



KIVA INSTITUTE, LLC
Guidance Memorandum 2020-02
Office of Management and Budget
Administrative Relief Related to COVID-19
April 20, 2020

Indian Country is facing new and unique challenges in confronting the COVID-19 pandemic as the outbreak has stymied tribal programs, affected service delivery to tribal communities and tribal members; and resulted in the spending of limited tribal funding resources. The pandemic has affected the tribal nations' ability to comply with the terms and conditions of existing federal awards. There is no foreseeable end to the pandemic. New Covid-19 Relief Funds (CRF) will be distributed to tribal nations (and tribal schools) in the near future to address tribal funding needs.

To respond to the challenges, the Office of Management and Budget (OMB), on March 9, 2020, issued Memorandum M-20-11 to provide thirteen (13) administrative relief items for federal awardees of the OMB Uniform Guidance requirements due to the Coronavirus (COVID-19) pandemic. On March 19, 2020, OMB issued another memorandum, M-20-17, to provide an expanded scope of *"recipients affect by the loss of operational capacity and increased costs due to the COVID-19 crisis"*. The memoranda offer temporary relief for administrative, financial management, and audit requirements under 2 CFR Part 200, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for federal awards without compromising federal financial assistance accountability requirements. See the attached copies of Memorandum M-20-11 and Memorandum M-20-17.

Indian tribes operate two basic types of federally-funded awards: (1) discretionary grant programs; and (2) entitlement programs, such as awards under Pub. L. 93-638, Indian Self-Determination and Education Assistance Act agreements. The OMB Administrative Relief exceptions affect both types of federal awards because Subpart E – Cost Principles; and Subpart F- Audit Requirements apply to discretionary grant awards and self-determination agreements under Pub. L. 93-638.

We issue this Guidance Memorandum, No. 2020-02, to provide additional guidance and advice on the application of the thirteen (13) exceptions; and how the exceptions will affect tribes and their existing federal awards, be it discretionary grant awards, or Pub. L. 93-638 agreements.

We understand that COVID-19 Relief Funds (CRF) are being distributed to tribal governments and tribal schools (BIE-funded schools) by the Bureau of Indian Affairs, Bureau of Indian Education; and the Indian Health Service; and may be placed in existing, or new Pub. L. 93-638 agreements. Other federal agencies may also be distributing CRF funds under their discretionary grant awards to tribes. These are one-time appropriations that must be used for prevention,

preparedness, and response to COVID-19, and must be used within allowable programs, functions, services and activities (PFSAs) in which the appropriations are received. Other special terms and conditions may be required by the funding agencies.

OMB Administrative Relief Exceptions. OMB authorizes federal agencies to take the following actions they deem are appropriate, to the extent permitted by law, with respect to the administrative provisions that apply to tribes affected by the COVID-19 pandemic “for both recipients with COVID-19 related grants; and other types of Federal grants”. We interpret “and other Federal awards” to mean other federal awards not specifically funded by COVID-19 funds but, nevertheless, are affected by the COVID-19 pandemic, such as work stoppage, cancellation of events, incurrence of additional, unanticipated expenses. We advise tribes to expect that expenditure of CRF funds and other federal funds will be subject to additional scrutiny by awarding agencies; and especially during the annual audit. Therefore, we advise tribes to maintain supporting documents; and maintain in full compliance with federal cost principles to avoid potential disallowed costs.

- 1. Flexibility with SAM Registration (2 CFR §200.205).** Current registrants in System for Award Management (SAM) with active registrations due to expire before May 16, 2020, will be afforded a one-time extension of 60 days so that release of funds can be expedited. Tribes should expect a written confirmation of their SAM registration extensions, but if not, request a confirmation for documentation. This exception does not apply to Pub. L. 93-638 agreements; as a SAM registration is not specifically required under Pub. L. 93-638.
- 2. Flexibility with Application Deadlines. (2 CFR §200.202).** Agencies are allowed to provide flexibility with regard to establishing deadlines for submitting competing grant applications for specific announcements and unsolicited applications. Search the funding agency websites for guidance. Tribes that are planning to submit grant applications, should be aware of the short deadlines for submitting your grant proposals. This exception does not apply to Pub. L. 93-638 awards as tribal governments are not required to compete for Pub. L. 93-638 awards.
- 3. Waiver for Notice of Funding Opportunities (NOFOs) Publications. (2 CFR §200.203).** Awarding agencies are permitted to publish emergency NOFOs for less than thirty (30) days. But agencies are required to keep track of NOFOs published for less than thirty (30) days. Again, make sure you stay current with forthcoming NOFOs, particularly those with expedited deadlines; and search funding agency websites for additional information. This exception does not apply to Pub. L. 93-638 awards. See explanation to Exception 2 above.
- 4. No-Cost Extensions on Expiring Grant Awards. (2 CFR §200.308).** Awarding agencies may automatically extend grant awards that are active as of March 31, 2020; and that are scheduled to expire prior to, or up to December 31, 2020, at no cost, for a period of twelve (12) months. Project-specific financial and performance reports will be due 90 days following the

date of the extension; and awarding agencies may examine the need to extend other project reporting as needs arise.

We recommend that tribes check their current grant awards that are due to expire December 31, 2020, request a no-cost extension from the awarding agency; and request the agencies to issue written extension of the grants for documentation and audit purposes. Keep track of all expenses during the extended period.

Contracts and compacts, under Pub. L. 93-638, are normally awarded as recurring agreements either as term contracts (1 year and up to 3 years in length), as mature contracts with or without expiration dates; or self-governance compacts. Savings from prior years are automatically carried into succeeding years without further justification. And, because self-determination contracts are typically recurring in nature it is not necessary to request no-cost extensions.

- 5. Abbreviated Non-Competitive Continuation Requests. (2 CFR §200.308).** Tribes with the need for continuation of their grants awards from April 1, 2020 to December 31, 2020, should submit their requests to the funding agencies with a brief statement that they are prepared to resume or restore the project activities; and are prepared to accept a continuation grant award.

Check federal awards that are scheduled to be completed by December 31, 2020; and project out the anticipated completion dates to use in the request for an extension. Communicate with the awarding agency and obtain guidance on the time extension and any associated terms and provisions that may be required. Be sure to document any grant extensions for the record and audit purposes. Search the funding agency websites for additional information and guidance that may affect 25 CFR §200.308 requirements, *Revision of budget and program plans*.

See the explanation under Exception 4 as it relates to Pub. L. 93-638 awards.

- 6. Allowability of Salaries and Other Project Activities. (2 CFR §200.403; 2 CFR §200.404; 2 CFR §200.405).** Awarding agencies may allow tribes to continue to charge salaries and benefits to current, active federal awards consistent with tribes' policy of paying salaries (under unexpected or extraordinary circumstances) from funding sources. Extra effort should be made in justifying and documenting expenses incurred during the suspension of work and other activities due to the pandemic (i.e. when work was interrupted; and when it restarted, and associated expenses), as no doubt, awarding agencies will need supporting justification and documentation.

Remember that OMB issued these exceptions to address the impacts to tribes for “*loss of operational capacity and increased costs due to the COVID-19 crisis*”. While tribes may continue to charge expenditures to the awards, make sure to document and maintain accurate records and cost documentations as required under §200.302, *Financial management* and 2

CFR §200.333, *Retention requirement of records*, to substantiate charging salaries and other costs of project activities related to the interruption of operations and services.

Keep records of emergency leave and extended leave, such as FMLA, or administrative leave granted to employees because of extenuating circumstances related to COVID-19. Awarding agencies may request copies of tribal personnel and leave policies and executive decisions that address granting extended leave to employees. Coordinate charging of extraordinary costs with the funding agencies to avoid potential disallowance of costs.

This exception also applies to Pub. L. 93-638 agreements. If tribes incur costs such as payroll and benefits costs, FMLA costs; and staff are unable to work because of COVID-19 interruptions or other extenuation circumstances, then these costs may be considered as allowable costs under the OMB exceptions. Other costs necessary to resume activities may also be treated as allowable costs under federal cost principles, Subpart E – Cost Principles of the OMB Uniform Guidance. Do not forget to cover indirect cost needs associated with the grants, so make sure to contact the awarding agencies regarding the allowability of CRF funds (and other supplemental COVID-19 appropriations), or normal Contract Support Costs appropriations, to meet indirect cost needs. Check with your awarding agencies for additional information and guidance.

- 7. Allowability of Costs not Normally Chargeable to Awards. (2 CFR §200.403; 2 CFR §200.404; 2 CFR §200.405).** Awarding agencies may allow tribes that incur costs related to the cancellation of events, travel, or other activities necessary and reasonable for the performance of the award, or the pausing and restarting of funded activities due to the public health emergency, to charge these costs to grants without regard to 2 CFR §200.403, *Factors affecting allowability of costs*; 2 CFR §200.404, *Reasonable costs*; and 2 CFR §200.405, *Allocable costs*.

Be mindful that funds may not necessarily be available to meet these needs. However, tribes should fully expect that funding agencies will require additional documentation to ensure that expenses were actually incurred due to cancellation of events, suspension of approved travel, and other related activities due to the COVID-19 pandemic. As such, records must be maintained to satisfy the requirements under 2 CFR §200.302, *Financial management*; and 2 CFR §200.333, *Retention requirement of records*; and for audit purposes. Funding agencies may provide additional guidance on specific types of costs on their websites.

The COVID-19 Relief Funds (CRF), made available under Pub. L. 116-123, “Coronavirus Aid, Relief and Economic Security Act (CARES Act)”, are being distributed to tribes (and BIE-funded schools); and are intended to be placed in existing, or new Pub. L. 93-638, or related agreements. Other federal funding agencies may also have funding available for COVID-19 relief.

Under section 106(a)(2) of the Pub. L. 93-638 regarding contract support costs, tribes are entitled to Contract Support Costs; however, we advise that tribes contact the awarding agencies for information on funding availability and guidance on the use of the COVID-19 funds, or regular Contract Support Cost appropriations, for meeting indirect cost needs.

- 8. Prior Approval Requirement Waivers. (2 CFR §200.407).** Awarding agencies may waive prior approval requirements as necessary to effectively address the response. Make sure charges to the federal awards are consistent with federal cost principles (OMB Subpart E – Cost Principles) and the terms and conditions of the awards, except where specified in the OMB Memorandum; and that records are maintained for audit purposes. This exception will also apply to Pub. L. 93-638 awards.

- 9. Exemptions of Certain Procurement Requirements. (2 CFR §200.319(b); 2 CFR §200.321).** Federal awarding agencies may waive procurement requirements contained in 2 CFR §200.319(b) pertaining to full and open competition; and 2 CFR §200.321 regarding contracting with small and minority businesses, women owned businesses, and labor surplus area firms.

We advise tribes to follow their tribal procurement management and financial management policies; including tribal preference policies, to acquire needed products and services necessary to carry out the federal awards. Avoid conflicts of interest situations. Tribal procurement policies should already provide guidance regarding emergency purchases, sole source purchases; and conflicts of interest. If the federal award requires specialty items and no immediate sources are available, check the market for product or service availability and proceed with the purchase, keeping in mind the federal cost principles and compliance with your procurement management policy. Always keep documents. Exception 9 will also apply to Pub. L. 93-638 awards.

For additional information, the OMB issued an exposure draft for proposed revisions to the Uniform Guidance in January 2020, that included proposed revisions to the procurement requirements for public comment. The comment period has ended, but it is not known when new guidance will be issued and when it will become final. We will keep you advised.

- 10. Extension of Financial, Performance, and other Reporting. (2 CFR §200.327; 2 CFR §200.328).** Awarding agencies may allow recipients to delay submission of financial, performance and other reports up to three (3) months beyond the normal due date. If an agency allows such a delay, tribes may continue to draw down federal funds without the timely submission of reports. Progress reports must be submitted at the end of the postponed period. We advise; however, that tribes endeavor to continue submitting financial and progress reports on time to avoid potential issues later.

Awarding agencies may waive the requirements for recipients to notify the agency of problems, delays or adverse conditions related to COVID-19 on an award-by-award basis; and in accordance with 2 CFR §200.328(d)(1). Make sure to coordinate with the awarding agencies on the delays in submitting financial status reports (SF-425s and progress reports) to ensure that those agencies document the delays, as authorized in the OMB Memorandum. Again, make sure records are maintained for documentation of drawdowns for audit purposes.

This exception also applies to Pub. L. 93-638 awards except that Pub. L. 93-638 only requires one (1) brief annual narrative report; and quarterly and a final Financial Status Report (SF-425). Awarding agencies may require special reports related specifically to COVID-19 impacts and how tribes performed services related to the pandemic.

11. Extension of Currently Approved Indirect Cost Rates. (2 CFR §200.414(c)). Awarding agencies may allow recipients to use currently approved indirect cost rates (i.e. predetermined, fixed, or provisional rates) to recover their indirect costs on federal awards under these exceptions. The OMB Memorandum also authorizes agencies to approve requests for extension of current indirect cost rates for one (1) additional year without having to submit a new indirect cost agreement proposal.

Current OMB Uniform Guidance (2 CFR §200.414) addresses indirect cost rates in several ways: (1) 25 CFR §200.414(c) requires that all federal agencies must accept negotiated indirect cost rates but may use a different rate for a class of federal awards, for a single federal award only when required by federal statute or regulation; or when approved by a federal awarding agency head based on justification; (2) a federal awarding agency must notify OMB of any approved deviations; (3) the awarding agency must implement and make publicly available, the policies, procedures and general decision making criteria that their programs will follow to seek and justify deviations from negotiated rates; and (4) the OMB Uniform Guidance, at 25 CFR §200.414(g), provides that recipients may apply for a one-time extension of their current negotiated indirect cost rate for up to four (4) years. The Interior Business Center (IBC), under this regulation, limits the indirect cost rate extensions to final and pre-determined indirect cost rates only.

Although the OMB Memorandum authorizes awarding agencies to approve requests for indirect cost rate extensions, keep in mind that tribal indirect cost rate agreements apply to all federal awards, either under a simplified rate method (single indirect cost rates); or multiple rate method (multiple rates).

Indirect cost rate proposals are due to the federal cognizant agency for indirect costs (IBC), six (6) months prior to the beginning of the tribal fiscal year. Given the OMB exception (Exception 11), it would be assumed that current tribal indirect cost agreements, when extended, would be applied through the following tribal fiscal year; and a new proposal would be due six (6)

months prior to the next (third) tribal fiscal year. See 25 CFR §200.414; and Appendix VII to Part 200 – *States and Local Governments and Indian Tribe Indirect Cost Proposals*, for guidance. We will provide clarifying guidance at a later date on the impacts of OMB Exception 11.

We recommend that tribes consult with their federal cognizant agency for indirect costs, to ensure the request for an indirect cost rate extension is approved properly to prevent potential adverse impacts to the recovery of indirect costs; and that the extension will stand the test of future audits. Also, expect that additional information and guidance will be forthcoming either from OMB, or the federal cognizant agency for indirect cost. We advise tribes to contact their awarding agencies for further guidance. Remember to document the extension for audit purposes.

Regarding the applicability of this exception to Pub. L. 93-638 awards, the Bureau of Indian Affairs and the Indian Health Service issued their respective Contract Support Cost policies that may have an effect on this exception. The Bureau of Indian Affairs Policy, issued January 10, 2017, provides that indirect cost rates that are up to 4 years old are considered current indirect cost rates. The Indian Health Service's (IHS) issued its Contract Support Cost Policy on October 28, 2016, which states if a tribe's indirect cost rate is more than three(3) years old, IHS will not award Contract Support Costs to the awards based on the three-year old rate, but will, instead negotiate "indirect-type costs" for the awards. In any event, contact the awarding officials at the two agencies to determine the appropriate amounts of Contract Support Costs to apply to the awards.

Some funding agencies may require grant match or cost sharing under the grant awards. In these instances, remember that the OMB Uniform Guidance, at 25 CFR §200.306(c), provides that unrecovered indirect costs may be included as part of cost sharing or matching requirements, but with the prior approval of the awarding agency. Further, Pub. L. 93-638, at section 103(c) and section 106(j), provide that funds under Pub. L. 93-638 agreements may be used to meet other federal grant match and cost sharing requirements. However, make sure the Pub. L. 93-638 agreements have a similar, a related purpose, or a reasonable relationship to the grant awards, otherwise use of Pub. L. 93-638 funds for matching or cost sharing may be questioned.

12. Extension of Closeout. (2 CFR §200.343). Awarding agencies may allow tribes to delay the submission of any pending financial status reports, performance reports, and other required reports, as required by the terms of the federal award, for closeout of expired projects for up to one (1) year; provided that proper notice is provided by the recipient to the awarding agency.

The above OMB Administrative Relief Exceptions, No. 4 – *No-cost extensions of expiring awards*; and No. 10 – *Extension of financial, performance, and other reporting*, will impact

the requirement to comply with your award closeout reporting requirements, including the federal financial reports (SF-425s), performance reports, and other required reporting requirements.

Unlike other exceptions described above, tribes, as recipients, must provide advanced notice to the awarding agencies regarding the delays in submitting final closeout reports, otherwise the closeout reports will still have to be provided as required in the federal awards. When tribes receive approval from the awarding agencies, document the approval for the records and audit purposes. This exception will also apply to Pub. L. 93-638 awards; however, Pub. L. 93-638 requires only one brief annual narrative report and a final Financial Status Report (SF-425). See Exception 4.

13. Extension of Single Audit Submission. (2 CFR §200.512). Awarding agencies, in their capacity as cognizant agencies for audits, should allow recipients and subrecipients that have not filed their single audit reports with the Federal Audit Clearinghouse (FAC) as of the date of the OMB Memorandum M-20-17 (March 19, 2020); and that have fiscal years ending June 30, 2020, to delay the submission of the single agency audit reporting package to six (6) months beyond the normal due date. Further action by the cognizant agency for audit (ICA) will be required to provide guidance on this exception. But the following chart explains the potential extensions:

Fiscal Year Start	Fiscal Year End	Report Due Date	Extended Due Date
July 1, 2018	June 30, 2019	March 31, 2020	September 30, 2020
October 1, 2018	September 30, 2019	June 30, 2020	December 31, 2020
January 1, 2019	December 30, 2019	September 30, 2020	March 31, 2021
July 1, 2019	June 30, 2020	March 31, 2021	September 30, 2021

OMB Exception 13 does not require tribes to seek approval for the extension by the cognizant or oversight agency for audit; however, tribes should maintain appropriate documentation of the reasons for the delayed filing. Be mindful that the extended audit report due dates may have cascading impacts on subsequent audit reports beyond 2021. The extension does not affect the tribes’ fiscal year, only the due dates for submitting the annual single audit reports, so keep proper records of expenditures by fiscal year. And be mindful of the potential impacts resulting from the above exception for grant extensions.

The audit report extension does not require that tribes seek approval from their awarding agencies and the federal cognizant agency for audit (ICA), but tribes should maintain records of the reasons for the delayed filing. Tribes taking advantage of this extension would still qualify as a “low risk” auditees. See 25 CFR §200.520. The extension also does not relieve tribes of necessary audit follow up requirements on audit findings. See 25 CFR §200.511.

This exception will also apply to Pub. L. 93-638 agreements. In addition, for awards under Pub. L. 93-638, this extension would affect the 365-day rule in section 106(f) of Pub. L. 93-638, wherein it states, in part “*any right of action or other remedy (other than those relating to a criminal offense) relating to any disallowance of costs shall be barred unless the Secretary has given notice of any such disallowance within three hundred and sixty-five days of receiving any required annual single agency audit report...*”. In this regard, we encourage tribes to seek further direction and guidance from your awarding agencies on the implementation of this exception.

Supplemental Note: The OMB exceptions (Memorandum M-20-11 and Memorandum M-20-17) address current federal grant awards; and do not address new awards that may be required to obligate CRF funding. Federal funding agencies will issue NOFOs to award discretionary grants to tribal grant recipients to obligate CRF funds. In those instances, follow the requirements issued by the funding agencies; and follow the OMB Uniform Guidance 2 CFR Part 200.

In the case of awards under Pub. L. 93-638, the Bureau of Indian Affairs, Bureau of Indian Education, and Indian Health Service, may provide specific instructions for obligating CRF funds, whether through amendments to existing Pub. L. 93-638 self-determination agreements, Pub. L. 93-638 self-governance compacts (or similar agreements); or as new self-determination agreements and compacts. In these instances, consult with your awarding agencies for information and guidance. Refer to Pub. L. 93-638 at section 102(a)(1) & (2), section 106(a)(1) & (2), section 10; and implementing regulations at 25 CFR Subpart C – *Contract Proposal Contents* for guidance.

Be mindful that, unlike contracting under Pub. L. 93-638, COVID-19 Funds (or CRF funds) are one-time funds; and are not recurring in nature. We highly recommend that separate records, including progress reports, are documented and maintained for audit purposes.

KIVA Webinar. KIVA will conduct a free webinar on April 30, 2020, on this subject to provide additional information and guidance related to this topic; and to address questions that tribes may have. We will be issuing information and guidance on how to register for the free webinar. In the meantime, we encourage you to submit your questions in advance to: info@kivainstitute.com, so that we may prepare to answer them during the webinar. Please do not hesitate to contact us at: info@kivainstitute.com; or our toll-free telephone number 1-866-202-5482, if you have questions and need additional guidance and assistance.

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