IHS TRIBAL SELF-GOVERNANCE ADVISORY COMMITTEE

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Robert McSwain, Acting Director
Indian Health Service
Department of Health and Human Services
The Reyes Building
801 Thompson Avenue, Suite 400
Rockville, MD 20852

RE: Determination of Contract Support Cost Requirements

Dear Acting Director McSwain,

On behalf of Self-Governance Tribes, we write to express our concern over the Indian Health Service's position that the amount of contract support costs (CSC) owed under its contracts and compacts with Tribes and tribal organizations under the Indian Self-Determination Act (ISDA) is determined based on "incurred costs."

The Indian Health Service (IHS) incurred cost approach was first developed as a way to calculate damages for unpaid CSC in settlements of breach of contract claims. However, your Dear Tribal Leader Letter of May 22, 2015 states that IHS has now applied this approach to the CSC payment and reconciliation process beginning with fiscal year 2014. We also understand that IHS may be contemplating incorporating this incurred cost approach into future revisions of its CSC Policy as set out in Part 6, Chapter 3 of the IHS Indian Health Manual ("CSC Policy"). For the reasons discussed below, we strongly urge IHS to abandon the incurred cost approach and to honor the longstanding process currently set out in the CSC Policy for determining full CSC need.

First and foremost, the incurred cost approach cannot be squared with the statutory provisions of the ISDA. Those provisions require that contract funds (including CSC) must be added to the contracts at the start of each contract period, and may be carried over (and are therefore not repaid to the agency) if not spent by the Tribe in that year, all without any reduction in subsequent year funding. The ISDA also requires that its provisions must be construed in favor of contracting Tribes and tribal organizations. IHS's CSC Policy is generally consistent with these requirements and provides that the full amount of CSC owed each year includes a negotiated sum for direct CSC, plus indirect cost funding determined either by applying a negotiated indirect cost rate to the direct cost base or by incorporating a lump-sum amount negotiated with IHS. An incurred cost approach that departs from or modifies the CSC Policy violates the ISDA and is strongly opposed by Tribes.

The incurred cost approach also imposes a serious hardship on contracting and compacting Tribes. Since this approach relies on a retroactive determination of expenditures, the final amount of CSC owed for a given contract year cannot be identified until final audits are completed, which can be two or more years later. This extended and indefinite

"reconciliation" period—which the agency has stated could last up to five years after the contract year—leads to significant uncertainty and complicates tribal accounting practices, thereby undermining the ISDA's goals of encouraging tribal self-determination and self-governance. It is also inconsistent with the indirect cost rate system utilized by Tribes and tribal organizations (along with most other government contractors) to recover indirect costs, which already adjusts based on actual expenditures.

IHS's Development of the Incurred Cost Approach

In June 2012 the Supreme Court for the second time held the government liable in damages for CSC underpayments. The Court's ruling came in a tribal lawsuit against the BIA, Salazar v. Ramah Navajo Chapter, and the Federal Circuit extended the ruling to IHS in Arctic Slope Native Association v. Sebelius. (The first Supreme Court decision on this issue, against IHS, was Cherokee Nation v. Leavitt (2005).)

After these rulings, IHS began settling damage claims for CSC underpayments. In the course of this work, IHS hired an accounting firm to perform a forensic audit of each claimant Tribe's finances for every claim year. Through this process the agency formulated its "incurred cost" or "actual cost" methodology. Pursuant to this methodology, IHS asserted it was only liable in damages for the difference between the costs a tribal contractor spent or "incurred" each year, and the amounts the agency paid. In adopting this methodology, IHS relied, in part, on a single statement in the Ramah decision that referred to "the full amount of 'contract support costs' incurred by Tribes in performing their contracts[,]" even though nothing in that opinion addressed how to calculate damages for CSC claims or what constitutes the "full amount" of CSC owed under ISDA contracts.[1] Tribes generally opposed use of the incurred costs method, but ultimately the methodological dispute did not preclude many settlements since there were a multitude of competing approaches for computing contract damages.

Although IHS originally applied this methodology only to determine damages for breach of contract, IHS has now stated that it intends to apply this method to also determine the price of an ISDA contract—how much CSC is owed under the contract. In a May 22, 2015 Dear Tribal Leader Letter, you stated:

> IHS interprets the ISDEAA to authorize CSC funding for those actual costs that Tribes incur that meet the definition of CSC as described in the [ISDA] at 25 U.S.C. § 450j-1(a). IHS relies, in part, on the Tribe's final audited costs and, in most cases, the applicable indirect cost rate negotiated with Tribes' cognizant federal agencies. To accurately calculate a Tribe's full estimated CSC need, the IHS also reviews costs for reasonableness and duplication. For example, for FY 2014, if the Tribe chose to use an indirect cost rate to estimate its CSC need, IHS expects that the final costs could be determined in FY 2016 once the Tribe receives its FY 2014 indirect cost rate, or later. Therefore, FY 2014 reconciliation will be open until final costs are determined.

[1] See Letter from Yvette Roubideaux, Director, Indian Health Service, to Tribal Leaders (Sept. 24, 2012).

Though the IHS represented to the appropriations committees that it was not employing a five-year reconciliation process for pricing and paying CSC dues under ISDA contracts, the approach described in the May 22 letter could result in exactly that. That is because, under the incurred cost approach, IHS will not be able to determine the contract price, including the full amount of CSC, until months or years after the end of each contract year and after the agency has completed its new "reconciliation" process. This approach treats ISDA contracts as cost-reimbursement contracts in violation of the ISDA, and substantially burdens contracting and compacting Tribes and tribal organizations. For these reasons, Tribes remain vehemently opposed to the incurred costs approach.

The Incurred Cost Approach Is Harmful to Tribes and Tribal Organizations

The agency's cost incurred method severely disrupts a Tribe's financial recording and accounting procedures. This is due in part to the added administrative burden and uncertainty inherent in a system that requires the parties to keep open as many as six fiscal years at once during an ongoing reconciliation process, handing funds back-and-forth based on when costs are incurred rather than how much is owed. This uncertainty and inflated administrative burden (for Tribes *and* the IHS) seriously undermines tribal self-determination and self-governance and threatens the stability of government and program operations.

Critically, the incurred cost approach penalizes routine tribal carryover decisions. IHS treats CSC paid but not expended in a given year as an overpayment that must be "recovered." But when IHS pays the correct amount under the CSC Policy, the simple fact that a Tribe elects to carry over program funding and associated CSC to the following year does *not* alter the amount owed and create an overpayment, any more than does the carryover of program funds. But, as discussed below, Tribes have a statutory right to determine when to spend their funding without affecting their entitlement to these funds. The incurred cost approach is an affront to this fundamental right of self-governance.

Further, IHS's approach is inconsistent with the indirect cost rate system used by Tribes and tribal organizations, and which IHS has long committed to using for calculating indirect contract support costs. This system is already tied to actual incurred costs in that indirect cost rates are adjusted upward or downward by the cognizant federal agency in future years based on a comparison of the rate-generated amount with actual, audited costs incurred during the year in which the rate applies.[2] Thus, if a Tribe's incurred costs in a given year are less than the rate-generated indirect cost amount, the government will be relieved of future payment obligations (because the Tribe's rate will decrease) to compensate. The same is true of under recoveries: if a Tribe incurs costs that exceed the amount reflected in the Tribe's fixed rate, then the Tribe's future rate (and therefore the government's payment obligation) is increased to adjust for the difference. This system was designed to avoid retroactive adjustments to contract payments, which are administratively burdensome, while remaining fairly rooted in actual costs. It avoids the handing back-and-forth of funds that the IHS's approach entails; is widely used in government contracting; and has been honored by both Tribes and the IHS in the past.

[2] According to the Interior Business Center, approximately 85% of Tribes and tribal organizations negotiate indirect cost rates using this "fixed-with-carryforward" system.

The IHS's incurred cost approach to pricing contracts is in conflict with the indirect cost rate system. One problem is that the reconciliation payments contemplated under the incurred cost approach would not avoid subsequent rate increases or reductions, because the carryforward template adjusts only for the difference between actual expenditures and the rate-generated amount, and does not take into account the amount actually paid. Additionally, the IHS is only one of several federal agencies for which a Tribe's indirect cost rate is used. All federal programs (and the agencies that administer those programs) are linked in the carryforward template based on their proportional shares of total expenditures. Therefore, the IHS cannot make independent adjustments to its own indirect cost obligations without effectively invalidating the entire indirect cost rate carryforward process.

More fundamentally, contracting Tribes and tribal organizations, like other government contractors, should be able to rely on the indirect cost rate negotiated with their cognizant agency and should not be required to negotiate with the federal government *twice*—once with its cognizant agency, and then a second time with IHS as part of the "reconciliation process." That is why the IHS is required to honor a Tribe or tribal organization's indirect cost rate. See 2 C.F.R. § 200.414(c)(1) (negotiated rates must be accepted by all Federal awarding agencies unless deviation required by statute or regulation or approved by agency head based on documented justification); see also Ramah, Partial Settlement Agreement III (all federal agencies, including IHS, must honor the rates negotiated pursuant to the OMB circular).[3] As noted, these rates are negotiated and awarded based in large part on prior years' audited costs and thus are rooted in actual expenditures for reasonable and allowable costs. They are negotiated with sophisticated federal agencies well-versed in the applicable rules and requirements. There is no reason for IHS to second-guess this system based on its own incurred cost approach, nor does the ISDA permit it to do so.

The Incurred Cost Approach Is Unlawful under the ISDA

The IHS approach is not only impractical and in conflict with the indirect cost rate system; it is also illegal. The ISDA makes plain that CSCs are calculated pursuant to a fixed methodology. ISDA contracts simply are not designed as cost-reimbursable contracts, and to treat them as such is inconsistent with the provisions of the ISDA.

First, the ISDA provides that "[u]pon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled . . . ." 25 U.S.C. § 450j-1(g) (emphasis added).[4] This provision mandates that the agency must pay a Tribe's full CSC amount up front and at the same time the Tribe receives its Secretarial amount. Section 450j-1(g) controls without regard to how a Tribe eventually spends the funds in carrying out the contract. Similarly, another statutory section provides that, at a Tribe's option, all contract funds are due in a single lump-sum payment at the beginning of the contract year (§ 450*l*(c), Model Agreement § 1(b)(6)(B)(i)).

[3] Partial Settlement Agreement III also insulated BIA and IHS from claims relating to the calculation of the rate as long as the rate was negotiated using one of the new templates and the rate negotiated was applied to generate IDC need. To the extent IHS seeks to abandon this rate or adjust it further, the agency may be violating this agreement, and/or subjecting itself to liability for rate miscalculation claims.
[4] All statutory cites are to 25 U.S.C. unless otherwise indicated.

Second, the Act provides that, once contract funds are paid to a Tribe, those funds may be rebudgeted and reallocated in whatever manner the Tribe deems best for the delivery of services to its people. § 450j-1(o). This provision goes to the heart of the federal self-determination policy.

Third, under the Act unspent contract funds are never paid back to the agency; instead, the Act authorizes Tribes to carry over all unspent ISDA funds and to spend them in the next year. Moreover, when funds are carried over in this manner the Act mandates there is to be no reduction in a Tribe's subsequent ISDA funding due in that subsequent year. These provisions include CSC funds. § 450*l*(c), Model Agreement § 1(b)(9)(A). None of these provisions, as set out in the statute and the contract, can be squared with the IHS's notion that a Tribe is only entitled to be reimbursed for costs actually "incurred" (including overhead costs) and must therefore repay CSC amounts paid pursuant to 25 U.S.C. § 450j-1(g) but not expended within the contract year.[5]

IHS's incurred cost approach is also foreclosed by legislative history explaining the addition of Section 110's remedial provisions and explaining Congress's decision to extend the Contract Disputes Act to the ISDA. Here, Congress actually rejected the "incurred cost" method for calculating unpaid CSC. The Senate Report accompanying the 1988 Amendments makes this clear:

> [T]he Bureau has argued that even if the self-determination contractor was entitled to receive the amount of indirect costs generated by its indirect costs rate . . . the contractor could not recover the difference between the amount it was entitled to receive under the contract, and the amount the Bureau paid. That is, the contractor could not recover ordinary contract damages for the Bureau's breach in failing to fully fund the contract. The type of funding violation involved in that instance was not the product of a Congressional appropriation shortfall, but of a unilateral decision by the BIA to fund indirect costs for the contractor pursuant to a method other than that provided for in the contract and the applicable law. The rationale offered by the BIA for this argument was that since the contractor had not received the funds it was entitled to receive, it had also not spent them and, therefore, had not incurred

[5] It is true that the word "incurred" is used in § 450j-1(a)(3) (contract support costs must "include" certain specified "incurred" costs). While this subsection provides that contract support costs must include these "incurred" costs, it certainly does not provide that they are limited to such costs. It is an elementary rule of statutory construction that the word "includes" means "includes but is not limited to." See OFFICE OF THE LEGIS. COUNSEL, U.S. HOUSE OF REPS., HOLC GUIDE TO LEGIS. DRAFTING, § VII(A), available at legcounsel.house.gov/HOLC/Draft-ing_Legislation/Drafting_Guide.html#VIIA. Moreover, the single use of the word "incurred" in § 450j-1(a)(3) cannot be read to undo the entire statutory scheme which, as noted in text, requires that CSC be added to the contracts at the start of each contract period and may be carried over if not spent by the Tribe in that year without any reduction in subsequent year funding.

It is significant, if not determinative, that certain types of costs provided under the ISDA—namely, start-up and preaward costs—are limited by the statute to the costs which are actually "incurred." See § 450j-1(a)(5)-(6). This tells us that Congress clearly knew how to limit the payment of costs in such a manner, when that was its judgment. It also tells us that Congress chose not to do so with respect to direct and indirect CSC. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) (internal quotation and quotation marks omitted).

> any costs which could be recovered as an indirect cost under the contract. Clearly, this is an unacceptable argument.

S. Rep. No. 100-274, at 37 (1987). While this passage addresses use of the incurred cost methodology in the context of contract damages, it demonstrates that Congress did not believe that incurred costs and full contract funding were equivalent. Further, the Senate Report makes clear that Congress understood that the ordinary indirect cost rate system is to be utilized by contracting Tribes and tribal organizations to determine the amount owed under a contract. Id. at 9.

To the extent there is any ambiguity in the statute about whether the CSC due is to be calculated based on IHS's new "incurred cost" theory or based on the contract price at the commencement of each contract period, the statute makes clear that such ambiguity must be resolved in favor of Tribes. The Supreme Court has said that "[c]ontracts made under ISDA specify that '[e]ach provision of the [ISDA] and each provision of this Contract shall be liberally construed for the benefit of the Contractor . . . .' 25 U.S.C. § 450*l*(c), (model agreement §1(a)(2))." Ramah, 132 S. Ct. at 2191. The Supreme Court has interpreted this language to mean that the Government "must demonstrate that its reading [of the ISDA] is clearly required by the statutory language." *Id.* (emphasis added). See also Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1461-2462 (10th Cir. 1997) ("[I]f the Act can reasonably be construed as the Tribe would have it construed, it must be construed that way." (internal citations omitted)). The IHS's reading of the statue to require a five year reconciliation period to price the amount of CSCs due under a contract is not "clearly required" by any statutory language. Rather, the statute can just as easily be read—and is most naturally read—to require that the contract price be determined at the time of contract award.

The Incurred Cost Approach Is not Supported by the Ramah Decision

The incurred cost approach is also not supported by the Ramah decision. The Court in Ramah noted several times that a tribal contractor is entitled to the *full amount* of CSC under the ISDA. See, e.g., Ramah, 132 S. Ct. at 2186, 2190–91, 2195. Nothing in Ramah even hints that the "full" CSC mandated by the ISDA is defined by costs incurred.

The majority in Ramah used the term "incurred" only once, and only in passing during the Court's introductory summary of the case. It was not part of the Court's holding, because the Court had not yet begun to even state the issues presented, much less to resolve them. Ramah's clear holding is that the agency must pay the "full amount" of contract support costs due in the first place, as defined by the agency's "contractual promise" and the ISDA.[6]

The Incurred Cost Approach Is Contrary to the IHS CSC Policy

The IHS CSC Policy has long explained how the full amount of CSC will be calculated. As detailed in that Policy, the full amount includes a negotiated sum for direct CSC plus indirect CSC, with the latter determined either by applying a negotiated indirect cost rate to the direct cost base or by a lump-sum agreement. This approach has been used

[6] The Court held that the government's *contractual promise* was binding: "The Government's contractual promise to pay each tribal contractor the 'full amount of funds to which the contractor [was] entitled,' § 450j-1(g), was therefore binding." Id. at 2190–91 (alternation in original).

by the IHS for decades to calculate the full amount of CSC owed to tribal contractors. It has also been reflected in decades of annual IHS shortfall reports submitted to Congress.

IHS's incurred cost approach is contrary to this Policy because it does not treat the negotiated lump-sum or indirect-rate driven CSC amount as the final sum that a Tribe is entitled to be paid for that year, as the Policy states. Instead, the incurred cost approach holds that those amounts are subject to later adjustment based on IHS's incurred cost analysis. For the reasons already discussed, Tribes would oppose any revision to the CSC Policy that replaces the current method for determining each Tribe's full "CSC requirement" with an incurred cost approach.

Conclusion

IHS must administer ISDA contracts in conformity with the law, and it must interpret any ambiguities in the law in favor of contracting and compacting Tribes. The incurred cost approach to CSC fails this basic metric. It also abandons IHS's CSC Policy. Although the CSC Policy would benefit greatly from being updated to reflect the current full funding environment for CSC, its basic approach to calculating the full CSC requirement has worked well and is consistent with the ISDA. Tribes strongly oppose any IHS plans to abandon that Policy in favor of a new "incurred cost" approach that substantially and illegally burdens tribal self-determination and self-governance.

If you have questions or would like to discuss this letter in further detail, please contact Chief Malerba at (860) 862-6192, lmalerba@moheganmail.com or Chairman Allen at (360) 681-4621 or email rallen@jamestowntribe.org. Thank you.

Sincerely,

Chief Lynn Malerba
The Mohegan Tribal Government
Chairwoman, IHS Tribal Self-Governance
Advisory Committee

W. Ron Allen, Tribal Chairman/CEO
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Vice-Chairman, IHS Self-Governance
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Cc: P. Benjamin Smith, Director, Office of Tribal Self-Governance
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