



U.S. Department  
of Transportation  
**Federal Highway  
Administration**

**Research, Development, and Technology**  
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In Reply Refer To:  
HRT-1

Mr. Dale Peabody  
Chair, AASHTO Research Advisory Committee  
Director, Transportation Research  
Maine Department of Transportation  
16 State House Station  
Augusta, ME 04333-0016

Dear Mr. Peabody:

With the adoption of new regulations such as 2 CFR 200, commonly known as the Supercircular, several State departments of transportation (DOT) and State universities have made inquiries to the Federal Highway Administration (FHWA) regarding how the overhead/indirect cost rate should be calculated by universities when conducting research for DOTs using FHWA State Planning and Research (SPR) funds. In particular, 2 CFR 200 Appendix III defines the indirect cost rate determination for universities that are approved by the Federal cognizant agency independent of the State DOT sponsored research and activities. Thus, the following question:

**Question:** When DOTs provide SPR funds to universities to conduct a research project, are the SPR funds considered “pass-through” awards to the universities? Does this affect the overhead/indirect cost rate that State DOTs must pay?

**Answer:** The status of SPR funds used to pay for State DOT research conducted by universities is determined by the substance of the relationship. The factors used to determine whether funds are being spent under a “pass through” grant, subaward, or a contract are described in detail in 2 CFR 200.330.

1. When a State DOT issues or awards a grant to a university to conduct transportation research where the principle purpose is to carry out a public purpose for the benefit of the university and not to acquire property or services for the State DOT (see 2 CFR 200.330(a)), the prevailing overhead/indirect cost must be applied if the rate exists. See 2 CFR 200.331. The approved indirect cost rate would be recorded in the subrecipient grant agreement. An example that would fall under this scenario would be if the State provides financial support for a university to carry out research at the university’s discretion with limited direction from the State DOT.
2. If a State DOT issues a fee-for-service contract to conduct specific studies, where there is no programmatic discretion for the university, the substantive transaction is generally not

considered a “pass-through” grant or “subaward.” See 2 CFR 200.330(b). In those instances, the State DOT could negotiate to pay either the prevailing overhead/indirect cost rate or negotiate with the university to pay a lower rate. See 2 CFR 200.317. Most SPR research is conducted as directed by the State DOT under a contractual agreement and therefore would fall under this scenario. Research projects are chosen by and regularly reported to the State DOT.

### **Discussion**

The pass-through determination has an impact on how indirect costs are determined and approved. Many State DOTs have negotiated a lower indirect cost overhead for SPR research contracts, but this rate may be used only for a contract awarded to the entity as described in paragraph 2 above. If the funds utilized to conduct SPR studies are considered “pass-through” grants or “subawards”, then the approved, federally recognized indirect cost rate negotiated between the subrecipient and the Federal government must be applied as directed in 2 CFR 200.331(a)(4). The indirect cost rates for Institutions of Higher Education (IHE) are typically negotiated and approved by either the Department of Health and Human Services or the Department of Defense, depending on which of the two agencies provided more funds to the IHE in the most recent three years. If an IHE has never received an indirect cost rate, then the State DOT may either negotiate a rate with the IHE, or the IHE may elect to charge a de minimis indirect cost rate as defined in 2 CFR 200.414(f).

Implementing regulations for the FHWA SPR program state that FHWA will attempt to allow State DOTs and metropolitan planning organizations “[m]aximum possible flexibility in the use of FHWA planning and research funds to meet highway and local public transportation planning and RD&T needs at the national, State, and local levels... (23 CFR 420.105(a))”.

Thus, depending on the State’s acquisition laws, regulations, and policies, a State DOT may be able to fund work described in the SPR legislative authority (23 U.S.C. 505 (a)) using State DOT staff, State universities, private universities, staff from other public entities, or private-sector contractors. As explained in section 2 CFR 200.330, in determining whether an agreement between a pass-through entity and another non-Federal entity results in a subaward or contract, the substance of the relationship should govern the final determination as opposed to the form of the agreement 23 CFR 200.330(c). The DOT may use either a contract or a grant, in accordance with that section, which describes the process for a DOT to determine whether funds are being provided to a subrecipient or a contractor.

Relevant sections of the Uniform Requirements for Federal Awards are the following:

**§ 200.74 Pass-through entity.**

*Pass-through entity means a non-Federal entity that provides a subaward to a subrecipient to carry out part of a Federal program.*

**2 CFR 200.93 Subrecipient.**

*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.

**2 CFR 200.330 Sub recipient and contractor determinations.**

The non-Federal entity may concurrently receive Federal awards as a recipient, a sub recipient, 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 sub recipient 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) Sub recipients.** A sub award is for the purpose of carrying out a portion of a Federal award and creates a Federal assistance relationship with the sub recipient. See § 200.92 Sub award. Characteristics which support the classification of the non-Federal entity as a sub recipient 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 § 200.22 Contract. 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 sub recipient 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 sub award or a procurement contract.

**§ 200.332 Fixed amount subawards.** With prior written approval from the Federal awarding agency, a pass-through entity may provide subawards based on fixed amounts up to the Simplified Acquisition Threshold, provided that the subawards meet the requirements for fixed amount awards in § 200.201 Use of grant agreements (including fixed amount awards), cooperative agreements, and contracts.

*Other Pertinent Sections of 2 CFR 200:*

- .22 Contract*
- .38 Federal Award*
- .51 Grant Agreement*
- .74 Pass-through entity*
- .86 Recipient*
- .92 Sub-award*
- .93 Sub recipient*
- .300 Sub recipient and contractor determinations*

If there are any questions, please direct them to: Sidney Stecker at (202) 493-3044 [sidney.stecker@dot.gov](mailto:sidney.stecker@dot.gov) or Jack Jernigan at 202-493-3363 [jack.jernigan@dot.gov](mailto:jack.jernigan@dot.gov).

Sincerely yours,

A handwritten signature in blue ink, appearing to read "Michael F. Trentacoste". The signature is fluid and cursive, with a large initial "M" and a long, sweeping underline.

Michael F. Trentacoste  
Associate Administrator