



UNITED STATES DEPARTMENT OF COMMERCE
Chief Financial Officer and
Assistant Secretary for Administration
Washington, D.C. 20230

FINANCIAL ASSISTANCE MEMORANDUM 2021-02

ACTION

MEMORANDUM FOR: DEPARTMENT OF COMMERCE GRANTS COUNCIL

FROM: *for:* Barry E. Berkowitz
Senior Procurement Executive
and Director for Acquisition Management

SUBJECT: Department of Commerce Policies, Procedures, and General Decision-Making Criteria for Deviations from Negotiated Indirect Cost Rates under Federal Financial Assistance Programs and Awards

- 1. Purpose.** In accordance with 2 C.F.R. § 200.414(c)(3) (Federal Agency Acceptance of Negotiated Indirect Cost Rates), this memorandum sets forth the Department of Commerce (DOC) policies, procedures, and general decision-making criteria for deviations from negotiated indirect cost rates. These policies and procedures are applicable to all Federal financial assistance programs awarded and administered by DOC bureaus as Federal awarding agencies.
- 2. Expiration date.** Until cancelled or superseded.
- 3. Background.** Pursuant to 2 C.F.R. § 200.414(c)(1), Federal agencies are required to accept Federally negotiated indirect cost rates, unless certain exceptions apply. Federal agencies may use a rate different from the negotiated rate for a class of awards or for a single award only when required by Federal statute or regulation, or when approved by a Federal awarding agency head or delegate, based upon documented justification described within 2 C.F.R. § 200.414(c)(3).

DOC has programs that impose reduced indirect cost rates.

- 4. Action required by this policy.** DOC bureaus shall apply the following policies, procedures, and general decision-making criteria for deviations from negotiated indirect cost rates for financial assistance programs and for individual financial assistance awards.
- 5. Distribution basis.** For all deviations to the Federally negotiated indirect cost rate; including statutory, regulatory, programmatic, and voluntary; the basis of direct costs against which the indirect cost rate is applied must be:
 - A.** The same base identified in the recipient's negotiated indirect cost rate agreement, if the recipient has a Federally negotiated indirect cost rate agreement; or

- B.** The Modified Total Direct Cost (MTDC) base in cases where the recipient does not have a federally negotiated indirect cost rate agreement (including a provisional rate) and elects to use the 10 percent de minimis indirect cost rate pursuant to 2 C.F.R. § 200.414(f). As defined at 2 C.F.R. § 200.1, MTDC means:

[A]ll direct salaries and wages, applicable fringe benefits, materials and supplies, services, travel, and up to the first \$25,000 of each subaward (regardless of the period of performance of the subawards under the award). MTDC excludes equipment, capital expenditures, charges for patient care, rental costs, tuition remission, scholarships and fellowships, participant support costs and the portion of each subaward in excess of \$25,000. Other items may only be excluded when necessary to avoid a serious inequity in the distribution of indirect costs, and with the approval of the cognizant agency for indirect costs.

The use of MTDC is to help ensure that the 10% de minimis rate is applied against a base that does not include any potentially distorting items (such as the portions of subawards more than \$25,000 and participant support costs) and is based on the requirements within 2 C.F.R. § 200.1; 2 C.F.R. § 200.414(f); and the relevant provisions of appendices to 2 C.F.R. Part 200 (see Section C.2. of Appendix III, Section B.3.f. of Appendix IV, and Section C.2.c. to Appendix VII).

- C.** Total direct costs, but only for DOC programs that have an approved indirect cost rate deviation and the approved deviation specifically provides for the use of total direct costs as the indirect cost base.

- 6. Indirect cost rate deviation required by statute or regulation.** In accordance with 2 C.F.R. § 200.414(c)(1), a Federal awarding agency may use a rate different from the negotiated rate for a class of Federal awards or a single Federal award only when required by Federal statute or regulation, or when approved by a Federal awarding agency head or delegate, based on documented justification as described in 2 C.F.R. § 200.414(c)(3) (*see* section 7 of this memorandum for DOC's process on indirect cost deviation justifications). When a different indirect cost rate is required by Federal statute or regulation, the official award file must document the specific statute or regulation that required the deviation. The official award file must also document deviations to negotiated indirect cost rates when approved by a Federal awarding agency head or delegate.

- 7. Process for indirect cost rate deviation approval.** In accordance with 2 C.F.R. § 414(c)(3), the following requirements apply to DOC bureaus as Federal awarding agencies in their review, approval, and posting of programmatic and award-specific indirect cost rate waivers:

- A. Program Qualifications.** Programs that have instituted a program-wide requirement and governance process for deviations from Federally negotiated indirect cost rates may qualify for a programmatic deviation approval.

B. Deviation Requests.

1. *Programmatic deviations.* The responsible senior program official must submit each programmatic deviation request to the head of the Federal awarding agency or delegate for review. **The request for deviation approval must include a description of the program, including the nature of the program and the program's reasons for limiting indirect costs, and the program's governance process for negotiating and/or communicating to recipients the indirect cost rate requirements under the program.** The program must make their program governance documentation, rate deviations, and other program information publicly available.
2. *Award specific deviations.* The responsible senior program official must submit each award-specific deviation request to the head of the Federal awarding agency or delegate for review. **The request for deviation approval must include a description of the award, including the nature of the award and the reasons for limiting indirect costs under the award, and how the deviation was negotiated and/or communicated to the recipient.** The program must make their rate deviations and other relevant award-specific information regarding the indirect cost rate publicly available.

C. Approvals. Programmatic and award-specific deviations must be approved, in writing, by the Federal awarding agency head or delegate. DOC bureaus must send approved deviations electronically to DOC's Office of Acquisition Management (OAM), which will make them publicly available, and must include the approved deviation in the award file of each relevant award. In addition, OAM will notify OMB of each approved deviation.

D. Programs approved for deviation. With the release of this policy, the following programs have been approved by the head of the respective Federal awarding agency or delegate to use a rate that deviates from the Federally negotiated indirect cost rate agreements.

1. National Institute of Standards and Technology (NIST) Small Business Innovation Research (SBIR) Program;
2. National Oceanic and Atmospheric Administration (NOAA) Small Business Innovation Research (SBIR) Program;
3. International Trade Administration (ITA) Market Development Cooperator Program (MDCP); and
4. National Telecommunications and Information Administration (NTIA) Tribal Broadband Connectivity Program (TBCP).

The approved deviation for each of these programs is included as an attachment to this memorandum. The rates in effect as of the date of this memorandum are subject to change based upon the governance process established for each program.

- 8. Voluntary indirect cost rate reduction.** On an award-specific basis, an applicant and/or proposed recipient may elect to reduce or eliminate the indirect cost rate applied to costs under that award. The election must be voluntary and cannot be required by the Grants Officer, Notice of Funding Opportunity (NOFO) announcement, program, or other non-statutory or non-regulatory requirements. For these voluntary, award-specific reductions, DOC bureaus can accept the lower rate as long as the official file clearly documents the recipient's voluntary election. For this purpose, a recipient's voluntary budgeting of indirect costs based on an indirect cost rate lower than the approved negotiated rate constitutes sufficient evidence of a recipient's voluntary election to use a lower indirect cost rate.
- 9. Unrecovered indirect costs and cost sharing.** Unrecovered indirect cost means the difference between the amount charged to the Federal award and the amount which could have been charged to the Federal award under the non-Federal entity's approved negotiated indirect cost rate. *See* 2 C.F.R. § 200.306(c). Unrecovered indirect costs arise where an Agency's approved indirect cost rate deviation results in a recipient recovering a lower amount of indirect costs than the recipient would otherwise be entitled to pursuant to its approved negotiated indirect cost rate. Unrecovered indirect costs do not arise where a recipient voluntarily reduces the amount of indirect costs otherwise allowable under a DOC financial assistance award.

With the prior approval of the Grants Officer, all, or a portion of a recipient's unrecovered indirect costs, including indirect costs on cost sharing or matching, may be included as part of cost sharing or matching funds under a DoC financial assistance award. For example, if the normal application of a recipient's negotiated indirect cost rate would result in the recovery of \$100 of indirect costs but, due to an approved Agency indirect cost rate deviation, the recipient was only entitled to recover \$50 of indirect costs, the \$50 of indirect costs not allowed pursuant to the Agency deviation would constitute unrecovered indirect costs to the recipient. With the prior approval of the Grants Office, the recipient may include all or some of the \$50 of unrecovered indirect costs as non-federal cost share on the subject award. In the absence of a Grants Officer's prior approval to use unrecovered indirect costs as non-federal cost share, unrecovered indirect costs are not an allowable cost under DOC financial assistance awards.

- 10. Publication.** This policy will be posted on DOC's website at <https://www.commerce.gov/oam/policy/financial-assistance-policy>. Please disseminate this policy throughout your organizations. Questions about this policy may be directed to John Geisen at (202) 482-0602.
- 11. Cancellation.** FAM 2015-02, *The Department of Commerce's Policies, Procedures, and General Decision-Making Criteria for Deviations from Negotiated Indirect Cost Rates under Federal Financial Assistance Programs and Awards*, dated 20 July 2015, is hereby cancelled.