

USTDA Secondary Agreements (Contracts Financed by USTDA Grants) – Guidelines to Assist Grantees and Contractors

After a USTDA grant agreement is signed and the selected contractor has cleared USTDA's due diligence review, the next step is for the grantee and contractor to negotiate a contract, also referred to as a secondary agreement. Once they do so, the parties provide ***their final, negotiated draft contract*** to USTDA for approval ***prior to signature***. These guidelines are intended to provide grantees and contractors with drafting pointers in order to prevent common problems at the USTDA contract review stage. Careful attention to these guidelines may help to prevent delays in the review process.

- A. The Terms of Reference (TOR) and USTDA's Mandatory Contract Clauses must be attached as Annex I and Annex II to the Contract, and must be identical to Annex I and Annex II to the grant agreement. ***Contract negotiation is not an opportunity for the parties to make changes to the TOR.*** Almost all TOR changes will require an amendment to the grant agreement, during which time the contract review would be put on hold. If a change to the TOR is required, the parties must first contact the USTDA Country Manager responsible for the activity.

- B. ***Changes to USTDA's Mandatory Contract Clauses are not permitted.***

- C. ***Contract terms and provisions must be consistent with the TOR and Mandatory Contract Clauses.*** Some common problems to avoid include:
 1. ***Confidentiality provisions that conflict with Mandatory Contract Clause I (USTDA Final Report).*** Pursuant to Mandatory Clause I, all contractors must ultimately submit a Public Version of the Final Report that is suitable for public distribution and that USTDA, the grantee and the Economic or Commercial Service of the U.S. embassy in the host country will have irrevocable, worldwide, royalty-free, non-exclusive rights to use and distribute. Accordingly, contractors must ensure that any confidential information is labeled as such and is contained only in the non-public version of the Final Report submitted for USTDA's records. Confidentiality provisions must be drafted to be consistent with Mandatory Clause I, and when such provisions are included, USTDA will require language stating that the provision does not affect the use and distribution rights set forth in Clause I.

 2. ***Liability clauses that conflict with Mandatory Contract Clause Q.*** USTDA does not permit disclaimers of special, incidental, general, or punitive damages, or disclaimers that would limit the contractor's total liability to an amount less than the amount disbursed to the contractor pursuant to the contract. There are no exceptions to this rule.

3. Indemnification provisions. USTDA grant funds may not be used for indemnification purposes. Any indemnification language must state this explicitly.

4. Personnel annexes which suggest inconsistency with Mandatory Contract Clause C (Nationality, Source and Origin) and/or fail to demonstrate that the project team possesses the requisite qualifications to perform the TOR. Contractors must identify the project team in a personnel annex (typically Annex III) to the contract, and must also include their CVs in this annex.

- D. Some parties choose to include a work plan as a separate annex (typically Annex IV). This is permissible; however, it is important that the work plan not conflict with the TOR. Please note that if a work plan is included, USTDA will require language stating that any work in the work plan that is not included the TOR will be performed at the contractor's cost, and further that in the event of any inconsistency between the TOR and work plan, the TOR will control.
- E. USTDA provides its template contract to grantees and contractors as a convenience. As a general rule of thumb, please review your draft contract for consistency with USTDA's template contract, and in particular with USTDA's Mandatory Contract Clauses, prior to submitting it to USTDA for review and approval.