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## MEMORANDUM

May 20, 2016

TO: Tribal Clients

FROM: HOBBS, STRAUS, DEAN & WALKER, LLP

RE: *BLA Holds Contract Support Costs Policy Consultation Sessions*

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Earlier this week, the Department of the Interior, Indian Affairs (IA), held two consultation sessions on its draft contract support costs (CSC) policy. IA, which encompasses the Bureau of Indian Affairs, the Office of the Special Trustee, and the Bureau of Indian Education, held sessions in Albuquerque on May 17 and San Francisco on May 19. The goals were to (1) summarize prior CSC policy consultation; (2) describe recent work on the CSC policy; (3) share proposed changes to the CSC policy; (4) solicit feedback on proposed changes to the CSC policy; and (5) solicit feedback on how to implement a proviso in the FY 2016 CSC appropriations language.

IA proposes to shift its CSC policy from a national policy memorandum, which was supposed to last for only a year but has been in place since 2006, to a chapter in the Indian Affairs Manual (IAM). The shift of the IA CSC policy to the IAM will allow for the policy to have a more permanent effect. Revisions to the policy are intended to simplify the process for IA awarding officials to calculate and pay CSC, making CSC more predictable to budget out two years in advance and helping tribal employees better understand how IA will calculate and pay CSC.

Most fundamentally, IA's new CSC policy governs how IA will ensure full payment of CSC, as required by the Indian Self Determination and Education Assistance Act (ISDEAA). The policy will apply to all agreements made under Title I and Title IV of the ISDEAA. The attached CSC Policy Crosswalk compares the changes in IA's proposed CSC policy for the IAM against the current CSC policy included in the national policy memorandum. Additionally, the text of IA's draft CSC policy chapter in the IAM is attached for your reference.

Changes to IA's new CSC policy discussed at the listening session and summarized in the CSC Policy Crosswalk include:

- Deletion of the three pool approach method to payment of CSC, an artifact of the "shortfall" era when IA's CSC spending was "capped" by Congress;

- Options for indirect cost calculation, including a simplified method and negotiated lump-sum option;
- Formal adoption of IA's longstanding practice of calculating direct CSC need based on 15% of salaries;
- Inclusion of a process to remedy over- and under-payments of CSC; and
- Revision of internal deadlines to enable IA to provide timely submission of the CSC report to Congress.

IA also invited input on how to implement a proviso in the FY 2016 CSC appropriations language that would count unexpended CSC in a given year against the next year's requirement: "*Provided, That amounts obligated but not expended by a tribe or tribal organization for contract support costs for such agreements for the current fiscal year shall be applied to contract support costs otherwise due for such agreements for subsequent fiscal years.*" As discussed in previous reports, the Indian Health Service (IHS) pushed for this language due to its "costs-incurred" policy, but IA opposes it.

Public comments at the Albuquerque consultation session centered primarily on opposition to the appropriations proviso. Specifically, those comments reflected a desire by tribes to use unexpended funds for unexpected needs and circumstances and expressed the belief that tribes will be penalized for not using the full amount of CSC funding in a given year. The San Francisco audience sounded the same theme, noting that tribes often do not receive their full CSC funding until late in the fiscal year due to continuing resolutions, delays by IA, late changes in program funding and indirect cost rates, all of which can make it difficult to spend the full amount by the end of the year. As Jim Mackay of the Susanville Indian Rancheria said, the proviso is unfair in penalizing tribes for the failures of Congress and the agencies. It also complicates tribes' indirect cost rate proposal preparations. Mr. Mackay recommended that IA ignore the proviso. Steve Osborne of Hobbs Straus suggested that IA implement the proviso—if it continues beyond FY 2016—by adopting a presumption that any unexpended CSC carried into the next year will be required in that next year to support program funding also carried forward. Unless IA had evidence otherwise, IA would presume no net effect on CSC requirements for the two years and no need to apply any offset. Sabrina McCarthy of the Interior Solicitor's office said that IA has pushed Congress to remove the proviso, but noted that the FY 2017 draft appropriations bill still includes it, and invited tribes to call on their delegations to oppose it.

As for the IA policy itself, public comments largely tracked the template comment letter attached to our report of May 6, 2016. In San Francisco, Will Micklin of the Central Council of Tlingit and Haida Tribes applauded the IA policy for its simplicity—especially in contrast to IHS's convoluted policy—and thanked Mr. Mackay and the CSC Workgroup for its efforts. He then paraphrased the revisions suggested in

the template letter, adding a criticism of the tendency of IA to funnel new funding sources into grant instruments rather than ISDEAA agreements to avoid CSC obligations.

The “simplified method” of indirect cost calculation drew extensive discussion in San Francisco. The IA policy proposes that smaller tribes—those under the Single Audit Act threshold of \$750,000 in federal funding—and that have no current rate and do not negotiate a lump sum for indirect-type costs may receive indirect cost funding at a 30% rate. Majel Russell, counsel for the Fort Peck Tribes, commented that many larger tribes also lack resources to negotiate indirect cost rates and lump sums, and should also be eligible for the default 30% rate. Tammy Mars of the Picayune Rancheria pointed out the policy is not entirely clear whether small tribes that are eligible for the simplified method also remain eligible to negotiate a lump sum for indirect-type costs if they think it would result in more funding than the 30% rate would generate. Jim Mackay pointed out that the Handbook proposed to accompany the policy will include a flow chart showing the options for indirect cost funding, which should help clarify this issue.

IA is accepting written comments on the draft CSC policy until July 29, 2016. Written comments may be sent via email to [consultation@bia.gov](mailto:consultation@bia.gov) or mailed to Office of the Assistant Secretary-Indian Affairs, Attn: CSC Comments, 1849 C Street, NW, MS-3071-MIB, Washington, D.C. 20240.

We will continue to monitor CSC policy developments in both IA and IHS. Please do not hesitate to contact Joe Webster (at [jwebster@hobbsstrauss.com](mailto:jwebster@hobbsstrauss.com) or 202-822-8282), Geoff Strommer (at [gstrommer@hobbsstrauss.com](mailto:gstrommer@hobbsstrauss.com) or 503-242-1745), or Steve Osborne (at [sosborne@hobbsstrauss.com](mailto:sosborne@hobbsstrauss.com) or 503-242-1745) should you have any immediate questions or concerns.