**Contract Addendum Template for Agreements with Contractors Paid for with American Rescue Plan Act Coronavirus State and Local Fiscal Recovery Funds**

***Note that this Contracts Addendum Template was drafted by former School of Government faculty member Connor Crews. It is intended to give NC local governments a general guide to crafting a Contract Addendum for Agreements with Contractors paid for with American Rescue Plan Act of 2021 Coronavirus State and Local Fiscal Recovery Fund monies. A local government must work with its attorney to draft contracts that are compliant with applicable laws and regulations. Use of this sample policy does not create an attorney/client relationship. The template was last updated in July 2022. Any questions about this sample policy, or suggestions for improvements, may be directed to the School of Government faculty member currently working in this area, Crista Cuccaro at*** ***cuccaro@sog.unc.edu******.***

**CORONAVIRUS STATE AND LOCAL FISCAL RECOVERY FUNDS CONTRACTS ADDENDUM TEMPLATE**

This **CORONAVIRUS STATE AND LOCAL FISCAL RECOVERY FUNDS ADDENDUM** (this “Addendum”) is entered into by and between [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_],[[1]](#footnote-2)a [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_][[2]](#footnote-3) (“Contractor”), and [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_],[[3]](#footnote-4) a [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_][[4]](#footnote-5) (“Unit”), and forms an integral part of the Contract (as defined in Section I hereof).

**RECITALS**

**WHEREAS**, Unit has received, either as a Recipient or Subrecipient (as each such term is defined in Section I hereof) a payment from the Coronavirus State Fiscal Recovery Fund (“State Fiscal Recovery Fund”) or Coronavirus Local Fiscal Recovery Fund (“Local Fiscal Recovery Fund” and, together with the State Fiscal Recovery Fund, the “Fiscal Recovery Funds”) established pursuant to 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”); and

**WHEREAS**, Unit intends to pay, in part or in whole, for the cost of the Contract (as defined in Section I hereof) using monies received from the Fiscal Recovery Funds; and

**WHEREAS**, in using such funds, Unit must comply with the terms of ARPA, regulations issued by the U.S. Department of the Treasury (“Treasury”) governing the expenditure of monies distributed from the Fiscal Recovery Funds (including, without limitation, the Interim Final Rule (86 Fed. Reg. 26,786 (May 17, 2021) and Final Rule (87 Fed. Reg. 4,338 (Jan. 27, 2022)), the Award Terms and Conditions applicable to the Fiscal Recovery Funds, and such other guidance as Treasury has issued or may issue governing the expenditure of monies distributed from the Fiscal Recovery Funds (collectively, the “Regulatory Requirements”); and

**WHEREAS**, pursuant to the Regulatory Requirements, Unit must comply with the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 2 C.F.R. Part 200, other than such provisions as Treasury has determined or may determine are inapplicable to the Fiscal Recovery Funds; and

**WHEREAS**, pursuant to 2 C.F.R. § 200.327, Unit must include within the Contract applicable provisions described in Appendix II to 2 C.F.R. Part 200, each of which is contained in this Addendum; and

**WHEREAS**, Unit shall not enter into the Contract or make any distributions of funds to Contractor using monies from the Fiscal Recovery Funds absent Contractor’s agreement and adherence to each term and condition contained herein.

**NOW THEREFORE**, Contractor and Unit do mutually agree as follows:

**AGREEMENTS**

1. Definitions

A.Unless otherwise defined in this Addendum, capitalized terms used in this Addendum shall have the meanings ascribed thereto in this Section I.

1. “ARPA” shall mean the American Rescue Plan Act of 2021, Pub. L. No. 117-2, as amended.

2. “Administering Agency” shall have the meaning specified in 41 C.F.R. § 60-1.3.

3. “Applicant” shall have the meaning specified in 41 C.F.R. § 60-1.3, which is provided here for ease of reference: (“An applicant for Federal assistance involving a construction contract, or other participant in a program involving a construction contract as determined by regulation of an administering agency. The term also includes such persons after they become recipients of such Federal assistance.”).

4. “Construction Work” shall have the meaning specified in 41 C.F.R. § 60-1.3, which is provided here for ease of reference: (“[T]he construction, rehabilitation, alteration, conversion, extension, demolition or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services. The term also includes the supervision, inspection, and other onsite functions incidental to the actual construction.”).

5. “Contract” shall mean the legal instrument by which Unit, as a Recipient or Subrecipient, shall purchase from Contractor property or services needed to carry out a project or program under a federal award, and of which this Addendum shall constitute an integral part.

6. “Contractor” shall mean the entity named as “Contractor” in this Addendum that has received a Contract from Unit.

7. “Federally Assisted Construction Contract” shall have the meaning specified in 41 C.F.R. § 60-1.3, which is provided here for ease of reference: (“[A]ny agreement or modification thereof between any applicant and a person for construction work which is paid for in whole or in part with funds obtained from the Government or borrowed on the credit of the Government pursuant to any federal program involving a grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any federal program involving such grant, contract, loan, insurance, or guarantee, or any application or modification thereof approved by the government of the United States of America for a grant, contract, loan, insurance, or guarantee under which the applicant itself participates in the construction work.”).

8. “Government” shall have the meaning specified in 41 C.F.R. § 60-1.3, which is provided here for ease of reference: (“[T]he government of the United States of America.”).

9. “Laborer” or “Mechanic” shall have the meaning specified in 29 C.F.R. § 5.2(m), which is provided here for ease of reference: (“The term *laborer* or *mechanic* includes at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial. The term *laborer* or *mechanic* includes apprentices, trainees, helpers, and, in the case of contracts subject to the Contract Work Hours and Safety Standards Act, watchmen or guards. The term does not apply to workers whose duties are primarily administrative, executive, or clerical, rather than manual. Persons employed in a bona fide executive, administrative, or professional capacity as defined in part 541 of [Title 40 of the United States Code] are not deemed to be laborers or mechanics. Working foremen who devote more than 20 percent of their time during a workweek to mechanic or laborer duties, and who do not meet the criteria of [Title 40 of the United States Code], are laborers and mechanics for the time so spent.”).

10. “Recipient” shall mean an entity that receives a federal award directly from a federal awarding agency. The term does not include subrecipients or individuals that are beneficiaries of an award.

11. “Subcontract” shall mean any agreement entered into by a Subcontractor to furnish supplies or services for the performance of this Contract or a Subcontract. It includes, but is not limited to, purchase orders and changes and modifications to purchase orders.

12. “Subcontractor” shall mean an entity that receives a Subcontract.

13. “Subrecipient” shall mean an entity that receives a subaward from a pass-through entity to carry out part of a federal award; but it does not include an individual that is a beneficiary of such award. A subrecipient may also be a recipient of other federal awards directly from a federal awarding agency.

14. “Tier” shall have the meaning indicated in 2 C.F.R. Part 180 and illustrated in 2 C.F.R. Part 180, Appendix II.

15. “Unit” shall have the meaning indicated in the preamble to this Addendum.

1. Equal Employment Opportunity[[5]](#footnote-6)

A. If this contract is a Federally Assisted Construction Contract exceeding $10,000, during the performance of this Contract, Contractor agrees as follows:

1. Contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. Contractor will take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.

2. Contractor will, in all solicitations or advertisements for employees placed by or on behalf of Contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin.

3. Contractor will not discharge or in any other manner discriminate against any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant. This provision shall not apply to instances in which an employee who has access to the compensation information of other employees or applicants as a part of such employee’s essential job functions discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or is consistent with Contractor’s legal duty to furnish information.

 4. Contractor will send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers’ representatives of Contractor’s commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

 5. Contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

 6. Contractor will furnish to the Administering Agency and the Secretary of Labor all information and reports required by Executive Order 11246 of September 24, 1965, and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to its books, records, and accounts by the Administering Agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

 7. In the event of Contractor’s noncompliance with the nondiscrimination clauses of this Contract or with any of the said rules, regulations, or orders, this Contract may be canceled, terminated, or suspended, in whole or in part, and Contractor may be declared ineligible for further Government contracts or Federally Assisted Construction Contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965. Such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

 8. Contractor will include the portion of the sentence immediately preceding paragraph A.1. of this Section II and the provisions of paragraphs A.1. through A.7. in every Subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each Subcontractor or vendor. Contractor will take such action with respect to any Subcontract or purchase order as the Administering Agency may direct as a means of enforcing such provisions, including sanctions for noncompliance.

Provided, however, that in the event Contractor becomes involved in, or is threatened with, litigation with a Subcontractor or vendor as a result of such direction by the Administering Agency, Contractor may request the United States to enter into such litigation to protect the interests of the United States.

Unit further agrees that it will be bound by the above equal opportunity clause with respect to its own employment practices when it participates in federally assisted construction work. Provided, that if Unit so participating is a State or local government, the above equal opportunity clause is not applicable to any agency, instrumentality, or subdivision of such government which does not participate in work on or under the Contract.

 9. Unit agrees that it will assist and cooperate actively with the Administering Agency and the Secretary of Labor in obtaining the compliance of Contractor and any Subcontractors with the equal opportunity clause and the rules, regulations, and relevant orders of the Secretary of Labor; that it will furnish the Administering Agency and the Secretary of Labor such information as they may require for the supervision of such compliance; and that it will otherwise assist the Administering Agency in the discharge of the agency’s primary responsibility for securing compliance.

10. Unit further agrees that it will refrain from entering into any contract or contract modification subject to Executive Order 11246 of September 24, 1965, with a contractor debarred from, or who has not demonstrated eligibility for, Government contracts and Federally Assisted Construction Contracts pursuant to the Executive Order and that it will carry out such sanctions and penalties for violation of the equal opportunity clause as may be imposed upon Contractor and any Subcontractors by the Administering Agency or the Secretary of Labor pursuant to Part II, Subpart D of the Executive Order. In addition, Unit agrees that if it fails or refuses to comply with these undertakings, the Administering Agency may take any or all of the following actions: Cancel, terminate, or suspend, in whole or in part, this grant (contract, loan, insurance, guarantee); refrain from extending any further assistance to the applicant under the program with respect to which the failure or refund occurred until satisfactory assurance of future compliance has been received from such applicant; and refer the case to the Department of Justice for appropriate legal proceedings.

B. If this Contract is not a Federally Assisted Construction Contract exceeding $10,000, the provisions of Section I.A. of this Addendum shall not apply.

1. Copeland “Anti-Kickback” Act[[6]](#footnote-7)
2. Contractor and any Subcontractors performing work under the Contract shall comply with 18 U.S.C. § 874. Unit shall report all suspected or reported violations to Treasury.[[7]](#footnote-8)
3. Contract Work Hours and Safety Standards Act[[8]](#footnote-9)

A. *Overtime Requirements.* No Contractor or Subcontractor contracting for any part of the Contract work which may require or involve the employment of Laborers or Mechanics shall require or permit any such Laborer or Mechanic in any workweek in which he or she is employed on such work to work in excess of forty hours in such workweek unless such Laborer or Mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek.

B. *Violation; Liability for Unpaid Wages; Liquidated Damages*. In the event of any violation of the clause set forth in Section IV.A. (*Overtime Requirements*), above, Contractor and any Subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such Contractor and Subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory) for liquidated damages. Such liquidated damages shall be computed with respect to each individual Laborer or Mechanic, including watchmen and guards, employed in violation of the clause set forth in Section IV.A. (*Overtime Requirements*), above, in the sum of $27 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in Section IV.A. (*Overtime Requirements*), above.

C. *Withholding for Unpaid Wages and Liquidated Damages*. Unit shall, upon its own action or upon written request of an authorized representative of the Department of Labor, withhold, or cause to be withheld, from any moneys payable on account of work performed by Contractor or Subcontractor under any such contract or any other federal contract with the same prime contractor, or any other federally assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime contractor, such sums as may be determined to be necessary to satisfy any liabilities of Contractor or Subcontractor for unpaid wages and liquidated damages as provided in Section IV.B. (*Violation; Liability for Unpaid Wages; Liquidated Damage*s) of this section.

D. *Subcontracts*. Contractor or Subcontractor shall insert in any Subcontract the clauses set forth in Sections IV.A. through IV.D. and also a clause requiring Subcontractors to include these clauses in any lower-Tier Subcontracts. Contractor shall be responsible for compliance by any first-Tier Subcontractor or lower-Tier Subcontractor with the clauses set forth in Sections IV.A. through IV.D.

E. *Payroll and Records*. Contractor or Subcontractor shall maintain payrolls and basic payroll records during the course of the work and shall preserve them for a period of three years from the completion of the Contract for all Laborers and Mechanics, including guards and watchmen, working on the Contract. Such records shall contain the name and address of each such employee, Social Security number, correct classifications, hourly rates of wages paid, daily and weekly number of hours worked, deductions made, and actual wages paid. Records to be maintained under this provision shall be made available by Contractor or Subcontractor for inspection, copying, or transcription by authorized representatives of the Department of the Treasury and the Department of Labor, and Contractor or Subcontractor will permit such representatives to interview employees during working hours on the job.

F. *Exceptions*.None of the requirements of Section IV of this Addendum shall apply if this Contract is a Contract (1) for transportation by land, air, or water; (2) for the transmission of intelligence; (3) for the purchase of supplies, materials, or articles ordinarily available in the open market; or (4) in an amount that is equal to or less than $100,000.[[9]](#footnote-10)

1. Rights to Inventions Made Under a Contract or Agreement[[10]](#footnote-11)

A. The Government reserves a royalty-free, non-exclusive and irrevocable license to reproduce, publish, or otherwise use, and to authorize others to use for “Government purposes,” any subject data or copyright described below.[[11]](#footnote-12) “Government purposes” means use only for the direct purposes of the Government. Without the copyright owner’s consent, the Government may not extend its federal license to any other party.

1. Any subject data developed under the Contract, whether or not a copyright has been obtained, and

2. Any rights of copyright purchased by Contractor using federal assistance funded in whole or in part by the Department of the Treasury.

B. Unless Treasury determines otherwise, a Contractor performing experimental, developmental, or research work required as part of this Contract agrees to permit Treasury to make available to the public either (1) Treasury’s license in the copyright to any subject data developed in the course of the Contract or (2) a copy of the subject data first produced under the Contract for which a copyright has not been obtained. If the experimental, developmental, or research work which is the subject of this Contract is not completed for any reason whatsoever, all data developed under the Contract shall become subject data as defined herein and shall be delivered as the Government may direct.

C. Unless prohibited by North Carolina law, upon request by the Government, Contractor agrees to indemnify, save, and hold harmless the Government, its officers, agents, and employees acting within the scope of their official duties against any liability, including costs and expenses, resulting from any willful or intentional violation by Contractor of proprietary rights, copyrights, or right of privacy arising out of the publication, translation, reproduction, delivery, use, or disposition of any data furnished under the Contract. Contractor shall be required to indemnify the Government for any such liability arising out of the wrongful act of any employee, official, or agent of the Contractor.

D. Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government under any patent.

E. Data developed by Contractor and financed entirely without using federal assistance provided by the Government that has been incorporated into work required by the underlying Contract is exempt from the requirements herein, provided that Contractor identifies those data in writing at the time of delivery of the Contract work. Contractor agrees to include these requirements in each Subcontract for experimental, developmental, or research work financed in whole or in part with federal assistance.

F. For the purposes of this Section V, “subject data” means “recorded information, whether or not copyrighted, . . . that is delivered or specified to be delivered as required by the Contract.” Examples of “subject data” include, but are not limited to, “computer software, standards, specifications, engineering drawings and associated lists, process sheets, manuals, technical reports, catalog item identifications, and related information, but do not include financial reports, cost analyses or other similar information used for performance or administration of the Contract.”[[12]](#footnote-13)

1. Clean Air Act and Federal Water Pollution Control Act[[13]](#footnote-14)

A. *Clean Air Act*.Contractor agrees to comply with all applicable standards, orders, and regulations issued pursuant to the Clean Air Act, as amended, 42 U.S.C. §§ 7401 *et seq.* Contractor agrees to report each violation to Unit and understands and agrees that Unit will, in turn, report each violation as required to Treasury and the appropriate Environmental Protection Agency Regional Office. Contractor agrees to include these requirements in each Subcontract exceeding $150,000 financed, in whole or in part, with federal assistance provided by Treasury.

B. *Federal Water Pollution Control Act.* Contractor agrees to comply with all applicable standards, orders, and regulations issued pursuant to the Federal Water Pollution Control Act, as amended, 33 U.S.C. §§ 1251 *et seq.* Contractor agrees to report each violation to Unit and understands and agrees that Unit will, in turn, report each violation as required to assure notification to Treasury and the appropriate Environmental Protection Agency Regional Office. Contractor agrees to include these requirements in each Subcontract exceeding $150,000 financed, in whole or in part, with federal assistance provided by Treasury.

1. Debarment and Suspension[[14]](#footnote-15)

A. Due to its receipt of Fiscal Recovery Funds, Unit is a participant in a nonprocurement transaction (defined at 2 C.F.R. § 180.970) that is a covered transaction pursuant to 2 C.F.R. § 180.210 and 31 C.F.R. § 19.210. Therefore, this Contract is a lower-Tier covered transaction for purposes of 2 C.F.R. Part 180 and 31 C.F.R. Part 19 if (1) the amount of this Contract is greater than or equal to $25,000 (2 C.F.R. § 180.220(b)(1); 31 C.F.R. § 19.220(b)(1)); (2) the Contract requires the consent of an official of the Department of the Treasury (2 C.F.R. § 180.220(b)(2); 31 C.F.R. § 19.220(b)(2)); or (3) this Contract is for federally required audit services (2 C.F.R. § 180.220(b)(3); 31 C.F.R. § 19.220(b)(3)).[[15]](#footnote-16)

B. If this Contract is a covered transaction as set forth in Section VII.A., above, Contractor hereby certifies as of the date hereof that Contractor, Contractor’s principals (defined at 2 C.F.R. § 180.995), and the affiliates (defined at 2 C.F.R. § 180.905) of both Contractor and Contractor’s principals are not excluded (defined at 2 C.F.R. § 180.935) and are not disqualified (defined at 2 C.F.R. § 180.935). If any of the foregoing persons are excluded or disqualified and the Secretary of the Treasury has not granted an exception pursuant to 31 C.F.R. § 19.120(a), (1) this Contract shall be void, (2) Unit shall not make any payments of federal financial assistance to Contractor, and (3) Unit shall have no obligations to Contractor under this Contract.

C. Contractor must comply with 2 C.F.R. Part 180, Subpart C and 31 C.F.R. Part 19 and must include a requirement to comply with these regulations in any lower-Tier covered transaction into which it enters.[[16]](#footnote-17) This certification is a material representation of fact relied upon by Unit, and all liability arising from an erroneous representation shall be borne solely by Contractor.

D. If it is later determined that Contractor did not comply with 2 C.F.R. Part 180, Subpart C and 31 C.F.R. Part 19, in addition to remedies available to Unit, the Government may pursue available remedies, including but not limited to suspension and/or debarment.

1. Byrd Anti-Lobbying Amendment[[17]](#footnote-18)

A. Contractor certifies to Unit, and Contractor shall cause each Tier below it to certify to the Tier directly above such Tier, that it has not used and will not use federally appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any federal contract, grant, or any other award covered by 31 U.S.C. § 1352. Contractor shall, and shall cause each Tier below it, to disclose any lobbying with non–federally appropriated funds that takes place in connection with obtaining any federal award. Such disclosures (to be set forth on Standard Form-LLL, contained in 31 C.F.R. Part 21, Appendix B) shall be forwarded from Tier to Tier up to the Unit, which will, in turn, forward the certification(s) to Treasury. Contractor shall cause the language of this Section VIII.A. to be included in all Subcontracts. This certification is a material representation of fact upon which Unit has relied when entering into this Contract, and all liability arising from an erroneous representation shall be borne solely by Contractor.

B. Contractors that bid or apply for a contract exceeding $100,000 (including this Contract, if applicable) also must file with Unit the certification in Attachment 1 to this Addendum, which is attached hereto and incorporated herein.

C. Contractor also shall cause any Subcontractor with a Subcontract (at any Tier) exceeding $100,000 to file with the Tier above it the certification in Attachment 1 to this Addendum, which is attached hereto and incorporated herein.

1. Procurement of Recovered Materials[[18]](#footnote-19)

A. Section IX.B. shall apply if (1) this Contract involves the purchase of an item designated by the Environmental Protection Agency (“EPA”) in 40 C.F.R. Part 247 that exceeds $10,000 or (2) the total value of such designated items acquired during Unit’s preceding fiscal year exceeded $10,000.

B. In the performance of the Contract, Contractor shall make maximum use of products containing recovered materials that are EPA-designated items, unless the product cannot (1) be acquired competitively within a timeframe providing for compliance with the Contract performance schedule, (2) meet Contract performance requirements, or (3) be acquired at a reasonable price. Information about this requirement, along with the list of EPA-designated items, is available on EPA’s website.[[19]](#footnote-20) Contractor also agrees to comply with all other applicable requirements of Section 6002 of the Solid Waste Disposal Act.

1. Prohibition on Contracting for Covered Telecommunications Equipment or Services[[20]](#footnote-21)

A. *Definitions*.Unless otherwise defined in this Contract, capitalized terms used in this Section X shall have the meanings ascribed thereto in this Section X.A.

1. “Backhaul” means intermediate links between the core network, or backbone network, and the small subnetworks at the edge of the network (e.g., connecting cell phones/towers to the core telephone network). Backhaul can be wireless (e.g., microwave) or wired (e.g., fiber optic, coaxial cable, Ethernet).

2. “Covered Foreign Country” means the People’s Republic of China.

3. “Covered Telecommunications Equipment or Services” means (a) telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities); (b) for the purpose of public safety, security of Government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities); (c) telecommunications or video surveillance services provided by such entities or using such equipment; or (d) telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a Covered Foreign Country.

4. “Critical Technology”[[21]](#footnote-22) means (1) defense articles or defense services included on the United States Munitions List set forth in the International Traffic in Arms Regulations under subchapter M of chapter I of title 22, Code of Federal Regulations; (2) items included on the Commerce Control List set forth in Supplement No. 1 to part 774 of the Export Administration Regulations under subchapter C of chapter VII of title 15, Code of Federal Regulations and controlled (a) pursuant to multilateral regimes, including for reasons relating to national security, chemical and biological weapons proliferation, nuclear nonproliferation, or missile technology, or (b) for reasons relating to regional stability or surreptitious listening; (3) specially designed and prepared nuclear equipment, parts and components, materials, software, and technology covered by part 810 of title 10, Code of Federal Regulations (relating to assistance to foreign atomic energy activities); (4) nuclear facilities, equipment, and material covered by part 110 of title 10, Code of Federal Regulations (relating to export and import of nuclear equipment and material); (5) select agents and toxins covered by part 331 of title 7, Code of Federal Regulations; part 121 of title 9 of such Code; or part 73 of title 42 of such Code; or (6) emerging and foundational technologies controlled pursuant to section 1758 of the Export Control Reform Act of 2018 (50 U.S.C. § 4817).

5. “Interconnection Arrangements” means arrangements governing the physical connection of two or more networks to allow the use of another’s network to hand off traffic where it is ultimately delivered (e.g., connection of a customer of telephone provider A to a customer of telephone company B) or sharing data and other information resources.

6. “Roaming” means cellular communications services (e.g., voice, video, data) received from a visited network when unable to connect to the facilities of the home network either because signal coverage is too weak or because traffic is too high.

7. “Substantial or Essential Component” means any component necessary for the proper function or performance of a piece of equipment, system, or service.

8. “Telecommunications Equipment or Services” means telecommunications or video surveillance equipment or services, such as, but not limited to, mobile phones, land lines, internet, video surveillance, and cloud services.

B. Prohibitions.

1. Section 889(b) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, and 2 C.F.R. § 200.216 prohibit the head of an executive agency on or after August 13, 2020, from obtaining or expending grant, cooperative agreement, loan, or loan guarantee funds on certain telecommunications products or from certain entities for national security reasons.

2. Unless an exception in Section X.C. applies, Contractor and any Subcontractors may not use grant, cooperative agreement, loan, or loan guarantee funds (including, without limitation, Fiscal Recovery Funds) received from a federal government to:

a. Procure or obtain any equipment, system, or service that uses Covered Telecommunications Equipment or Services as a Substantial or Essential Component of any system or as Critical Technology of any system;

b. Enter into, extend, or renew a contract to procure or obtain any equipment, system, or service that uses Covered Telecommunications Equipment or Services as a Substantial or Essential Component of any system or as Critical Technology of any system;

c. Enter into, extend, or renew contracts with entities that use Covered Telecommunications Equipment or Services as a Substantial or Essential Component of any system or as Critical Technology as part of any system; or

d. Provide, as part of its performance of this Contract, any Subcontract; any other contractual instrument; or any equipment, system, or service that uses Covered Telecommunications Equipment or Services as a Substantial or Essential Component of any system or as Critical Technology as part of any system.

C. Exceptions.

1. This clause does not prohibit Contractor or Subcontractors from providing:

a. A service that connects to the facilities of a third party, such as Backhaul, Roaming, or Interconnection Agreements, or

b. Telecommunications equipment that cannot route or redirect user data traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handles.

2. By necessary implication and regulation, the prohibitions also do not apply to:

a. Covered telecommunications equipment that:

i. Is not used as a Substantial or Essential Component of any system and

ii. Is not used as Critical Technology of any system.

b. Other telecommunications equipment or services that are not considered Covered Telecommunications Equipment or Services.

D. Reporting Requirement

1. In the event Contractor identifies, during contract performance, covered Telecommunications Equipment or Services used as a Substantial or Essential Component of any system or as Critical Technology as part of any system, or if Contractor is notified of such by a Subcontractor at any Tier or by any other source, Contractor shall report the information in paragraph D.2(d)(2) of this Section X to Unit, unless procedures for reporting the information are established elsewhere in this Contract.

2. Contractor shall report the following information to Unit pursuant to paragraph D.1 of this Section X:

a. Within one business day from the date of such identification or notification: contract number; order number(s), if applicable; supplier name; supplier unique entity identifier (if known); supplier Commercial and Government Entity (CAGE) code (if known); brand; model number (original equipment manufacturer number, manufacturer part number, or wholesaler number); item description; and any readily available information about mitigation actions undertaken or recommended.

b. Within ten business days of submitting the information in paragraph D.2.a. of this Section: any further available information about mitigation actions undertaken or recommended. In addition, Contractor shall describe (i) the efforts it undertook to prevent use or submission of Covered Telecommunications Equipment or Services and (ii) any additional efforts that will be incorporated to prevent future use or submission of Covered Telecommunications Equipment or Services.

E. *Subcontractor*. Contractor shall cause to be inserted into all Subcontracts and other contractual instruments relating to the performance of this Contract the substance of this Section X, including this paragraph E.

1. Domestic Preferences for Procurements[[22]](#footnote-23)

A. For purposes of this Section XI, the terms below are defined as follows:

1. “Produced in the United States” means, for iron and steel products, that all manufacturing processes, from the initial melting stage through the application of coating, occurred in the United States.

2. “Manufactured Products” means items and construction materials composed, in whole or in part, of non-ferrous metals such as aluminum; plastics and polymer-based products such as polyvinyl chloride pipe; aggregates such as concrete; glass, including optical fiber; and lumber.

B. As applicable, and to the extent consistent with law, Contractor should, to the greatest extent practicable, provide a preference for the purchase, acquisition, or use of goods, products or materials Produced in the United States. This includes, but is not limited to, iron, aluminum, steel, cement, and other Manufactured Products. Contractor shall cause any Subcontractors to include the requirements of this Section XI in any Subcontracts.

1. Solicitation of Minority and Women-Owned Business Enterprises[[23]](#footnote-24)

A. If Contractor intends to let any Subcontracts, Contractor shall (1) place qualified small and minority businesses and women’s business enterprises on its solicitation lists; (2) assure that small and minority businesses and women’s business enterprises are solicited whenever they are potential sources; (3) divide total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses and women’s business enterprises; (4) establish delivery schedules, where the requirement permits, which encourage participation by small and minority businesses and women’s business enterprises; (5) use the services and assistance, as appropriate, of the Small Business Administration, the Minority Business Development Agency of the Department of Commerce, and the North Carolina Office for Historically Underutilized Businesses.

B. For the purposes of Section XII.A., an entity shall qualify (1) as a “minority business” or “women’s business enterprise” if it is currently certified as a North Carolina “historically underutilized business” under Chapter 143, Section 128.4(a) of the N.C. General Statutes (hereinafter G.S.), and (2) as a “small business” if it is independently owned and operated and is qualified under the Small Business Administration criteria and size standards at 13 C.F.R. Part 21.[[24]](#footnote-25)

1. Access to Records[[25]](#footnote-26)

A. Contractor agrees to provide Unit, the Department of the Treasury, the Treasury Office of Inspector General, the Government Accountability Office, and the Comptroller General of the United States, or any authorized representatives of these entities, access to any records (electronic and otherwise) of Contractor which are directly pertinent to this Contract to conduct audits or any other investigations. Contractor agrees to permit any of the foregoing parties to reproduce such records by any means whatsoever or to copy excerpts and transcriptions as reasonably needed.

B. Contractor agrees to retain all records covered by this Section XIII through December 31, 2031, or such longer period as is necessary for the resolution of any litigation, claim, negotiation, audit, or other inquiry involving the Contract.

1. Conflicts of Interest; Gifts and Favors[[26]](#footnote-27)

A. Contractor understands that (1) Unit will use Fiscal Recovery Funds to pay for the cost of this Contract and (2) the expenditure of Fiscal Recovery Funds is governed bythe [*Conflict of Interest Policy*] of the Unit, the Regulatory Requirements (including, without limitation, 2 C.F.R. § 200.318(c)(1)), and North Carolina law (including, without limitation, G.S. 14-234(a)(1) and -234.3(a)).

B. Contractor certifies to Unit that as of the date hereof, to the best of its knowledge after reasonable inquiry, no employee, officer, or agent of Unit involved in the selection, award, or administration of this Contract (each a “Covered Individual”); no member of a Covered Individual’s immediate family; no partner of a Covered Individual; and no organization (including Contractor) which employs or is about to employ a Covered Individual has a financial or other interest in, or has received a tangible personal benefit from, Contractor. Should Contractor obtain knowledge of any such interest or any tangible personal benefit described in the preceding sentence after the date hereof, Contractor shall promptly disclose the same to Unit in writing.

C. Contractor certifies to Unit that it has not provided, nor offered to provide, any gratuities, favors, or anything of value to an officer, employee, or agent of Unit. Should Contractor obtain knowledge of the provision, or offer of any provision, of any gratuity, favor, or anything of value to an officer, employee, or agent described in the preceding sentence after the date hereof, Contractor shall promptly disclose the same to Unit in writing.

1. Assurances of Compliance with Title VI of the Civil Rights Act of 1964[[27]](#footnote-28)
2. Contractor and any Subcontractor, or the successor, transferee, or assignee of Contractor or any Subcontractor, shall comply with Title VI of the Civil Rights Act of 1964, which prohibits recipients of federal financial assistance from excluding from a program or activity, denying benefits of, or otherwise discriminating against a person on the basis of race, color, or national origin (42 U.S.C. §§ 2000d *et seq*.), as implemented by the Department of the Treasury’s Title VI regulations, 31 C.F.R. Part 22, which are herein incorporated by reference and made a part of this Contract. Title VI also provides protection to persons with “Limited English Proficiency” in any program or activity receiving federal financial assistance, 42 U.S.C. §§ 2000d *et seq*., as implemented by Treasury’s Title VI regulations, 31 C.F.R. Part 22, and herein incorporated by reference and made a part of this Contract.[[28]](#footnote-29)
3. Other Non-Discrimination Statutes

A. Contractor acknowledges that Unit is bound by and agrees, to the extent applicable to Contractor, to abide by the provisions contained in the federal statutes enumerated below and any other federal statutes and regulations that may be applicable to the expenditure of Fiscal Recovery Funds:

1. The Fair Housing Act, Title VIII of the Civil Rights Act of 1968 (42 U.S.C. §§ 3601 *et seq*.), which prohibits discrimination in housing on the basis of race, color, religion, national origin, sex, familial status, or disability;

2. Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794), which prohibits discrimination on the basis of disability under any program or activity receiving federal financial assistance;

3. The Age Discrimination Act of 1975, as amended (42 U.S.C. §§ 6101 *et seq.*), and Treasury’s implementing regulations at 31 C.F.R. Part 23, which prohibit discrimination on the basis of age in programs or activities receiving federal financial assistance; and

4. Title II of the Americans with Disabilities Act of 1990, as amended (42 U.S.C. §§ 12101 *et seq.*), which prohibits discrimination on the basis of disability in programs, activities, and services provided or made available by state and local governments or instrumentalities or agencies thereto.

1. Miscellaneous
2. *Increasing Seat Belt Use in the United States*. Pursuant to Executive Order 13043, 62 Fed. Reg. 19,216 (Apr. 18, 1997), Unit encourages Contractor to adopt and enforce on-the-job seat belt policies and programs for its employees when operating company-owned, rented, or personally owned vehicles.

B. *Reducing Text Messaging While Driving*. Pursuant to Executive Order 13513, 74 Fed. Reg. 51,225 (Oct. 6, 2009), Unit encourages Contractor to adopt and enforce policies that ban text messaging while driving.

1. Conflicts and Interpretation

A. To the extent that any portion of this Addendum conflicts with any term or condition of this Contract expressed outside of this Addendum, the terms of this Addendum shall govern.

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**CONTRACTOR:**

By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Title: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**UNIT:**

By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Title: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

[*Signature Page to Coronavirus State and Local Fiscal Recovery Funds Addendum*]

**ATTACHMENT 1**

**TO**

**CORONAVIRUS STATE AND LOCAL FISCAL RECOVERY FUNDS ADDENDUM**

**APPENDIX A, 31 C.F.R. PART 21 – CERTIFICATION REGARDING LOBBYING**

The undersigned certifies, to the best of the undersigned’s knowledge and belief, that:

1. No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, or the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.
2. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit [Standard Form-LLL, “Disclosure Form to Report Lobbying,”](https://images.federalregister.gov/EC21OC91.002/large.png) in accordance with its instructions.
3. The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.
4. This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by Section 1352, Title 31 of the U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

The Contractor, \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, certifies and affirms the truthfulness and accuracy of each statement of its certification and disclosure, if any. In addition, the Contractor understands and agrees that the provisions of 31 U.S.C. Chapter 38, Administrative Remedies for False Claims and Statements, apply to this certification and disclosure, if any.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Signature of Contractor’s Authorized Official

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Name and Title of Contractor’s Authorized Official

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Date

1. **Note to Draft**: Insert legal name of counterparty (e.g., “ABC Industries, Inc.”). [↑](#footnote-ref-2)
2. **Note to Draft**: Insert type of legal entity (e.g., “a Delaware corporation”). [↑](#footnote-ref-3)
3. **Note to Draft**: Insert legal name of unit of local government (e.g., “Town of Coatesville”). [↑](#footnote-ref-4)
4. **Note to Draft**: Insert type of legal entity (e.g., “a municipal corporation of the State of North Carolina”). [↑](#footnote-ref-5)
5. **Note to Draft**: This provision satisfies 2 C.F.R. Part 200, Appendix II (hereinafter Appendix II), § (C). It contains the equal opportunity clause provided under [41 C.F.R. § 60-1.4(b)](https://www.ecfr.gov/current/title-41/subtitle-B/chapter-60/part-60-1/subpart-A/section-60-1.4). The clause applies only to Federally Assisted Construction Contracts (as defined in [41 C.F.R. § 60-1.3](https://www.ecfr.gov/current/title-41/subtitle-B/chapter-60/part-60-1/subpart-A/section-60-1.3)) that exceed $10,000. Section I contains certain definitions from 41 C.F.R. § 60-1.3 relevant to these provisions. [↑](#footnote-ref-6)
6. **Note to Draft**: Under Appendix II, § (D), “[w]hen required by Federal program legislation, all prime construction contracts in excess of $2,000 awarded by non-Federal entities must include a provision for compliance with the Davis-Bacon Act ([40 U.S.C. 3141-344](https://uscode.house.gov/view.xhtml?req=(title:40%20section:3141%20edition:prelim)%20OR%20(granuleid:USC-prelim-title40-section3141)&f=treesort&edition=prelim&num=0&jumpTo=true), and [3146-3148](https://uscode.house.gov/view.xhtml?hl=false&edition=prelim&req=granuleid%3AUSC-prelim-title40-section3146&f=treesort&num=0&saved=%7CKHRpdGxlOjQwIHNlY3Rpb246MzE0MSBlZGl0aW9uOnByZWxpbSkgT1IgKGdyYW51bGVpZDpVU0MtcHJlbGltLXRpdGxlNDAtc2VjdGlvbjMxNDEp%7CdHJlZXNvcnQ%3D%7C%7C0%7Cfalse%7Cprelim)), as supplemented by Department of Labor regulations ([29 CFR Part 5, “Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction](https://www.ecfr.gov/current/title-29/subtitle-A/part-5)”).” This Addendum does not contain a provision requiring Contractor to comply with the Davis-Bacon Act (“DBA”) or its associated regulations. The Davis-Bacon Act, by its own terms, applies only to construction contracts to which the United States of America or the District of Columbia is a party. *See* [41 U.S.C. § 3142(a)](https://uscode.house.gov/view.xhtml?path=/prelim@title40/subtitle2/partA/chapter31/subchapter4&edition=prelim). Congress must act separately to extend coverage of the Davis-Bacon Act to construction contracts entered into by non-federal entities receiving federal financial assistance (e.g., a federal grant or loan). *See* Dep’t of Lab., Wage & Hour Div.,[Field Operations Handbook](https://www.dol.gov/agencies/whd/field-operations-handbook/Chapter-15#B15b00) (hereinafter DOL Handbook) ch. 15, § 15b00(a) (“[I]f a statute authorizes assistance but does not include either directly or by reference a DBA labor standards clause, the DBRA [Davis-Bacon Related Act] does not apply.”). Treasury has indicated that Davis-Bacon Act requirements (prevailing wage rates) do not apply to projects funded solely with monies distributed from the Fiscal Recovery Funds other than those undertaken by the District of Columbia. *See* U.S. Dept’ of the Treasury, [Coronavirus State and Local Fiscal Recovery Funds Interim Final Rule: Frequently Asked Questions as of January 2022](https://home.treasury.gov/system/files/136/SLFRPFAQ.pdf) § 6.17 (hereinafter FAQs); [Coronavirus State and Local Fiscal Recovery Funds, 87 Fed. Reg. 4,338, 4,431 (Jan. 27, 2022)](https://www.govinfo.gov/content/pkg/FR-2022-01-27/pdf/2022-00292.pdf) (hereinafter Final Rule) (noting that despite a general requirement to “comply with . . . federal, state, and local background laws, including environmental laws,” certain statutes will not apply “unless explicitly stated, including, *e.g.*, . . . the Davis-Bacon Act”). Treasury’s response in the FAQs and the Final Rule is consistent with ARPA’s text, as the statute does not expressly or indirectly require Fiscal Recovery Fund recipients or subrecipients to abide by the Davis-Bacon Act. *Compare* Pub. L. No. 117-2 *with* [American Reinvestment and Recovery Act of 2009, Pub. L. No. 111-5, Div. A, § 1606](https://www.congress.gov/111/plaws/publ5/PLAW-111publ5.pdf) (“Notwithstanding any other provision of law . . . , all laborers and mechanics employed by contractors or subcontractors on projects funded directly by or assisted in whole or in part by and through the Federal Government pursuant to this Act shall be paid wages at rates not less than those prevailing on projects of a character similar in the locality as determined by the Secretary of Labor in accordance with subchapter IV of chapter 31 of title 40, United States Code.”). If a unit uses federal financial assistance other than monies distributed from the Fiscal Recovery Funds to pay for the cost of the Contract, the Davis-Bacon Act may apply. *See* FAQs, § 6.17; *see also* [DOL Handbook, § 15b00(b)](https://www.dol.gov/agencies/whd/field-operations-handbook/Chapter-15#B15b00) (“In situations where a product is funded under a number of federal statutes, DBRA applies to the project if any one of the statutes authorizing a portion of the financial assistance requires payment of DBA wages.”). [↑](#footnote-ref-7)
7. **Note to Draft**: Section III satisfies the requirements of Appendix II, § (D) relating to the Copeland “Anti-Kickback” Act. Section III requires Contractor and any Subcontractors to comply with the core provision of the Copeland Anti-Kickback Act, which criminalizes “induc[ing] any person employed in the construction, prosecution, completion or repair of any public building, public work, or building or work financed in whole in part by . . . grants from the United States, to give up any part of the compensation to which he is entitled under his contract of employment.” [18 U.S.C. § 874](https://www.govinfo.gov/content/pkg/USCODE-2010-title18/pdf/USCODE-2010-title18-partI-chap41-sec874.pdf). Section III does not require Contractor to comply with weekly payroll reporting requirements pursuant to [41 U.S.C. § 3145](https://www.govinfo.gov/content/pkg/USCODE-2011-title40/pdf/USCODE-2011-title40-subtitleII-partA-chap31-subchapIV-sec3145.pdf) and [29 C.F.R. Part 3](https://www.ecfr.gov/current/title-29/subtitle-A/part-3). 29 C.F.R. Part 3 applies to “*any contract which is subject to Federal wage standards* and . . . is for the construction, prosecution, completion, or repair of public buildings, public works or buildings or works financed in whole or in part by loans or grants from the United States.” [29 C.F.R. § 3.1(a)](https://www.ecfr.gov/current/title-29/subtitle-A/part-3/section-3.1) (emphasis added). The term “federal wage standards” likely applies to prevailing wage standards established by the Davis-Bacon Act. *See* [DOL Handbook, § 15a04(d)](https://www.dol.gov/agencies/whd/field-operations-handbook/Chapter-15#B15a04) (noting that the “Anti-Kickback” provision applies to “any federally-funded or assisted contract except contracts for which the only assistance is a loan guarantee” and that “29 CFR 3 . . . applies only to payroll deductions made under contracts subject to federal wage standards”). The Federal Emergency Management Agency (“FEMA”) also notes that “[w]here the Davis-Bacon Act does not apply, neither does the Copeland ‘Anti-Kickback’ Act.” Fed. Emergency Mgmt. Agency, [FEMA Contract Provisions Guide, Navigating Appendix II to Part 200—Contract Provisions for Non-Federal Entity Contracts Under Federal Awards 15 (June 2021)](https://www.fema.gov/sites/default/files/documents/fema_contract-provisions-guide_6-14-2021.pdf). While FEMA provides no support for this statement, 29 C.F.R. § 3.1(a) can be read to limit the application of 29 C.F.R. Part 3 to contracts subject to prevailing wage standards under the Davis-Bacon Act. [↑](#footnote-ref-8)
8. **Note to Draft:** Treasury stated in the Final Rule that a contract in excess of $100,000 supported by Fiscal Recovery Funds that involves the employment of mechanics and laborers “must include a provision for compliance with certain provisions of the [Contract Work Hours and Safety Standards Act, 40 U.S.C. 3702 and 3704](https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title40-chapter37&edition=prelim), as supplemented by Department of Labor regulations ([29 CFR Part 5](https://www.ecfr.gov/current/title-29/subtitle-A/part-5)).” Final Rule at 4,393 (general capital expenditures), 4,409 (water, sewer, or broadband infrastructure). The legal basis for Treasury’s application of the Contract Work Hours and Safety Standards Act (“CWHSSA”) to a recipient’s expenditure of Fiscal Recovery Funds is not clear. CWHSSA applies, in part, to a “contract for work financed at least in part by . . . grants from . . . the [federal government] or an agency or instrumentality *under any federal law providing wage standards for the work*.” [40 U.S.C. § 3701(b)(1)(B)(iii)](https://www.govinfo.gov/content/pkg/USCODE-2011-title40/pdf/USCODE-2011-title40-subtitleII-partA-chap37-sec3701.pdf) (emphasis added). Interpreting this provision, the Department of Labor has stated that “coverage on federally assisted contracts does not exist unless the particular statute under which the loans or grants are authorized contains wage standards, directly or by reference.” [DOL Handbook § 15i01(a)](https://www.dol.gov/agencies/whd/field-operations-handbook/Chapter-15#B15i00). ARPA does not directly or by reference impose wage standards on the expenditure of Fiscal Recovery Funds. Therefore, Treasury’s requirement in the Final Rule seems to extend beyond the statutory scope of CWHSSA. A recipient or subrecipient of Fiscal Recovery Funds still may want to include these provisions out of an abundance of caution. [↑](#footnote-ref-9)
9. **Note to Draft**: These are statutory exceptions to CWHSSA’s scope. *See* [40 U.S.C. § 3701(b)(3)(A)](https://www.govinfo.gov/content/pkg/USCODE-2011-title40/pdf/USCODE-2011-title40-subtitleII-partA-chap37-sec3701.pdf). [↑](#footnote-ref-10)
10. **Note to Draft**: Appendix II, § (F) states that if a “federal award meets the definition of ‘funding agreement’ under [37 C.F.R. § 401.2(a)](https://www.ecfr.gov/current/title-37/chapter-IV/part-401/section-401.2) . . . and the recipient or subrecipient wishes to enter into a contract with a small business firm or nonprofit organization regarding the . . . performance of experimental, developmental, or research work under that ‘funding agreement’, the recipient or subrecipient must comply with the requirements of [37 C.F.R. Part 401](https://www.ecfr.gov/current/title-37/chapter-IV/part-401?toc=1) . . . and any implementing regulations issued by the awarding agency.” A “funding agreement” under 37 C.F.R. § 401.2(a) includes any “grant . . . entered into between any Federal agency . . . and any contractor for the performance of experimental, developmental, or research work funded in whole or in part by the Federal government.” The term “contractor” encompasses federal grantees. It is not clear that assistance agreements between the Department of the Treasury and recipients of Fiscal Recovery Funds constitute “funding agreements” within the meaning of 37 C.F.R. § 401.2(a), as they do not expressly contemplate the “performance of experimental, developmental, or research work.” Treasury has not directly addressed this question in any regulations implementing 37 C.F.R. Part 401, and no case law directly interprets the meaning of the phrase. This clause is derived from a model clause developed by the Federal Transit Administration. *See* [Fed. Transit Admin., Best Practices Procurement & Lessons Learned Manual, FTA Report No. 0105 A-69-78 (2016)](https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/funding/procurement/8286/fta-best-practices-procurement-and-lessons-learned-manual-2016.pdf) (hereinafter Best Practices Manual). [↑](#footnote-ref-11)
11. **Note to Draft**: Pursuant to [2 C.F.R. § 200.315(b)](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/subpart-D/subject-group-ECFR8feb98c2e3e5ad2/section-200.315), a federal awarding agency “reserves a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use [work that is subject to copyright, or for which ownership was acquired, under a federal award] for Federal purposes, and to authorize others to do so.” Further, 2 C.F.R. § 200.315(c) states that the “Federal Government has the right to (1) obtain, reproduce, publish, or otherwise use the data produced under a Federal award; and (2) authorize others to receive, reproduce, or otherwise use such data for Federal purposes.” The Department of the Treasury has not indicated that 2 C.F.R. § 200.315 does not apply to the expenditure of Fiscal Recovery Funds. [↑](#footnote-ref-12)
12. Best Practices Manual, at A-51. [↑](#footnote-ref-13)
13. **Note to Draft:** Section VI satisfies the requirements of Appendix II, § (G). [↑](#footnote-ref-14)
14. **Note to Draft**: Section VII satisfies the requirements of Appendix II, § (H) and § 9(b)(iv) of the U.S. Dep’t of the Treas., [Local Fiscal Recovery Fund Award Terms and Conditions](https://home.treasury.gov/system/files/136/NEU_Award_Terms_and_Conditions.pdf) (hereinafter Local FRF Award Terms). § 9(b)(iv) requires recipients and subrecipients of monies from the Fiscal Recovery Funds to include a “term or condition in all lower tier covered transactions (contracts and subcontracts described in [2 C.F.R. Part 180, subpart B](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-I/part-180/subpart-B)) that the award is subject to [2 C.F.R. Part 180](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-I/part-180/subpart-B) and Treasury’s implementing regulation at [31 C.F.R. Part 19](https://www.ecfr.gov/current/title-31/subtitle-A/part-19).” [↑](#footnote-ref-15)
15. **Note to Draft:** A contract between a recipient or subrecipient of Fiscal Recovery Funds and a prime contractor is a lower-Tier procurement transaction and is a “covered transaction” for purposes of [2 C.F.R. Part 180](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-I/part-180/subpart-B) and [31 C.F.R. Part 19](https://www.ecfr.gov/current/title-31/subtitle-A/part-19) if one or more of the conditions set out in [2 C.F.R. § 180.220(b)](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-I/part-180/subpart-B/section-180.220) and [31 C.F.R. § 19.220(b)](https://www.ecfr.gov/current/title-31/subtitle-A/part-19/subpart-B/section-19.220) applies. Section VII.A. sets forth these conditions. Prior to entering into a “covered transaction,” a recipient or subrecipient must “verify” that the counterparty is not excluded or disqualified. *See* [2 C.F.R. § 180.300](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-I/part-180/subpart-C/section-180.300); [31 C.F.R. § 19.300](https://www.ecfr.gov/current/title-31/subtitle-A/part-19/subpart-C/subject-group-ECFR17b3886c0d43454/section-19.300). This verification may occur by (1) checking [System for Award Management (“SAM”) exclusions](https://sam.gov/content/home), (2) collecting a certification from the lower-Tier counterparty, *or* (3) adding a clause or condition to the covered transaction with the lower-Tier counterparty. Section VII.B. acts as both a certification and a condition. Separately, the procurement standards in the Uniform Guidance only allow recipients and subrecipients to award contracts to “responsible” contractors (*see* [2 C.F.R. § 200.318(h)](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/subpart-D/subject-group-ECFR45ddd4419ad436d/section-200.318)), and checking the SAM.gov exclusions system can demonstrate a good-faith attempt to comply with this requirement. [↑](#footnote-ref-16)
16. **Note to Draft**: [2 C.F.R. § 180.220(c)](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-I/part-180/subpart-B/section-180.220) provides that a “subcontract” is also a “covered transaction” if (1) “[i]t is awarded by a participant in a procurement transaction under a nonprocurement transaction of a Federal agency that extends the coverage of [2 C.F.R. § 180.220(b)(1)] to additional tiers of contracts . . . ;” and (2) “[t]he value of the subcontract is expected to equal or exceed $25,000.” Unlike implementing regulations adopted by several other federal agencies (e.g., the Department of Health and Human Services), the Department of the Treasury’s implementing regulations do not expressly extend the coverage of 2 C.F.R. § 180.220(b)(3) to lower-Tier subcontracts *under* covered nonprocurement transactions. *Compare* [2 C.F.R. § 376.220](https://www.ecfr.gov/current/title-2/subtitle-B/chapter-III/part-376/subpart-B/section-376.220) (“In addition to the contracts covered under 2 C.F.R. § 180.220(b), this part also applies to all lower Tiers of subcontracts under covered nonprocurement transactions, as permitted under the OMB [Office of Management and Budget] guidance at 2 C.F.R. § 180.220(c).”) *with* [31 C.F.R. § 19.220(b)](https://www.ecfr.gov/current/title-31/subtitle-A/part-19/subpart-B/section-19.220). Even though the Treasury implementing regulations do not extend coverage to subcontracts described in 2 C.F.R. § 180.220(b)(3), the language of § 9(b)(iv) of the Local FRF Award Terms may extend coverage to these subcontracts. *See* *supra* footnote 14 (noting that § 9(b)(iv) of the Local FRF Award Terms requires including a “term or condition in all lower-tier covered transactions (contracts and subcontracts described in 2 C.F.R Part 180, subpart B) that the award is subject to 2 C.F.R. Part 180 and Treasury’s implementing regulation at 31 C.F.R. Part 19.”). Section VII gives effect to this requirement. [↑](#footnote-ref-17)
17. **Note to Draft**: Section VIII satisfies the requirements of Appendix II, § (I) and § 9(b)(vii) of the of the [Local](https://home.treasury.gov/system/files/136/NEU_Award_Terms_and_Conditions.pdf) FRF Award Terms. § 9(b)(vii) of the Local FRF Award Terms requires recipients and subrecipients of monies from the Fiscal Recovery Funds to abide by [31 C.F.R. Part 21](https://www.ecfr.gov/current/title-31/subtitle-A/part-21), which implements the provisions of the Byrd Anti-Lobbying Amendment ([31 U.S.C. § 1352](https://www.govinfo.gov/content/pkg/USCODE-2010-title31/pdf/USCODE-2010-title31-subtitleII-chap13-subchapIII-sec1352.pdf)). The statute and the Department of the Treasury’s implementing regulations prohibit recipients of federally appropriated funds from using those funds to lobby federal agencies or Congress to obtain, extend, or modify an award of federal funds. *See* [31 U.S.C. § 1352(a)(1)](https://www.govinfo.gov/content/pkg/USCODE-2010-title31/pdf/USCODE-2010-title31-subtitleII-chap13-subchapIII-sec1352.pdf); [31 C.F.R. § 21.100(a)](https://www.ecfr.gov/current/title-31/subtitle-A/part-21/subpart-A/section-21.100). They also require Treasury grant recipients to (1) certify that the recipient has not made and will not make any prohibited payment of federal grant funds ([31 U.S.C. § 1352(b)(2)(A)](https://www.govinfo.gov/content/pkg/USCODE-2010-title31/pdf/USCODE-2010-title31-subtitleII-chap13-subchapIII-sec1352.pdf); [31 C.F.R. § 21.110(a)(1), (b)(1)](https://www.ecfr.gov/current/title-31/subtitle-A/part-21/subpart-A/section-21.110) (for grants exceeding $100,000)) and (2) disclose any payments made for lobbying services in connection with a federal grant even if paid for with non-federal funds ([31 U.S.C. § 1352(b)(2)(B)](https://www.govinfo.gov/content/pkg/USCODE-2010-title31/pdf/USCODE-2010-title31-subtitleII-chap13-subchapIII-sec1352.pdf); [31 C.F.R. § 21.110(a)(1), (b)(1)](https://www.ecfr.gov/current/title-31/subtitle-A/part-21/subpart-A/section-21.110) (for grants exceeding $100,000)). These certification and disclosure requirements *extend* to any contractor or subcontractor that receives federal grant funds where the cost of a contract or subcontract exceeds $100,000. *See* 31 C.F.R. § 21.110(d)(2). Recipients and subrecipients (and the contractors and subcontractors of each) of monies from Fiscal Recovery Funds must obtain a certification from the Tier immediately below it where the cost of such a contract or subcontract exceeds $100,000. A recipient, contractor, or subcontractor receiving a certification need not forward a certification to a higher Tier but each must forward any disclosure forms (on Standard Form-LLL, contained in 31 C.F.R. Part 21, Appendix B) to the Tier immediately above. *See* 31 C.F.R. § 21.110(e). [↑](#footnote-ref-18)
18. **Note to Draft**: Section VIII satisfies the requirements of Appendix II, § (J) and 2 C.F.R. § 200.323. [↑](#footnote-ref-19)
19. *See* Env’t Prot. Agency, [*Comprehensive Procurement Guideline (CPG) Program*](https://www.epa.gov/smm/comprehensive-procurement-guideline-cpg-program), EPA.gov (last updated Dec. 15, 2021). [↑](#footnote-ref-20)
20. **Note to Draft**: Section IX satisfies the requirements of Appendix II, § (K) and 2 C.F.R. § 200.216. On August 13, 2020, the Office of Management and Budget (“OMB”) published revisions to the Uniform Guidance that, among other things, prohibit recipients and subrecipients of federal grant funds from obligating or expending such funds to procure equipment or systems using equipment made by certain Chinese manufacturers. *See* Off. of Mgmt. & Budget, [Guidance for Grants and Agreements, 85 Fed. Reg. 49,506, 49,543 (Aug. 13, 2020) (promulgating 2 C.F.R. § 200.216)](https://www.govinfo.gov/content/pkg/FR-2020-08-13/pdf/2020-17468.pdf). These revisions implement [Section 889 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232](https://www.congress.gov/115/plaws/publ232/PLAW-115publ232.pdf) (hereinafter NDAA for FY2019). Appendix II, § (K) states simply “see[2 C.F.R. § 200.216](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/subpart-C/section-200.216)”—and 2 C.F.R. § 200.216 does not expressly require federal grant recipients or subrecipients to include a clause in procurement contracts. Nonetheless, some federal agencies (including FEMA) have interpreted § (K) to require the inclusion of a contract clause in grant-supported contracts. *See, e.g.*, Fed. Emergency Mgmt. Agency, [FEMA Policy #405-143-1 Prohibitions on Expending FEMA Award Funds for Covered Telecommunications Equipment or Services (Interim)](https://www.fema.gov/sites/default/files/documents/fema_prohibitions-expending-fema-award-funds-covered-telecommunications-equipment-services.pdf), (Nov. 24, 2020) (hereinafter FEMA Covered Telecom Policy). FEMA has released a sample clause, which mirrors the clause contained in the Federal Acquisition Regulation (“FAR”). *See* [48 C.F.R. 52.204-25](https://www.ecfr.gov/current/title-48/chapter-1/subchapter-H/part-52/subpart-52.2/section-52.204-25). While the FAR is not applicable to procurement by non-federal entities using federal grant funds, it can provide helpful drafting guidance for some grantee contract clauses. Units receiving distributions of Fiscal Recovery Funds, as recipients or subrecipients, should include this clause in all supported contracts. [↑](#footnote-ref-21)
21. **Note to Draft**: The FEMA Covered Telecom Policy drew relevant definitions from the FAR but did not expressly incorporate the definition of “critical technology” in 48 C.F.R. § 52.204-25(a). The definition used in this Section X is derived from the FAR, which mirrors the definitions contained in the NDAA for FY 2019. *See also* Section 1703 of Title XVII, Pub. L. No. 115-232; 50 U.S.C. § 4565(a)(6)(A). [↑](#footnote-ref-22)
22. **Note to Draft**: Section XI satisfies the requirements of Appendix II, § (L) and 2 C.F.R. § 200.322. Among other things, OMB’s 2020 revisions to the Uniform Guidance encourage recipients and subrecipients of federal grant funds to provide a purchasing preference for goods, products, or materials produced in the United States. *See* [2 C.F.R. § 200.322](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/subpart-D/subject-group-ECFR45ddd4419ad436d/section-200.322). The use of the term “should” rather than “must” in the new regulation indicates that imposition of a domestic preference is not required but is, rather, suggested. *See* [2 C.F.R. § 200.101(b)(1)](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/subpart-B/section-200.101) (“Throughout this part when the word ‘must’ is used it indicates a requirement. Whereas, use of the word “should” or “may” indicates a best practice or recommended approach rather than a requirement and permits discretion.”). [2 C.F.R. § 200.322(a)](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/subpart-D/subject-group-ECFR45ddd4419ad436d/section-200.322) mandates the inclusion of its requirements in “all contracts and purchase orders for work or for products under [an] award.” The clause, as drafted in this Section XI, also requires the inclusion of these requirements in any subcontracts necessary to complete the Contract. The Department of the Treasury has not released any guidance on the extent to which recipients or subrecipients of Fiscal Recovery Funds should provide a preference for domestically made products in contracts supported by Fiscal Recovery Funds. Recipients and subrecipients should be mindful that the use of federal monies other than Fiscal Recovery Funds may trigger domestic preference requirements in other federal laws or regulations. *See, e.g.*, [49 C.F.R. § 661.5(a)](https://www.ecfr.gov/current/title-49/subtitle-B/chapter-VI/part-661/section-661.5) (subject to limited exceptions, prohibiting the obligation of any federal monies by the Federal Transit Administration for grantee projects unless all iron, steel, and manufactured products used in the funded project are “produced in the United States”). [↑](#footnote-ref-23)
23. **Note to Draft**: Section XII addresses the requirements of [2 C.F.R. § 200.321](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/subpart-D/subject-group-ECFR45ddd4419ad436d/section-200.321), which requires recipients and subrecipients of federal grant funds, when entering into any contract subject to the federal procurement standards in [Subpart D of 2 C.F.R. Part 200](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/subpart-D?toc=1), to take “all necessary affirmative steps to assure that minority businesses, women’s businesses, and labor surplus area firms are used when possible.” 2 C.F.R. § 200.321(a). The regulation lists those affirmative steps and also mandates that a non-federal entity require its prime contractors to take these steps should the prime contractor let any subcontracts. *See* 2 C.F.R. § 200.321(b)(6). These affirmative steps apply to all contracts let with federal grant funds; they are not limited to contracts for construction or repair work. While the Uniform Guidance does not expressly require inclusion of this clause, it could assist a recipient or subrecipient in demonstrating that it required a prime contractor to take the affirmative steps. [↑](#footnote-ref-24)
24. **Note to Draft**: [2 C.F.R. § 200.321](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/subpart-D/subject-group-ECFR45ddd4419ad436d/section-200.321) does not expressly or by reference define “minority business,” “women’s business enterprise,” or “small business.” Treasury has not released any interpretative guidance of these definitions for purposes of Fiscal Recovery Funds. In another context, FEMA has accepted the definitions of these terms set forth in state and local laws and regulations. *See* Fed. Emergency Mgmt. Agency, [Procurement Disaster Assistance (PDAT) Field Manual: Procurement Information for FEMA Award Recipients and Subrecipients (FM-207-21-0002) (Oct. 2021) (hereinafter FEMA PDAT Field Manual](https://www.fema.gov/sites/default/files/2020-07/fema_procurement-disaster-assistance-PDAT_field-manual.pdf)) § 2 (“Definitions for Socioeconomic Firms”). North Carolina law contains a definition of “historically underutilized business” that tracks definitions of “minority business” and “women’s business enterprise” contained in federal law. *Compare* [G.S. 143-128.4(a)](https://www.ncleg.net/enactedlegislation/statutes/html/bysection/chapter_143/gs_143-128.4.html) (defining “historically underutilized business”) *with* [13 C.F.R. §§ 124.103](https://www.ecfr.gov/current/title-13/chapter-I/part-124/subpart-A/subject-group-ECFR4ef1291a4a984ab/section-124.103), [124.102](https://www.ecfr.gov/current/title-13/chapter-I/part-124/subpart-A/subject-group-ECFR4ef1291a4a984ab/section-124.102), and [124.105](https://www.ecfr.gov/current/title-13/chapter-I/part-124/subpart-A/subject-group-ECFR4ef1291a4a984ab/section-124.105) (collectively defining “minority business”). North Carolina law does not define “small business” in a procurement preference; this definition is taken from the FEMA PDAT Field Manual. [↑](#footnote-ref-25)
25. **Note to Draft**: Section XIII.B. satisfies the requirements of § 4 of the Local FRF Award Terms and [2 C.F.R. § 200.334](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/subpart-D/subject-group-ECFR4acc10e7e3b676f/section-200.334). Under § 4(a) of the Local FRF Award Terms, recipients of distributions of Local Fiscal Recovery Funds must “maintain records and financial documents sufficient to evidence compliance with section 603(c) of [ARPA], Treasury’s regulations implementing that section, and guidance issued by Treasury regarding the foregoing.” Under § 4(c) of this same document, a recipient must maintain these records for a period of five years after all funds have been expended or returned to Treasury, whichever is later. The Uniform Guidance requires non-federal entities to maintain all “[f]inancial records, supporting documents, statistical records, and all other non-Federal entities pertinent to a Federal award” for *three* years unless otherwise notified by federal awarding agencies in writing. [2 C.F.R. § 200.334(b)](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/subpart-D/subject-group-ECFR4acc10e7e3b676f/section-200.334). Recipients and subrecipients should consider the retention period of five years stated in the Local FRF Award Terms to constitute this written notification and should abide by this restriction. While inclusion of this clause is not required by the Uniform Guidance, it could assist a recipient or subrecipient in meeting the obligations discussed in this footnote. [↑](#footnote-ref-26)
26. **Note to Draft**: The Uniform Guidance prohibits any employee, officer, or agent of a non-federal entity from participating in the selection, award, or administration of a contract supported by federal grant funds if the employee, officer, or agent; any member of their immediate family; their partner; or an organization that does or is about to employ any of these individuals has a financial interest in or has received a tangible personal benefit from a firm considered for a contract. *See* [2 C.F.R. § 200.318(c)(1)](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/subpart-D/subject-group-ECFR45ddd4419ad436d/section-200.318). It also prohibits officers, employees, and agents of non-federal entities from soliciting or accepting gratuities, favors, or anything of monetary value from contractors or subcontracts. *See* [*id.*](https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/subpart-D/subject-group-ECFR45ddd4419ad436d/section-200.318)Each recipient and subrecipient of Fiscal Recovery Funds must adopt and maintain written standards of conduct covering these conflicts of interest. *See id.*; *see also* Section 8 of the Local FRF Award Terms (“Recipient understands and agrees that it must maintain a conflict of interest policy consistent with 2 C.F.R. § 200.318(c) and that such conflict of interest policy is applicable to each activity funded under this award.”).While the Uniform Guidance does not require a contractor to make the certifications contained in Sections XIV.B. or XIV.C., securing these representations can act as an additional protection for a recipient or subrecipient. [↑](#footnote-ref-27)
27. **Note to Draft**: As a condition of receiving a distribution of monies from the Fiscal Recovery Funds, each recipient must execute and submit to the Department of the Treasury an [Assurances of Compliance with Civil Rights Requirements](https://home.treasury.gov/system/files/136/Title_VI_Assurances.pdf) (the “Assurances”). In the Assurances, recipients agree to comply with Title VI of the Civil Rights Act of 1964, which prohibits exclusion from participation in, denial of the benefits of, or subjection to discrimination under programs and activities receiving federal financial assistance, of any person in the United States on the basis of race, color, or national origin. *See* [42 U.S.C. § 2000d](https://www.govinfo.gov/content/pkg/USCODE-2008-title42/pdf/USCODE-2008-title42-chap21-subchapV.pdf); [31 C.F.R. § 22.5(a)](https://www.ecfr.gov/current/title-31/subtitle-A/part-22/section-22.5) (requiring an applicant for federal financial assistance to “contain, be accompanied by, or be covered by a specifically identified assurance from the applicant or recipient . . . that each program or activity operated by the applicant or recipient and to which these Title VI regulations apply will be operated in compliance with these Title VI regulations”). Treasury’s regulations, which mirror other federal implementing regulations, note that a recipient may not “directly *or through contractual arrangements*” take certain specified actions that violate Title VI. *See* [31 C.F.R. § 22.4(b)](https://www.ecfr.gov/current/title-31/subtitle-A/part-22/section-22.4) (emphasis added). To the extent that a contractor performs an “essential function” for a recipient or subrecipient of Fiscal Recovery Funds, Title VI may apply. *See generally* [U.S. Dep’t of Just., Title VI Legal Manual](https://www.justice.gov/crt/fcs/T6manual5) § V.5 (noting the holding of the U.S. Court of Appeals for the Fifth Circuit in *Frazier v. Board of Trustees*, 765 F.2d 1278 (5th Cir. 1985), that Title VI may cover a grantee’s contractor that performs an “essential function” for the recipient, making the contractor itself a recipient). [↑](#footnote-ref-28)
28. **Note to Draft**: Treasury’s regulations implementing Title VI of the Civil Rights Act of 1964 require the Department to “specify the extent to which . . . assurances will be required of [a] . . . recipient’s subgrantees, contractors, subcontractors, transferees, or successors in interest,” and Section 5 of the Assurances requires that recipients include the clause in Section XVI.A. in any “contract or agreement subject to Title VI and its regulations.” For more information regarding the application of Title VI, see footnote 27, *supra*. [↑](#footnote-ref-29)