

IHS Contract Support Costs
Policy Draft -- Tribal Consultation Session
Tribal Caucus Talking Points
April 26, 2016

The past six months, the IHS has at last engaged Tribes in a meaningful and productive manner, resulting in a draft Contract Support Cost Policy issued for Tribal Consultation on April 11, 2016. This followed two years of discussion, disagreement but little negotiation and no joint written product prior to Mary Smith's arrival as Deputy Director of IHS.

Although the Draft Policy is very complex, there are tangible and significant improvements over the previous version of the policy. On the other hand, there were a few important policy issues over which the IHS and the Tribes on the CSC Workgroup could not agree. The Workgroup dealt with these impasses by being somewhat circuitous in the Draft on these issues, and at times including Footnotes with each position described.

In summary, unfortunately, the resulting Draft Policy is not simplified, efficient, or align with the BIA Policy (which is much more streamlined), although these are stated Goals on pages 3-4 of the policy.

Highlights of the Policy:

1. Duplication Issue

- a. The previous policy provided for an option to accept a 80/20 rule for Tribal Shares – in other words, absent a line-by-line negotiation, 20% of Tribal Shares is assumed to be duplicated with CSC. Alternatively, Tribes may negotiate specific duplicated costs with IHS.
- b. The new Draft incorporates a similar option for the Program Base amount, at 97/3 – in other words, Tribes have the option to assume that 3% of the Program Base is duplicated with CSC, or alternatively they may do a negotiation of specific costs.
- c. Tribes supported “grandfathering” previous negotiations of duplicated costs, and not requiring a new negotiation for every Tribe.
- d. Exceptions that prompt a new negotiation of duplication are only applicable: (1) to new or expanded programs, (2) where new costs are placed into a Tribe's indirect cost pool, causing the pool to grow by more than 2% for that reason, or (3) to past ongoing contracted operations where the Tribe chooses to negotiate a new amount with IHS.
- e. ***This was the most significant unresolved issue in the Policy:***
 - i. ***Tribes and IHS have differing interpretations of the ISDEAA on how duplication of funding should be dealt with.***

- ii. **The Draft Policy does not articulate a solution to this fundamental difference, but does not concede either position. Footnotes 1 and 10 describe this issue.**
- iii. **The Tribal position is that nothing precludes funding any eligible category of CSC, as long as it is not duplicated with funding provided by the IHS. Any necessary and reasonable costs above what the IHS provided should be allowed.**
- iv. **This will likely arise in negotiations with individual Tribes and TOs.**

2. Pre-Award and Startup Costs

- a. We agree with compromise provisions calling for a post year-end tribal self-certification that startup costs have been expended.
- b. We also agree with provisions allowing negotiation of additional startup costs a Tribe incurs in excess of the negotiated amount.
- c. Finally, we agree with provisions stating that excess startup costs may either be repaid or applied to the subsequent year's CSC requirement.

3. Direct CSC

- a. Renegotiation of DCSC. In previous policy, DCSC continues with inflationary adjustment until a Tribe requests renegotiation.
 - i. We agree with provisions retaining DCSC costs as recurring costs, subject to an inflationary adjustment, and calling for renegotiation only in limited circumstances:
 - 1. when a tribe requests and concludes a renegotiation,
 - 2. when a cost previously funded as DCSC is moved to an indirect cost pool,
 - 3. when a tribe withdraws from an intertribal consortium, or
 - 4. when a tribe converts IPA or MOA personnel to direct hire (page 13) – these can be done incrementally without requiring renegotiation of the entire DCSC need.
 - 5. A Tribe may also negotiate DCSC for new and expanded programs without requiring renegotiation of the existing DCSC.
- b. Inflationary Adjustment – the Draft Policy continues the practice of using the Non-Medical Inflation rate. The Tribes have consistently advocated for use of the Medical Inflation Rate. Although IHS is working on this issue, it has not yet determined it is authorized to use the Medical rate, and the Tribal position is footnoted.**

4. Indirect Costs (IDC)

- a. IHS began the discussion with an “incurred costs” approach, which means that the amounts paid as IDC must be no more than what a Tribe’s actual costs for Indirect

Costs applicable to IHS programs are. This would require a look back after the end of the funding year, and very likely a payment due back from the Tribe/TO to match exactly how much of the IDC awarded was actually spent.

- b. The IHS also initially discussed keeping the IDC payment open indefinitely until a Tribe receives its final IDC rate, leaving uncertainty with no Tribal option to close out the award.
- c. This would have potentially kept IDC payments/reconciliation open for multiple years, with the possibility of a “surprise” bill for collection from IHS years after the award was made.
- d. Tribes objected to this interpretation and approach, so a compromise was reached on the process, which follows.
- e. Negotiating IDC need at the beginning of an award:
 - i. The IHS will assume that a Tribe has spent its entire IDC allocation if the Tribe spent an amount that equaled or exceeded the IHS award from its Total Health Care Funding (from whatever source, including 3rd party and Tribal resources). According to IHS data, a substantial majority of Tribes/TO’s (95%) fully expend their funding using this definition.
 - ii. ***Tribes expressed that it is still preferred that since 95% of Tribes/TO’s expend their funding, the IHS should assume all Tribes spend their funding (or will spend it in the next fiscal year) and that to fund the need up-front will not be a material difference.***
- f. Negotiating final IDC payment:
 - i. The compromise in the Policy draft was that Tribes may opt to close out their CSC award/payment a few months after year end, if:
 - 1. A Tribe/TO has a fixed-with-carryover rate no more than one-year old; or
 - 2. A Tribe/TO has a provisional final rate no more than two years old.
 - ii. The Policy draft includes a transition period of three years to allow Tribes/TOs notice and time to get more up-to-date IDC rates.
 - iii. Alternatively, a Tribe/TO has the option to not close out the CSC award, in order to make adjustment/payment for an updated IDC rate, for example.
 - iv. To close out CSC awards, a bilateral amendment would be signed between the Tribe and the IHS.
 - v. ***Tribes still prefer that IHS align its policy with the BIA CSC Policy, which allows for final payment to be made based on the most recent IDC rate in effect by the end of the Fiscal Year, so long as the rate is no older than 3 years.***

5. Overpayments:

- a. The Policy draft provides that overpayments for CSC may either:
 - i. Be paid back by the Tribe/TO; or
 - ii. Be applied to the next year’s CSC need

- b. The method is at the Tribe's option. Tribes support these provisions. It may be useful to clarify the language in the draft as a technical change.
6. Negotiating Indirect-Like Amounts:
 - a. The Policy draft remains substantially the same from previous CSC policy.
 - b. Tribes/TOs with IDC rates older than 3 years would be required to negotiate Indirect-Like Costs in lieu of using an IDC rate.
 - c. The Policy clarifies that Tribes with IDC rates may also negotiate Indirect-Like Costs for eligible costs that are not included in any other category of CSC or duplicated in the direct program.
 - d. Tribes support these provisions.
7. Annual Funding Report to Tribes:
 - a. This is a new section to provide a report to all Tribes with CSC funding data each year.
 - b. The Report to Tribes is not dependent upon the timeline for the separate CSC Report to Congress that IHS must submit.
 - c. Tribes support the new report.
8. CSC Calculation Template (in the Exhibits):
 - a. Tribes support the inclusion of a consistent process to calculate CSC, as practices varied among the Area Offices. This applies to the Exhibit as included in the Draft Policy.
 - b. The Tribes strongly disagreed with several of the supplemental tabs that "fed into" the Template, therefore they were removed from the Exhibit.**
 - c. Tribes must require IHS conduct Tribal Consultation prior to IHS use of any additional tabs.**
9. **Training – the Policy is so complicated that Training for IHS and Tribal staff is critical. Tribes request that training be funded and made available, with both IHS and Tribal perspectives/trainers represented.**