



215 SW Washington Street, Suite 200
Portland, OR 97204


T 503.242.1745
F 503.242.1072

HOBBSSTRAUS.COM

MEMORANDUM

December 21, 2023

To: TRIBAL HOUSING CLIENTS

From:  Ed Clay Goodman and Cari L. Baermann
HOBBS, STRAUS, DEAN & WALKER, LLP

Re: *Federal Housing Regulations Updates*

This memorandum provides a summary of the U.S. Department of Housing and Urban Development's (HUD) notification on flexibilities and waivers available to tribal grantees for disaster relief, the U.S. Office of Management and Budget's (OMB) proposed rule ("Proposed Rule") for the regulations at 2 CFR Part 200, and HUD's tribal consultation on the Indian Community Development Block Grant (ICDGB) program regulations.

I. Notification of HUD Waivers and Flexibilities

On December 20, 2023, HUD published a [notification](#) ("Notification") of the availability of waivers and flexibilities from HUD requirements for its Indian Housing Block Grant (IHBG), ICDBG, and Native Hawaiian Housing Block Grant (NHHBG) grantees located in areas that are covered by Presidentially Declared Disasters (PDDs) declared during calendar years 2024 and 2025.¹

A PDD "is a major disaster or emergency declared under the Robert T. Stafford Disaster Relief and Emergency Assistance Act that activates an array of Federal programs to assist in the response and recovery efforts." Flexibilities Available to Tribal Grantees, 88 Fed. Reg at 87,900. The Notification describes regulatory and administrative requirement flexibilities available to assist IHBG, ICDBG, and NHHBG grantees affected by a PDD. Additionally, a grantee may request a waiver or flexibility of a HUD requirement not listed in the Notification. HUD will provide an expedited review of the request, provided that the grantee demonstrates that the waiver or flexibility is necessary to assist its disaster relief and recovery efforts. Further, those waivers and flexibilities described in the Notification do not apply to the various COVID-relief related programs administered by the Office of Native American Programs (IHBG-CARES, IHBG-ARP, ICDBG-CARES, ICDBG-ARP, and NHHBG-ARP), as HUD has already issued separate flexibilities for those programs. For further information, contact HUD at Hilary.C.Atkin@hud.gov or at (202) 402-3427.

¹ Regulatory and Administrative Requirement Flexibilities Available to Native American Programs During CY 2024 and CY 2025 to Tribal Grantees to Assist with Recovery and Relief Efforts on Behalf of Families Affected by Presidentially Declared Disasters ("Flexibilities Available to Tribal Grantees"), 88 Fed. Reg 87,900 (Dec. 20, 2023).

II. OMB Proposed Rule 2 CFR Part 200

On October 5, 2023, OMB published the [Proposed Rule](#) to revise the OMB Guidance for Grants and Agreements codified in 2 CFR Part 200. The Proposed Rule would change the generally applicable Federal requirements governing Federal financial assistance. Overall, the proposed revisions appear to be beneficial to tribes and tribally designated housing entities (TDHEs), removing some of the burdens previously imposed by the regulations.

Of particular note, OMB proposes to streamline procurement requirements applicable to Tribal grantees by authorizing Tribal grantees to adopt their own procurement policies and standards. In the Proposed Rule, OMB states that the proposed revisions are intended to: "(1) incorporate[] statutory requirements and administration priorities; (2) reduc[e] agency and recipient burden; (3) clarify[] sections that recipients or agencies have interpreted in different ways; and (4) rewrite[e] applicable sections in plain language, improv[e] flow, and address[] inconsistent use of terms." Guidance for Grants and Agreements, 88 Fed. Reg 69,390 (Oct. 5, 2023).

In addition to proposed revisions in Part 200, the Proposed Rule also includes proposed revisions to other parts in 2 CFR: Part 1 (About Title 2 of the Code of Federal Regulations and Subtitle A); Part 25 (Universal Identifier and System for Award Management); Part 170 (Reporting Subaward and Executive Compensation Information); Part 175 (Award Term for Trafficking in Persons); Part 180 (OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement)); Part 182 Governmentwide Requirements for Drug-Free Workplace (Financial Assistance); and Part 183 (Never Contract with the Enemy).

A. Subpart A—Acronyms and Definitions; and Subpart B—General Provisions

OMB proposes a number of revisions and additions to the definitions in Subpart A—Acronyms and Definitions. Of particular note for tribes, the OMB proposes to revise the definition of "Indian Tribe" to include the following underlined language:

Indian Tribe means any Indian Tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. Chapter 33), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. See 25 U.S.C. 5304(e). This includes any Indian Tribe identified in the annually published Bureau of Indian Affairs list of "Indian Entities Recognized and Eligible to Receive Services" and other entities that qualify as an Alaska Native village or regional village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act.

Guidance for Grants and Agreements, 88 Fed. Reg. at 69394, 69434. OMB also proposes revisions to 2 CFR § 200.113 on mandatory disclosure to clarify that recipients and subrecipients must "promptly disclose" (versus the previous language of disclosing "in a timely manner,") any credible evidence of a violation of Federal criminal law potentially affecting the Federal award.

B. Subpart C—Pre-Federal Award Requirements and Contents of Federal Awards

OMB proposes a number of revisions to Subpart C—Pre-Federal Award Requirements and Contents of Federal Awards. The main revisions that may affect tribes and tribally designated housing entities (TDHEs) are revisions to certain requirements for fixed amount awards. One such revision would clarify in 2 CFR § 200.201 that "recipients are entitled to any unexpended funds under a fixed amount award if the required activities were completed in accordance with the terms and conditions of the award." Guidance for Grants and Agreements, 88 Fed. Reg. at 69394. Proposed revisions to 2 CFR § 200.201 would also clarify record retention and post award certification requirements. *Id.*

The Proposed Rule would further revise 2 CFR § 200.216 on the prohibition of certain telecommunications and video surveillance services or equipment to expand the guidance by incorporating additional information from OMB's Frequently Asked Questions document. Guidance for Grants and Agreements, 88 Fed. Reg. at 69395.

C. Subpart D—Post Federal Award Requirements

The Proposed Rule contains a number of proposed revisions to Subpart D of 2 CFR Part 200 (Post Federal Award Requirements) that will affect tribes and TDHEs. A proposed revision to 2 CFR § 200.307(a) would provide "clarifications regarding use and expenditure of program income, including allowing program income for certain closeout costs." Guidance for Grants and Agreements, 88 Fed. Reg. at 69395. OMB proposes to add a new paragraph to 2 CFR § 200.311 on appraisals to introduce guidance on standards for conducting independent appraisals consistent with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, (42 U.S.C. 4601–4655). Guidance for Grants and Agreements, 88 Fed. Reg. at 69396.

In 2 CFR § 200.313, which covers equipment, OMB proposes to increase the threshold value for equipment from \$5,000 to \$10,000. Guidance for Grants and Agreements, 88 Fed. Reg. at 69396, 69451. OMB also proposes to define "encumbrance" as "a claim or liability that is attached to the property or some other right held by a party that is not the owner. An encumbrance may lessen the value of the property and restrict its free use until the encumbrance is lifted." Further, OMB proposes to allow Indian Tribes to dispose of equipment in accordance with tribal law. *Id.*

Section 2 CFR § 200.314 (supplies) currently states that when a recipient has an "inventory of unused supplies exceeding \$5,000 in total aggregate value upon termination or completion of the project or program and the supplies are not needed for any other Federal award, the non-Federal entity must retain the supplies for use on other activities or sell them, but must, in either case, compensate the Federal Government for its share." OMB proposes to raise this threshold from \$5,000 to \$10,000. Guidance for Grants and Agreements, 88 Fed. Reg. at 69396, 69452.

OMB proposes several revisions to the procurement standards in 2 CFR Part 200. First, in recognition of tribal sovereignty, OMB proposes to revise Section 200.317 to allow Indian

tribes to follow their own policies and procedures. Guidance for Grants and Agreements, 88 Fed. Reg. at 69396. Second, OMB proposes to revise the procurement standards in section 200.318. These proposed revisions include providing additional guidance that contractors appropriately classify employees consistent with the Fair Labor Standards Act. *Id.* OMB proposes adding a new paragraph (l) in section 200.318 to clarify that the procurement standards in Part 200 do not prohibit recipients or subrecipients from taking a number of steps to provide protections for employee protections or address high poverty by supporting disadvantaged individuals, among other things. For example, recipients or subrecipients can still use Project Labor Agreements or similar forms of pre-hire collective bargaining agreements; require commitments or goals to hire people residing in high-poverty areas, disadvantaged communities, or offer employees of a predecessor contractor rights of first refusal under a new contract. *Id.*

In section 200.319, OMB proposes to remove the prohibition on using geographic preference requirements. OMB's proposed revisions would state that "subpart D does not prohibit recipients and subrecipients from incorporating a scoring mechanism that rewards bidders committing to specific numbers and types of U.S. jobs, as well as certain compensation and benefits. *Id.*

In section 200.320 (covering procurement methods), OMB proposes to revise the term "small purchases" to be "simplified acquisitions". OMB also proposes to remove the requirements that local and tribal governments must open sealed bids in public. *Id.* In section 200.321, OMB proposes to add "veteran-owned business" to the types of businesses that federal award recipients and subrecipients are encouraged to consider for procurement contracts. *Id.* In section 200.333, OMB proposes to remove "the current Simplified Acquisition Threshold limit for fixed amount subawards to provide agencies and recipients with increased flexibility in making programmatic and budgetary decisions, while still allowing recipients to establish their own award-specific thresholds with the prior written approval of the Federal agency." Guidance for Grants and Agreements, 88 Fed. Reg. at 69397.

D. Subpart F—Audit Requirements

In subpart F 2 CFR § 200.501, the Proposed Rule would increase the single audit threshold from \$750,000 to \$1,000,000. Guidance for Grants and Agreements, 88 Fed. Reg. at 69398. This proposed revision may decrease some of the burden on tribes and TDHEs, as it increases the threshold for which tribes and TDHEs must have a single or program-specific audit conducted for a given year.

E. Appendices

OMB is proposing a complete revision to the template for a NOFO, located in Appendix I of 2 CFR Part 200. OMB intends the revisions to reduce administrative burdens and unnecessary obstacles for applying to Federal financial assistance. Guidance for Grants and Agreements, 88 Fed. Reg. at 69391, 69399. More specifically, the proposed changes are intended to:

- (1) follow plain language principles;
- (2) group similar items together to streamline content;
- (3) align sections more closely to the application process;
- (4) include basic

information at the top of a funding opportunity so that applicants can more easily make decisions about whether or not to apply; (5) clearly define what must be included in a section of the funding opportunity versus what is at an agency's discretion; and (6) provide flexibility to agencies while also giving applicants a common way to find information in every funding opportunity. *Id.*

III. ICDBG Rulemaking Consultation

On December 12, 2023, HUD Office of Native American Programs (ONAP) held a consultation on its rulemaking process on the ICDBG program regulations (24 CFR Part 1003). Deputy Assistant Secretary (DAS) Heidi Frechette, ONAP Director of Performance and Planning Jad Atallah, and Grant Management Specialist Damon Adams ran the consultation session. HUD ONAP is looking for input on how to improve the program through amending the regulations.

F. Regional Competitions for Funding and Income Criteria

The ICDBG competitive program is currently set up to be a regional competition. Each region receives an allocation based on a formula set out in the regulations. Tribes then only compete with other tribes in their Area ONAP (AONAP); they are not being scored compared to tribes in other AONAPs. Based on the regulations, if all of the ICDBG competitive funding in one of the ONAP areas is not fully allocated, HUD reallocates that funding to a different AONAP. However, HUD is looking for feedback on whether that should change going forward.

Regarding income criteria for families receiving ICDBG assistance, low- and moderate-income beneficiaries are those whose incomes do not exceed 80% of the area median income. In contrast, under NAHASDA low-income families are those whose income does not exceed 80% of the local area median income or the national median income, whichever is greater. Commenters recommended that HUD change the ICDBG criteria to be the same as the NAHASDA criteria.

G. NOFO Rating Factors

HUD explained that the Notice of Funding Opportunity (NOFO) Rating Factors for ICDBG grants are dictated by 24 CFR § 1003.303. They are: (1) Capacity; (2) Need/Extent of the Problem; (3) Soundness of Approach; (4) Leveraging of Resources; and (5) Comprehensiveness and Coordination. HUD asked for comments on the NOFO Rating Factors.

One commenter recommended that HUD should reduce the requirements for doing new construction. There are too many hoops for tribes to jump through just to build a new home. The current requirement that tribes demonstrate that there is overcrowding or that no other homes are available is burdensome, as those factors have already been demonstrated. HUD staff responded that those requirements are statutory, so HUD cannot change the requirement through a regulatory amendment. However, HUD will look into other ways to address that problem. One commenter asked whether the regulations could be changed to give consideration for smaller tribes that have less ability to compete with larger tribes. HUD staff responded that

HUD may be able to explore providing some sort of consideration for small tribes in the NOFO. HUD staff therefore asked for feedback on how it should structure this change.

Another commenter stated that the requirement that tribes have a citizen participation meeting between the application date and the publication date is burdensome. HUD staff responded that they will look at that requirement and welcome feedback on how that requirement could be loosened. One commenter remarked that the ICDBG grant should be changed so that if a tribe shows enough need, they do not need to leverage other funding. They noted that if a tribe's community is particularly poor, the tribe would have even more difficulty leveraging funding. HUD staff responded that it may be a possibility for HUD to allow tribes in the bottom quarter of the income tiers for all tribes to qualify without having to leverage funding. HUD welcomes feedback on which other factors HUD should assess in determining whether a tribe could obtain a waiver of this leveraging requirement.

H. Imminent Threat Grants

The U.S. Government Accountability Office (GAO) issued a report that stated that the requirements for ICDBG imminent threat (IT) program were a barrier to addressing climate change with Federal funds. In light of that, HUD is looking for tribal feedback on the following: (1) if they have concerns with changing the "unique, unusual, nonrecurring" requirements for IT projects; and (2) if Tribes should be required to certify that there are no other available Tribal resources before qualifying for an ICDBG IT grant.

One commentator asked what it would take to increase the ICDBG grant amount to \$5 million. HUD staff responded that Congress sets that amount through statute, so HUD cannot change it through a regulatory amendment. If tribes want more funding allocated, they can contact their Congress members to advocate that more funding be appropriated for Imminent Threat Grants.

I. Next Steps

HUD encouraged Tribes to submit comments to: consultation@hud.gov. HUD is receiving comments on a rolling basis. HUD will publish a draft proposed new rule in the Federal Register and will hold additional Tribal consultations on the draft.

Conclusion

If you have any questions about this memorandum, please contact Ed Clay Goodman (egoodman@hobbsstrauss.com) or Cari Baermann (cbaermann@hobbsstrauss.com); both may be reached by phone at 503-242-1745.