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Title 49 —Transportation

Subtitle A —Office of the Secretary of Transportation

Part 29 Tribal Transportation Self-Governance Program

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PART 29—TRIBAL TRANSPORTATION SELF-GOVERNANCE PROGRAM

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Subpart A—General Provisions

§ 29.1 What is the purpose and authority for this part?

- (a) The regulations in this part implement the Tribal Transportation Self Governance Program established in 23 U.S.C. 207 and set forth rules for compacts and funding agreements negotiated between the Department and Tribes eligible under the Program.
- (b) The Department prepared and issued these rules pursuant to 23 U.S.C. 207(n) with the active participation and representation of Tribes, Tribal organizations, consortia, and individual Tribal members, consistent with the procedures of the Negotiated Rulemaking Act.

§ 29.2 What is the Department's policy for the Program?

It is the Department's policy to:

- (a) Recognize the unique government-to-government relationship with Tribes, including the right of Tribes to self-government, and to support Tribal sovereignty and self-determination;
- (b) Encourage Tribes to participate in the Program;
- (c) Affirm and enable the United States to fulfill its obligations to Tribes under treaties and other laws, and to ensure the continuation of the trust responsibility of the United States to Tribes and Indians that exist under treaties, other laws, and Executive orders;
- (d) Interpret Federal laws and regulations in a manner that will facilitate the inclusion of eligible funds in funding agreements under the Program to carry out Tribal PSFAs, except as otherwise provided by law;
- (e) Consult with Tribes directly and meaningfully on policies that have Tribal implications and affect the Program;
- (f) Acknowledge that Tribes perform PSFAs as an exercise of Tribal self-determination and self-governance; are responsible for day-to-day operation of PSFAs carried out under the Program; and accept responsibility and accountability for the use of funds and satisfactory performance consistent with the terms of funding agreements; and
- (g) Liberally construe this part to effectuate 23 U.S.C. 207 for the benefit of Tribes participating in the Program.

§ 29.3 What is the effect of this part on existing Tribal rights?

- (a) A Tribe may apply for the Program at any time, but nothing in this part requires a Tribe to do so.
- (b) A Tribe's decision to participate in the Program does not:
 - (1) Affect, modify, diminish, or otherwise impair the sovereign immunity from suit enjoyed by the Tribe;
 - (2) Terminate, waive, modify, or reduce the trust responsibility of the United States to the Tribe or individual Indians; or
 - (3) Reduce the amount of the Tribe's formula or discretionary funding from the Department or impair the Tribe's ability to obtain funding from another Federal program.

§ 29.4 How do Departmental circulars, policies, manuals, guidance, or rules apply to a Tribe's performance under the Program?

A Tribe's performance under the Program is not subject to any Departmental circular, policy, manual, guidance, or rule, except for this part, unless the Department and the Tribe otherwise negotiate and agree in the compact or funding agreement.

§ 29.5 Who is responsible for carrying out the functions connected with the Program?

The Department will carry out the Program, including making eligibility determinations; negotiating compacts and funding agreements with Tribes; overseeing compliance with Department requirements; and otherwise administering and implementing the Program consistent with this part. As provided in § 29.402, a Tribe is responsible for day-to-day management of the Tribe's PSFAs consistent with the compact and funding agreement.

§ 29.6 Must the Department consult with Tribes regarding matters that affect the Program?

The Department must consult with Tribes on matters relating to the Program. The Department will carry out consultations in accordance with Executive Order 13175 and applicable Department policies, including the Department's Tribal Consultation Plan.

§ 29.7 What is the effect of this Program on existing Tribal Transportation Program agreements?

This Program does not terminate existing authority for a Tribe to enter into agreements with the Federal Highway Administration, or contracts or agreements with the Department of the Interior, for the Tribal Transportation Program. A Tribe may maintain its current contracts or agreements, or include Tribal Transportation Program funds in a funding agreement under this Program. A Tribe may only have one agreement at a time for the same funds.

§ 29.8 What happens if more than one party purports to be the authorized representative of a Tribe?

If more than one party purports to be the authorized representative of a Tribe during the negotiation of a compact, funding agreement, or amendment, the Department will notify the parties, consult with the Department of the Interior, defer negotiation or execution of any documents, if necessary, until such authority is clarified, and provide written notice to the parties of the Department's decision to defer.

§ 29.9 What definitions apply to this part?

Unless otherwise provided, the following definitions apply to this part:

Appeal means a request by a Tribe for an administrative or judicial review of a decision by the Department.

Self-Governance Official means a Department official responsible for overseeing the Program and carrying out the responsibilities set forth in this part.

Compact means a legally binding and mutually enforceable written agreement between the Department and a Tribe entered into pursuant to 23 U.S.C. 207(c) and this part that sets forth the general terms that will govern the Tribe's participation in the Program and affirms the government-to-government relationship.

Consortium means an organization or association of Tribes that is authorized by those Tribes to participate in the Program under this part and is responsible for negotiating, executing, and implementing compacts and funding agreements on behalf of its member Tribes.

Consultation means the process by which the Department and Tribes engage in timely, substantive, and meaningful government-to-government communication, collaboration and participation, and exchange views in furtherance of the Federal trust responsibility and the principles of self-governance, before any action is taken that will have Tribal implications as defined by Executive Order 13175, in accordance with the Department's Tribal Consultation Plan, Executive Order 13175, all subsequent Presidential Memoranda regarding Tribal consultation, and applicable Federal law.

Contractor means a third party who has entered into a legally binding agreement with a Tribe to provide goods or services.

Days means calendar days. When the last day of any time period specified in this part falls on a Saturday, Sunday, or Federal holiday, the period shall carry over to the next business day unless otherwise prohibited by law.

Department means the U.S. Department of Transportation.

Discretionary or competitive grant means funds provided by the Department where it selects the award amount and recipients from among all eligible applicants consistent with the legislative and regulatory requirements and selection criteria established for a program.

Excess property means real or personal property under the control of a Federal agency that is not required for the agency's needs and the discharge of its responsibilities.

Funding agreement means a legally binding and mutually enforceable written agreement between the Department and a Tribe entered into pursuant to 23 U.S.C. 207(d) and this part that identifies the funds the Tribe will use to carry out its PSFAs, and sets forth the terms and conditions under which the Tribe will receive the funds.

Gross mismanagement means a significant, clear, and convincing violation of a compact, funding agreement, or regulatory or statutory requirements applicable to Federal funds included in a compact and funding agreement that results in a significant reduction of funds available for a PSFA carried out by a Tribe.

Imminent jeopardy means an immediate threat to a trust asset, natural resource, or public health and safety that is caused by the act or omission of a Tribe and that arises out of a failure by the Tribe to carry out the compact or funding agreement.

Indian means a person who is a member or citizen of a Tribe.

Indian Tribe or Tribe means any Indian or Alaska Native tribe, band, nation, pueblo, village, or community (including colonies and rancherias) that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. In any case in which an Indian Tribe has authorized another Indian Tribe, an intertribal consortium, or a Tribal organization to plan for or carry out PSFAs on its behalf under this part, the authorized Indian Tribe, intertribal consortium, or Tribal organization shall have the rights and responsibilities of the authorizing Indian Tribe (except as otherwise provided in the authorizing resolution or in title 23 of the U.S. Code). In such event, the term Indian Tribe or Tribe as used in this part shall include such other authorized Indian Tribe, intertribal consortium, or Tribal organization.

Inherent Federal functions means those Federal functions that cannot legally be delegated to a non-Federal entity, including a Tribe.

Operating Administration means a component administration of the U.S. Department of Transportation.

Program means the Tribal Transportation Self-Governance Program established by 23 U.S.C. 207.

Project means any activity determined as being eligible under the U.S. Code title and program for which funds are being provided.

Programs, services, functions, and activities or PSFAs means programs, services, functions, and activities, or portions thereof, that a Tribe carries out using funds included in a funding agreement under the Program.

Real property means any interest in land together with the improvements, structures, and fixtures and appurtenances.

Reassumption means the termination, in whole or part, of a funding agreement and assuming or reassuming the remaining funds included in the compact and funding agreement pursuant to 23 U.S.C. 207(f)(2)(A).

Receipt means the actual date on which a submission is received. With respect to receipt by the Department, receipt is the date on which the Department official specified in this part receives the submission. Demonstration of receipt includes a postal return receipt, express delivery service receipt, or any other method that demonstrates actual receipt by the Departmental official specified in this part, including via electronic mail.

Retrocession means the voluntary return of a Tribe's PSFA and associated remaining funds for any reason before or on the expiration of the term of the funding agreement.

Secretary means the Secretary of Transportation.

Self-Determination Contract means a contract (or grant or cooperative agreement) entered into pursuant to title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5321) between a Tribe and the appropriate Federal agency for the planning, conducting and administration of programs or services that are otherwise provided to Tribes.

Self-governance means the Federal policy of Indian self-determination and self-government rooted in the inherent sovereignty of Tribes, reflected in the government-to-government relationship between the United States and Tribes, and expressed in the Indian Self-Determination and Education Assistance Act, Public Law 93-638, as amended, and the policy of Tribal self-determination established under the Program.

State means any of the 50 States, the District of Columbia, or Puerto Rico.

Surplus government property means excess real or personal property that is not required for the needs of and the discharge of the responsibilities of all Federal agencies that has been declared surplus by the General Services Administration.

Technical assistance means the process by which the Department provides targeted support to a Tribe with a development need or problem.

Transit means regular, continuing shared ride surface transportation services that are open to the general public or open to a segment of the general public defined by age, disability, or low income, excluding the transportation services set forth in 49 U.S.C. 5302(14)(B).

Tribal Transportation Program (TTP) means a program established in section 1119 of Moving Ahead for Progress in the 21st Century (MAP-21), Public Law 112-141 (July 6, 2012), and codified in 23 U.S.C. 201 and 202. The Fixing America's Surface Transportation Act (FAST Act), Public Law 114-94 (December 4, 2015) reauthorized this program.

TTP Agreement means an agreement between a Tribe and either the Federal Highway Administration or the Bureau of Indian Affairs pursuant to 23 U.S.C. 202 that authorizes a Tribe to carry out all but the inherently Federal functions of the TTP.

Tribal Organization means the recognized governing body of any Tribe, any legally established organization of Indians that is controlled, sanctioned, or chartered by such governing body or is democratically elected by the adult members of the Indian community to be served by such organization, and includes the maximum participation of Indians in all phases of its activities.

Subpart B—Eligibility and Negotiation Process

ELIGIBILITY

§ 29.100 What are the criteria for eligibility to participate in the Program?

- (a) **Eligibility.** A Tribe is eligible to participate in the Program if—
- (1) The Tribe requests participation in the Program by resolution or other official action by the governing body of the Tribe; and
 - (2) The Department determines, based on the evidence submitted by the Tribe, that, over the 3 most recent fiscal years, the Tribe has demonstrated financial stability and financial management capability, and transportation program management capability in accordance with the criteria specified in 23 U.S.C. 207(b) and this section.
- (b) **Financial stability and financial management capability.** In making the eligibility determination under 23 U.S.C. 207(b), the Department must determine that a Tribe demonstrates financial stability and financial management capability. To assist the Department in determining whether a Tribe meets the financial stability and financial management capability criterion, a Tribe must satisfy one of the following evidence standards:
- (1) **Conclusive evidence.** A Tribe subject to the Single Audit Act demonstrates financial stability and financial management capability by providing evidence establishing that, during the preceding 3 fiscal years, the Tribe had no uncorrected significant and material audit exceptions in the required annual audit of the Tribe's self-determination contracts or self-governance funding agreements with any Federal agency. This will be conclusive evidence that the Tribe has satisfied the financial stability and financial management capability criterion.
 - (2) **Sufficient evidence.** A Tribe subject to the Single Audit Act that has a TTP Agreement, or a grant award provided by the Department may provide evidence establishing that, during the preceding 3 fiscal years, the Tribe had no uncorrected significant and material audit exceptions in its required single audit of the Tribe's Federal award programs. This will be sufficient evidence that the Tribe has satisfied the financial stability and financial management capability criterion.

- (3) ***Evidence without a mandate to comply with the Single Audit Act.*** If a Tribe is not subject to the Single Audit Act, a Tribe may provide evidence of the following for the Department's determination of whether the Tribe satisfies the financial stability and financial management capability criterion:
- (i) An independent audit, consistent with 2 CFR 200.514, containing no uncorrected significant and material audit exceptions that covers the preceding 3 fiscal years of the Tribe's self-determination contracts or self-governance funding agreements with any Federal agency, TTP Agreements, or a grant award from the Department; and
 - (ii) Evidence demonstrating that the Tribe has financial management systems and standards that meet or exceed the standards set forth in §§ 29.505 through 29.511 and 29.515 of this part. The Department will confirm in writing within 90 days of receipt of any such submission by the Tribe whether the Tribe's management systems meet the required standards.
- (c) ***Transportation program management capability.*** In making the eligibility determination under 23 U.S.C. 207(b), the Department also must determine that a Tribe demonstrates transportation program management capability, including the capability to manage and complete projects eligible under title 23 and chapter 53 of title 49 of the U.S. Code, based on the totality of the evidence that a Tribe submits to the Department.
- (1) ***Evidence of transportation management capability.*** To assist the Department in determining whether a Tribe meets the transportation program management capability criterion, a Tribe may submit evidence including:
- (i) Documentation showing that the Tribe has previously or is currently directing or carrying out transportation services, projects, or programs under a self-determination contract, self-governance compact, a TTP Agreement, or a grant award with the Department.
 - (ii) Documentation showing the extent to which the Tribe previously received Federal funding and carried out management responsibilities relating to the planning, design, delivery, construction, maintenance, or operation of transportation-related projects, and whether they were completed;
 - (iii) Documentation that the Tribe has established and maintains, as appropriate, a staffed and operational transportation or transit program, department, commission, board, or official of any Tribal government charged by its laws with the responsibility for transportation-related responsibilities, including administration, planning, maintenance, and construction activities. This documentation should identify the Tribal personnel, job descriptions, and expertise necessary to administer or implement PSFAs that the Tribe proposes to assume under the Program. The documentation may also include resolutions, other authorizations, or proposed budgets demonstrating that the Tribe has taken steps to organize a Tribal office or department to address the transportation-related needs of the Tribe and how that entity has or will demonstrate transportation program management capacity; and
 - (iv) Documentation showing the completion of one or more transportation projects or operation of a program that is related to or similar to the PSFA the Tribe requests to include in a funding agreement negotiated between the Department and the Tribe. The Department will consider the number, complexity, and type of projects or programs that the Tribe has carried out and describes as part of this determination. This documentation should address the substantive involvement of the Tribe in operating a transportation program, which may be demonstrated by:
 - (A) Involvement in the development of a completed and approved highway safety plan;

- (B) Involvement in the development of completed and approved plans, specifications, and estimates design package for one or more transportation projects to be carried out with available funding;
 - (C) Involvement in the delivery of a completed and approved transportation construction project using Federal or non-Federal funds;
 - (D) Oversight or operation of a public transit project or public transit system;
 - (E) Oversight or operation of a transportation maintenance system; or
 - (F) Other information that evidences the transportation program management capabilities of the Tribe.
- (2) **Other indicia of program management capability.** In determining transportation program management capability, the Department will consider any other evidence that a Tribe may submit, including the operation by the Tribe of non-transportation programs of similar complexity, size, administrative need, staffing requirement, or budget.
- (d) **Program eligibility determination.** The Department will make its determination of a Tribe's eligibility according to the following time frames:
 - (1) Within 30 days of receipt of a Tribe's submission seeking an eligibility determination under this section to participate in the Program, the Department will notify the Tribe in writing to confirm that it has received the submission and notify the Tribe whether any evidence necessary to make the determination is missing.
 - (3) Within 120 days of receipt of an initial submission, the Department will issue its determination of a Tribe's eligibility to participate in the Program. If the Tribe provides additional evidence to complete the application, the Department will have up to an additional 45 days after such submittal to issue its determination of the Tribe's eligibility to participate in the Program. The determination will constitute final agency action, which the Tribe may appeal in accordance with §§ 29.904 through 29.911.
- (e) **Technical assistance.** A Tribe with one or more uncorrected significant and material audit exceptions may request technical assistance from the Department through the Self-Governance Official. To the extent feasible, the Department will provide technical assistance, such as feedback on management systems and standards or review of internal controls, with the goal of assisting the Tribe to establish eligibility for the Program. Where audit exceptions involve funding administered by another Federal agency, the Tribe will resolve those exceptions with that agency.

NEGOTIATIONS

§ 29.101 How does a Tribe commence negotiations for a compact, funding agreement, or amendment?

After the Department notifies a Tribe in writing that it is eligible to participate in the Program pursuant to § 29.100, the Tribe must submit a written request to the Self-Governance Official to begin negotiating a compact and funding agreement. A Tribe participating in the Program may submit a written request to the Self-Governance Official at any time to begin negotiating an amendment. A Tribe may send the request to ttsgp@dot.gov or use any other method that provides receipt.

§ 29.102 What information should a Tribe provide to the Department when it expresses its interest in negotiating a compact, funding agreement, or amendment?

After the Department notifies a Tribe in writing that it is eligible to participate in the Program pursuant to § 29.100, the Tribe may express its interest in negotiating a compact, funding agreement, or amendment by written request. Such request need only request that the Department enter into negotiations for a compact, funding agreement, or amendment. To the degree the Tribe has the following information available to it, the request may include, as appropriate:

- (a) Whether the Tribe wants to negotiate a compact, funding agreement, or amendment;
- (b) The funding programs that the Tribe wants to include in the funding agreement or amendment;
- (c) The terms the Tribe wants to include in the compact, funding agreement, or amendment;
- (d) Any information or technical assistance the Tribe needs from the Department to assist in pursuing the negotiation process; and
- (e) The Tribal official with authority to negotiate on behalf of the Tribe, the designated Tribal contact, relevant contact information, and, if applicable, the name and contact information of an attorney authorized to represent the interests of the Tribe in the negotiation.

§ 29.103 How will the Department respond to a Tribe's written request?

Within 15 days of receipt of a Tribe's written request, the Department will notify the Tribe in writing of the identity of the designated representative(s) of the Department who will conduct the negotiation and, to the extent feasible, will provide to the Tribe the information requested by the Tribe consistent with § 29.102(d).

§ 29.104 Must the Department and a Tribe follow a specific process when negotiating compacts, funding agreements, and amendments?

The Department and a Tribe do not have to follow a specific process when negotiating compacts, funding agreements, and amendments. The Department and the Tribe should cooperate to develop a plan to address each issue subject to negotiation and provide the representatives an opportunity to address the Tribal proposals, legal or program issues of concern, the time needed to complete the negotiations, and the development of a term sheet.

§ 29.105 Will negotiations commence or conclude within a specified time period?

Unless the Department and the Tribe agree otherwise, negotiations will commence within 60 days of the Department's receipt of the Tribe's written request to negotiate a compact, funding agreement, or amendment. The Department and the Tribe should make every effort to conclude negotiations within 90 days from the date on which negotiations commence, unless they agree to extend the time period for negotiations. Negotiations may proceed by electronic mail, teleconferences, or in-person meetings.

§ 29.106 What are best practices to pursue negotiations?

- (a) The Department and the Tribe should collaborate and provide a clear explanation of their positions and interests. Each party should provide timely and specific responses to proposals presented during negotiations in order to conclude negotiations as soon as possible within the period provided in § 29.105.

- (b) In negotiating the applicable construction, design, monitoring, or health and safety requirements that apply to the PSFAs the Tribe carries out using funds included in a funding agreement, along with the other terms set forth in § 29.307, the Department and the Tribe should cooperate and the Department will prioritize the reduction of administrative requirements on the Tribe when negotiating the terms of the compact, funding agreement, or amendment to effectuate Tribal self-governance.
- (c) The Department and the Tribe should conduct the negotiations in order to reach agreement on as many items as possible, and to refine unresolved issues in order to avoid disputed terms. The negotiations should conclude with mutually agreed upon terms and conditions. If any unresolved issues remain, the Tribe may submit a final offer to the Department under subpart C of this part.

§ 29.107 What recourse does the Department or the Tribe have if the negotiations reach an impasse?

The Department and the Tribe should resolve disagreements informally and by mutual agreement whenever possible. If the Department and the Tribe are unable to reach agreement by the agreed upon date for completing negotiations, the Tribe may request to participate in an alternative dispute resolution process pursuant to § 29.901, or it may submit a final offer to the Self-Governance Official in accordance with subpart C of this part.

§ 29.108 May the Department and the Tribe continue to negotiate after the Tribe submits a final offer?

The Department and the Tribe may continue negotiations after the Tribe submits a final offer by mutual agreement, and may execute the remaining terms of the compact, funding agreement, or amendment not subject to the final offer, consistent with § 29.213.

§ 29.109 Who is responsible for drafting the compact or funding agreement?

It is the mutual obligation of the Department and the Tribe to draft the compact, funding agreement, or amendment. Either the Department or the Tribe may prepare the initial draft for the other party's review.

Subpart C—Final Offer Process

§ 29.200 What is covered by this subpart?

This subpart explains the final offer process for resolving, within a specific time frame, disputes that may develop in negotiation of a compact, funding agreement, or amendment.

§ 29.201 In what circumstances should a Tribe submit a final offer?

If the Department and a Tribe are unable to agree, in whole or in part, on the terms of a compact, funding agreement, or amendment, the Tribe may submit a final offer to the Department.

§ 29.202 How does a Tribe submit a final offer?

- (a) A Tribe must submit a written final offer to the Self-Governance Official to ttsgp@dot.gov or send the final offer using any other method that provides receipt to: Self-Governance Official, U.S. Department of Transportation, Office of the Secretary, Office of the Assistant Secretary for Governmental Affairs (I-10), 1200 New Jersey Avenue SE, Washington, DC 20590.

- (b) The final offer should be a separate document from the compact, funding agreement, or amendment and clearly identified as a "Final Offer—Response due within 45 days of receipt."

§ 29.203 What must a final offer contain?

A final offer must contain a description of the disagreement between the Department and the Tribe, the Tribe's final proposal to resolve the disagreement, including any draft proposed terms to be included in a compact, funding agreement, or amendment, and the name and contact information for the person authorized to act on behalf of the Tribe. If the final offer is insufficient for the Department to make a decision, the Department will notify the Tribe and request additional information. A request for more information has no effect on deadlines for response.

§ 29.204 How many days does the Department have to respond to a final offer?

The Department has 45 days to respond to the final offer. The 45-day review period begins on the date the Self-Governance Official receives the final offer.

§ 29.205 How does the Department acknowledge receipt of a final offer?

Within 10 days of the Self-Governance Official receiving the final offer, the Department will send the Tribe an acknowledgement of the final offer, together with documentation that indicates the date on which the Self-Governance Official received the final offer. The Department's failure to send the acknowledgement does not constitute approval of the final offer.

§ 29.206 May the Department request and obtain an extension of time of the 45-day review period?

The Department may request an extension of time before the expiration of the 45-day review period. The Tribe may either grant or deny the Department's request for an extension. Any grant of extension of time must be in writing and signed by a person authorized by the Tribe to grant the extension before the expiration of the 45-day review period.

§ 29.207 What happens if the Department takes no action within the 45-day review period (or any extensions thereof)?

The final offer is accepted by operation of law if the Department takes no action within the 45-day review period (or any extensions thereof).

§ 29.208 What happens once the Department accepts the Tribe's final offer or the final offer is accepted by operation of law?

Once the Department accepts the Tribe's final offer or the final offer is accepted by operation of law, the Department must add the terms of the Tribe's accepted final offer to the compact, funding agreement, or amendment, and transfer funds consistent with §§ 29.403 through 29.405.

REJECTION OF FINAL OFFERS

§ 29.209 On what basis may the Department reject a Tribe's final offer?

The Department may reject a Tribe's final offer for any of the following reasons:

- (a) The amount of funds proposed in the final offer exceeds the applicable funding level to which the Tribe is entitled;
- (b) The subject of the final offer is an inherent Federal function that cannot legally be delegated to the Tribe;
- (c) Carrying out the PSFA would result in significant danger or risk to public health or safety; or
- (d) The Tribe is not eligible to participate in self-governance under section 23 U.S.C. 207(b).

§ 29.210 How does the Department reject a final offer?

The Department must reject a final offer by providing written notice to the Tribe based on the criteria in § 29.209 no more than 45 days after receipt of a final offer by the Self-Governance Official, or within a longer time period as agreed to by the Department and the Tribe consistent with this subpart. The notice must explain the basis for the rejection of the final offer.

§ 29.211 Is technical assistance available to a Tribe to overcome rejection of a final offer?

The Department must provide technical assistance to overcome the objections stated in the Department's rejection of a final offer.

§ 29.212 May a Tribe appeal the rejection of a final offer?

A Tribe may appeal the rejection of a final offer in accordance with §§ 29.904 through 29.911.

§ 29.213 If a Tribe appeals a final offer, do the remaining provisions of the compact, funding agreement, or amendment not in dispute go into effect?

If a Tribe appeals the rejection of a final offer, the Department and the Tribe may execute and make effective any non-disputed, severable provisions of the compact, funding agreement, or amendment that are not already executed and are not subject to appeal.

Subpart D—Contents of Compacts and Funding Agreements

COMPACTS

§ 29.300 What is included in a compact?

A compact only includes the general terms that govern a Tribe's participation in the Program and such other terms as the Department and the Tribe mutually agree that will continue to apply from year to year, and affirms the government-to-government relationship between the Department and the Tribe. Such terms include the authority, purpose, and obligations of the Department and the Tribe. The written compact memorializes matters on which the Department and the Tribe agree. The compact will not include language not agreed to by the Department and the Tribe.

§ 29.301 Is a compact required to participate in the Program?

A Tribe must have a compact in place to participate in the Program. A compact must be in effect between the Department and the Tribe before the Tribe may enter into a funding agreement with the Department. The Tribe may negotiate a compact at the same time it is negotiating a funding agreement, so long as the compact is executed prior to or concurrent with the funding agreement.

§ 29.302 What is the duration of a compact?

A compact remains in effect until it is terminated by mutual written agreement, retrocession, or reassumption under this part.

§ 29.303 May more than one Tribe enter into a single compact and funding agreement?

A consortium of two or more Tribes may participate in the Program by entering into a single compact and funding agreement on the same basis as an individual Tribe. A consortium may comprise a combination of one or more Tribes that may or may not be independently eligible under § 29.100, so long as the consortium is eligible.

§ 29.304 May a compact be amended?

A compact may be amended at any time by the mutual written agreement of the Department and the Tribe.

FUNDING AGREEMENTS

§ 29.305 When can a Tribe initiate negotiation of a funding agreement?

Concurrent with or after a Tribe has entered into a compact with the Department, the Department and the Tribe will negotiate a funding agreement, consistent with §§ 29.101 through 29.109. The funding agreement is the legally binding written agreement that identifies the funds the Tribe will use to carry out its PSFAs, and sets forth the terms and conditions under which the Tribe will receive the funds.

§ 29.306 What is the duration of a funding agreement?

- (a) The duration of a funding agreement is one year unless the Department and a Tribe negotiate a multi-year funding agreement or, for an initial funding agreement, a partial-year agreement.
- (b) Each funding agreement will remain in full force and effect until the Department and the Tribe execute a subsequent funding agreement, except when:
 - (1) The Tribe provides notice to the Department that it is withdrawing or retroceding funds for the operation of one or more PSFAs (or portions thereof) identified in the funding agreement;
 - (2) The Department terminates the funding agreement under 23 U.S.C. 207(f)(2); or
 - (3) The Department and the Tribe agree otherwise.

§ 29.307 What terms must a funding agreement include?

A funding agreement must set forth the following:

- (a) The funds the Department will provide, including those funds provided on a recurring basis;
- (b) The PSFAs the Tribe intends to carry out using the funds;
- (c) The general budget category assigned to the funds;
- (d) The time and method of transfer of funds;
- (e) The responsibilities of the Department and the Tribe;
- (f) Any applicable statutory limitations on the use of funds;

- (g) Any statutory or negotiated reporting requirements;
- (h) Any applicable Federal or federally approved design, construction, and monitoring standards, or the Tribe's design, construction, and monitoring standards, if they are consistent with or exceed the Federal or federally approved standards;
- (i) Other Federal health and safety requirements that apply to the funds included in the funding agreement, or the Tribe provides adequate assurance that its relevant health and safety requirements are consistent with or exceed such requirements;
- (j) If the funding agreement includes TTP funds under 23 U.S.C. 202 and § 29.400(a), provisions related to planning, inventory, and allowable use of funds in 25 CFR part 170 necessary for administration of the TTP, consistent with the Program's goal to reduce administrative burdens on the Tribe, or Tribal provisions that meet or exceed those standards;
- (k) Any other provision agreed to by the Department and the Tribe, such as program oversight, accountability, annual reporting on expenditure of Federal funds, and technical assistance; and
- (l) Provisions authorizing the Department to terminate the funding agreement (in whole or in part) and reassume the remaining funding for transfer, as appropriate.

§ 29.308 May the funding agreement include additional terms from title I of the Indian Self-Determination and Education Assistance Act?

At a Tribe's request, the Department and the Tribe may incorporate into a compact or funding agreement any other provision of title I of the Indian Self-Determination and Education Assistance Act, unless the Department determines there is a conflict between the provision and 23 U.S.C. 207. The Department will make the determination consistent with 23 U.S.C. 207(j).

§ 29.309 Will a funding agreement include provisions pertaining to flexible or innovative financing?

If the Department and a Tribe agree, a funding agreement will include provisions pertaining to flexible financing and innovative financing. In that event, the Department and the Tribe will establish terms and conditions relating to the flexible and innovative financing provisions that are consistent with 23 U.S.C. 207(d)(2)(C).

§ 29.310 How is a funding agreement amended?

A funding agreement may be amended by the mutual written agreement of the Department and the Tribe as provided for in the funding agreement. The Department will not revise, amend, or require additional terms in a new or subsequent funding agreement without the consent of the Tribe, unless such terms are required by Federal law.

§ 29.311 Is a subsequent funding agreement retroactive to the end of the term of the preceding funding agreement?

When the Department and a Tribe execute a subsequent funding agreement, the provisions of such a funding agreement are retroactive to the end of the term of the preceding funding agreement.

Subpart E—Rules and Procedures for Transfer and Use of Funds

§ 29.400 What funds may a Tribe elect to include in a funding agreement?

A Tribe may elect to include in a funding agreement the following funds:

- (a) Funds provided to the Tribe under the Tribal Transportation Program identified in 23 U.S.C. 202 in accordance with the statutory formula set forth in 23 U.S.C. 202(b);
- (b) Any transit funds provided to the Tribe under 49 U.S.C. 5311;
- (c) Funds for any discretionary or competitive grant administered by the Department awarded to the Tribe for a transportation program under title 23 of the U.S. Code or chapter 53 of title 49 of the U.S. Code;
- (d) Funds for any other discretionary or competitive grant for a transportation-related purpose administered by the Department otherwise available to the Tribe;
- (e) Federal-aid funds apportioned to a State under chapter 1 of title 23 of the U.S. Code if the State elects to transfer, pursuant to 23 U.S.C. 207(d)(2)(A)(ii) or 23 U.S.C. 202(a)(9), a portion of such funds to the Tribe for an eligible project; and
- (f) Formula funds awarded to a State under 49 U.S.C. 5311 that the State elects to award to the Tribe, where the Tribe and State agree that the Department will award the funds directly to the Tribe.

§ 29.401 What funds must the Department transfer to a Tribe in a funding agreement?

- (a) Subject to the terms of a funding agreement, the Department must transfer to a Tribe all the funds provided for in the funding agreement.
- (b) The Department must provide funds for periods covered by a joint resolution adopted by Congress making continuing appropriations and authorization extensions, to the extent permitted by such resolutions. The Department will defer payment of funds to the Tribe if the period of continuing appropriations is less than 35 days.
- (c) To the extent a Tribe elects to include the following funds in its funding agreement, the Department will include the amount equal to:
 - (1) The amount awarded to the Tribe for any discretionary or competitive grant;
 - (2) The amount transferred to the Tribe by a State;
 - (3) The sum of the funds that the Tribe would otherwise receive in accordance with a funding formula or other allocation method set forth in title 23 of the U.S. Code or chapter 53 of title 49 of the U.S. Code; and
 - (4) Such additional amounts as the Department determines equal the amounts that would have been withheld, if any, for the costs of the Bureau of Indian Affairs to administer the program or project on behalf of the Tribe.

§ 29.402 Is the Tribe responsible for the funds included in a funding agreement?

The Tribe is responsible for implementing the Tribe's PSFAs using the funds included in a funding agreement and for administering the funds in accordance with this part. In addition, the Tribe must carry out its PSFAs in accordance with the funding agreement, and all applicable statutes and regulations identified in the funding agreement.

§ 29.403 When must the Department transfer to a Tribe the funds identified in a funding agreement?

When a funding agreement requires an annual transfer of funds to be made by the Department at the beginning of a fiscal year, or requires semiannual or other periodic transfers of funds to be made to a Tribe, the Department will make the first transfer no later than 10 days after the apportionment of such funds by the Office of Management and Budget to the Department, unless the funding agreement provides otherwise. Consistent with the Prompt Payment Act, the Department is not responsible for any interest penalty if the Department makes the transfer within 30 days.

§ 29.404 When must the Department transfer funds that were not paid as part of the initial lump sum payment (or initial periodic payment)?

The Department must transfer any funds that were not paid in the initial lump sum payment (or initial periodic payment) within 10 days after the apportionment of such funds by the Office of Management and Budget to the Department, unless the funding agreement provides otherwise. Consistent with the Prompt Payment Act, the Department is not responsible for any interest penalty if the Department makes the transfer within 30 days.

§ 29.405 When must the Department transfer funds for a discretionary or competitive grant?

If the Department selects a Tribe for a discretionary or competitive grant, and the Tribe elects to include the grant funds in its funding agreement, the Department will transfer the funds to the Tribe in accordance with the terms of the Notice of Funding Opportunity or as the Department and the Tribe may otherwise agree. The Department will transfer these funds no later than 10 days after the Department and the Tribe execute a funding agreement or an amendment covering the grant, unless the funding agreement provides otherwise. Consistent with the Prompt Payment Act, the Department is not responsible for any interest penalty if the Department makes the transfer within 30 days.

§ 29.406 Does the award of funds for a discretionary or competitive grant entitle a Tribe to receive the same amount in subsequent years?

The award of funds for a discretionary or competitive grant does not entitle a Tribe to receive the same amount of funds in subsequent years.

§ 29.407 Does the award of funds for discretionary or competitive grants entitle the Tribe to receive contract support costs?

Receipt of discretionary or competitive grant awards does not entitle the Tribe to receive contract support costs or any other amounts identified in 25 U.S.C. 5325. However, a Tribe may use grant awards to cover overhead and administrative expenses associated with operation of the grant, as provided in the grant award.

§ 29.408 How may a Tribe use interest earned on funds included in a funding agreement?

A Tribe may retain interest earned on funds included in a funding agreement to carry out transportation or governmental functions.

§ 29.409 May a Tribe carry over from one fiscal year to the next any funds that remain at the end of the funding agreement?

A Tribe may carry over from one fiscal year to the next any funds that remain at the end of the funding agreement, consistent with the following:

- (a) The period of availability for formula funds included in a funding agreement does not lapse. After transfer to the Tribe, such funds will remain available until expended. If a Tribe elects to carry over funds from one fiscal year to the next, such carryover funds will not diminish the amount of formula funds the Tribe is authorized to receive under its funding agreement in that or any subsequent fiscal year.
- (b) The period of availability for discretionary or competitive grants are specific to the funding source and will be set forth in the funding agreement.

§ 29.410 May a Tribe use remaining funds from a discretionary or competitive grant included in a funding agreement?

A Tribe may use remaining funds from a discretionary or competitive grant included in a funding agreement, but only with written approval from the Department. The Department must determine that the use of such funds is consistent with the statutory requirements of the grant program, including purpose and time, and is for the project for which the grant was provided.

§ 29.411 Are funds included in a compact and funding agreement non-Federal funds for purposes of meeting matching or cost participation requirements under any other Federal or non-Federal program?

Notwithstanding any other provision of law, pursuant to 25 U.S.C. 5325(j), funds included in a compact and funding agreement are considered non-Federal funds for purposes of meeting matching or cost participation requirements under any other Federal or non-Federal program.

§ 29.412 May the Department increase the funds included in the funding agreement if necessary to carry out the Program?

The Department may increase the funds included in the funding agreement if necessary to carry out the Program. However, the Department and the Tribe must agree to any transfer of funds to the Tribe unless otherwise provided for in the funding agreement.

§ 29.413 How will the Department assist a Tribe with its credit requests?

At the request of a Tribe that has applied for a loan or other credit assistance from a State infrastructure bank or other financial institution to complete an eligible transportation-related project with funds included in a funding agreement, the Department will provide documentation in its possession or control to assist the Tribe.

§ 29.414 What limitations apply to Department actions related to transfer of funds associated with PSFAs?

The Department will not:

- (a) Fail or refuse to transfer to a Tribe its full share of funds due under the Program, except as required by Federal law;
- (b) Withhold portions of such funds for transfer over a period of years;
- (c) Reduce the amount of funds identified for transfer in a funding agreement to make funding available for self-governance monitoring or administration by the Department;
- (d) Reduce the amount of funds included in a funding agreement in subsequent years, except pursuant to:
 - (1) A reduction in appropriations from the previous fiscal year or a change in the funding formula;
 - (2) A congressional directive in legislation or accompanying report;
 - (3) A Tribal authorization;
 - (4) A change in the amount of pass-through funds;
 - (5) Completion of a project, activity, or program for which discretionary or competitive grant funds were provided;
 - (6) Expenditure of all discretionary or competitive grant funds authorized by the Department under separate statutory authorities for an eligible project, activity, or program; or
 - (7) A final decision by the Department pursuant to subpart I to terminate a compact or funding agreement (or portions thereof) due to a finding of gross mismanagement or imminent jeopardy.
- (e) Reduce the amount of funds identified in a funding agreement to pay for Federal functions, including Federal pay costs, Federal employee retirement benefits, automated data processing, technical assistance, and monitoring of activities under the Program, except that such prohibition is inapplicable when Congress authorizes the Department to set aside a portion of the funds for Department project monitoring and oversight related functions; or
- (f) Reduce the amount of funds required under the Program to pay for costs of Federal personnel displaced by compacts and funding agreements.

§ 29.415 Does the Prompt Payment Act apply to funds included in a funding agreement?

The Prompt Payment Act, 31 U.S.C. 3901 *et seq.*, applies to the transfer of funds under the Program.

§ 29.416 What standard applies to a Tribe's management of funds included in a funding agreement?

- (a) A Tribe must invest and manage funds included in a funding agreement as a prudent investor would, in light of the purpose, terms, distribution requirements, and applicable provisions, in the compact and funding agreement. This duty requires the exercise of reasonable care, skill, and caution, and is to be applied to investments not in isolation, but in the context of the investment portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suited to the Tribe. In making and implementing investment decisions, the Tribe has a duty to diversify the investments unless, under the circumstances, it is prudent not to do so.
- (b) A Tribe must:
 - (1) Conform to fundamental fiduciary duties of loyalty and impartiality;

- (2) Act with prudence in deciding whether and how to delegate authority and in the selection and supervision of agents; and
- (3) Incur only costs that are reasonable in amount and appropriate to the investment responsibilities of the Tribe.

§ 29.417 Must a Tribe continue performance of the Tribal Transportation Program or the Tribal Transit Program under a compact and funding agreement if the Department does not transfer sufficient funds?

A Tribe does not have to continue performance of the Tribal Transportation Program (23 U.S.C. 202(b)) or the Tribal Transit Program (49 U.S.C. 5311(c)(1)) that requires an expenditure of funds in excess of the amount of funds included in a funding agreement. If at any time the Tribe has reason to believe that the total amount included in a funding agreement is insufficient, the Tribe must provide reasonable notice of such insufficiency to the Self-Governance Official. If the Department does not increase the amount of funds included in the funding agreement for the Tribal Transportation Program or Tribal Transit Program, the Tribe may suspend performance of the program activity until such time as the Department transfers additional funds.

§ 29.418 May a funding agreement include transfers of State funds?

- (a) A State may elect to provide a portion of Federal-aid funds apportioned to the State under chapter 1 of title 23 of the U.S. Code to an eligible Tribe for a project eligible under 23 U.S.C. 202(a).
- (b) If a State provides such funds, the transfer may occur in accordance with 23 U.S.C. 202(a)(9), 23 U.S.C. 207(d)(2)(A)(ii), or the State may transfer the funds to the Department, and the Department will transfer the funds to the participating Tribe through the Tribe's funding agreement.
- (c) If a State provides such funds, the Tribe (and not the State) will be responsible for:
 - (1) Constructing and maintaining any projects carried out using the funds;
 - (2) Administering and supervising the projects and funds in accordance with 23 U.S.C. 207;
 - (3) Complying with applicable post-construction requirements.
- (d) The receipt of any State funds transferred at the election of a State to the Tribe pursuant to 23 U.S.C. 202(a)(9), 23 U.S.C. 207(d)(2)(A)(ii), or funds awarded to a State pursuant to 49 U.S.C. 5311 that are transferred at the election of a State to the Federal Transit Administration for the benefit of a Tribe does not entitle the Tribe to receive contract support costs under 25 U.S.C. 5325(a). While a Tribe is not entitled to additional funds for contract support costs, a Tribe may use a portion of such State funds for overhead and administrative expenses if such costs are reasonable, allowable, and allocable in accordance with 2 CFR part 200 and the statutory and regulatory requirements applicable to the funding source.

§ 29.419 Does the award of formula funds entitle a Tribe to receipt of contract support costs?

The award of formula funds does not entitle a Tribe to receive contract support costs under 25 U.S.C. 5325(a). A funding agreement will not provide additional funds for contract support costs to carry out PSFAs. While a Tribe is not entitled to additional funds for contract support costs, a Tribe may use a portion of its formula funds (§ 29.400(a) and (b)) for overhead and administrative expenses if such costs are reasonable, allowable, and allocable in accordance with 2 CFR part 200 and the statutory and regulatory requirements applicable to the funding source.

§ 29.420 Is a Tribe entitled to enter into facility leases from the Department and to receive facility support costs?

A Tribe is not entitled to enter into facility leases with the Department and receive facility support costs. A funding agreement will not provide additional funds for facility leases and facility support costs to carry out PSFAs. However, facility leases and facility support costs may be an eligible and allowable use of funds a Tribe receives under a funding agreement.

§ 29.421 May a Tribe redesign, consolidate, reallocate, or redirect the funds included in a funding agreement?

- (a) A Tribe may redesign, consolidate, reallocate, or redirect funds included in a funding agreement in any manner it considers to be in the best interest of the Indian community being served, provided that:
 - (1) The funds are expended on projects identified in a transportation improvement program approved by the Department, where statutorily required; and
 - (2) The funds are used in accordance with the requirements in appropriations acts, title 23 of the U.S. Code, chapter 53 of title 49 of the U.S. Code, and any other applicable law.
- (b) Consistent with 23 U.S.C. 207(e)(1)(B), a Tribe may not redesign, consolidate, reallocate, or redirect any discretionary or competitive grant funds or State transfers of funds that are included in the funding agreement. A Tribe may use remaining funds from a discretionary or competitive grant in accordance with § 29.410.

Subpart F—Program Operations

AUDITS AND COST PRINCIPLES

§ 29.500 Must a Tribe undertake an annual audit?

A Tribe that meets the applicable thresholds under 2 CFR 200.501 must undertake an annual audit pursuant to the regulations set forth in 2 CFR part 200, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, except to the extent that part 200 exempts a Tribe from complying with the audit requirements.

§ 29.501 Must a Tribe submit any required audits to the Federal Audit Clearinghouse and the Department?

A Tribe must submit any required audits to the Federal Audit Clearinghouse pursuant to the Office of Management and Budget procedures and provide prompt notice to the Department it has done so.

§ 29.502 Who is responsible for compiling, copying, and paying for materials for any audit or examination?

The agency or entity undertaking the examination or audit will be responsible for all costs associated with an audit or examination of Tribal records. A Tribe is responsible for making records available during regular business hours, and may prevent removal of the records from Tribal offices. If an agency or entity undertaking the examination or audit requests that the Tribe make copies of records for its use, the Tribe must do so, but may charge the examining agency reasonable per-page fees for photocopying or scanning of documents and records.

§ 29.503 How may the Federal Government make a claim against a Tribe relating to any disallowance of costs based on an audit conducted under this part?

- (a) **Disallowance of costs.** Any claim by the Federal Government against a Tribe relating to funds included in a funding agreement based on any audit conducted pursuant to this part is subject to 25 U.S.C. 5325(f).
 - (1) Any right of action or other remedy (other than those relating to a criminal offense) relating to any disallowance of costs is barred unless the Department provides notice of such a disallowance within 365 days from receiving any required annual audit report. The notice must set forth the Tribe's appeal and hearing rights in accordance with §§ 29.912 through 29.923.
 - (2) To calculate the 365-day period, an audit report is deemed received by the Department on the date of electronic submission to the Federal Audit Clearinghouse. The Department has 60 days after receiving the audit report to give notice to the Tribe of its determination to reject an audit report as insufficient due to non-compliance with the applicable provisions of 2 CFR part 200 or any applicable statute.
- (b) **Criminal penalties.** Any person, officer, director, agent, employee, or person otherwise connected with a recipient of a contract, subcontract, grant, or sub-grant under a compact or funding agreement who embezzles, willfully misapplies, steals, or obtains by fraud any of the money, funds, assets, or property provided to the recipient will be fined not more than \$10,000 or imprisoned for not more than 2 years, or both. If the amount of funds in question does not exceed \$100, then the fine will be no more than \$1,000 and imprisonment not more than 1 year, or both.

§ 29.504 What cost principles must a Tribe apply in compacts and funding agreements?

- (a) A Tribe must apply the applicable cost principles of the Office of Management and Budget's Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 2 CFR part 200, except as modified by:
 - (1) 25 U.S.C. 5325(k), which sets forth certain categories of allowable uses of funds that a Tribe may include in a funding agreement provided that such use supports implementation of a PSFA;
 - (2) Other provisions of Federal law; or
 - (3) Any subsequent exemptions granted by the Office of Management and Budget.
- (b) The Department may not require a Tribe to apply other audit or accounting standards.

STANDARDS FOR TRIBAL MANAGEMENT SYSTEMS

§ 29.505 What are the financial management systems that a Tribe carrying out a compact and funding agreement must develop, implement, and maintain to ensure the proper expenditure and accounting of Federal funds?

- (a) **Generally.** To ensure the proper expenditure and accounting of Federal funds, a Tribe carrying out a compact and funding agreement must develop, implement, and maintain financial management systems that meet the financial standards and minimum requirements set forth in §§ 29.506 and 29.507, unless the Department waives, in whole or in part, one or more of the standards.

- (b) **Applicability to Tribal contractors.** A Tribe may require that its contractors comply with some or all of the standards and requirements in §§ 29.506 and 29.507 when the Tribe retains contractors to assist in carrying out the requirements of a funding agreement.
- (c) **Evaluation.** When required under 2 CFR part 200, an independent auditor retained by a Tribe must evaluate the financial management systems of the Tribe through an annual audit report in accordance with the Single Agency Audit Act, 31 U.S.C. 7501-7506.

§ 29.506 What standards apply to a Tribe's financial management systems when carrying out a compact and funding agreement?

The following standards apply to a Tribe's financial management systems when carrying out a compact and funding agreement:

- (a) The system must expend and account for funds included in a funding agreement in accordance with:
 - (1) The compact and funding agreement;
 - (2) All statutory requirements applicable to the funding source; and
 - (3) Applicable provisions of 2 CFR part 200.
- (b) The fiscal control and accounting procedures of a Tribe's financial management system must be sufficient to:
 - (1) Permit the preparation of reports required by applicable Federal law, the compact, funding agreement, and this part; and
 - (2) Permit the tracing of program or project funds to a level of expenditure adequate to establish that the funds have not been used in violation of any restrictions or prohibitions contained in any statute or provision of 2 CFR part 200 that applies to the funds included in the compact and funding agreement.

§ 29.507 What minimum requirements must a Tribe's financial management system include to meet the standards set forth in § 29.506?

To meet the standards set forth in § 29.506, a Tribe's financial management system must include the following minimum requirements:

- (a) **Financial reports.** The financial management system must provide for accurate, current, and complete disclosure of the financial results of activities carried out by a Tribe under a compact and funding agreement;
- (b) **Accounting records.** The financial management system must maintain records sufficiently detailed to identify the source and application of funds transferred to a Tribe in a funding agreement. The system must contain sufficient information to identify awards, obligations and unobligated balances, assets, liabilities, outlays, or expenditures and income;
- (c) **Internal controls.** The financial management system must maintain effective control and accountability for all funds included in a funding agreement and for all Federal real property, personal property, and other assets furnished for use by a Tribe under its compact and funding agreement;
- (d) **Budget controls.** The financial management system must permit the comparison of actual expenditures or outlays with the amounts budgeted by a Tribe for each funding agreement;

- (e) **Allowable costs.** The financial management system must be sufficient to determine that the expenditure of funds is reasonable, allowable, and allocable based upon the terms of the compact and funding agreement and applicable provisions of 2 CFR part 200;
- (f) **Source documentation.** The financial management system must contain accounting records that are supported by source documentation, such as canceled checks, paid bills, payroll records, time and attendance records, contract award documents, purchase orders, and other primary records that support expenditures; and
- (g) **Cash management.** The financial management system must provide for accurate, current, and complete disclosure of cash revenues disbursements, cash-on-hand balances, and obligations by source and application for a Tribe so that complete and accurate cash transactions may be prepared by the Tribe.

§ 29.508 What procurement standards apply to contracts carried out using funds included in a funding agreement?

- (a) Each contract carried out using funds included in a funding agreement must, at a minimum:
 - (1) Be in writing;
 - (2) Identify the interested parties, their respective roles and responsibilities, and the purposes of the contract;
 - (3) State the work to be performed under the contract;
 - (4) State the process for making any claim, the payments to be made, and the terms of the contract; and
 - (5) State that it is subject to 25 U.S.C. 5307(b) consistent with § 29.524.
- (b) A Tribe that chooses to use a procurement method that is not provided for in its established procurement management standards in the delivery of a Tribal transportation project must submit the request to deviate from these standards to the Department for review and approval in accordance with § 29.515. The deviation request must specify the procurement method that the Tribe proposes to use and the project to which such method will be applied.

§ 29.509 What property management systems and standards must a Tribe maintain?

- (a) **Property management system.** A Tribe must maintain a property management system to account for all property acquired with funds included in a funding agreement, acquired with Federal funds awarded by the Department or the Department of the Interior, or obtained as excess or surplus Federal property to be used for activities under the Program. The property management system must address the use, care, maintenance, and disposition of such property as follows:
 - (1) Where title vests in the Tribe, in accordance with Tribal law and procedures; or
 - (2) In the case of a consortium, according to the internal property procedures of the consortium.
- (b) **Transit asset management.** In addition to the property management system and standards in this section, property acquired with transit funds (chapter 53 of title 49 of the U.S. Code) is subject to the property management requirements set forth in 49 U.S.C. 5326 concerning the transit asset management plan, performance targets, and reports.
- (c) **Tracking requirements under a property management system.** The property management system of a Tribe relating to property used under the Program must track:

- (1) Personal property and rolling stock with an acquisition value in excess of \$5,000 per item;
 - (2) Sensitive personal property, which is all personal property that is subject to theft and pilferage, as defined by the Tribe; and
 - (3) Real property.
- (d) **Records.** The property management system must maintain records that accurately describe the property, including any serial number, vehicle identification number, or other identification number. These records should contain current information such as the source, titleholder, acquisition date, acquisition cost, share of Federal participation in the cost, location, use and current condition of the property, and the date of disposal and sale price, if any.
- (e) **Internal controls.** The property management system must maintain effective internal controls that include, at a minimum, procedures for a Tribe to:
- (1) Conduct periodic, physical inventories at least once every 2 years and reconcile such inventories with the Tribal internal property and accounting records;
 - (2) Prevent loss or damage to property; and
 - (3) Ensure that property is used by the Tribe to carry out activities under a funding agreement until the Tribe declares the property excess to the needs of the PSFAs carried out by the Tribe under the funding agreement, consistent with the property management system of the Tribe.
- (f) **Maintenance requirements.** Required maintenance includes the performance of actions necessary to keep the property in good working condition, the procedures recommended by equipment manufacturers, and steps necessary to protect the interests of the Department and the Tribe in any express warranties or guarantees covering the property.
- (g) **Disposition of personal property acquired under a funding agreement.** Prior to disposition of any personal property acquired under a funding agreement, including rolling stock, a Tribe must report to the Self-Governance Official in writing on the property's status (e.g., worn out, lost, stolen, damaged beyond repair, or no longer needed to carry out activities under a funding agreement). The Department will provide disposition instructions in accordance with 2 CFR 200.313. A Tribe may retain, sell, or otherwise dispose of personal property with a current per unit fair market value of \$5,000 or less with no further obligation to the Department.
- (h) **Disposition of real property acquired under a funding agreement.** Prior to disposition of any real property acquired under a funding agreement, a Tribe must report to the Self-Governance Official, who will ensure the Department provides disposition instructions in accordance with 2 CFR 200.311.

RECORDS

§ 29.510 Must a Tribe maintain a recordkeeping system?

A Tribe must maintain records and provide Federal agency access to those records as provided in 25 U.S.C. 5386(d) and the statutory requirements of the funds included in a funding agreement.

§ 29.511 Are Tribal records subject to the Freedom of Information Act and Federal Privacy Act?

- (a) Except to the extent that a Tribe specifies otherwise in its compact or funding agreement, the records of the Tribe retained by the Tribe will not be considered Federal records for purposes of chapter 5 of title 5 of the U.S. Code.
- (b) Tribal records submitted to the Department are considered Federal records for the purposes of the Freedom of Information Act (FOIA) and Federal Privacy Act. If a Tribe provides information to the Department that the Tribe considers to be trade secret, or confidential commercial or financial information, the Tribe must identify it as such. The Department will not disclose the information to the public, except to the extent required by law. In the event the Department receives a FOIA request for such information, the Department will follow the procedures described in its FOIA regulations at 49 CFR part 7.

§ 29.512 Must a Tribe make its records available to the Department?

After 30 days advance written notice from the Department, a Tribe must provide the Department with reasonable access to such records to enable the Department to meet its minimum legal recordkeeping system and audit requirements.

§ 29.513 How long must a Tribe keep and make available records?

A Tribe must keep books, documents, papers, and records of funding, grants, and State-provided funds for 3 years from the date of submission of the Single Audit Act audit report and provide the Department or the Comptroller General access to such records for audit and examination related to compacts, funding agreements, grants, contracts, subcontracts, sub-grants, or other arrangements under the Program.

PROCUREMENT

§ 29.514 When procuring property or services with funds included in a funding agreement, can a Tribe follow its own procurement standards?

When procuring property or services with funds included in a funding agreement, a Tribe must have standards that conform to the procurement standards in this subpart. If a Tribe relies upon procurement standards different than those described in § 29.515, it must identify the standards it will use in the initial negotiation of a funding agreement or as a waiver request to an existing funding agreement. The Tribe must submit the request to the Department in accordance with § 29.534.

§ 29.515 What are the minimum procurement standards that a Tribe must follow when procuring property or services with funds included in a funding agreement?

A Tribe must follow the minimum procurement standards set forth in this section when procuring property or services with funds included in a funding agreement.

- (a) *Minimum procurement standards.*
 - (1) A Tribe must ensure that its vendors and contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase agreements or orders.
 - (2) A Tribe must maintain written standards of conduct governing the performance of its employees who award and administer contracts paid for using funds included in a funding agreement.

- (i) An employee, officer, elected official, or agent of a Tribe must not participate in the selection, award, or administration of a procurement supported by Federal funds if a conflict of interest, real or apparent, as defined in the conflict of interest policies of the Tribe, would be involved.
 - (ii) Employees, officers, elected officials, or agents of a Tribe, or of a subcontractor of the Tribe, must not solicit or accept gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to sub-agreements, except that the Tribe may exempt a financial interest that is not substantial or a gift that is an unsolicited item of nominal value.
 - (iii) The standards must also provide for penalties, sanctions, or other disciplinary actions for violations of the procurement standards.
- (3) A Tribe must review proposed procurements to avoid buying unnecessary or duplicative items and ensure the reasonableness of the price. The Tribe should consider consolidating or separating out procurement to obtain more economical purchases. Tribes are encouraged to realize economies of scale in the procurement of goods, services, and supplies under this part, including the negotiation of cooperative agreements with other public authorities. Where appropriate, the Tribe must compare leasing and purchasing alternatives to determine which is more economical.
- (4) A Tribe must conduct all major procurement transactions that exceed the simplified acquisition threshold set forth in 2 CFR 200.88 by providing full and open competition to the extent necessary to assure efficient expenditure of contract funds and to the extent feasible in the local area.
- (i) Consistent with 2 CFR 200.88, a Tribe may develop its own definition for a simplified acquisition threshold.
 - (ii) To the greatest extent feasible, a Tribe must apply to any procurement award the Indian preference requirements for wages and grants contained in 25 U.S.C. 5307(b).
- (5) A Tribe must make procurement awards only to responsible entities with the ability to perform successfully under the terms and conditions of the proposed procurement. In making this judgment, the Tribe will consider such matters as the contractor's integrity, its compliance with public policy, its record of past performance, and its financial and technical resources.
- (6) A Tribe must maintain records on the significant history of all major procurement transactions. These records must include, but are not limited to, the rationale for the method of procurement, the selection of contract type, the contract selection or rejection, and the basis for the contract price.
- (7) A Tribe is solely responsible, using good administrative practice and sound business judgment, for processing and settling all contractual and administrative issues arising out of a procurement. These issues include, but are not limited to, source evaluation, protests, disputes, and claims.
- (i) The settlement of any protest, dispute, or claim will not relieve the Tribe of any obligations under a funding agreement.
 - (ii) Violations of law must be referred to the Tribal or Federal authority having proper jurisdiction.
- (b) **Conflicts of interest.** A Tribe participating in the program must ensure that internal measures and controls are in place to address conflicts of interest in the administration of compacts and funding agreements.

§ 29.516 Do Federal laws and regulations apply to a Tribe's contractors or subcontractors?

A Tribe's contractors or subcontractors are responsible for complying with Federal laws and regulations. Contracts between a Tribe and its contractors should inform contractors that the contract is carried out using funds included in a funding agreement, and that the contractors and its subcontractors are responsible for identifying and ensuring compliance with applicable Federal laws and regulations. The Department and the Tribe may, through negotiation, identify all or a portion of such requirements in the funding agreement and, if so identified, these requirements should be identified in the contracts the Tribe awards using funds included in a funding agreement.

§ 29.517 Can a Tribe use Federal supply sources in the performance of a compact and funding agreement?

A Tribe and its employees may use Federal supply sources (including lodging, airline, interagency motor pool vehicles, and other means of transportation) in the performance of a compact and funding agreement to the same extent as if the Tribe were a Federal agency. The Department will assist the Tribes, to the extent feasible, to resolve any barriers to full implementation.

REPORTING

§ 29.518 What reporting must a Tribe provide?

- (a) A Tribe must provide reports mandated by statute associated with the funds included in the funding agreement. In accordance with § 29.307, the funding agreement will list these reporting requirements. The Tribe will cooperate with the Department to assist the Department in complying with its statutory reporting requirements. No additional reporting will be required of the Tribe.
- (b) Notwithstanding paragraph (a) of this section, if the Tribe includes funds for a discretionary or competitive grant in a funding agreement, the Department and the Tribe will negotiate the appropriate reporting requirements to include in the funding agreement.

PROPERTY

§ 29.519 How may a Tribe use existing Department facilities, equipment, or property?

At the request of a Tribe, the Department will permit the Tribe to use and maintain existing facilities, equipment therein or appertaining thereto, and other personal property, if applicable, owned by the Government within the Department's jurisdiction, subject to terms and conditions agreed to by the Department and the Tribe. The requested facilities, equipment, or property must be used to carry out the Tribe's PSFAs under the compact and funding agreement. Such facilities, equipment, or other personal property will be eligible for replacement, maintenance, and improvement using funds included in a funding agreement, or the Tribe may expend its own funds. The Department does not have any additional funding sources for replacement, maintenance, or improvement of such facilities, equipment, other personal property. The Department will exercise discretion in a way that gives the maximum effect to the request of the Tribe to use such facilities, equipment, or property.

§ 29.520 How may a Tribe acquire surplus or excess Federal property for use under the Program?

A Tribe may acquire any surplus or excess property for use in the performance of the compact and funding agreement consistent with the procedures established by the General Services Administration. The Tribe must notify the Self-Governance Official of the surplus or excess property it proposes to acquire and the purpose for which it will be used in the performance of the compact or funding agreement. If the Department participates in the acquisition by the Tribe of any excess or surplus Federal property, the Department will expeditiously process the request and assist the Tribe in its acquisition to the extent feasible and exercise discretion in a way that gives maximum effect to the Tribe's request for donation of the excess or surplus Federal property. When the Department's participation is required, the Department should expeditiously request acquisition of the property from the General Services Administration or the holding agency, as appropriate, by submitting the necessary documentation prior to the expiration of any "freeze" placed on the property by the Tribe or the Department on the Tribe's behalf. The Tribe must take title to any property acquired pursuant to this section. Such surplus or excess property will be eligible for replacement, maintenance, and improvement using funds included in a funding agreement, or the Tribe may expend its own funds. The Department does not have any additional funding sources for replacement, maintenance, or improvement of such surplus or excess property.

§ 29.521 How must a Tribe use surplus or excess Federal property acquired under the Program?

A Tribe must use any property acquired under this section in a manner consistent with the justification submitted at acquisition. The Tribe should notify the Self-Governance Official whenever use of the property changes significantly and upon disposal or sale.

§ 29.522 If a compact or funding agreement (or portion thereof) is retroceded, reassumed, terminated, or expires, may the Department reacquire title to property purchased with funds under any compact and funding agreement or excess or surplus Federal property that was donated to the Tribe under the Program?

If a compact or funding agreement (or portion thereof) is retroceded, reassumed, terminated, or expires, the Tribe retains title to the property purchased with funds under any compact and funding agreement or excess or surplus Federal property donated under the Program if it is valued at \$5,000 or less. If the value of the property is over \$5,000 at the time of retrocession, withdrawal, or reassumption, title to such property may revert to the Department at the Department's discretion.

TECHNICAL ASSISTANCE

§ 29.523 What technical assistance is available to a Tribe from the Department?

Upon the written request of a Tribe, and to the extent feasible, the Department will provide technical assistance, including periodic program reviews, to assist a Tribe improve its performance in carrying out the Program.

PREVAILING WAGES

§ 29.524 Do the wage and labor standards in the Davis-Bacon Act apply to employees of a Tribe?

Wage and labor standards of the Davis-Bacon Act do not apply to employees of a Tribe. However, Davis-Bacon wage rates apply to all Tribal contractors and subcontractors.

TRIBAL PREFERENCE

§ 29.525 Does Indian preference apply to PSFAs under the Program?

To the greatest extent feasible, any contract, subcontract, grant, or sub-grant under a compact and funding agreement must give preference for employment and training, and the award of subcontracts and sub-grants, to Indians, Indian organizations, and Indian-owned economic enterprises, as defined in 25 U.S.C. 1452.

§ 29.526 When do Tribal employment law and contract preference laws govern?

To the extent provided in applicable Federal law, Tribal law governs Indian preference policies in the performance of a compact and funding agreement. When a compact or funding agreement is intended to benefit one Tribe, the Tribal employment or contract preference laws adopted by such Tribe will govern with respect to the administration of the compact and funding agreement.

ENVIRONMENTAL AND CULTURAL RESOURCE COMPLIANCE

§ 29.527 What compliance with environmental and cultural resource statutes is required?

- (a) The Department must meet the requirements of applicable Federal environmental and cultural resource laws, such as the National Environmental Policy Act (NEPA) and the National Historic Preservation Act, for a proposed project under the Program.
- (b) The Secretary has delegated environmental and cultural resource compliance responsibilities to the Operating Administrations, as appropriate. As such, an Operating Administration will serve as the lead agency responsible for final review and approval of environmental documents, and any associated environmental determinations and findings for a proposed project under the Program. The Secretary, as delegated to the Operating Administrations, is also responsible for making determinations and issuing approvals in accordance with 23 U.S.C. 138 and 49 U.S.C. 303 (Section 4(f)), as applicable. Tribes may consult with the Self-Governance Official to determine which Operating Administration should serve as the lead agency.
- (c) If the Department is conducting the environmental review process for a proposed project under the Program, the Tribe must assist the Department to satisfy the requirements of applicable Federal environmental and cultural resource laws.
- (d) A Tribe may manage or conduct the environmental review process for a proposed project under the Program and may prepare drafts of the appropriate environmental review documents for submission to the Department.
 - (1) A Tribe may follow its own environmental review procedures if the procedures and documentation also satisfy the Federal environmental review requirements applicable to the project. A Tribe should work with the Operating Administration serving as lead agency to ensure the Tribal process will satisfy all applicable Federal environmental review requirements.
 - (2) The Operating Administration serving as lead agency must determine that the Tribe's process and documentation satisfy the applicable Federal environmental review requirements.
- (e) As resources permit and at the request of a Tribe, the Department will provide advice and technical assistance to the Tribe to assist in the management of the Federal environmental review process and preparation of environmental documents.

- (f) Unless prohibited by law, a Tribe may use funds included in a funding agreement to pay for environmental review activities.

FEDERAL TORT CLAIMS ACT

§ 29.528 Is the Federal Tort Claims Act applicable to a Tribe when carrying out a compact and funding agreement?

- (a) Section 314 of Public Law 101-512 and 25 U.S.C. 5396(a) incorporated by 23 U.S.C. 207(l)(8) make the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2401, 2671-2680, applicable to a Tribe carrying out a compact and funding agreement.
- (b) Contractors, subcontractors, or sub-recipients of a Tribe are not subject to the terms and conditions of the FTCA. The Tribe may use the regulations set forth in 25 CFR part 900, subpart M, as guidance on the Tribe's rights and responsibilities under the FTCA. Accordingly, the Tribe must include, in any contract entered into with funds provided under a compact and funding agreement, a requirement that contractors, sub-contractors, or sub-recipients maintain applicable insurance coverage, such as workers compensation, auto, and general liability insurance, consistent with statutory minimums and local industry standards.

§ 29.529 What steps should a Tribe take after becoming aware of a Federal Tort Claim?

- (a) Immediately after receiving a claim or a summons and complaint filed under the FTCA, the Tribe must notify the Self-Governance Official at ttsqp@dot.gov or use any other method that provides receipt.
- (b) The Tribe, through a designated tort claims liaison assigned by the Tribe, must assist the Department in preparing a comprehensive and factually based report, which will inform the Department's report to the U.S. Department of Justice.
- (c) The Tribe's designated tort claims liaison must immediately provide the following significant details of the event and include, as appropriate and to the extent within their knowledge, possession, or control:
 - (1) The date, time, and exact place of the accident or incident;
 - (2) A concise and complete statement of the circumstances of the accident or incident;
 - (3) The names and addresses of Tribal or Federal employees involved as participants or witnesses;
 - (4) The names and addresses of all other eyewitnesses;
 - (5) An accurate description of all Federal, Tribal, and privately owned property involved, and the nature and amount of damage, if any;
 - (6) A statement as to whether any person involved was cited for violating a Federal, State, or Tribal law, ordinance, or regulation;
 - (7) The Tribe's determination as to whether any of its employees (including Federal employees assigned to the Tribe) involved in the incident giving rise to the tort claim were acting within the scope of their employment in carrying out the funding agreement at the time the incident occurred;
 - (8) Copies of all relevant documentation, including available police reports, statements of witnesses, newspaper accounts, weather reports, plats, and photographs of the site or damaged property, that may be necessary or useful for the Department to determine the claim; and

- (9) Insurance coverage information, copies of medical bills, and relevant employment records.
- (d) The Tribe must cooperate with and provide all necessary assistance to the U.S. Department of Justice and the Department's attorneys assigned to defend the tort claim including case preparation, discovery, and trial.
- (e) If requested by the Department, the Tribe must make an assignment and subrogation of all the Tribe's rights and claims (except those against the Federal Government) arising out of a tort claim against the Tribe.
- (f) If requested by the Department, the Tribe must authorize representatives of the Department to settle or defend any claim and to represent the Tribe in or take charge of any action. If the Federal Government undertakes the settlement or defense of any claim or action, the Tribe must provide all reasonable additional assistance in reaching a settlement or asserting a defense.

§ 29.530 Is it necessary for a compact or funding agreement to include any terms about FTCA coverage?

Terms about FTCA coverage are optional in a compact or funding agreement, and the FTCA applies even if terms regarding FTCA are not included in a compact or funding agreement.

§ 29.531 Does FTCA cover employees of the Tribe who are paid by the Tribe from funds other than those provided through the compact and funding agreement?

Subject to FTCA limitations, the FTCA covers employees of the Tribe who are not paid from compact and funding agreement funds as long as the services out of which the claim arose were performed in carrying out a compact and funding agreement.

§ 29.532 May persons who are not Indians assert claims under FTCA?

Any aggrieved person may assert claims for alleged torts arising from activities performed in carrying out compacts and funding agreements.

§ 29.533 Does the year PSFAs are funded affect FTCA coverage?

The year the funding was provided has no effect on the application of the FTCA.

WAIVER OF PROGRAM REGULATIONS

§ 29.534 What is the process for regulation waivers under this part?

- (a) A Tribe may request a waiver of a regulation in this part with respect to a compact or funding agreement. The Tribe must submit the request in writing to the Self-Governance Official to ttsgp@dot.gov or use any other method that provides receipt, at the following address: Self-Governance Official, U.S. Department of Transportation, Office of the Secretary [INSERT MAIL CODE], 1200 New Jersey Avenue SE, Washington, DC 20590. The request must be marked with the words "REQUEST TO WAIVE REGULATIONS" on the first page of the request and on the envelope enclosing the request (or in the subject line if by electronic mail). The request must identify the regulation subject to the waiver request, the language the Tribe seeks to waive, and the basis for the request.

- (b) Within 10 days of receipt of the waiver request, the Self-Governance Official will send the Tribe an acknowledgement of the waiver request, together with a date-stamped cover sheet that indicates the date on which the Department received the waiver request.
- (c) No later than 90 days after the date of receipt of a written request under paragraph (a) of this section, the Department must approve or deny the request in writing. If the application for a waiver is denied, the Department must provide the Tribe with the reasons for the denial as part of the written response.
- (d) The Department will consider the following factors in making its decision on a waiver request:
 - (1) Whether the waiver is contrary to Federal law;
 - (2) The extent to which the waiver provides flexibility to facilitate the implementation of the Program at the Tribal level consistent with the principles of self-governance;
 - (3) The extent to which the Tribe will benefit from the waiver; and
 - (4) Whether the waiver is consistent with Federal transportation policy.
- (e) If the Department does not approve or deny a request submitted under paragraph (a) of this section on or before the last day of the 90-day period, the request will be deemed approved by operation of law.
- (f) A decision by the Department on a waiver request is a final agency action subject to judicial review under the Administrative Procedure Act.

Subpart G—Withdrawal

§ 29.600 May a Tribe withdraw from a consortium?

A Tribe may fully or partially withdraw from a consortium in accordance with any applicable terms and conditions of a consortium agreement with the Tribe. The withdrawing Tribe must provide written notification to the consortium and the Department of its decision to withdraw.

§ 29.601 When does a withdrawal from a consortium become effective?

A withdrawal from a consortium becomes effective within the time frame specified in the resolution that authorizes the Tribe to withdraw from the consortium. In the absence of a specific time frame set forth in the resolution, such withdrawal becomes effective on:

- (a) The earlier of 1 year after the date of submission of such request, or the date on which the funding agreement expires; or
- (b) Such date as may be mutually agreed upon by the Department, the withdrawing Tribe, and the consortium that has executed the compact and funding agreement.

§ 29.602 How are funds redistributed when a Tribe fully or partially withdraws from a compact and funding agreement administered by a consortium serving more than one Tribe and elects to enter into a compact and funding agreement with the Department?

A withdrawing Tribe that is eligible for the Program under 23 U.S.C. 207(b) and § 29.100 may negotiate and enter into a compact and funding agreement for its share of funds supporting those PSFAs that the Tribe will carry out. The share of funds is calculated on the same basis as the funds were initially allocated in the funding agreement of the consortium, unless otherwise agreed to by the consortium and the Tribe.

§ 29.603 How are funds distributed when a Tribe fully or partially withdraws from a compact and funding agreement administered by a consortium serving more than one Tribe, and the withdrawing Tribe elects not to or is ineligible to enter into a compact and funding agreement?

Unless otherwise agreed to by the consortium and the withdrawing Tribe, the consortium must return to the Department all funds not obligated and expended by the consortium associated with the withdrawing Tribe when the withdrawing Tribe elects not to or is ineligible to enter into a compact and funding agreement.

Subpart H—Retrocession

§ 29.700 May a Tribe retrocede a PSFA and the associated funds?

A Tribe may voluntarily retrocede (fully or partially) its PSFA and the associated funds under a compact and funding agreement. A Tribe may retrocede for any reason.

§ 29.701 How does a Tribe notify the Department of its intention to retrocede?

- (a) *Notice to the Department.* A Tribe must submit a written notice of its intent to retrocede to the Self-Governance Official to ttsqp@dot.gov or by any other method that provides receipt. The notice must specifically identify those PSFAs the Tribe intends to retrocede.
- (b) *Notice to the Department of the Interior.* The Department will send the Tribe's notice of its intention to retrocede to the Department of the Interior and request that the Department of the Interior determine whether the PSFA is associated with transportation services provided by the Department of the Interior.

§ 29.702 What happens if the Department of the Interior determines that it provides the transportation services the Tribe intends to retrocede?

If the Department of the Interior determines that it provides the transportation services the Tribe intends to retrocede, the Department will notify the Tribe. The Tribe must return all remaining funds, less closeout costs, associated with those transportation services to the Department for transfer to the Department of the Interior.

§ 29.703 What happens if the Department of the Interior determines that it does not provide the transportation services the Tribe intends to retrocede?

If the Department of the Interior determines that it does not provide the transportation services the Tribe intends to retrocede, the Tribe may withdraw its notice to retrocede or return all remaining funds, less closeout costs, associated with the retroceded PSFA, and the Department will distribute those funds in accordance with applicable law.

§ 29.704 When is the retrocession effective?

The retrocession is effective within the time frame specified in the funding agreement. In the absence of a specified date, the retrocession becomes effective:

- (a) On the earlier of 1 year after the date of the Tribe's submission of the request, or the date on which the funding agreement expires; or
- (b) Such date mutually agreed upon by the Departments and the retroceding Tribe when the Department of the Interior has agreed to assume a retroceded PSFA.

§ 29.705 What effect will a retrocession have on a Tribe's right to compact under the Program?

Provided that a Tribe is eligible under § 29.100, retrocession will not adversely affect any future request by the Tribe to include funds from the same program in a compact or funding agreement.

§ 29.706 Will retrocession adversely affect future funding available for the retroceded program?

Retrocession will not adversely affect future funding for the retroceded program. Future funding will be available to the Tribe at the same level of funding as if there had been no retrocession.

Subpart I—Termination and Reassumption

§ 29.800 When can the Department reassume a compact or funding agreement?

The Department may terminate and reassume a compact or funding agreement (or portion thereof) when the Department makes a specific finding, in writing, to a Tribe, that the Department has found that there is:

- (a) Imminent jeopardy to a trust asset, natural resources, or public health and safety that is caused by an act or omission of the Tribe and that arises out of a failure by the Tribe to carry out the compact or funding agreement; or
- (b) Gross mismanagement with respect to funds included in a funding agreement, as determined by the Department in consultation with the Office of the Inspector General, as appropriate. Gross mismanagement means a significant, clear, and convincing violation of compact, funding agreement, or regulatory or statutory requirements applicable to Federal funds included in a compact and funding agreement that results in a significant reduction of funds available for the PSFA carried out by the Tribe.

§ 29.801 Can the Department reassume a portion of a compact or funding agreement and the associated funds?

The Department may reassume a portion of a compact or funding agreement and the associated funds if the Department has sufficient grounds to do so. The Department must identify the narrowest portion of the compact or funding agreement for reassumption.

§ 29.802 What process must the Department follow before termination of a compact or funding agreement (or portion thereof)?

Except as provided in § 29.805, prior to a termination becoming effective, the Department must:

- (a) Notify the Tribe in writing by any method that provides receipt of the findings required under § 29.800;
- (b) Request specific corrective action within a reasonable period, no less than 45 days, to correct the conditions that may result in the Department's termination of a compact or funding agreement (or portion thereof);
- (c) To the extent feasible and if requested, provide technical assistance to assist the Tribe in overcoming the conditions that led to the findings described under paragraph (a) of this section. Technical assistance may take the form of feedback, review, and other assistance requested, as appropriate; and
- (d) Provide an opportunity for a hearing on the record in accordance with Subpart J of this part.

§ 29.803 What happens if the Department determines that the Tribe has not corrected the conditions that the Department identified in the notice?

- (a) If the Department determines that the Tribe has not corrected the conditions that the Department identified in the notice, the Department must provide a second written notice by any method that provides receipt to the Tribe notifying it that the Department will terminate the compact or funding agreement, in whole or in part.
- (b) The second notice must include:
 - (1) The effective date of the termination;
 - (2) The details and facts supporting the termination; and
 - (3) Instructions that explain the Tribe's right to a hearing pursuant to § 29.925.

§ 29.804 When may the Department reassume?

Except as provided in § 29.805, the Department may not reassume until 30 days after receipt of the notice, the final resolution of the hearing, or the resolution of any appeals, whichever is latest, to provide the Tribe with an opportunity to take corrective action in response to any adverse final ruling.

§ 29.805 When can the Department immediately terminate a compact or funding agreement (or portion thereof)?

- (a) The Department may immediately terminate a compact or funding agreement (or a portion thereof) if:
 - (1) The Department makes a finding of imminent substantial and irreparable jeopardy to a trust asset, natural resource, or public health and safety; and
 - (2) The jeopardy arises out of a failure to carry out the compact or funding agreement.
- (b) The Department must provide notice of immediate termination by any method that provides receipt. The notice must set forth the findings that support the Department's determination, advise the Tribe whether it will be reimbursed for any closeout costs incurred after the termination, request the return of any property, and advise the Tribe of its right to a hearing pursuant to § 29.925. Concurrently, the Department must notify the Office of Hearings that the Department intends to immediately terminate a compact or funding agreement. Pursuant to 23 U.S.C. 207(f)(2)(E) and § 29.928, the Department has the burden of proof in any hearing or appeal of an immediate termination.

§ 29.806 Upon termination, what happens to the funds associated with the terminated portions of the compact or funding agreement?

Upon termination, the Department will reassume the remaining funds associated with the terminated portions of the compact or funding agreement. The Department may:

- (a) Transfer funds associated with transportation services provided by the Department of the Interior to the Department of the Interior; or
- (b) Distribute any funds not transmitted to the Department of the Interior in accordance with applicable law.

Subpart J—Dispute Resolution and Appeals

§ 29.900 What is the purpose of this subpart?

This subpart sets forth procedures that a Tribe may use to resolve disputes with the Department arising before or after the execution of a compact or funding agreement. It also sets forth the process for filing and processing administrative appeals under this part.

§ 29.901 Can the Department and a Tribe resolve disputes using alternative dispute resolution processes?

At any time, the Department or a Tribe may request an informal process or an alternate dispute resolution procedure, such as mediation, conciliation, or arbitration, to resolve disputes. The goal of any such process (which may involve a third party) is to provide an inexpensive and expeditious mechanism to resolve disputes by mutual agreement instead of an administrative or judicial proceeding. The Department and the Tribe should resolve disputes at the lowest possible organizational level whenever possible.

§ 29.902 Does the Equal Access to Justice Act apply to the Program?

The Equal Access to Justice Act (EAJA), 5 U.S.C. 504 and 28 U.S.C. 2414, and the relevant implementing regulations (48 CFR 6101.30 and 6101.31; 49 CFR part 6) will apply if the Tribe's compact or funding agreement make these provisions applicable.

§ 29.903 What determinations may not be appealed under this subpart?

A Tribe may not appeal the following determinations under this subpart:

- (a) **Waiver determination.** A waiver determination made pursuant to § 29.534 is a final agency action subject to judicial review under the Administrative Procedure Act.
- (b) **Disputes or appeals arising under other Federal laws.** Decisions made under other Federal statutes, such as the Freedom of Information Act and the Privacy Act. Such decisions may be appealable under those statutes and their implementing regulations.
- (c) **Selection and award decisions for discretionary or competitive grants.** The Department's selection and level of funding decisions for discretionary or competitive grants are not subject to appeal.

PRE-AWARD DECISIONS

§ 29.904 What are pre-award decisions that a Tribe may appeal?

A Tribe may appeal pre-award decisions, which include:

- (a) A decision whether to include a Department program in a funding agreement;
- (b) A decision whether an activity is an inherent Federal function;
- (c) A decision on a final offer before the Department and the Tribe enter into a compact or funding agreement;
- (d) A decision on a final offer before the Department and the Tribe execute an amendment modifying the terms of an existing compact or funding agreement; and
- (e) An eligibility determination.

§ 29.905 To whom does a Tribe appeal a pre-award decision?

A Tribe appeals a pre-award decision in accordance with the process in § 29.907 to a hearing official who was not involved in the initial decision and is appointed by the General Counsel of the Department.

§ 29.906 Must a Tribe exhaust its administrative remedies before initiating a civil action against the Department in the U.S. District Courts for a pre-award decision?

A Tribe must exhaust its administrative remedies before initiating a civil action against the Department in the U.S. District Courts, except a Tribe may appeal the rejection of a final offer directly to the U.S. District Courts in lieu of an administrative appeal.

§ 29.907 When and how must a Tribe appeal a pre-award decision?

- (a) Unless a Tribe appeals, a pre-award decision becomes final 30 days after receipt by the Tribe. To appeal the pre-award decision, a Tribe must submit a written request to the Office of the General Counsel and the Self-Governance Official within 30 days of receiving the pre-award decision. The request must include a statement describing the reasons for appeal and any supporting documentation.
- (b) The Tribe may request to resolve the dispute using an alternative dispute resolution process before the hearing official issues a decision.

§ 29.908 May a Tribe request an extension of time to file an administrative appeal?

If a Tribe needs additional time, it may request an extension of time to file an appeal of a pre-award decision. Within 30 days of receiving a decision, a Tribe must request the extension from the Office of the General Counsel, which has the discretion to grant the extension, and notify the Self-Governance Official of the request. The request must be in writing and give a reason for not filing its administrative appeal within the 30-day period. The Department may accept an appeal after the 30-day period for good cause.

§ 29.909 When and how must the hearing official respond to the Tribe's appeal?

- (a) The hearing official must issue a decision in writing within 60 days of the receipt of the appeal. If the Tribe requests an informal hearing, the hearing official must issue a decision within 60 days of the hearing.
- (b) All decisions issued by the hearing official must include a statement describing the rights of a Tribe to appeal the decision to the U.S. District Courts. The Department must provide the decision to the Tribe by any method that provides a receipt.

§ 29.910 What is the Department's burden of proof for appeals of pre-award decisions?

The Department must demonstrate by clear and convincing evidence the validity of a pre-award decision, and that the decision is consistent with 23 U.S.C. 207.

§ 29.911 What is the effect of a pending appeal on negotiations?

A pending appeal of a pre-award decision will not prevent the Department from negotiating and executing the non-disputed, severable provisions of a compact or funding agreement or prevent the Department from awarding funds to the Tribe that may be included in a funding agreement.

POST-AWARD DISPUTES

§ 29.912 What is a post-award dispute?

A post-award dispute is a claim that arises under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 7101-7109. Such disputes arise once a compact or funding agreement is executed. Post-award disputes include:

- (a) Disputed interpretation of a provision of an executed compact or funding agreement;
- (b) Disallowance of costs under a funding agreement;
- (c) Suspension of payments under a funding agreement;
- (d) Allocation, distribution, or reduction of funds when a dispute arises between a consortium and a withdrawing Tribe;
- (e) Failure to comply with the terms of a funding agreement; and
- (f) Any other claim arising out of a compact or funding agreement.

§ 29.913 What is a claim under the Contract Disputes Act?

A Contract Disputes Act claim is a written demand filed by a Tribe that seeks one or more of the following:

- (a) Payment of a specific sum of money under the funding agreement;
- (b) Adjustment or interpretation of terms in a funding agreement;
- (c) Payment that is disputed as to liability or amount;
- (d) Payment that the Department has not acted upon in a reasonable time following a demand for payment; or
- (e) Any other claim relating to the terms of the compact or funding agreement.

§ 29.914 How does a Tribe file a Contract Disputes Act claim?

A Tribe must submit its claim in writing to the Self-Governance Official, who serves as the Department's awarding official for the purposes of Contract Disputes Act claims. The Self-Governance Official will document the receipt of the claim.

§ 29.915 Must a Tribe certify a Contract Disputes Act claim?

A Tribe must certify a claim for more than \$100,000 in accordance with the Contract Disputes Act. The Tribe must certify that:

- (a) The claim is made in good faith;
- (b) Documents or data supporting the claim are accurate and complete to the best of the Tribe's knowledge and belief;
- (c) The amount claimed accurately reflects the amount the Tribe believes is owed; and
- (d) The individual making the certification is authorized to make the claim on behalf of the Tribe and bind the Tribe with respect to the claim.

§ 29.916 Who bears the burden of proof in a Contract Disputes Act claim?

The Tribe bears the burden of proof to demonstrate, by a preponderance of the evidence, the validity of a Contract Disputes Act claim.

§ 29.917 What is the Department's role in processing a Contract Disputes Act claim?

- (a) The Department must document the date that the Self-Governance Official received the claim.
- (b) The Self-Governance Official must provide the Tribe with an opportunity to resolve the claim informally with assistance from Department officials who have not substantially participated in the disputed matter. Such informal mechanisms may include participating in dispute resolution pursuant to § 29.901.
- (c) If the Department and the Tribe do not agree on a settlement, the Self-Governance Official must issue a written decision on the claim by any method that provides a receipt.

§ 29.918 What information must the Self-Governance Official's decision contain?

- (a) The Self-Governance Official's decision must:
 - (1) Describe the claim or dispute;
 - (2) Reference the relevant terms of the compact or funding agreement;
 - (3) Set forth the factual areas of agreement and disagreement; and
 - (4) Set forth the Self-Governance Official's decision, and provide the facts and reasons that support the decision.
- (b) The Self-Governance Official must provide the decision to the Tribe and describe the Tribe's appeal rights in language similar to the following:

This is a final decision. You may appeal this decision to the Civilian Board of Contract Appeals (CBCA), 1800 F Street NW, Washington, DC 20245. If you decide to appeal, you must provide written notice within 90 days of receipt of this decision to the CBCA and provide a copy to the Self-Governance Official. The notice must indicate that an appeal is intended, and refer to the decision and contract number. Instead of appealing to the CBCA, you may bring an action in the U.S. Court of Federal Claims or U.S. District Courts within 12 months of the date you receive this notice. If you do not appeal a decision within one of these time periods, it is not subject to further review.

§ 29.919 When must the Self-Governance Official issue a written decision on the claim?

- (a) If the claim is for less than \$100,000, the Tribe may request that the Self-Governance Official issue a decision within 60 days of the date of receipt of the claim. If the Tribe does not request that the Self-Governance Official issue a decision within 60 days of the date of receipt of the claim, the Self-Governance Official must issue a decision within a reasonable time, which will depend on the size and complexity of the claim and the adequacy of the information provided in support of the claim. The Tribe must request a decision by the Self-Governance Official before seeking an appeal in accordance with paragraph (c) of this section.
- (b) If the claim is for more than \$100,000, the Self-Governance Official must issue a decision within 60 days of the date of receipt of the claim or notify the Tribe of the time within which the Self-Governance Official will issue a decision. Such time frame must be reasonable, which will depend on the size and complexity of the claim and the adequacy of the information provided in support of the claim.

- (c) If the Self-Governance Official does not issue a decision within these time frames, a Tribe may treat the delay as a denial of its claim and appeal the decision in accordance with § 29.921.

§ 29.920 Is a decision of the Self-Governance Official final?

- (a) A decision of the Self-Governance Official is final and conclusive, and not subject to review, unless the Tribe timely commences an appeal or suit pursuant to the Contract Disputes Act.
- (b) Once the Self-Governance Official issues a decision, the decision may not be changed except by agreement of the Department and the Tribe or under the following limited circumstances:
 - (1) Evidence is discovered that could not have been discovered through due diligence before the Self-Governance Official issued the decision;
 - (2) The Self-Governance Official learns that there has been fraud, misrepresentation, or other misconduct by a party;
 - (3) The decision is beyond the scope of the Self-Governance Official's authority;
 - (4) The claim has been satisfied, released, or discharged; or
 - (5) Any other reason justifying relief from the decision.
- (c) If the Self-Governance Official withdraws a decision and issues a new decision, the Tribe may appeal the new decision in accordance with § 29.921. If the Self-Governance Official does not issue a new decision, the Tribe may proceed under § 29.919(c).
- (d) If a Tribe files an appeal or suit, the Self-Governance Official may modify or withdraw the final decision before a decision is issued in the pending appeal.

§ 29.921 Where may the Tribe appeal the Self-Governance Official's decision on a Contract Disputes Act claim?

The Tribe may appeal the Self-Governance Official's decision on a Contract Disputes Act claim in one of the following forums:

- (a) The Civilian Board of Contract Appeals. The appeal must be in accordance with the Board's implementing regulations in 48 CFR part 6101;
- (b) The U.S. Court of Federal Claims; or
- (c) The U.S. District Courts.

§ 29.922 May a party appeal a Civilian Board of Contract Appeals decision?

A party may appeal a decision of the Civilian Board of Contract Appeals within 120 days to the U.S. Court of Appeals for the Federal Circuit.

§ 29.923 What is the effect of a pending appeal?

- (a) The Tribe must continue performance in accordance with the compact and funding agreement during the appeal of any claims to the same extent the Tribe would have performed had there been no dispute.
- (b) A pending dispute will not affect or prevent the negotiation or award of any subsequent compact or funding agreement between the Department and the Tribe.

TERMINATION APPEALS

§ 29.924 May a Tribe appeal the Department's decision to terminate a compact or funding agreement?

A Tribe may appeal the Department's decision to terminate a compact or funding agreement to the Department's Office of Hearings.

§ 29.925 Is a Tribe entitled to a hearing on the record?

- (a) The Department must provide a Tribe with a hearing on the record for a non-immediate termination prior to or in lieu of the corrective action period set forth in the termination notice as described in § 29.802.
- (b) The Department must provide a Tribe with a hearing on the record for an immediate termination. The Department and the Tribe will work together to determine a mutually acceptable time and place for the hearing. The hearing on the record must commence no later than 10 days after the date of such termination or a later date upon mutual agreement. If feasible, the hearing may occur virtually or telephonically. If requested by the Tribe, the Department may arrange for an in-person hearing.
- (c) A Tribe may decline a hearing in writing.

§ 29.926 What rights do the Department and a Tribe have in an appeal of a termination decision?

- (a) During the appeal of a termination decision, the Department and a Tribe have the right to:
 - (1) A designated representative;
 - (2) Present the testimony of witnesses, orally or in writing, who have knowledge of the relevant issues;
 - (3) Cross-examine witnesses;
 - (4) Introduce oral or documentary evidence, or both;
 - (5) Receive, upon request and payment of reasonable costs, a copy of the transcript of the hearing, and copies of all documentary evidence that is introduced at the hearing;
 - (6) Take depositions, request the production of documents, serve interrogatories on other parties, and request admissions; and
 - (7) Any other procedural rights established under the Administrative Procedure Act.
- (b) An administrative law judge assigned by the chief administrative law judge of the Department's Office of Hearings must conduct hearings on the record for a termination decision unless the Tribe waives the hearing.

§ 29.927 What notice and service must the Department and the Tribe provide?

- (a) The Department and the Tribe must file each document with U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- (b) The Department and the Tribe must serve copies of each document with:
 - (1) The Self-Governance Official; and

- (2) The authorized Tribal representative.

§ 29.928 What is the Department's burden of proof for a termination decision?

The Department must demonstrate by clear and convincing evidence the validity of the grounds for the termination.

§ 29.929 How will the Department communicate its decision following a hearing on a termination decision?

After the hearing or any post-hearing briefing schedule established by the Department's Office of Hearings, the administrative law judge must send the Department and the Tribe the decision by any method that provides a receipt. The decision must contain the administrative law judge's findings of fact and conclusions of law on all the issues.

§ 29.930 May the Department or the Tribe appeal the decision of an administrative law judge?

- (a) The decision of an administrative law judge is a recommended decision that the Department or the Tribe may appeal to the Secretary.
- (b) The decision of an administrative law judge becomes the final decision of the Secretary 60 days after it is served on the Department and the Tribe unless a petition for review is filed in accordance with § 29.931. The decision of the Secretary is a final agency action that the Tribe may appeal to the U.S. District Courts.

§ 29.931 How can the Department or the Tribe obtain review of the recommended decision of an administrative law judge?

- (a) **Time for filing.** Within 30 days after service of any recommended decision of an administrative law judge, the Department or the Tribe may file a petition for review of the recommended decision with the Secretary. A copy must be served on the opposing party.
- (b) **Service.** Each document filed with or by the Secretary must be accompanied by a certificate of service specifying the manner in which and the date on which service was made with the Secretary and the opposing party.
- (c) **Form and content of objections.** The petition for review must set out separately and in detail each objection to the recommended decision, and the basis and reasons supporting such objection. The petition for review must state whether such objections are related to alleged errors of law or fact. The petition for review must also identify the relief requested.
- (d) **Introduction of new information on review.** If the Department or the Tribe fail to object to any errors in the recommended decision, the party waives the right to allege such error in subsequent proceedings. The petition for review may not set forth for the first time on brief to the Secretary any matters of law or fact that were not argued before the administrative law judge.
- (e) **Reply briefs.** An opposing party has 30 days from the date of service of the petition for review to file its reply brief.
- (f) **Failure to file timely and adequate objections.** Late filed petitions for review are not permitted, and incomplete objections will not be reviewed.

§ 29.932 May a Tribe appeal the decision of the Secretary?

The decision of the Secretary on the merits of a petition for review constitutes final agency action. A Tribe may appeal the decision to the U.S. District Courts.

§ 29.933 What is the effect of an appeal on negotiations?

A pending appeal of a termination decision will not affect or prevent the award of another funding agreement or TTP Agreement.

However, if the Department terminates all or a portion of a compact or funding agreement due to a finding of gross mismanagement or imminent jeopardy that is sustained on appeal, and the Tribe has not corrected the adverse findings, the Department has discretion to reject a proposal to award the Tribe a new funding agreement or provide new funds in an existing funding agreement.