



THE TRIBAL TRANSPORTATION SELF-GOVERNANCE PROGRAM (TTSGP) AT USDOT (49 CFR Part 29): The Benefits of Tribal Participation

Matt Jaffe, Partner
Sonosky, Chambers, Sachse,
Endreson & Perry, LLP

Self-Governance Communication &
Education Tribal Consortium (SGC&ETC)
November 16, 2020

SONOSKY

SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP

Topics for discussion:

1. What are the benefits for a Tribe to pursue a TTSGP compact and funding agreement with the Department of Transportation under the Program regulations (49 CFR Part 29)?
2. What are some of the key provisions of the Program that Tribes should be familiar with?
3. What are some of the key similarities/differences in Self-Governance at USDOT and Self-Governance at DOI/IHS?

1. Tribal Benefits of Participating in the TTSGP

- Affords a Tribe greater control and decision-making authority over certain funds eligible for inclusion in the funding agreement;
- Reduces administrative burdens;
- Maintains and improves the Federal Government's unique and continuing relationship with and responsibility to Tribes without diminishing the trust responsibility of the United States to Tribes and Indians;
- Extends Federal Tort Claims Act (FTCA) coverage to the PSFAs a Tribe carries out under the TTSGP compact and funding agreement;
- Establishes a close working relationship with USDOT and its modal admin.

1. Tribal Benefits of Participating in the TTSGP

- There's no planning phase; first, a Tribe qualifies for the Program, and then the Tribe negotiates a TTSGP compact and funding agreement directly with USDOT;
- Familiar compact, funding agreement, and definitions (Sub. A);
- Familiar "final offer" phase if the Tribe and USDOT disagree (Sub. C);
- Rule sets firm time limits for eligibility determination and negotiation phase to complete a compact and funding agreement with the Department;
- Rule provides express authority for Tribes to execute cooperative agreements with other public authorities to realize economies of scale (29.515(a)(3)).

What is the Tribal Transportation Self-Governance Program?



- A new program for Tribes, established by federal law and regulations;
- Expands Tribal Self-Governance principles to USDOT;
- Recreates a familiar compact and funding agreement for the Program that permits eligible Tribes to streamline transportation infrastructure, transit, and safety; and
- Reduces administrative burdens.

2. Key provisions of the Program that Tribes should be familiar with?

- Review the final rule for the TTSGP which USDOT published in the Federal Register on June 1, 2020 (85 Fed. Reg. 33494 – 33520). Key provisions include:
- Establishing eligibility for the Program – *see* Subpart A; 49 CFR § 29.100);
- Negotiation preparations – Know the PSFAs the Tribe wants to include; *see* Subpart A 49 CFR §§ 29.101-29.109);
- Minimize disputed terms and conditions, but use the “final offer” process if necessary – Narrow disputed terms/conditions before using “final offer” process (*see* 49 CFR Part 29, Subpart C (§§ 29.200 – 29.213).
- Contents of the Compact and Funding Agreement & the Rules for Transfer of Funds – *see* 49 CFR Subparts D & E (§§ 29.300 – 29.421);
- Understand the difference between formula-based programs and funding and discretionary/competitive grants – Tribes must use a discretionary/competitive grant based on the award and NOFO; tribes have greater flexibility with formula-based funds included in the F.A.

2. Key provisions of the Program that Tribes should be familiar with?

- Familiarize yourself with the six broad categories of funds eligible for inclusion in the TTSGP compact and funding agreement:
- (1) the Tribal Transportation Program (TTP) “tribal shares” under the statutory funding formula set out in 23 USC 202(b);
- (2) any transit funds provided to the Tribe under 49 USC 5311;
- (3) funds for any discretionary or competitive grant administered by the Department of Transportation awarded to the Tribe for a transportation program under title 23 or chapter 53 of title 49 (transit);
- (4) funds for any other discretionary or competitive grant for a transportation-related purpose administered by USDOT otherwise available to the Tribe;
- (5) Federal-aid funds apportioned to State if the State elects to transfer a portion of such funds to the Tribe for an eligible project; and
- (6) formula funds awarded to a State under 49 USC 5311 that the State elects to award to the Tribe and the parties agree that USDOT will transfer the funds to the Tribe for its use.

See 49 CFR 29.400 et seq.

2. Key provisions of the Program that Tribes should be familiar with?

- Know the eligible compact/funding agreement terms and conditions of Subpart E (Transfer and Use of Funds) 49 CFR §§ 29.400 et seq. These include:
 - (1) interest income (29.408)
 - (2) carryover of funds (29.409)
 - (3) use of funds as “non-federal funds” for matching or cost participation (29.411)
 - (4) leveraging funds through loans (29.413)
 - (5) standard “limitation of cost” principles (29.417)
 - (6) invest funds using the “prudent investor” standard (29.416)
- The mandatory and discretionary terms of the funding agreement (29.307); and
- The Tribe may incorporate title I and title V ISDEAA provisions in the compact and funding agreement that are “consistent” with the Program.

2. Key provisions of the Program that Tribes should be familiar with?

- No CSCs for TTP shares, discretionary/competitive grants, or State Federal-aid transfers (202(a)(9), but a Tribe can charge reasonable “overhead and administrative expenses” for such awards (49 CFR §§ 29. 419, 407, 418(d)).
- No section 105(l) lease agreement payments to a Tribe, but a Tribe may charge facility lease and facility support costs expenses within the formula or grant award (49 CFR §§ 29.420).
- Know Subpart F’s Program Operations – familiar Self-Governance provisions relating to audit and cost principles; **standards for Tribal financial management systems**; records; **procurement**; reporting; **property**; technical assistance; **Davis-Bacon Act wage rates**; Tribal preference; **environmental and cultural resource compliance**; and FTCA.

3. What are some of the key similarities/differences in Self-Governance at USDOT and Self-Governance at DOI/IHS?

Similarities:

- ✓ Familiar eligibility criteria with the addition of demonstrating successful administration and oversight of transportation/transit programs and projects;
- ✓ Familiar Compact and Funding Agreement and negotiation phase;
- ✓ Familiar Final Offer procedure for disagreements;
- ✓ Familiar definitions, program standards, and operating provisions for the use, expenditure and documentation of programs;
- ✓ Familiar burden of proof standard ("clear and convincing" for Department).

3. What are some of the key similarities/differences in Self-Governance at USDOT and Self-Governance at DOI/IHS?

Differences:

- ✓ No CSCs to be added to the formula or discretionary grants, but ...
- ✓ No section 105(l) lease payments, but ...
- ✓ Tribes must exhaust administrative remedies imposed under the rule for certain disputes (although a Tribe may file suit in U.S. District Courts to challenge an adverse “final offer” decision);
- ✓ No OSG/Office of Tribal Government Affairs (yet) and no SGAC;
- ✓ USDOT Discretionary/competitive grants are “backward looking” rather than “prospective” as with DOI/DHHS PSFAs – Under the TTSGP, a Tribe can only add a USDOT discretionary/competitive grant that it has won;
- ✓ Clear time frames for eligibility (generally 120 days), compact negotiations (generally 90 days), final offers (generally 45 days); appeal decisions (hearing official issues a decision within 60 days of receipt of the appeal);
- ✓ Reporting relief/reduction of administrative burdens is possible in the negotiation phase (29.307(j) and 29.518);
- ✓ Final offers and post-award appeals will not prevent the Department from negotiating and executing the severable, non-disputed components of the compact or funding agreement (see 29.213).

Questions?

Matt Jaffe

mjaffe@sonosky.com

Sonosky, Chambers,
Sachse, Endreson &
Perry, LLP

