

SECTION 105(I) LEASES

IHS, BIE, and now BIA!

Philip Baker-Shenk

January 22, 2020

DOI SELF-GOVERNANCE ADVISORY COMMITTEE

Holland & Knight

What Is A Section 105(I) Lease?

- An agreement by which --
 - BIA/IHS leases facility space from a Tribal Organization, and
 - The Tribal Organization uses the space to carry out its Indian Self-Determination Act contracts or self-governance agreements with BIA/IHS
- The BIA/IHS is the lessee (tenant)
- The Tribal Organization is the lessor (landlord)

The Statute Is Plain And Simple

- **25 U.S.C. §5324. Contract or grant provisions and administration**
- **(I) Lease of facility used for administration and delivery of services**
 - (1) Upon the **request** of an Indian tribe or tribal organization, the Secretary **shall** enter into a lease with the Indian tribe or tribal organization that holds **title** to, a **leasehold** interest in, or a **trust interest** in, a **facility used** by the Indian tribe or tribal organization **for the administration and delivery of services** under this chapter.
 - (2) The Secretary **shall compensate** each Indian tribe or tribal organization that enters into a lease under paragraph (1) for the use of the facility leased for the purposes specified in such paragraph. Such compensation may include rent, depreciation based on the useful life of the facility, principal and interest paid or accrued, operation and maintenance expenses, and such other reasonable expenses that the Secretary determines, by regulation, to be allowable.

The Regulation Is Plain and (SORT OF) Simple

25 C.F.R. 900

Subpart H—Lease of Tribally-Owned Buildings by the Secretary

§ 900.69 What is the purpose of this subpart?

Section 105(1) of the Act requires the Secretary, at the request of an Indian tribe or tribal organization, to enter into a lease with the Indian tribe or tribal organization for a building owned or leased by the tribe or tribal organization that is used for administration or delivery of services under the Act. The lease is to include compensation as provided in the statute as well as “such other reasonable expenses that the Secretary determines, by regulation, to be allowable.” This subpart contains requirements for these leases.

The Regulation Is Plain and (SORT OF) Simple

25 C.F.R. 900

§ 900.74 How may an Indian tribe or tribal organization propose a lease to be compensated for the use of facilities?

There are three options available:

(a) The lease may be based on fair market rental.

(b) The lease may be based on a combination of fair market rental and paragraphs (a) through (h) of § 900.70, provided that no element of expense is duplicated in fair market rental.

(c) The lease may be based on paragraphs (a) through (h) of § 900.70 only.

The Regulation Is Plain and (SORT OF) Simple

25 C.F.R. 900

§ 900.70 What elements are included in the compensation for a lease entered into between the Secretary and an Indian tribe or tribal organization for a building owned or leased by the Indian tribe or tribal organization that is used for administration or delivery of services under the Act?

To the extent that no element is duplicative, the following elements may be included in the lease compensation:

(a) Rent (sublease);
(b) Depreciation and use allowance based on the useful life of the facility

based on acquisition costs not financed with Federal funds;

(c) Contributions to a reserve for replacement of facilities;

(d) Principal and interest paid or accrued;

(e) Operation and maintenance expenses, to the extent not otherwise included in rent or use allowances, including, but not limited to, the following:

- (1) Water, sewage;
- (2) Utilities;
- (3) Fuel;
- (4) Insurance;
- (5) Building management supervision and custodial services;
- (6) Custodial and maintenance supplies;
- (7) Pest control;
- (8) Site maintenance (including snow and mud removal);
- (9) Trash and waste removal and disposal;
- (10) Fire protection/fire fighting services and equipment;

(11) Monitoring and preventive maintenance of building structures and systems, including but not limited to:

(i) Heating/ventilation/air conditioning;

(ii) Plumbing;

(iii) Electrical;

(iv) Elevators;

(v) Boilers;

(vi) Fire safety system;

(vii) Security system; and

(viii) Roof, foundation, walls, floors.

(12) Unscheduled maintenance;

(13) Scheduled maintenance (including replacement of floor coverings, lighting fixtures, repainting);

(14) Security services;

(15) Management fees; and

(16) Other reasonable and necessary operation or maintenance costs justified by the contractor;

(f) Repairs to buildings and equipment;

(g) Alterations needed to meet contract requirements;

(h) Other reasonable expenses; and

(i) The fair market rental for buildings or portions of buildings and land, exclusive of the Federal share of building construction or acquisition costs, or the fair market rental for buildings constructed with Federal funds exclusive of fee or profit, and for land.

How Best To Negotiate?

- Successful negotiations begin with proposals that include line-by-line detail and cost justification for each cost element
 - Reasonable estimates or evidence of actual costs from comparable space or prior year on space to be leased
- Lease Compensation Negotiation Issues
 - How much money?
 - What is reasonable?
 - Is it a duplicate cost?
- Detailed calculations and documentation

Case Study: Red Lake's BIA Leases

- Criminal Justice Center
 - \$500,000 in annual O&M funding for adult and juvenile jail, police headquarters, and court facilities of the Tribe
 - Significantly increased annual Section 501 (I) lease compensation, including principal and interest, replacement reserve, and actual operations and maintenance costs
- Fire Halls
 - Condemned as fire traps
 - Borrowed and built replacement fire halls
 - Lease covers principal and interest, replacement, final build out costs, and operation and maintenance

Senate FY 2020 Appropriations Guidance

The Committee is aware the Bureau of Indian Affairs has received proposals from tribes seeking to procure a lease under section 105(I) of the Indian Self Determination Act and Education Assistance Act [ISDEAA], Public Law 93–638, 25 U.S.C. 5342(I). The Committee expects the Bureau to communicate regularly on the status of cost estimates for the leases and directs the Bureau to report back to the Committee **within 90 days of enactment** of this act [*P.L. 116-94 signed December 20, 2019*] regarding what actions the Department has taken or plans to take in fiscal year 2020 to **engage Tribes and Tribal organizations to develop the necessary policies and protocols to analyze and evaluate future lease requests**. The Committee also directs the Indian Health Service and the Department of the Interior to **consult with Tribes**, the Department of Justice, and the Office of Management and Budget and to work with the House and Senate committees of jurisdiction, the Committees on Appropriations, and other relevant Federal partners to formulate budget and legislative strategies to address this situation, including discussions about whether, in light of the Maniilaq decisions, **these funds should be reclassified as an appropriated entitlement**.

Funding Is an Unresolved Challenge



- “Indefinite” appropriations authority
- House/Senate Appropriations Committee interest is focused on fixing it for FY 2021
- Is it in the DOI/OMB request for FY 2021 to be released February 10th?
- Tribally-driven solution?
- Proactive or reactive?

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December 11, 2019

The Honorable David Bernhardt
Secretary – Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Re: Requesting support for indefinite appropriations authority for Section 105(i) leases

Dear Mr. Secretary:

I write for two purposes. First, to commend the Department, and in particular, Assistant Secretary Tara Sweeney, for the Department’s active use of long-ignored authority to enter into “Section 105(i)” leases with Indian Tribal Governments for facilities that house Indian Self-Determination Act activities assumed by a Tribe. At Red Lake, we were pleased recently to execute such a Section 105(i) lease for our Criminal Justice Complex, after good and productive negotiations with Interior. We hope to complete additional negotiations for our new fire halls in the coming days.

I also write to ask Interior to work with OMB and the White House to request “indefinite appropriations” authority for Section 105(i) leases in the President’s Budget Request for FY 2021. “Indefinite appropriations” authority would facilitate the funding of lease payments and obviate a time consuming and costly reprogramming process that frustrates both federal and tribal administrators. We ask that the Administration place something like the following language in its FY 2021 request, modeled after what has been requested by the Administration and adopted by Congress in prior years for Contract Support Costs: *“For payment of compensation to tribes and tribal organizations, pursuant to 25 C.F.R. § 900 (Subpart H), for Section 105(i) leases by the Secretary for tribally-owned facilities associated with Indian Self-Determination and Education Assistance Act agreements with the Bureau of Indian Affairs and the Bureau of Indian Education for fiscal year 2021, such sums as may be necessary, which shall be available for obligation through September 30, 2022.”*

Thank you for your support for a more effective government-to-government relationship.

Respectfully,

Darrell G. Seki, Sr.
Chairman

cc: Hon. Tara Sweeney

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Questions

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