

Subawards and Procurement Contracts

Reference Guide

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Guidance on Subawards and Procurement Contracts

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Subawards and Procurement Contracts

Introduction

Award recipients often turn to other non-Federal entities to provide goods and services in order to fulfill their responsibilities under an award. They accomplish this through the use of subawards and/or procurement contracts. The legal instruments used to accomplish these vary according to state and local laws and regulations. However, the definition and classification of a subaward versus a procurement contract under Federal regulations is not dependent on the legal instrument but on the nature of the goods and services to be provided under the agreement.

There are significant differences between a subaward and a procurement contract. If a recipient enters into an agreement that is a “subaward” of an OJP award, specific rules apply – many of which are set by federal statutes and DOJ regulations; others by award conditions. The rules determine much of what the written subaward agreement itself must require or provide and determine much of what an OJP recipient must do both **before** and **after** it makes a subaward.

If a recipient enters into an agreement that is a “procurement contract under an OJP award” (rather than a “subaward”), a dramatically different set of federal rules applies.

DEFINITIONS

Recipient:

§200.86 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. The term recipient does not include subrecipients.

Non-Federal Entity:

§200.69 Non Federal entity means a state, local government, Indian tribe, institution of higher education (IHE), or nonprofit organization that carries out a Federal award as a recipient or subrecipient.

Subaward:

*§200.92 Subaward means 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. It does not include payments to a contractor or payments to an individual that is a beneficiary of a Federal program. **A subaward may be provided through any form of legal agreement, including an agreement that the pass through entity considers a contract.***

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.

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.

Contractor:

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

Subawards:

<i>Subaward</i>	<i>Examples</i>
• May determine who may be eligible to receive Federal assistance under the program guidelines. • Has its performance measured in relation to whether objectives of a Federal program were met. • Has responsibility for programmatic decision making. • In accordance with its award agreement, uses the Federal funds to carry out a program for a public purpose specified in authorizing statute.	• An entity that identifies and selects mentors and mentees under a federal award funding a mentoring program. • Data from the entity's operation will be used to report program progress or performance to the federal agency. • An entity is authoring a publication pursuant to program goals and objectives. • References to legislation authorizing the program or CFDA number may be used in the award agreement. • An entity conducting research pursuant to program goals and objectives.

Procurement Contracts:

<i>Procurement Contract</i>	<i>Example</i>
• Provides the goods and services within normal business operations. • Provides similar goods or 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.	• Accounting firms, • office supply stores, • IT services • Legal services • Specified services in support of a research program • Agreement specifies the types of goods and services provided and the associated costs.

The remainder of this guide outlines what the grant manager must do in each stage of the award process for subawards and procurement contracts.

Pre-Award

In the pre-award stage grant managers should review the Budget Detail Worksheet and Budget Narrative to ensure the recipient has clearly identified and categorized all known subrecipients and contractors.

Budget Proposals – Subaward Requests

- Applicants may identify subawards in the context of the budget detail worksheet or budget narrative. Financial clearance by OJP of a proposed budget does not indicate whether OJP agrees with the applicant's characterization of a proposed agreement as a subaward.
- Final financial clearance of subawards, which are **clearly identified as subawards** in the applicant's budget detail worksheet or budget narrative, **authorizes the subaward**; this authorization does not mean that OJP agrees with the subaward classification as not enough information is provided in the application to make that determination.
- Sole source reviews are not required for subawards.

Budget Proposals –Procurement Contracts

- Applicants may identify procurement contracts in the context of the budget detail worksheet or budget narrative. Financial clearance by OJP of a proposed budget does not indicate whether OJP agrees with the applicant's characterization of a proposed agreement as a procurement contract.
- Noncompetitive (sole source) procurement contracts are **not approved** in the application or budget review process.
- Neither the OJP award document nor a financial clearance by OJP's OCFO of the proposed budget for this award (including a financial clearance issued after the recipient accepts the award) constitutes the required specific advance authorization to use a non-competitive procurement approach ("sole source").

Funding Recommendation Memoranda - Subaward and Procurement Contract Disclosure

Important to Know: To ensure that approvers of funding recommendation memoranda are aware of potential conflicts of interest, known subrecipients and procurement contracts/contractor must be disclosed. In FY 2017, the Funding Recommendation Memorandum templates were updated to include a Disclosure of Subrecipients and/or Procurement Contracts/Contractors section.

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- For each applicant with proposed subrecipients and/or procurement contracts/contractors, include a list as an attachment to the Funding Recommendation Memorandum. The Funding Recommendation Memorandum template includes a sample list that can be used when developing the memo.
 - If there are no proposed subrecipients or procurement contracts/contractors, the following statement must be included in the body of the memo: *There are no proposed subrecipients or procurement contracts/contractors in any of the applications being recommended for funding.*

Post-Award

Post-Award Requests for Subaward Authorization

Important to Know: If a particular subaward is not authorized by federal statute or regulation, or is not clearly identified in the Budget Detail Worksheet and/or Budget Detail Narrative in the application as approved by OJP, the recipient must request and obtain written authorization from OJP before it may make the subaward. Any such post-award request for authorization to make a subaward must be submitted via OJP's Grants Management System ("GMS"), as a "Change of Scope" Grant Adjustment Notice ("GAN"). Unless and until OJP authorizes the subaward by approving the requested Change of Scope GAN, the recipient may not obligate, expend, or draw down award funds for the proposed subaward.

In reviewing the Change of Scope GAN:

- Check to see that the recipient is properly categorizing the subaward, and that it should not instead be a procurement contract. *To help make the determination, please see the [OJP Checklist to Determine Subrecipient or Contractor Classification](#), and the [OJP Subaward vs Procurement Contract Toolkit](#).*
- Approve the request, as appropriate, if it meets the criteria for a subaward and supports the goals and objective of the award/program.
- Deny the GAN if the request does not meet the criteria for a subaward and should instead be a procurement contract.
 - If the request is determined to be a procurement contract and it is within the scope of the approved project, prior approval from OJP is not required. However the recipient must follow its procurement policies if it chooses to continue with the contract.
 - If the GAN contains a request for a procurement contract that is outside the scope of the approved project, the BPO should evaluate and process it (approve/deny) based on the grant program, as they would for any changes of scope requiring prior approval per 200.308.c(1).
- If the request is for a noncompetitive procurement contract over the simplified acquisition threshold (currently \$150,000), the recipient must submit a Sole Source Approval GAN to OJP prior to entering into the contract.

Sole Source Justification Approvals

Important to Know: To request advance approval from OJP to use a noncompetitive approach for a procurement contract (as determined by OJP) that would exceed the simplified acquisition threshold, the recipient must submit a justification for use of a noncompetitive approach. The recipient must submit its request for approval to use a noncompetitive approach (along with the justification) as a "**Sole Source Approval**" Grant Adjustment Notice ("GAN"), via the OJP GMS.

In deciding whether to authorize a recipient to proceed with a procurement contract over the simplified acquisition threshold without competition, OJP will consider the justification and budget submitted by the recipient, including the details that explain why, in the particular circumstances, it is appropriate to proceed without competition. Use the [Sole Source Review Checklist](#) to assist in the review and approval of sole source requests.

If the request is unclear after reviewing the recipient's justification and the Sole Source Review Checklist, the request should be discussed with your first line supervisor to determine the next steps.



OJP has available, an [OJP Sole Source Justification Fact Sheet](#), which recipients should use in developing their sole source requests.

Grant recipients must maintain documentation to justify noncompetitive contracting in their procurement files *regardless* of the amount of the contract. Grant managers must check procurement files for adequate documentation justifying noncompetitive contracts during site visits and EPDRs. The justification must be in compliance with the requirements in 2 CFR 200.320 and with the grant recipient's procurement policy.

Noncompetitive contracting may only be used in the following circumstances:

- o The item is available only from a single source,
- o The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation (*Examples of public emergencies include natural disasters or catastrophic events, it does **not** include situations where a grant recipient experiences a delay and then wants to use noncompetitive contracting as a result of that delay*), or
- o After solicitation of a number of sources, competition is determined inadequate.

Monitoring and Oversight

Recipient of Federal Funds Monitoring of Subawards

Important to Know: A recipient typically [must report first-tier subawards of \\$25,000](#) or more to the Federal Funding Accountability and Transparency Act (FFATA) Subaward Reporting System at www.fsrs.gov, and otherwise comply with the [Award Condition: Reporting Subawards and Executive Compensation](#).

As an OJP grant manager, you must assess whether the recipient is sufficiently monitoring a subrecipient. During in-depth monitoring, the grant manager must:

- Review the recipient's subrecipient policies and procedures that cover the pre-award, post-award monitoring, and closure and ensure they contain the following elements:
 - Pre-Award:**
 - ☐ Process to ensure that subrecipients are not suspended or debarred by the federal government
 - ☐ List of data elements the subrecipient agreement must include as outlined in 2 C.F.R. § 200.331 (collect a sample award document)
 - ☐ Requirement that applicable federal special conditions are passed down to the subrecipient award
 - Post-award Monitoring:**
 - ☐ Risk based approach
 - ☐ On-site monitoring process and frequency of activities
 - ☐ Monitoring checklist
 - ☐ Process for documenting findings
 - ☐ Procedures for follow-up on issues for resolution
 - Closeout:**
 - ☐ Process for closing an award
- Verify that the recipient has an established subrecipient monitoring plan in place for the current year.
- Verify that the recipient has documentation to demonstrate the recipient is conducting monitoring activities on their subrecipients.
- Verify that the recipient is maintaining adequate subrecipient files to include the following documentation:
 - o Signed subrecipient agreements
 - o Subrecipient agreements with pass-through of OJP special conditions
 - o Subrecipient financial reports and/or invoices when appropriate
 - o Subrecipient progress reports
 - o Subrecipient performance data
 - o Subrecipient budget and drawdown activity
 - o Documentation that the subrecipient has met audit requirements
- Verify that the recipient is reporting subrecipient awards as required by FFATA.

A recipient must monitor a subrecipient to ensure that the subaward is used for authorized purposes, in compliance with Federal statutes, regulations, and the terms and conditions of the subaward; and that subaward performance goals are achieved. Below are what recipients must have in place to sufficiently monitor subrecipients:

- A recipient [must assess each subrecipient's risk of noncompliance](#) with award conditions and applicable federal law, and must take its assessment into account in its monitoring of the subrecipient.
- A recipient [must require each subrecipient to provide the progress and financial reports and performance data](#) necessary for the recipient to make complete reports to OJP on progress under the award and on data pertinent to the OJP performance measures.
- A recipient must require a subrecipient – through a written agreement (which could be an MOU, Inter-local agreement, contract, or other written instrument) and through monitoring – to [comply with all applicable conditions and restrictions](#) included in the OJP award, including all “pass-through” requirements.
- The recipient should be following-up and ensuring that the subrecipient takes timely and appropriate action on all deficiencies identified through its monitoring.
- A recipient must verify that every subrecipient is audited annually as required by [Subpart F of the Uniform Guidance](#), unless the subrecipient expended less than the threshold in the previous fiscal year.
- A recipient must require – through a written subaward agreement and through monitoring – that a subrecipient comply with all applicable requirements of the Part 200 Uniform Requirements.
 - Absent unusual circumstances, any recipient that makes a subaward must pass through these requirements, among other things: requirements regarding financial management, internal controls, cost principles, allowable costs, indirect costs, and records retention and access.
 - Subrecipients, like recipients, are subject to the audit requirements set out in the Part 200 Uniform Requirements (at [Subpart F of 2 C.F.R. Part 200](#)), or to related requirements set out in award conditions.
 - A subrecipient that itself makes (lower-tier) subawards must be required to comply with the provisions of Part 200 Uniform Requirements concerning Subrecipient Monitoring and Management. Similarly, a subrecipient that itself enters into procurement contracts under the subaward must be required to comply with the Procurement Standards set out in the Part 200 Uniform Requirements.



For more details and examples, please see the [OJP Subaward vs Procurement Contract Toolkit](#).

Procurement Contracts

Important to Know: In its procurement contracts, a recipient must include **all applicable contract provisions** set out in the [Part 200 Uniform Requirements in Appendix II](#) of 2 C.F.R. Part 200 Uniform Requirements.

In connection with any “procurement contract under an OJP award”:

- A recipient must comply with the **Procurement Standards**, and also with the recipient’s own written procurement policies and procedures, to the extent they are consistent with the Procurement Standards and other applicable federal law.
 - For detailed guidance, refer to the [Guide to Procurement under DOJ Grants and Cooperative Agreements \(July 2016\)](#) (issued by the OJP Office of the Chief Financial Officer).
- A recipient must provide for [full and open competition](#) in procurements to the extent required by the Procurement Standards and OJP award conditions.

- o The Procurement Standards include specific rules for “micropurchases” and “small purchases.”
- o The Procurement Standards incorporate certain priorities for small businesses, and woman- or minority-owned businesses.
- o No employee, officer, or agent of an OJP recipient who has a real or apparent **conflict of interest** may participate in the selection, award, or administration of a procurement contract under an OJP award.
- A recipient must [document the history of each procurement](#) under an OJP award, including the **rationale** for each of the following– (1) method of procurement, (2) selection of contract type, (2) contractor selection or rejection, and (4) basis for contract price.
- A recipient must perform (and document) a [cost or price analysis](#) before awarding or modifying any procurement contract that would exceed the simplified acquisition threshold (currently, \$150,000). The required cost or price analysis must incorporate independent estimates developed prior to the receipt of bids or proposals.

Attachments

[Checklist to Determine Subrecipient or Contractor Classification](#)

[Sole Source Justification Factsheet](#)

[Sole Source Review Checklist](#)

Checklist to Determine Subrecipient or Contractor Classification

INSTRUCTIONS: To help make the determination, please first review the [Subaward vs Procurement Contract Toolkit](#). Complete all sections of the checklist by marking all characteristics that apply to the non-Federal entity. The section with the greatest number of marked characteristics indicates the likely type of relationship. **The substance of the relationship should be given greater consideration than the form of agreement between the prime recipient and the outside entity.** Section 3 should be used to provide documentation of the justification that was used in determining the proper relationship classification. Maintain a copy of this form in the subaward or procurement file.

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

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.

NAME OF OUTSIDE ENTITY: _____

SECTION 1 - SUBRECIPIENT

Description: 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 contractor:

- ☐ 1. May determine who may be eligible to receive Federal assistance under the program guidelines;
 - For example: An entity that identifies mentors and mentees under a mentoring program.
- ☐ 2. Has its performance measured in relation to whether objectives of a Federal program were met;
 - The prime recipient will rely upon that data to submit its own performance data to OJP.
- ☐ 3. Has responsibility for programmatic decision making;
 - For example: If the primary recipient funds an entity to develop (or improve) a particular program and that entity will use its own judgment, discretion, and expertise to develop all or part of the program.
- ☐ 4. In accordance with its award agreement, the entity 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.
 - For example: To provide crime- or criminal-justice-related services (and, in the case of crime victims, compensation) to individual members of the public, such as victims of crime, or at-risk youth
- ☐ 5. The entity will not earn a profit under the arrangement.
- ☐ 6. The entity is required to contribute cash or in-kind match in support of the award.

SECTION 2 - CONTRACTOR

Description: 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 non-Federal entity receiving the Federal funds:

- ☐ 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.
 - Office equipment, supplies, software licenses, reference books, chemical reagents, cell phones, body-worn cameras, body armor, internet services, cell phone service, website hosting, copying/printing, lodging
- ☐ 5. The entity may earn a profit under the contract.

FINAL DETERMINATION:

☐

SUBRECIPIENT

☐

CONTRACTOR

SECTION 3 - Justification

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 justify the classification of each agreement as a subaward or a procurement contract.

Justification of Determination:

Prepared By: _____

Date: _____



Fact Sheet

www.ojp.gov

Sole Source Justification

What is "sole source" procurement?

Sole source or procurement by noncompetitive proposals, is procurement through solicitation of a proposal from only one source. Sole source procurements must adhere to the standards set forth in 2 C.F.R. § 200.320(f) in the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, as adopted by the U.S. Department of Justice in 2 C.F.R. § 2800.101. To help determine when a sole source procurement should be used, see OJP's *Sole Source Review Checklist*.

When is sole source approval required by OJP?

All sole source procurements require adequate written justification that meets the criteria listed below and documentary support in the procurement file to be allowable.

A recipient must also request and receive written approval from OJP **prior to** purchasing equipment, technology, or services; obligating funding for a contract; or entering into a contract with award funds related to sole source procurements in excess of the simplified acquisition threshold, as determined by the Uniform Guidance (currently \$150,000). For the purchase of equipment, technology, or services under an OJP award – to include but not limited to noncompetitive ('sole source') procurements, recipients must use their own documented procurement procedures that reflect applicable state and local laws and regulations, as long as those requirements conform to the federal procurement standards set forth in 2 C.F.R. § 200.318. A sole source justification request should only be submitted if a recipient determines that the award of a contract through a competitive process is infeasible.

Recipients may conduct noncompetitive ('sole source') procurement through solicitation of proposals from only one source when one or more of the following circumstances apply:

- The item/service is available only from one source.
- The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation.
- Competition is determined inadequate after solicitation of a number of sources.

Sole source procurement should be used only when competitive solicitation procedures like sealed bids or competitive proposals are not applicable to the requirements or are impracticable.

What documentation must be submitted to OJP for sole source approval?

An award recipient must initiate a *Sole Source Approval* Grant Adjustment Notice (GAN) in the Office of Justice Programs (OJP) Grants Management System (GMS) to request approval to enter into a noncompetitive contractual relationship, with a contractor under a Federal award, where the contracted cost exceeds the Simplified Acquisition Threshold (currently \$150,000).

The GAN submission should include a copy of the completed Sole Source Review Checklist. The outline below may be helpful in preparing your agency's sole source request and ensuring that all of the necessary information is included. The request should include the following information:

Section I. A brief description of the project, the amount to be designated for the sole source procurement, and the purpose of the contract along with an itemized budget of the contract amount.

Section II. (a) An explanation as to why it is necessary to contract in a noncompetitive manner and (b) Which one (or more) of the three circumstances identified below, for which OJP will approve a sole source contract, applies to the procurement transaction (include supporting information as identified below under the applicable section(s)):

1. If the item or service is available only from one source, please include the following:
 - Uniqueness of items or services to be procured from the proposed contractor or vendor (compatibility, patent issues, etc.)
 - How the agency determined that the item or service is only available from one source (e.g., market survey results, independent agency research, patented or proprietary system, etc.)
 - Explanation of need for contractor's expertise linked to the current project (e.g., knowledge of project management, responsiveness, experience of contractor personnel, prior work on earlier phases of project)
 - Any additional information that would support the case
2. If the public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation, please include the following:
 - Need for the contract and period of performance
 - Impact on project if deadline/dates are not met

- How long it would take an alternate contractor to reach the same required level of competence (equate to dollar amounts, if desired)
- Any additional information that would support the case

3. If competition is determined inadequate after solicitation of a number of sources, please include the following:
 - Results of a market survey to determine competition availability; if no survey is conducted, please explain why not
 - Any additional information that would support the case

Section III. A declaration that this action/choice is in the best interest of the agency.

Failure to provide all of the necessary information will delay the processing of your request. Your agency will be contacted if any of the identified information is missing or if additional supporting information is required. If OJP determines that the request does not meet the standards set forth above, the request will be denied.

Please be advised that conflicts of interest are prohibited under the procurement standards set forth in 2 C.F.R. § 200.318(c). In addition, program funds should not be awarded to any party that is debarred or suspended from participation in federal assistance programs.

If you have any questions regarding the federal requirements that guide procurement procedures, please contact your Grant Program Specialist or Program Manager.

Note: Time constraints will not be considered a factor if the award recipient has not sought competitive bids in a timely manner. Examples of public emergencies include natural disasters or other catastrophic events requiring an urgent or immediate response.

Contact OJP

For further information on procurement under awards, please see *Chapter 3.8: Procurement Under Awards of Federal Assistance*, in the [2015 Department of Justice \(DOJ\) Grants Financial Guide](#).

Sole Source Review Checklist

Tool to assess the merits of a sole source approval request



A *Sole Source Approval* Grant Adjustment Notice (GAN) in the Office of Justice (OJP) Grants Management System (GMS) must be initiated to request approval to enter into a noncompetitive contractual relationship, with a contractor under an award, where the contracted cost exceeds the Simplified Acquisition Threshold of \$150,000. The sole source justification should include adequate information to address the elements below. In addition, an itemized budget of the contract amount should be included.

Below is a checklist intended to help evaluate sole source requests. The sole source approval request only needs to meet one of the qualifying situations listed on this checklist. All the conflict of interest items must be addressed in the justification.

Item Only Available Through a Single Source

- ☐ Does independent research through internet searches or discussions with subject matter experts corroborate that the item is available only from a single source?
- ☐ Does the request demonstrate the uniqueness of items or services to be procured from the proposed contractor or vendor (compatibility, patent issues, etc.)?
- ☐ Does the request demonstrate and support how it was determined that the item or service is only available from one source (e.g., market survey results, independent agency research, patented or proprietary system, etc.)?
- ☐ Does the request demonstrate a significant need for contractor's expertise linked to the current project (e.g., knowledge of project management, responsiveness, experience of contractor personnel, or prior work on earlier phases of project)?

Public Emergency

- ☐ Is there a public emergency such as a natural disaster or catastrophic event?
- ☐ Has there been a declared state of emergency in which these goods and services will be needed?
- ☐ Is there a health or safety concern?

Inadequate Competition

- ☐ Does the request adequately describe the efforts to competitively contract for this item? For example, were requests for proposals or bids conducted and what was the nature of the responses?
- ☐ Does this request adequately describe the efforts to ensure the contract pricing is fair and reasonable?
- ☐ Does the request provide results of a market survey to determine competition availability or explain why no survey was conducted?

Conflict of Interest/Suitability/Procurement Standards

- ☐ Does the request ensure there is no conflict of interest with the proposed vendor?
- ☐ Does the request indicate whether or not the proposed vendor has been debarred from receiving federal funds?
- ☐ Does the request include evidence that the procurement will be competed in compliance with the other procurement standards in the Uniform Guidance, including the required contract provisions?

