



**U.S. TRADE AND DEVELOPMENT AGENCY**  
**Arlington, VA 22209-3901**

**USTDA SECONDARY AGREEMENTS (CONTRACTS FINANCED BY USTDA GRANTS)**  
**GUIDELINES TO ASSIST GRANTEES AND CONTRACTORS**  
*As of April 13, 2020*

After a USTDA grant agreement (“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, based on USTDA’s form template. 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 from the Grant Agreement must be attached as Annex I and Annex II to the Contract. Contract negotiation is not an opportunity for the parties to make changes to the TOR. Almost all TOR changes prior to signing the Contract will require an amendment to the Grant Agreement, during which time the Contract review process 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 Contract Clause I, all contractors must ultimately submit a Public Version of the Final Report that is suitable for public distribution, and the Public Version must include a written statement that USTDA, the grantee and the Commercial and/or Economic Section(s) of the U.S. Embassy in the host country will have irrevocable, perpetual, transferrable, worldwide, royalty-free, non-exclusive rights to use and distribute the Final Report. 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 Contract 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 Mandatory Contract Clause I.

2. Liability clauses that conflict with Mandatory Contract Clause Q. USTDA does not permit disclaimers of damages that are natural, probable and reasonably foreseeable as a result of the breach of the contract, or disclaimers that would limit the contractor's total liability to an amount less than the total 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.

*Questions regarding these guidelines may be addressed to the USTDA Office of General Counsel.*