



MEMORANDUM

March 7, 2016

TO: Contract Support Cost Clients

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

RE: ***BIA and IHS Roll Out Draft CSC Policies at NCAI Sessions***

The Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS) each unveiled a discussion draft of its proposed new contract support cost (CSC) policy. In separate sessions at the National Congress of American Indians (NCAI) Executive Council Winter Session in Washington, DC, the agencies initiated the process of gathering comments on the draft policies and the upcoming tribal consultation process.

BIA Session

On February 25, 2016, the Department of the Interior (DOI) held a listening session to review DOI's discussion draft of its CSC policy. DOI representatives from BIA CSC Workgroup led the session, including Hankie Ortiz, Deputy Bureau Director – Indian Services; Sunshine Jordan, Self-Determination Specialist; and Sabrina McCarthy of the DOI Solicitor's Office. Ms. Ortiz gave a presentation detailing the changes to DOI's CSC policy encompassed within the discussion draft and the process used to generate the discussion draft.

Ms. Ortiz began by stressing that DOI is committed to paying 100 percent of tribes' calculated CSC need. She explained that Congress, in a statement accompanying its 2014 appropriations act, called on the Bureau of Indian Affairs to streamline and simplify the calculation and payment of CSC. DOI thereafter began work to update and streamline its CSC policy, compressing the policy from its previous 17 pages to the discussion draft's six pages. In 2014, DOI held eight consultation sessions on the CSC policy and worked in conjunction with tribal Workgroup participants to review the comments generated. Using these comments, DOI created the CSC policy discussion draft.

Mr. Ortiz explained that the changes to the CSC policy reflected in the discussion draft focus on streamlining and simplifying the CSC process. The ultimate goal is to ensure that the payment of CSC is accurate, timely, and meets 100 percent of tribes' CSC needs as calculated under the policy. This predictability should allow DOI to budget CSC two years in advance. Many of the changes the policy contains formalize practices DOI had already been employing. To ensure these practices continue into the future, DOI plans to move the CSC policy into the Indian Affairs Manual.

MEMORANDUM

March 7, 2016

Page 2

The CSC policy discussion draft includes the following changes based on feedback received during the initial consultation:

General

- Pools - CSC funds are no longer categorized into three pools because DOI is now paying full CSC and no longer needs to allocate insufficient funding.
- Direct CSC - DOI will calculate tribes' direct CSC needs based on 15 percent of identified salaries minus fringe.
- Overpayments - When DOI determines that funds above the amount calculated under the policy were provided to a tribe, the tribe will be given the opportunity to respond or to identify errors or corrections in the CSC calculation. No overpayment determinations will result in a bill or collection until the procedure is complete.
- Deadline for Annual CSC Report - Internal DOI deadlines have been established to meet the Indian Self-Determination and Education Assistant Act deadline for submitting the annual CSC report to Congress. DOI will not propose a statutory amendment to the deadline, which had been discussed during consultations.

Indirect Costs

- Simplified Method - Tribes that do not meet the single audit threshold and do not have an approved indirect cost (IDC) rate that is four or fewer years old may have their CSC IDC need calculated at a flat rate of 30 percent.
- Negotiated Lump Sum Method - Tribes that met the single audit threshold in the prior fiscal year and do not have an approved IDC rate that is four or fewer years old may negotiate a lump sum amount for indirect-type costs for the contract year.
- Small and Needy Tribes - Small and needy tribes will also be captured in either the simplified method or the negotiated lump sum method for calculating indirect CSC. Small and needy tribes will not all receive a flat rate of 30 percent for IDC, which had been discussed during consultations.

Listening session participants were provided with the CSC policy discussion draft (attached), and DOI seeks informal feedback on the discussion draft to help simplify and clarify its terms. DOI will begin formal consultation shortly, and that consultation will continue for 90 days. Four consultation sessions are planned, with the first scheduled for April 27, 2016, in Lake Buena Vista, Florida. After consultation ends, the Workgroup will meet to review and discuss the comments and to finalize the CSC policy, which will then be approved by the Assistant Secretary – Indian Affairs.

MEMORANDUM

March 7, 2016

Page 3

IHS Session

On February 22, 2016, the IHS federal-tribal CSC Workgroup held an informational session on the draft IHS CSC policy. This meeting, too, was held in conjunction with the NCAI conference in Washington, DC.

Participants in the briefing were Mohegan Chief Lynn Malerba; Nicholas Baston of the Direct Services Tribal Advisory Committee; Caitrin Shuy of the National Indian Health Board; Mary Smith, Deputy Director of the IHS¹; Roselyn Tso, lead for the IHS on CSC; Geoff Strommer of Hobbs, Straus, Dean & Walker; and Lloyd Miller of Sonosky, Chambers, Sachse, Endreson & Perry.

Deputy Director Smith said that they will not put out a policy that is not acceptable to tribes, both self-governance and direct service. The draft policy required give and take on the tribal and the IHS sides. She said IHS wants the policy to be consistent with the BIA CSC policy, although the formatting will be different.

We reported on the major features of the IHS draft policy in our memorandum of February 16, 2016. Rather than repeat that description, we attach a copy of that report for your convenience. Attached are:

- Our memorandum of February 16, 2016;
- The draft policy, dated February 20, 2016; and
- The power point used by Roselyn Tso of IHS.

There are still some areas under discussion with regard to the policy and those are noted in the right margins of the policy paper. As noted by Geoff Strommer and Lloyd Miller, the issue of duplication of funds remains the most controversial. The policy would institute a process for assessing duplication between the indirect cost pool and the Secretarial of 106(a)(1) amount. There is pending litigation on this issue and so the policy will contain a footnote describing each side's legal position.

The briefing was well attended, although it generated no questions from the audience. The next step is to complete the exhibits that will accompany the policy – a meeting to complete that task is scheduled for March 28-29, 2016. One of the exhibits will be a comprehensive template, known as the Annual CSC Calculation (ACC) tool, governing CSC calculation. A comment period will ensue, and the final policy should be issued this summer.

¹ Ms. Smith has since become the Principal Deputy Director of IHS, replacing Robert McSwain as the agency's top official.

MEMORANDUM

March 7, 2016

Page 4

Conclusion

We will continue to follow CSC developments in both IHS and BIA on your behalf. 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).