

Using the Coronavirus State and Local Fiscal Recovery Funds Model Addendum: Purpose, Usage, Questions and Answers

Connor Crews

Purpose of the Model Addendum*

The Coronavirus State and Local Fiscal Recovery Funds Model Addendum (“Addendum”), attached to this bulletin, is intended for use by units of local government in North Carolina that have received payments from the Coronavirus State Fiscal Recovery Fund (“State Fiscal Recovery Fund”) or the Coronavirus Local Fiscal Recovery Fund (“Local Fiscal Recovery Fund” and, together with the State Fiscal Recovery Fund, the “Fiscal Recovery Funds”) established under Sections 602 and 603, respectively, of the Social Security Act, as added by Section 9901 of the American Rescue Plan Act of 2021, Pub. L. No. 117-2 (“ARPA”).

The U.S. Department of the Treasury (“Treasury”) has stated in its Interim Final Rule, recently released Final Rule, and Compliance and Reporting Guidance that, with few exceptions, the procurement standards contained in the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 C.F.R. Part 200) (“Uniform Guidance”) apply when a recipient or subrecipient of Fiscal Recovery Funds uses these monies to purchase goods or services.¹ Among other things, the procurement standards in the Uniform Guidance

[Connor Crews](#) is an assistant professor at the School of Government specializing in the areas of local government contracting, procurement, and finance.

* A full, modifiable version of the [Model Addendum](#) may be accessed on this bulletin’s page on the School of Government’s website.

1. See [Coronavirus State and Local Fiscal Recovery Funds](#), 86 Fed. Reg. 26,786, 26,811 (May 17, 2021) (hereinafter Interim Final Rule) (“As provided for in the award terms, payments from the Fiscal Recovery Funds as a general matter will be subject to the provisions of the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 CFR Part 200) (the Uniform Guidance [.]”); [Coronavirus State and Local Fiscal Recovery Funds](#), 87 Fed. Reg. 4,338, 4,375 (Jan. 27, 2022) (hereinafter Final Rule) (“Recipients must comply with the applicable requirements of the Uniform Guidance regarding procurement, contract, and conflicts of interest and must follow the applicable laws and regulations in their jurisdictions.”); U.S. DEP’T OF THE TREAS., [COMPLIANCE AND REPORTING GUIDANCE: STATE AND LOCAL FISCAL RECOVERY FUNDS](#), version 2.1, 8 (Nov. 15, 2021) (“Recipients are responsible for ensuring that any procurement using SLFRF funds, or payments under procurement

(2 C.F.R. §§ 200.317–.327) require recipients and subrecipients to include certain clauses in Fiscal Recovery Fund–supported contracts to purchase goods or services.² Separately, the Local Fiscal Recovery Fund Award Terms and Conditions executed by each recipient unit of local government also require the inclusion of certain clauses in these contracts.³

This Addendum addresses (1) contract clauses required by the procurement standards in the Uniform Guidance, (2) contract clauses required by the Local Fiscal Recovery Fund Award Terms and Conditions, and (3) recommended contract clauses that may assist a unit in satisfying statutory and regulatory requirements applicable to the expenditure of Fiscal Recovery Funds. A unit should use this Addendum in consultation with legal counsel, as both interpretations of these requirements and a particular unit’s views on proper risk allocation or contract drafting may differ.

The Addendum assumes (1) a unit of local government is a “recipient” or a “subrecipient” of monies from the Fiscal Recovery Funds, (2) the unit is using these funds to pay for the cost of a good or service to carry out an eligible use under ARPA, and (3) the unit and a contractor have entered into a separate written agreement that governs the terms of payment and delivery of the goods or services.⁴ **The Addendum does not include any clauses that may be required under North Carolina law.**

Questions and Answers

This section answers several questions that users of the Addendum may have.

Question 1: Should a unit use this Addendum as a subaward agreement to govern a transfer of Fiscal Recovery Funds to a subrecipient?

Answer: No. Recipients of Fiscal Recovery Funds may “transfer” these funds to other governmental or nonprofit organizations where both ARPA and North Carolina law authorize a transfer.⁵ Under ARPA and applicable federal grant regulations, the transferee of these funds will be a “subrecipient” that has received a “subaward”—and a recipient must enter into a subaward agreement with that subrecipient to govern the transaction.

contracts using such funds are consistent with the procurement standards set forth in the Uniform Guidance at 2 CFR 200.317 through 2 CFR 200.327, as applicable.”).

2. See 2 C.F.R. § 200.327 (“The non-Federal entity’s contracts must contain the applicable provisions described in appendix II to this part.”); 2 C.F.R. pt. 200 app. II.

3. U.S. DEP’T OF THE TREAS., [LOCAL FISCAL RECOVERY FUND AWARD TERMS AND CONDITIONS](#) § 8 (hereinafter LOCAL FRF AWARD TERMS); U.S. DEP’T OF THE TREAS., [CORONAVIRUS STATE FISCAL RECOVERY FUND AWARD TERMS AND CONDITIONS](#) § 8.

4. As used here, the term “contractor” means an entity that receives a “contract.” See 2 C.F.R. § 200.1 (defining “contractor” as “an entity that receives a contract as defined in this section”); *id.* (defining “contract” as “a legal instrument by which a recipient or subrecipient purchases property or services needed to carry out the program or project under a Federal award.”).

5. See generally Kara Millonzi, [American Rescue Plan Act of 2021: Local Government Authority to Expend Their Allocations](#), COATES’ CANONS: NC LOCAL GOV’T LAW Blog (Apr. 5, 2021).

Under the Uniform Guidance, a “contract” is distinct from a “subaward.”⁶ The Addendum only addresses required provisions for the former type of agreement, not the latter.⁷

Question 2: Should our unit modify the Addendum prior to use?

Answer: Yes. The Addendum contains footnotes (each labeled “Note to Draft”) that explain why the Addendum contains specific clauses. Units should review and remove these explanatory footnotes in consultation with legal counsel when finalizing an addendum for a particular contract supported by Fiscal Recovery Funds.

Question 3: Does the Addendum contain all contract clauses described in 2 C.F.R. § 200.327 and Appendix II to 2 C.F.R. Part 200?

Answer: Almost. The Addendum does **not** contain: (1) a contract clause addressing “administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms” (required under Appendix II, § (A) for contracts exceeding the Simplified Acquisition Threshold); or (2) a contract clause addressing “termination for cause and for convenience by the non-federal entity[,] including the manner by which it will be effected and the basis for settlement.”

Each of these clauses will differ based upon the type of contract involved and the operating procedures in a given unit. Each unit should consult legal counsel to develop appropriate terms.⁸ The Addendum contains all other clauses required by 2 C.F.R. Part 200, Appendix II that are applicable to Fiscal Recovery Funds (but see Question 4, below).

Question 4: Appendix II, § (D) requires “all prime construction contracts in excess of \$2,000” to include a provision for compliance with the Davis-Bacon Act and associated regulations promulgated by the Department of Labor. Why does the Addendum *not* contain provisions requiring compliance with the Davis-Bacon Act?

Answer: See footnote 6 of the Addendum.

Question 5: Which clauses in the Addendum are mandatory and which are recommended?

Answer: The table below provides a reference guide and the source of any requirement or recommendation. This table should be read in conjunction with the footnotes in the Addendum.

6. When a recipient or subrecipient makes a disbursement of federal award monies subject to the provisions of the Uniform Guidance, it must determine on a case-by-case basis whether the transferee of those funds is a “contractor” or a “subrecipient.” See [2 C.F.R. § 200.331](#). One commentator has explained this determination process as examining “how benefit flows.” ROBERT M. LLOYD, *A PRACTICAL GUIDE TO FEDERAL GRANTS MANAGEMENT – FROM SOLICITATION TO AUDIT* 246 (3d ed. 2020). In a “contract” relationship, the benefit of federal grant funds flows “up”—a non-federal entity purchases goods or services for its *own* use to carry out the purposes of the federal award. In a “subaward” relationship, the benefit of federal grant funds flows “down”—a non-federal entity acts much like a federal agency and distributes funds that a third party uses to itself carry out the purposes of the federal award.

7. [2 C.F.R. § 200.332](#) addresses required provisions for subaward agreements.

8. The Federal Transit Administration has developed sample clauses addressing the clauses required by §§ (A) and (B) of Appendix II to 2 C.F.R. Part 200. See FED. TRANSIT ADMIN., [BEST PRACTICES PROCUREMENT & LESSONS LEARNED MANUAL, FTA REPORT NO. 0105 A-69-78](#) (2016).

Addendum Number and Title of Section	Is Inclusion of Clause Mandatory or Recommended? ^a	Source of Requirement or Recommendation ^b
I. Definitions	N/A	N/A
II. Equal Employment Opportunity	Mandatory	Appendix II, § (C)
III. Copeland Anti-Kickback Act	Mandatory	Appendix II, § (D)
IV. Contract Work Hours and Safety Standards Act	Mandatory	Appendix II, § (E)
V. Rights to Inventions Made Under a Contract or Agreement	Mandatory ^c	Appendix II, § (F)
VI. Clean Air Act and Federal Water Pollution Control Act	Mandatory	Appendix II, § (G)
VII. Debarment and Suspension	Mandatory	Appendix II, § (H)
VIII. Byrd Anti-Lobbying Amendment	Mandatory	Appendix II, § (I)
IX. Procurement of Recovered Materials	Mandatory	Appendix II, § (J); 2 C.F.R. § 200.323
X. Prohibition on Contracting for Covered Telecommunications Equipment or Services	Mandatory	Appendix II, § (K); 2 C.F.R. § 200.216
XI. Domestic Preferences for Procurement	Mandatory	Appendix II, § (L); 2 C.F.R. § 200.322
XII. Solicitation of Minority-and Women-Owned Business Enterprise	Mandatory (if Subcontracts are to be let)	2 C.F.R. § 200.321(b)(6)
XIII. Access to Records	Recommended	FRF Award Terms, § 4; 2 C.F.R. § 200.334
XIV. Conflicts of Interest; Gifts and Favors	Recommended	FRF Award Terms, § 8; 2 C.F.R. § 200.318(c)(1)
XV. Assurances of Compliance with Title VI of the Civil Rights Act of 1964	Mandatory	FRF Award Terms/Assurances of Compliances § 5
XVI. Other Non-Discrimination Statutes	Recommended	FRF Award Terms, § 9(c)
XVII. Miscellaneous	Recommended	FRF Award Terms, §§ 17–18
XVIII. Conflicts and Interpretation	Recommended	N/A

a. For purposes of this table, a “mandatory” clause means that the clause (as drafted in the Addendum) should be included in a “contract” supported by Fiscal Recovery Funds. A “mandatory” clause, by its terms, still may not apply in a particular scenario if the clause’s language does not trigger its application. For example, 2 C.F.R. Part 200, Appendix II, § (C) requires that, “[e]xcept as otherwise provided under 41 C.F.R. Part 60, all contracts that meet the definition of ‘federally assisted construction contract’ [as defined in 41 C.F.R. § 60-1.3] must include the equal opportunity clause provided under 41 C.F.R. Part 60[.]” 41 C.F.R. Part 60 applies only to federally assisted construction contracts in excess of \$10,000. See 41 C.F.R. § 60-4.1. Section II of the Addendum is drafted to limit the scope of this provision to federally assisted construction contracts in excess of \$10,000—and it need not be removed.

b. All references to “Appendix II” are to Appendix II to 2 C.F.R. Part 200. All references to the “FRF Award Terms” are to the LOCAL FRF AWARD TERMS.

c. *But see* footnote 10 in the Addendum.

Question 6: Can a unit use a “short form” of these provisions?

Answer: Likely not. While counsel might assist in shortening some of these provisions, a blanket incorporation of “all provisions required by Appendix II to 2 C.F.R. Part 200” or “all provisions required by the Fiscal Recovery Fund Award Terms and Conditions” is not a best practice. A “short form” may fail to adequately notify contractors which terms actually apply and may increase the risk that either the unit or the contractor will fail to take required actions.

The Federal Transit Administration (“FTA”), in addressing the obligation of FTA grantees to include required clauses in third-party procurement contracts, has noted that “[i]t is not acceptable to simply reference [the FTA’s Master Award Agreement with grantees] and leave contractors the responsibility to decide which statutes and regulations apply to that particular contract.”⁹ Similarly, it is unlikely that Treasury has a favorable view of “short form” contract provisions that incorporate all statutory or regulatory requirements that *may* be applicable to a particular contract supported by Fiscal Recovery Funds. In December 2021, the Office of Management and Budget (OMB) specifically indicated that auditors should check Fiscal Recovery Fund–supported contracts for the inclusion of applicable contract clauses contained in 2 C.F.R. Part 200, Appendix II.¹⁰ Considering the specific direction given to auditors and potential confusion generated by a blanket incorporation of “all applicable terms and conditions,” units should use the Addendum to develop standard terms and conditions that can be used for Fiscal Recovery Fund–supported contracts.

Question 7: If a unit desires to make a “micro purchase” of goods or services from a qualified contractor, must it enter into a written contract with such contractor containing clauses from the Model Addendum?

Answer: Units of local government may, on a non-competitive basis, use Fiscal Recovery Funds to acquire supplies or services when the aggregate amount of such purchase does not exceed the “micro-purchase threshold.”¹¹ As of November 12, 2020, a unit of local government in North Carolina expending federally awarded funds subject to the procurement standards in the Uniform Guidance must “determin[e] and documen[t] an appropriate micro-purchase threshold based on internal controls, an evaluation of risk, and its documented procurement procedures.”¹² Generally, that threshold is \$10,000 (as identified in the Federal Acquisition Regulation (48 C.F.R. Part 2, Subpart 2.1)), unless a unit self-certifies a “higher threshold consistent with state law” or receives federal authorization to set an alternative micro-purchase threshold that exceeds \$50,000.¹³

9. See Fed. Transit Admin., *Contract Clauses, Frequently Asked Questions*, TRANSIT.DOT.GOV (last updated Oct. 21, 2015).

10. OFF. OF MGMT. & BUDGET, 2 CFR PART 200, UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES, AND AUDIT REQUIREMENTS, 6 Fed. Reg. 68,533, 68,533 (Dec. 3, 2021); see also OFF. OF MGMT. & BUDGET, 2021 ADDENDUM 1 COMPLIANCE SUPPLEMENT ASSISTANCE LISTING 21.027, CORONAVIRUS STATE AND LOCAL FISCAL RECOVERY FUNDS (2021).

11. See 2 C.F.R. § 200.320(a)(1)(ii).

12. *Id.* § 200.320(a)(1)(iii).

13. For additional detail about the “self-certification” of a micro-purchase threshold exceeding \$10,000, see Connor Crews, *Raising the Federal Micro-Purchase Threshold: Self-Certification for Units of Local Government in North Carolina*, COATES’ CANONS: NC LOC. GOV’T LAW blog (Apr. 23, 2021).

In non-binding guidance, the U.S. Chief Financial Officers' Council has stated that a non-federal entity may use a purchase card or charge card to make a micro-purchase, as long as the entity has documented and approved procedures for such purchases.¹⁴ Such a purchase is still a "contract" for purposes of the Uniform Guidance procurement standards. Therefore, a unit using Fiscal Recovery Funds to pay for such a contract still may have an obligation under 2 C.F.R. § 200.327 and Appendix II to 2 C.F.R. Part 200 to include in those contracts the clauses specified in Appendix II to 2 C.F.R. Part 200. In these cases, a unit may consider placing the required clauses on its website, stating that such provisions govern any electronic transactions into which the unit enters using Fiscal Recovery Funds. Alternatively, a unit could avoid purely electronic payment and ensure that a contractor executes a purchase order containing the terms required by the Addendum.

Question 8: What is the purpose of Attachment 1? Is it part of the Addendum?

Answer: See footnote 17 of the Addendum. If a contract amount exceeds \$100,000, a unit should collect a certification regarding lobbying from the contractor. If the contractor intends to let any subcontracts exceeding \$100,000, the contractor also should collect this certification from subcontractors holding these subcontracts.

Question 9: If a unit has used other forms of federal financial assistance and developed clauses to use for contracts supported by such assistance, will those clauses suffice for contracts supported by Fiscal Recovery Funds?

Answer: Maybe. Units of local government in North Carolina use federal financial assistance to fund procurement costs in a wide variety of contexts.¹⁵ Many units have sought reimbursement from the Federal Emergency Management Agency's ("FEMA") Public Assistance Program for the costs of purchasing goods or services qualifying as "emergency protective measures." Other units have received grants or loans from, among other federal entities, the Environmental Protection Agency, the Department of Agriculture, the Economic Development Administration, the Department of Housing and Urban Development, the Department of Justice, or the Federal Transit Administration.

The universe of federal laws and regulations potentially applicable to a unit of local government's expenditures of federal financial assistance from these agencies is massive. And despite the promulgation of the Uniform Guidance, it is not the case that a uniform set of regulations governs the expenditure of all funds originating from a federal source. Instead, as local government staff across North Carolina have learned in recent months, the rules applicable to federal grants originate in a wide range of federal statutes, regulations, financial assistance agreements, and agency guidance. And the rules that govern other federal grant programs may not apply to the expenditure of Fiscal Recovery Funds. Units and counsel should consider rules applicable to Fiscal Recovery Funds rather than those that may be applicable to other federal grant programs (e.g., FEMA Public Assistance authorized under the Stafford Act, Pub. L. No. 93-288, as amended).

14. U.S. CHIEF FIN. OFFICERS' COUNCIL, [2 CFR FREQUENTLY ASKED QUESTIONS Q-90](#) (May 23, 2021).

15. "Federal financial assistance" is defined by regulation. See [2 C.F.R. § 200.1](#) (defining "federal financial assistance" to include, among other things, grants, loans, loan guarantees, cooperative agreements, and direct appropriations).

Units also should be aware that the OMB revised the Uniform Guidance in August 2020.¹⁶ Among other things, those revisions resulted in the addition of two new required contract clauses. The Addendum addresses these clauses in Section X and Section XI.

Question 10: Will these clauses be effective for the entirety of the period of performance for ARPA Fiscal Recovery Funds (i.e., through December 31, 2026)?

Answer: Maybe. Units should remain cognizant that Treasury continues to release additional compliance guidance governing the expenditure of Fiscal Recovery Funds and may modify or exclude certain contract clauses contained in the Model Addendum.

16. OFF. OF MGMT. & BUDGET, [GUIDANCE FOR GRANTS AND AGREEMENTS](#), 85 Fed. Reg. 49,506 (Aug. 13, 2020).