

IHS TRIBAL SELF-GOVERNANCE ADVISORY COMMITTEE

c/o Self-Governance Communication and Education

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Submitted via: consultation@ihs.gov

June 9, 2016

Mary Smith, Principal Deputy Director
Indian Health Service
5600 Fishers Lane
Mail Stop: 08E86
Rockville, MD 20857

RE: TSGAC Comments on IHS Contract Support Costs Policy

Dear Principal Director Smith:

On behalf of the Tribal Self-Governance Advisory Committee (TSGAC), we submit the following comments on the agency's proposed revisions to Chapter 6-3 of the Indian Health Service (IHS) Manual addressing contract support cost (CSC) issues.

Introductory remarks.

At the outset, the TSGAC would like to note that Congress has declined to delegate any authority to the agency to write regulations on contract support cost issues. 25 U.S.C. § 450k(a)(1); *Ramah Navajo School Bd. v. Babbitt*, 87 F.3d 1338, 1349 (D.C. Cir. 1996) (interpreting § 450k(a)(1)). While the agency is free to amend its own Manual, the Indian Self-Determination and Education Assistance Act (ISDEAA) also makes it clear that agency manuals and guidelines are not binding on the Tribes. 25 U.S.C. § 450l(c), sec. 1(b)(11); § 458aaa-16(e). Nonetheless, we see substantial value in the agency setting forth in its Manual how it plans to deal with CSC issues. For that reason, we are pleased to see IHS moving forward to reform its internal CSC procedures in light of recent litigation requiring full payment of CSC (*Salazar v Ramah*, 132 S. Ct. 2181 (2012)), the agency's own commitment to that goal, and the recent congressional decision to appropriate such sums as may be necessary each year to pay contract support costs in full. Having a policy in place—even with the shortcomings noted below—would mark an improvement over the recent state of affairs, in which IHS makes unilateral implementation decisions without notice that then may be implemented differently throughout the IHS Areas.

Before commenting on specific provisions, we also want to offer praise to IHS for pursuing an inclusive and collaborative consultation process over the past six months for developing the proposed new CSC Chapter. For years following the *Ramah* decision, IHS leadership refused to engage meaningfully and openly with Tribal leadership. But under your leadership and that of former Principal Deputy Robert McSwain, that approach changed and, consistent with the President's and the Department's consultation policies, IHS finally engaged in genuine government-to-government dialogue over the CSC Chapter. In this respect, IHS set an excellent example of the way in which the Federal-Tribal relationship should work in the context of developing Federal guidelines, manuals and regulations impacting Tribal governments.

Overview.

On the whole, the proposed new CSC chapter is helpful in laying out in considerable detail how IHS intends to negotiate, determine, and pay CSC. However, the Chapter is overly complex, and it imposes unnecessary accounting restrictions and requirements on the computation and reconciliation of CSC amounts. It appears to us that IHS's litigation experience over the past three years in the CSC claims arena has led IHS to adopt an increasingly narrow interpretation of the ISDEAA. This has occurred despite the Act's direction to IHS to interpret the Act's provisions "liberally" in favor of the Tribes. 25 U.S.C. § 4501(c), sec. 1(a)(2); § 458aaa-11(f). The Bureau of Indian Affairs (BIA) approach, on both scores, is both simpler and more in line with past BIA and IHS practice. That said, we appreciate that the approach laid out in the proposed CSC Chapter is a compromise between the Tribes' views of what the law commands and the agency's competing current views.

Because of the CSC Chapter's resulting complexity, the Chapter largely misses the goals laid out on pages 3-4 that the Chapter should "be simple and efficient," "align with the [BIA] CSC policy," "provid[e] needed certainty," and "minimize future litigation." However, we recommend that these provisions be retained in the hopes that upcoming and future revisions to the Chapter will hit closer to the mark. Moreover, we urge that these principles guide IHS's interpretation and implementation of the policy once finalized. The principles of simplicity, efficiency, transparency, consistency, and trust all should permeate IHS training on and implementation of the policy.

Duplication Issue.

Much of what is new in the proposed CSC Chapter concerns the so-called "duplication" issue—*i.e.*, how to account for costs requested as CSC that may duplicate amounts already transferred by the Secretary. We recognize that the duplication issue has emerged in the last two years as a particularly contentious issue between IHS and Tribes; and that as a result the Chapter does not reflect a consensus on how the duplication issue should be addressed. To the contrary, footnote 1 on page 9 and footnote 10 on page 41 summarize the competing agency and Tribal views on this issue. Additional places where this issue arises are in several footnotes appearing on pages 60-65, concerning the negotiation of various types of direct CSC.

Without belaboring the issue, we agree with the Tribal position that nothing in the ISDEAA disqualifies any category of costs for consideration as CSC, so long as a given type of cost meets the definitional provisions set forth in 25 U.S.C. § 450j-1(a)(3), which is where the duplication provision appears. We therefore recommend that the final CSC Chapter either adopt the Tribal position or retain all these footnotes unchanged.

Duplication in Recurring Service Unit Tribal Shares. One area where the CSC Chapter specifically addresses the duplication issue in a practical compromise fashion concerns Recurring Service Unit Shares. The existing Manual provides an optional default rule that 20% of Area and Headquarters Tribal Shares are considered duplicative of CSC amounts otherwise due (page 19). The new draft Chapter provides a similar optional (and prospective) rule under which 3% of Recurring Service Unit Tribal Shares will be considered duplicative of CSC amounts otherwise due (page 18). As with the Area and Headquarters Shares offset, the new Chapter would provide Tribes with the alternative of engaging in a detailed analysis of the shares being contracted or compacted.

In principal, we support the proposed prospective 3% duplication provision as a reasonable and efficient optional approach to the duplication issue, provided (as the draft notes) that the provision

does not displace existing and longstanding agreements over contracted amounts (including existing agreements about duplicated amounts or the lack thereof). We support grandfathering in all existing agreements, so that the provision is only applied: (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.

We do suggest that the term "2% in the value of the IDC pool" at the top of page 18 be explained, since the provision may be read to mean a change in the pool leading to an increase in an indirect cost rate exceeding 2 percentage points (that is, from a 30% rate to a rate in excess of 32%). We believe what is intended is an increase in the size of the pool exceeding 2% of the value of the pool, such as from a \$1,000,000 pool to a pool exceeding \$1,020,000 where the \$20,000 additional amount is attributable to placement of a new type of cost in the pool. Further, during the Tribal Consultation held at the Annual Tribal Self-Governance Consultation Conference in May, 2016, Tribes questioned the reasonableness of the 2% level as constituting a material change in the IDC pool. Typically, materiality for costs in an annual audit are closer to 10%, so we believe this threshold should be re-examined by the CSC Workgroup prior to finalizing the Policy.

Also, in deciding whether a cost is a "new type" so as to trigger a detailed duplication analysis (or the 3% offset), IHS should interpret this phrase liberally in favor of the awardee, in accordance with the letter and spirit of the ISDEAA. For example, if an awardee were to create a new compliance officer position, that would be a new cost but should not be deemed a new "type" of cost if it contributes to pre-existing administrative and management functions. Like all parts of the policy, the triggers to duplication analysis must also be subject to liberal interpretation in favor of Tribes.

Finally, we recommend this provision be modified to avoid a disproportionate impact on Tribes with low rates. Tribes with low indirect cost rates necessarily have few costs in their pools, and therefore less duplication. Yet, the draft policy makes no accommodation to such Tribes. In contrast, the Area shares 80-20 rule does seek an accommodation to Tribes with lower rates. Thus, while the 80-20 rule reflects a 25% rate, the manual accommodates Tribes with lower rates % by noting that any portion of the "20" amount over the Tribe's rate is not to be used as an offset and is instead available to provide additional direct services. To accomplish a similar goal in the context of service unit shares, we urge the agency to only apply the full 3% offset to Tribes whose rates are 25% or higher, and to proportionately reduce the offset for Tribes with lower rates. Thus (for instance), a Tribe with a 12.5% rate would only have offset one-half the amount that would be offset for a Tribe with a 25% rate.

Startup and Pre-award Costs (page 12).

We do not strongly oppose compromise provisions calling for a post year-end Tribal self-certification that startup costs have been spent on negotiated startup activities. (We agree with provisions addressing the negotiation of additional startup costs a Tribe incurs in excess of the negotiated amount.) We also do not strongly oppose the provisions stating that excess startup costs may either be repaid or applied to the subsequent year's CSC requirement—although this should be clarified to be a tribal option. In both instances, however, we would prefer to see any excess funds subjected to the Act's carryover provisions so that the funds would be applied to health care.

As with other aspects of the proposed new Manual chapter, we are concerned about the imposition of additional accounting burdens designed to force Tribes to return or credit funds, when the health

care system IHS supports is so deeply—even gravely—underfunded. Until IHS is fully funded, funds not needed for one purpose (such as CSC) should routinely be available to the Tribes for expenditure on other health care purposes.

Direct Contract Support Costs (DCSC) (pages 12-14; and pages 58 and 59).

Renegotiation of DCSC. 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 inter-tribal consortium; or, (4) when a Tribe converts IPA or MOA personnel to direct hire (page 13).

Inflation adjustment. We strongly support switching the inflationary adjustment to a medical inflation rate (as discussed in footnote 2, page 13), and urge the agency to make this change in 2016. DCSC costs are part of the medical program being operated and there is accordingly no sound reason for not adjusting such costs by a medical inflation rate.

Identification of Additional Permissible DCSC Item: Examples of DCSC are described in the standards for the review and approval of CSC in Manual Exhibit 6-3-G. In addition, in the tables on pages 58 and 59,¹ items that are permissible for inclusion in the DCSC calculations as fringe benefits are shown. These include Federal Insurance Contributions Act (FICA) payments, Medicare taxes, and payments made for Life, Health, and Disability insurance, as well as payments to satisfy federal and / or state law requirements for workers' compensation insurance and unemployment insurance.

We recommend that payments made to satisfy federal Employer Shared Responsibility requirements under section 4980H of the Internal Revenue Code for applicable employees (added to the Code by the Affordable Care Act) also be identified in the page 58 and page 59 tables as examples of allowable fringe costs under DCSCs. Under the ACA, an employer has an option of either: (1) offering and paying at least a minimum amount of the cost of employee health insurance coverage; or, (2) making a per full-time employee payment to the federal government (e.g., approximately \$2,000 or \$3,000 per applicable employee in 2015). The Option 1 expenditures for the purchase of health insurance coverage are already shown in these tables as permissible costs. Also identifying Option 2 Employer Shared Responsibility payment expenditures as permissible costs would provide an important clarification for Tribes and Tribal organizations.

In requesting that the Employer Shared Responsibility payments be included as an allowable DCSC, it is important to clarify that these payments are distinct from “penalties” that are not allowable as DCSCs. Although the Employer Shared Responsibility payments are sometimes referred to casually as “penalties”, the Internal Revenue Service (IRS) refers to Shared Responsibility amounts as payments. For example, in one IRS explanatory document it states: “An applicable large employer (ALE) member may choose to either offer affordable minimum essential coverage that provides minimum value to its full-time employees (and their dependents) or potentially owe an employer shared responsibility payment to the IRS.”² Another IRS Frequently Asked Questions document also indicates that employers have the option of offering coverage that meets certain requirements or not offer coverage and make Employer Shared Responsibility

¹ On page 59, the table at the top of the page contains examples of other fringe benefit items.

² See <https://www.irs.gov/Affordable-Care-Act/Employers/Types-of-Employer-Payments-and-How-They-Are-Calculated>, May 27, 2016.

payments in amounts determined by an established formula. In contrast, employers failing to satisfy the requirements under the Affordable Care Act, such as those pertaining to market reforms, are potentially subject to an excise tax penalty.³

A parallel example to the Employer Shared Responsibility payments is the requirement that employers pay the IRS matching amounts to an employee's Medicare and Social Security taxes. The payment of the Social Security and Medicare amounts are includable costs for DCSC purposes. In contrast, employers who do not comply with the employment tax laws may be subject to criminal and civil sanctions for failing to pay the Social Security and Medicare employment taxes.⁴ Amounts paid pursuant to these sanctions would not be includable costs.

Indirect Costs (pages 14-17).

Negotiating the estimated indirect CSC requirement at the front end. Given the agency's insistence upon a so-called "incurred cost" approach to estimating and paying CSC requirements, we appreciate the agency's decision to assume that CSC is to be calculated on the entire contracted amount if at least that much in total Tribal health care funding (from whatever source) was spent in the preceding year. The agency states in footnote 3 (page 15) that a "substantial majority of awardees" show total health care expenditures exceeding the IHS contract amount, and its internal study showed that over 95% of Tribal contractors and compactors fall into this category. While it is unfortunate that the agency is moving away from simply calculating CSC on the current year's contracted amount—a practice the BIA will continue to follow under its proposed new Manual—the assumption that IHS dollars are spent first will limit the adverse impact of IHS's position for most Tribes. Of course, far preferable would be for IHS to return to past practice and not overly complicate the calculation and payment of CSC amounts by including provisions driven by circumstances facing only 5% of Tribal contractors.

Negotiating the final indirect CSC requirement after year-end. In the past, IHS has negotiated final year-end amounts based upon the best available data on hand within the 90-day period following the close of the contract year. We understand this is how the BIA will continue to operate. But because IHS has seized upon the "incurred cost" approach, IHS has in recent years discussed waiting as long as 5 years to reconcile final CSC requirements against not only full audits, but subsequent indirect cost rate carryover schedules issued two and even four years out. This delay is unnecessary. We encourage IHS to return to a policy of negotiating final amounts for each year within 90 days of the end of that contract year based on the best available data at that time. This leads to the next issue.

Aged IDC rates. We are pleased to see that IHS has developed a compromise approach that will permit close-out of the CSC negotiation process within a few months after the close of the contract year. But we are concerned that this approach is only possible for a Tribe that has a fixed indirect cost rate that is no more than one year old (for Tribes with a fixed-with-carry-forward rate), or a final rate that is no more than two years old (for Tribes with provisional-final rates). We are concerned that the switch from using up to three year old rates for this purpose, to using one or two year old rates, will adversely impact a significant number of Tribes, even if (as footnote 4 on page 16 indicates) there is a three-year transition period for this change to be implemented. Indeed, the

³ ... such an arrangement fails to satisfy the market reforms and may be subject to a \$100/day excise tax per applicable employee (which is \$36,500 per year, per employee) under section 4980D of the Internal Revenue Code."

<https://www.irs.gov/affordable-care-act/employer-health-care-arrangements>, May 27, 2016.

⁴ See <https://www.irs.gov/uac/employer-and-employee-responsibilities-employment-tax-enforcement>, May 27, 2016.

burden will fall on the Tribes that are least able to suffer the impact of the burden—those that for whatever reason do not have sufficiently current rates. The abstract quest for greater accuracy should not come at the cost of further burdening Tribes doing their best to carry out health care services for their tribal citizens.

We urge the agency to carefully monitor the impact of this change. Given the relative stability of rates over time, we question whether the change is worth the substantial additional time it will take before final CSC amounts can be negotiated. We also note that the ability to obtain current rates may be heavily impacted by outside factors, such as whether the cognizant rate agencies are short-staffed.

Bilateral amendments. We support the new practice of doing post-year bilateral amendments to reflect finally-negotiated CSC amounts (pages 16-17). However, this new practice will impose a substantial additional burden upon IHS, as well as Tribal, personnel.

Overpayments. When the parties agree that the awardee was overpaid, the policy provides that the awardee will either pay back IHS or IHS will apply the overpayment to the awardee's CSC need in the subsequent year. Section 6-3.2E.1.b.6. But the better practice would be to recognize the Tribe's right to apply the "overpayment" to direct services. As noted earlier, Tribes are hardly being "overpaid" in the health care arena; to the contrary, they are being severely underpaid. Measures that seek the repayment of certain sums paid initially as CSC only make a bad funding situation worse.

Even if this section remains as drafted, this section needs to make clear that it is the *awardee's* option whether to reimburse or take the offset in the following year. Therefore, if the overpayment provision is not removed altogether, then we suggest revising the last sentence of section 6-3.2E.1.b.6 (page 17) to read as follows (new language underlined; removed language in strikethrough): "If the awardee was overpaid, the awardee will have the option to either (a) ~~it will~~ reimburse IHS for the overpayment; or, (b) agree that IHS will apply the overpayment to the awardee's CSC need in the subsequent year."

Negotiating Indirect-like Costs (pages 17, 57).

We are pleased to see IHS retain language on page 17 and in Exhibit H (page 57 and footnote 14) recognizing the right of a Tribe to negotiate indirect-like costs even if the Tribe is also receiving indirect CSC amounts as a result of having an indirect cost rate. A Tribe often has a relatively low indirect cost rate because indirect-type functions that the agency should be funding are simply not included in the Tribe's IDC pool for reasons that have nothing to do with the IHS program. Since the ISDEAA does not condition payment of administrative CSC based upon a Tribe's cost allocation system between indirect costs and direct costs, direct costs that are administrative in nature should be payable under the Act regardless of how they are classified. Language on page 17 and page 57 of Exhibit H, together with footnote 14, assure such Tribes will enjoy this right going forward.

Annual Funding Report to Tribes (pages 23-24).

We are pleased to see IHS make clear that it will produce a funding report that is independent of any reports due to Congress, and that the funding report to Tribes will be provided annually to the Tribes regardless of any delays associated with issuance of any congressional report. The two reports are entirely separate, and the special clearance process for issuing reports to Congress

should not delay the release of financial expenditure data. Receiving such data on a timely basis is critical for Tribes to provide meaningful and timely input to IHS on contract support cost issues.

CSC on Federal Programs, Services, Functions or Activities Supported with Third- Party Revenues, and on MSPI/SASP, DVPI and CHEF funds.

We believe the agency is required by law to add CSC funding to support the delivery of Federal programs, services, functions, or activities that are paid for with third-party revenues (page 55, note 12), as well as on MSPI/SASP, DVPI, and CHEF funds. We appreciate that the agency disagrees with Tribes on this issue, and further appreciate that the proposed Chapter leaves this issue unresolved. In some instances, congressional clarification may be warranted; in others, only litigation may be able to resolve the issue. Correctly, the Manual remains neutral on these issues.

Impact on Ratemaking Process.

The IHS CSC policy affects not only awardees' relationships with IHS, but also with the cognizant agencies charged with negotiating indirect cost rates, which in turn affects awardees' relationships with every other federal agency with which they interact. This policy raises additional questions, such as how these agencies would deal with the CSC policy's treatment of overpayments during the year-end reconciliation process—requiring either repayment to IHS or application of the overpayment to the CSC need in the subsequent year—which will necessarily affect the cognizant agency's carryforward calculation or final rate determination.

Training.

The policy is so long, complex, and daunting that non-expert Tribal leaders and staff—not to mention IHS negotiators—can be expected to have difficulty understanding and applying it. A thorough and thoughtful training curriculum for both Tribal and IHS personnel should already be under development. One of the Guiding Principles is that the policy “will be supplemented with regular training for IHS and Tribal personnel to assure consistency in its application” (page 4). This needs to happen early and often. We recommend that IHS seek input from the Workgroup on the best ways to make the necessary training available to federal and Tribal staff.

We also strongly recommend that IHS negotiators for CSC have experience in finance and familiarity with Tribal cost allocation methods and operations. Agency Lead Negotiators for Self-Governance will require the requisite training and support to effectively negotiate CSC requirements.

Other Issues.

Calculation Template. We are pleased to see that the agency and Tribal representatives have reached agreement on a summary worksheet showing the basic math behind the CSC calculation process (Exhibit F, page 37). However, we are concerned that the various tabs which feed into that summary sheet (which is part of an excel workbook) have not been included because they have not yet been negotiated. We urge the agency to make the negotiation of those templates its very highest priority. We also emphasize that deployment and adoption of any “tabs” supporting CSC calculations as IHS policy by practice not be conducted without such tabs being recommended by the CSC Workgroup and subjected to Tribal Consultation. We call to the agency's attention our strong opposition to some of the assumptions and limiting principles reflected in those tabs.

For instance, the tabs demand a federal duplication credit of 25.89% against Tribal fringe benefit requirements, even though the calculation of the federal credit is severely inflated by the treatment of substantial salary benefits such as housing and special pays as fringe amounts. It is deeply disturbing that at no time have IHS personnel disclosed to the CSC workgroup how the agency arrived at the 25.89% computation. We ask that the agency revisit this position in an open and collaborative manner so that agreement can be reached (and potential litigation avoided) on the appropriate federal fringe benefit offset calculation.

Another area of concern is the agency's unilateral cap on salaries as a proportion of programs, at 62%. Here, again, the agency has never shared with the CSC workgroup the data behind this limitation, nor explained why a national computation is appropriate as a flat rule for all contracting circumstances. Here, too, we ask that the agency revisit this position with Tribes in an open and collaborative manner.

There are a number of other tabs that have not been shared with the Workgroup in quite some time so it is impossible to discern if they reflect other areas of disagreement. Therefore, we suggest that any additional tabs be developed collaboratively by the Workgroup before being put into use by agency officials.

In closing, we thank you for the opportunity to submit comments on this proposed draft Chapter. TSGAC remains willing to assist IHS in any way possible. Should you have any questions or wish to discuss further, please do not hesitate to contact me at (860)862-6192; or via email: lmalerba@moheganmail.com.

Sincerely,



Chief Lynn Malerba, Mohegan Tribe of Connecticut
Chairwoman, IHS TSGAC

cc: P. Benjamin Smith, Director, Office of Tribal Self-Governance
TSGAC Members and Technical Workgroup