



MEMORANDUM

August 22, 2016

TO: Contract Support Cost Clients

FROM: HOBBS, STRAUS, DEAN & WALKER, LLP /s/

RE: ***BIA CSC Workgroup Revises Draft Policy Based on Comments from Tribal Consultation; Update on Ramah Settlement and Payment Process***

The Bureau of Indian Affairs (BIA) Contract Support Cost (CSC) Workgroup met in Oklahoma City during August 16-18 to address the comments submitted during tribal consultation on the agency's draft CSC policy. The resulting draft, which will now go forward for Departmental review, is very similar to the draft BIA sent out for comment and which we have distributed and discussed in previous reports. The agency did not accept many of the tribal recommendations to improve the draft—a disappointing development. Nonetheless, the draft policy is fundamentally sound, and tribal representatives hope and anticipate it will be approved before the end of the Obama Administration.

Below we describe the major areas of discussion, based on the tribal consultation comments, and the ultimate outcome as decided by BIA representatives. We also provide a brief update on the Ramah CSC settlement and payment process.

BIA CSC Workgroup Revises Draft Policy Based on Comments from Tribal Consultation

BIA's draft CSC policy responds to Congress's call to fully fund CSC and to simplify and streamline the process of calculating and paying CSC. The purpose of the Oklahoma City meeting was to walk through the comments received during the tribal consultation process, which included sessions ranging from Orlando to San Francisco, as well as written comments. Although only 18 sets of written comments were received, hundreds of tribes signed onto comments submitted by tribal organizations such as the Self-Governance Advisory Committee and the United South and Eastern Tribes.

Hankie Ortiz, Deputy Director of the Office of Indian Services (OIS) in BIA, led the sessions along with Tribal Co-Chair Jim Mackay of the Susanville Rancheria. The Workgroup walked through the tribal comments, summarized in the attached BIA document, and determined how to respond. Ultimately, the Workgroup approved the attached policy draft, which shows changes from the consultation version in underline-strikeout format.

MEMORANDUM

August 22, 2016

Page 2

Purpose (Section 1 of the Policy)

Tribal comments suggested adding a clear statement that the policy is not binding on a tribe unless agreed to by the tribe. (Throughout the policy, "tribe" means tribe or tribal organization contracting with BIA under the Indian Self-Determination and Education Assistance Act (ISDEEA), and this memo follows that usage.) BIA agreed to add such a statement at the end of this section. The ISDEEA specifies that tribes are not subject to agency circulars and policy manuals unless the tribe agrees or they are otherwise required by law.

Policy (Section 3)

BIA accepted the tribal comments urging inclusion of a statement that the policy will be liberally construed for the benefit of tribes. This familiar canon of construction applies to ISDEEA agreements as well as the statute itself.¹

Pre-Award Costs (Section 6)

The Workgroup had a lengthy discussion on BIA's process for the review and approval of pre-award costs, which are incurred prior to the start date of a new or expanded contract to plan, prepare for, and assume the new or expanded program. Tribes must inform the Awarding Official or the Office of Self-Governance (OSG) of the nature and extent of such costs before incurring them. The Awarding Official or OSG reviews requests and makes a recommendation to OIS at BIA's central office as to which costs (if any) should be reimbursed. Many tribes requested that BIA should delegate approval authority to the regional and field personnel, who are more familiar with the programs and the costs typically associated with assuming and running them. But BIA declined to accept this recommendation, insisting that the central office retain the final review and approval authority in the interest of consistency. BIA did agree to language that requires OIS to collaborate with the tribe and the Awarding Official or OSG before making a final decision.

Tribal representatives succeeded in quashing BIA's proposal to limit pre-award costs to "administrative" costs and exclude "programmatic" costs. Pre-award costs are not just "administrative"—they can include, for example, salaries of program personnel to plan and prepare to assume the program, or necessary equipment not included in the Secretarial amount.

The pre-award section makes clear that requests are subject to the ISDEEA declination process, so BIA must respond within 90 days, or else the request is deemed approved by operation of law. The Workgroup added a sentence informing tribes of their appeal rights in the event of a declination.

¹ See, e.g., 25 U.S.C. § 450l(c), Model Agreement § 1(a)(2).

MEMORANDUM

August 22, 2016

Page 3

Startup Costs (Section 7)

Like pre-award costs, startup costs are one-time expenses associated with the assumption of a new or expanded program, but they are incurred during the first year after the start of the new contract. The Workgroup made the same changes it did to the pre-award section discussed above.

Direct Contract Support Costs (DCSC) (Section 8)

The policy continues BIA's longstanding practice of calculating DCSC as 15% of salaries. BIA accepted the tribal comment to clarify that this means 15% of *tribally* budgeted salaries, not the salary amount BIA previously spent or would spend if it ran the program. BIA also accepted clarifying language that fringe benefit costs would be excluded from, but not subtracted from, salaries.

The discussion went downhill from there. Tribal comments suggested that the percentage be raised to 18% in light of increasing health care and other costs, but BIA representatives refused to consider this, stating that former Assistant Secretary Kevin Washburn had already rejected the same request. Tribal representatives pointed out that Mr. Washburn's decision was made before Congress lifted the CSC spending "caps," so his rationale—that 18% would be "too expensive" and eat up too much of the limited CSC appropriation—no longer holds water. Ms. Ortiz of BIA said tribes are free to take up the issue again with Acting Assistant Secretary Larry Roberts, but warned that the effort is unlikely to gain traction unless tribes can present a study with hard figures showing that 15% is not enough.

Tribes also commented that the policy should include the option to negotiate actual DCSC for tribes whose need exceeds 15%. BIA once again flatly refused, stating that the agency does not have personnel trained to negotiate DCSC. Moreover, BIA said, individual negotiations would undermine the policy's goal of a simple and streamlined approach. Tribal representatives argued that very few tribes would likely opt for negotiation, and that the personnel issue was not persuasive in light of BIA's willingness and ability to negotiate lump sums for indirect-type costs. But BIA made clear it will not negotiate DCSC. However, Sabrina McCarthy of the Interior Solicitor's Office acknowledged the ISDEAA's requirement to pay full CSC and stated that if a tribe could demonstrate DCSC needs in excess of 15% of salaries, the tribe would be paid the extra amount, either during the contract year or as damages for a contract claim.

Tribal representatives asked whether BIA would respond in writing to the comments and explain why many were not adopted. Ms. McCarthy said the agency was not required to do so, as it would be with notice-and-comment rulemaking. BIA officials ultimately agreed to do so, however.

MEMORANDUM

August 22, 2016

Page 4

Indirect Costs (Section 9)

The most controversial aspect of this section is that BIA will pay no CSC at all to tribes that (1) are above the single-audit threshold of \$750,000 (those below it can opt for an automatic 30% rate under the Simplified Method); (2) lack an indirect cost rate four years old or less; and (3) do not initiate negotiations for a lump-sum amount for indirect-type costs. Tribal comments suggested that BIA pay these tribes a de minimus rate of 10%. This minimal amount would at least partially honor the ISDEAA's mandate that the Secretary "shall add" CSC, yet would still provide incentive to negotiate a rate that would almost certainly be higher. BIA stridently disagreed, offering somewhat contradictory arguments. On the one hand, 10% would not cover the tribe's costs and thus would afford the agency no protection from liability in litigation. On the other hand, paying an automatic 10% would make tribes "complacent" and would be unfair to tribes with negotiated rates below 10%. (BIA awarding officials insisted there were several such tribes.) Finally, the agency wants to apply maximum pressure to get tribes to engage with BIA on lump-sum negotiations or the Interior Business Center (IBC) for rate negotiations.

BIA used the same reasoning in rejecting similar tribal comments that tribes ineligible for the Simplified Method that have no applicable rates and fail to initiate lump-sum negotiations should be paid the same amount as the previous year. This comment finds support in the no-reduction clause of the ISDEAA, which says that funding cannot be reduced from year to year unless one of five limited exceptions applies.² BIA countered that the statute also requires that CSC be "reasonable," and if the agency has no basis on which to determine the reasonable amount, it should pay nothing. Tribal representatives pointed out that the prior year's amount (or even 10%) would almost certainly be closer to the actual costs than \$0, and thus more reasonable, but BIA was unmoved. BIA did state, however, that if the tribe at any time produced documentation of costs incurred, BIA would pay.

Overpayment (Section 10)

The tribal frustration continued to mount as the Workgroup addressed comments that tribes should have the option to either repay overpaid amounts or apply them as an offset to the next year's CSC requirement. BIA could not agree to the offset option, which the Indian Health Service has included in its draft policy. In a lengthy discussion, BIA officials gave various reasons that offsets could not be applied. These ranged from technical difficulties (with Interior's financial management system software) to legal problems (appropriations law prevents the use of one year's funds to pay another year's obligations—a principle that does not apply here). Therefore, the policy requires that any offset be paid back to the agency, which will be administratively burdensome for both

² 25 U.S.C. § 450j-1(b).

MEMORANDUM

August 22, 2016

Page 5

BIA and tribes. BIA pledged to address this issue in its written response to the comments and explain clearly why it is unable or unauthorized to resolve overpayments through offsets.

Underpayments and Adjustments (Section 11)

The policy provides that BIA will calculate a tribe's final CSC requirement by using the most recent indirect cost rate (up to four years old) in effect as of the close of the tribe's fiscal year. Any necessary adjustments would be based on that calculation. While tribes generally liked the idea of a clear cut-off date, many tribal comments noted that this could be unfair to tribes with proposals pending for a higher rate that do not get approved before the end of the fiscal year due to IBC's slowness. The comments suggested giving tribes the option to either close out using the older rate in effect at the end of the fiscal year or to wait for the new rate to be approved.

BIA rejected this comment for a few reasons. First, it cut against the desire for a quick and efficient close out. Second, it could delay or create gaps in the annual CSC report to Congress. Third, it was seen as unfair, since tribes would only wait for rates that would be higher, while BIA would never get the benefit of rates that came in lower.

CSC Report to Congress (Section 12)

Tribal comments called on BIA to make a draft of the annual report—or at least the data to be included in the report—available to tribes in advance of its submittal to the Secretary and then Congress. In the past, when the draft reports were released early, the Workgroup was able to identify trends and correct significant errors before the reports became final and problems could no longer be fixed. The new policy, however, allows each tribe to review only its own data. As we have reported in the past, Interior has adopted the position that the Privacy Act prevents BIA from releasing financial information such as that contained in the CSC distribution reports until the information is made public by its release to Congress. The Workgroup argued about whether this was true, but Ms. McCarthy assured the group that her advice to Interior would not change. She said the Assistant Secretary receives "a lot of letters" from tribes complaining about the release of information about them. The discussion turned to workarounds such as redacting names and aggregating data. BIA ultimately agreed to provide the Workgroup composite national CSC need and distribution data by April 15 each year to assist in the appropriations advocacy process.

Handbook

Once the Workgroup completed revisions to the policy itself, it turned to the Handbook, a group of template letters, spreadsheets, and other documents that serve as tools to help BIA and tribes understand and implement the policy. BIA's view is that the Handbook contains no policy, so it did not have to go out for consultation—contrary to

MEMORANDUM

August 22, 2016

Page 6

the view expressed in many tribal comments—and can be changed unilaterally as needed. BIA did pledge, however, to confer with the Workgroup on any substantive changes to the Handbook chapters.

The Workgroup spent the last day of the meeting working through the Handbook, which remains very much a work in progress. All of the substantive documents, such as CSC calculation spreadsheets, were assigned to BIA and OSG personnel for updates and revisions. BIA will continue to work on these tools through the Workgroup, and we will keep you apprised as progress is made.

Update on Ramah Settlement and Payment Process

On August 17, 2016, the New Mexico district court issued an order granting the parties' joint motion to modify the claim form and clarify the settlement agreement. The modified claim form, a template version of which is attached, now includes an option for class members to receive payment by check or by wire transfer. The court also approved two new cover letters, one for class members who owe money to the Government and will have their shares offset in whole or in part by the Treasury Department, and one for all the other class members. Only ten class members will suffer offsets, with total reductions of just over \$500,000.

Class counsel also filed an unopposed motion to approve a methodology for distribution of shares to class members that no longer exist—primarily tribal organizations that have dissolved. If the motion is approved as expected, these shares will either go to either a "successor entity" or be split equally among the tribes that authorized the defunct tribal organization.

We understand from class counsel that claim forms will start going out within the next couple of weeks. Payments will begin on a rolling basis as the claim forms come in, probably beginning in October. At this point there is no deadline for turning in the claim forms. In about two months, class counsel must report to the court on how the process is going, and the court will set a deadline for submission of claim forms at that point.

Conclusion

If you have any questions about this memorandum, please do not hesitate to contact Joe Webster (jwebster@hobbsstrauss.com or 202-822-8282), Geoff Strommer, (gstrommer@hobbsstrauss.com or 503-242-1745), or Steve Osborne (sosborne@hobbsstrauss.com or 503-242-1745).