



## United South and Eastern Tribes, Inc.

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Transmitted via email to:  
consultation@ihs.gov

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

Re: IHS Contract Support Costs Policy

Dear Principal Deputy Director Smith,

The United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) is pleased to provide the Indian Health Service (IHS) with the following comments in response to the Agency's April 11, 2016 "Dear Tribal Leader" letter initiating consultation on its revised Contract Support Costs (CSC) policy. We appreciate the Agency's efforts in working with Tribal leaders and advocates to reach some compromise on historically contentious policy issues. However, as identified in the draft policy, the CSC workgroup couldn't come to agreement on some of the key policy issues, so further consultation and additional revisions will be needed. USET SPF offers comments on behalf of the Tribal Nations we serve.

USET SPF is a non-profit, inter-tribal organization representing 26 federally recognized Tribal Nations from Texas across to Florida and up to Maine.<sup>1</sup> Both individually, as well as collectively through USET SPF, our member Tribal Nations work to improve health care services for American Indians. Our member Tribal Nations operate in the Nashville Area of the Indian Health Service (IHS), which contains 36 IHS and Tribal health care facilities. Our citizens receive health care services both directly at IHS facilities, as well as in Tribally-operated facilities operated under contracts with IHS pursuant to the Indian Self-Determination and Education Assistance Act (ISDEAA), P.L. 93-638.

At the outset, we 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, ISDEAA also makes it clear that Agency manuals and guidelines are not binding on Tribal Nations. 25 U.S.C. § 450l(c), sec. 1(b)(11); §

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<sup>1</sup> USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Aroostook Band of Micmac Indians (ME), Catawba Indian Nation (SC), Cayuga Nation (NY), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

458aaa-16(e). Nonetheless, we see substantial value in the Agency setting forth in its Manual how it plans to deal with contract support cost 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 contract support costs (*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. See Pub. L. 114-113, 129 Stat. 2242 (2015). Having a policy in place—even with the shortcomings identified 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 Areas.

Again, before commenting on specific provisions, USET SPF would like to acknowledge IHS for pursuing an inclusive and collaborative consultation process in developing the proposed CSC policy. For years following the *Ramah* decision, IHS leadership declined 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 engaged in genuine government-to-government dialogue over the CSC policy. 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 policy is helpful in laying out, in considerable detail, how IHS intends to negotiate, determine, and pay CSC. However, the policy is overly complex, and it imposes unnecessary accounting restrictions and requirements on the computation and reconciliation of CSC amounts. It appears that IHS' 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 Tribal Nations. 25 U.S.C. § 450(c), sec. 1(a)(2); § 458aaa-11(f). The Bureau of Indian Affairs (BIA) approach, on both scores, is both simple and more in line with past BIA and IHS practice. That said, we appreciate that the proposed CSC policy is a compromise between Tribal Nations' views of what the law commands and the Agency's competing current views.

Because of the resulting complexity of the policy, the policy largely misses the guiding principles laid out on pages 3-4, that the policy 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 policy will hit closer to the mark. Moreover, we urge that these principles guide IHS' 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**

Much of what is new in the proposed CSC policy concerns the "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 Tribal Nations, and that as a result the policy 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 contract support costs.

Without belaboring the issue, we support the Tribal position, that nothing in the ISDEAA disqualifies any category of costs for consideration as contract support costs, 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. Therefore, USET SPF recommends that the final CSC policy either adopt the Tribal position or retain all these footnotes unchanged.

Duplication in Recurring Service Unit Tribal Shares. One area where the CSC policy 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 policy 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 policy would provide Tribal Nations 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 Tribal Nation'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 Tribal Nation 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.

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 other triggers to duplication analysis must also be subject to liberal interpretation in favor of Tribal Nations.

### **Startup and Pre-award Costs (page 12)**

USET SPF agrees with compromise provisions calling for a post year-end Tribal self-certification that startup costs have been spent on negotiated startup activities. We also support provisions addressing the negotiation of additional startup costs a Tribal Nation incurs in excess of the negotiated amount and provisions stating that excess startup costs may either be repaid or applied to the subsequent year's CSC requirement.

### **Direct Contract Support Costs (DCSC) (pages 12-14)**

USET SPF supports provisions retaining DCSC costs as recurring costs, subject to an inflationary adjustment, and calling for renegotiation only in limited circumstances: (1) when a Tribal Nation requests and concludes a renegotiation, (2) when a cost previously funded as DCSC is moved to an indirect cost pool, (3) when a Tribal Nation withdraws from an intertribal consortium, or (4) when a Tribal Nation converts Intergovernmental Personnel Act or Memorandum of Agreement personnel to direct hire (page 13).

Inflation adjustment. We strongly support changing 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.

### **Indirect Costs (pages 14-17)**

Negotiating the estimated indirect CSC requirement at the front end. Given the Agency's insistence upon an "incurred cost" approach to estimating and pay CSC requirements, we support 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 years 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 Tribal Nations. 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 five 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.

Aged IDC rates. USET SPF is 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, so long as a Tribal Nation has a fixed indirect cost rate that is no more than one year old (for Tribal Nations with a fixed-with-carry-forward rate), or a final rate that is no more than two years old for Tribal Nations 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 Tribal Nations, even if (as footnote 4 on page 16 indicates) there is a three-year transition period for this change to be implemented.

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, USET SPF is concerned that the new practice will impose a substantial additional burden upon IHS and 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. needs to make clear that it is the *awardee's* option whether to reimburse or take the offset in the following year. Therefore 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) 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)**

USET SPF is pleased to see IHS retain language on page 17 and in Exhibit H (page 57 and footnote 14) recognizing the right of a Tribal Nation to negotiate indirect-like costs even if the Tribal Nation is also receiving indirect CSC amounts as a result of having an indirect cost rate. A Tribal Nation often has a relatively low indirect cost rate because indirect-type functions that the Agency should be funding are simply not included in the Tribal Nation'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 Tribal Nation'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 these Tribal Nations will enjoy this right going forward.

### **Annual Funding Report to Tribal Nations (page 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 Tribal Nations will be provided annually 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 Tribal Nations 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**

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 Catastrophic Health Emergency Fund (CHEF), Domestic Violence Prevention Initiative (DVPI), and Substance Abuse and Suicide Prevention (SASP) Program funds. We understand the Agency disagrees with Tribal Nations on this issue, and appreciate that the proposed policy remains neutral. In some instances, congressional clarification may be warranted for determining CSC allowance.

### **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 complex and daunting that non-expert Tribal Leaders and/or 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 CSC Workgroup on the best ways to make the necessary training available to federal and Tribal staff.

### **Other Issues**

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. In so doing, 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 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. Particularly for USET SPF Tribal Nations residing in areas where cost of living can be high, flexibility to offer competitive salaries and benefits to hire and retain quality health staff is necessary. Arbitrary limitations on salaries endanger a self-governing Tribal Nation's ability to administer their health programming with their chosen staff. Here too, we ask that the Agency revisit this position with Tribal Nations 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.

### **Conclusion**

USET SPF appreciates the opportunity to provide our views on the draft policy, with a goal of finalizing a CSC policy that is reflective of the federal government's commitment to supporting Tribal self-determination and self-governance. We look forward to further consultation and opportunities to provide feedback on this critically important policy.

Should you have any questions or require additional information, please do not hesitate to contact Ms. Liz Malerba, USET Director of Policy and Legislative Affairs, at (202) 624-3550 or by e-mail at [lmalerba@usetinc.org](mailto:lmalerba@usetinc.org).

Sincerely,



Brian Patterson  
President



Kitcki A. Carroll  
Executive Director

CC: USET member Tribal Nations  
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*"Because there is strength in Unity"*