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MEMORANDUM

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TO: Contract Support Cost Clients
FROM: HOBBS, STRAUS, DEAN & WALKER, LLP *Jeff Strommer by SDO*
RE: Interior Formally Approves New BIA Contract Support Cost Policy

In the closing days of the Obama Administration, the Department of the Interior finally approved a new contract support cost (CSC) policy that will apply to contracts and compacts under the Indian Self-Determination and Education Assistance Act (ISDEAA). Years in the making, the policy was signed by Principal Deputy Assistant Secretary – Indian Affairs Lawrence Roberts on January 10 and issued on January 18. Attached is a copy of the policy, as well as a press release announcing its approval. The policy has been incorporated into the Indian Affairs Manual and is available on BIA’s website.¹

Tribal representatives are generally pleased with the policy, which provides full funding and is relatively simple to understand and apply—especially in comparison with the new Indian Health Service CSC policy. The new policy reflects the full-funding mandate of the ISDEAA, as interpreted by the U.S. Supreme Court in the *Ramah* case.² It replaces the previous policy, published in 2006, which governed how the Bureau of Indian Affairs (BIA) and the Office of Self-Governance (OSG) distributed Congress’s insufficient CSC appropriations under the old “shortfall” system.

In general, the policy is quite similar to the version that went out for consultation last summer and which we have described in previous reports.³ A notable difference, however, is that the policy includes an increase in direct CSC (DCSC) from 15% to 18% of salaries (see section 1.9). Tribes have long advocated for this increase, citing rising health insurance and other costs, but the Department has staunchly resisted until now, so the increase comes as a pleasant surprise. But several tribal recommendations were rejected. Here is a brief summary of how the approved policy deals with some key issues:

¹ See <https://www.indianaffairs.gov/cs/groups/xraca/documents/document/idc2-060037.pdf>.

² *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012).

³ See, e.g., our memorandum of August 22, 2016.

- **Policy** (Section 1.1): At the suggestion of tribes, the Department added a sentence at the end of this section stating that the policy—like the ISDEAA itself—must be liberally construed in favor of tribes.
- **Pre-Award and Start-Up Costs** (Sections 1.7 and 1.8): Tribes had recommended that final determination of these costs be made by the Awarding Official or OSG, not the Central Office. But the policy retains a process in which the BIA Awarding Official or OSG reviews proposals and makes a recommended decision, but then forwards the proposal and recommendation to the Office of Self-Determination Services at headquarters for a final decision.
- **DCSC** (Section 1.9): As noted above, the policy bumps up DCSC from 15% to 18% of salaries—a major improvement. But the Department refused to include the option to negotiate actual DCSC for tribes that believe their need exceeds 18%.
- **Indirect CSC** (Section 1.10): Over tribal objections, the policy continues to provide that the Department will pay no indirect 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.
- **Overpayment** (Section 1.11): Overpayments must be repaid, and may not—as tribes suggested—be applied as an offset to the following year’s requirement. In the final policy, the Department deleted a sentence that said no bill of collection will issue until the procedure set out in the Department’s Financial Management Collection Procedures Handbook is completed.
- **Underpayment** (Section 1.12): The final policy adds a somewhat useful definition: “A CSC underpayment is defined as ‘X’ in the equation $C - P = X$, where C is the amount of CSC calculated under this policy at the end of the Tribe’s fiscal year, without regard to the later issuance of a different [indirect cost] rate for that period, and P is the amount of CSC paid, and X is a positive number.”
- **CSC Workgroup**: Previous drafts of the policy have included a section defining the BIA CSC Workgroup and its mission and providing that it will convene at least once a year. The final policy, however, does not mention the Workgroup at all. Thus it is not clear what vehicle, if any, the Department will use to seek tribal input on implementation of the policy.

Finally, an important aspect of CSC policy implementation—if not the policy itself—is the 14-part Handbook the Workgroup developed. The Handbook contains template letters, spreadsheets, and other documents to help BIA staff and tribes to understand and implement the policy. But the Department does not consider the Handbook to be a part of the policy, it did not go out for consultation, and it has not been issued or

posted with the policy on the BIA website. Tribal representatives have asked the Department for an update on the Handbook's status.

Conclusion

We will continue to follow CSC developments in both BIA and the Indian Health Service 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).