profit organization’s completion of the project and must ensure they comply with federal laws and terms and conditions of subaward
<p>Scenario B-2: The not-for-profit organization will need to bid out a piece of the project for completion.</p>		<ul style="list-style-type: none"> • Not-for-profit organization must use 2 CFR Part 200.320 methods of procurement to bid out a piece of the project for completion • Not-for-profit has oversight responsibility to ensure that contractor fulfills terms, conditions and specifications of contract
<p>Sub-scenario: Contracted entity is another not-for-profit organization</p>	<p>Entity is a contractor</p>	<ul style="list-style-type: none"> • Not-for-profit is subject to same terms and conditions as the non profit and the County under the federal award • Direct and Indirect cost limitations applicable under 200.413(f) and 200.414
<p>Sub-scenario: Contracted entity is for-profit entity</p>	<p>Entity is a contractor</p>	<ul style="list-style-type: none"> • For-profit entity is subject to all the same terms and conditions as the non profit and the County under the federal award • 2 CFR 200 Subparts A-E apply to for profit entity