



MEMORANDUM

March 11, 2021

TO: TRIBAL CLIENTS

FROM: Geoff Strommer & Steve Osborne
HOBBS, STRAUS, DEAN & WALKER, LLP

RE: ***Updates to the Indian Affairs Manual—Part 80 Chapter 7 “Facilities Management Program 105(l) Lease of Facilities”***

This brief memorandum summarizes a new Part 80 Chapter 7 of the Indian Affairs Manual (IAM)—“Facilities Management Program 105(l) Lease of Facilities.” The chapter lays out the basic steps to requesting 105(l) leases with Bureau of Indian Affairs (BIA) or Bureau of Indian Education (BIE), and the roles of the various offices within the Department of the Interior. Because this guidance applies to Interior officials, it does not affect 105(l) leases with Indian Health Service.

Background on 105(l) Leasing

A 105(l) lease is a lease between BIA/BIE and a Tribe or Tribal Organization (T/TO) under Section 105(l) of the Indian Self-Determination Education and Assistance Act (ISDEAA), 25 U.S.C. § 5324(l), for a facility in which the T/TO holds title, has a leasehold interest, or has a trust interest, for the administration or delivery of services under a funding agreement. These funding agreements may take the form of ISDEAA Title I contracts, Title IV self-governance funding agreements (for Title IV compacts or contracts) or Public Law (P.L.) 100-297 grants for BIE Tribally Controlled Schools. As established in *Maniilaq Association v. Burwell*, 170 F. Supp. 3d. 243 (D.D.C. 2016), Section 105(l) requires BIA/BIE not only to enter a lease, but to fully compensate the T/TO for the reasonable, non-duplicative costs of operating and maintaining the facility.

IAM Chapter Updates

BIA’s policy under the chapter is to timely process 105(l) lease requests in compliance with all laws, regulations, and policy requirements. The chapter lays out the basic responsibilities of each departmental official involved in the lease request process, from the Real Property Leasing (RPL) officials at the frontlines of the process up to the Assistant Secretary of Indian Affairs.

The chapter then lays out the fundamental steps BIA/BIE will follow in processing a lease request. First, the T/TO submits their request and supporting documentation for 105(l)

leases to the RPL official at the Office of Facilities, Property and Safety Management for review and approval. The RPL officials will then notify their overseeing departmental officials of the request. In the event the T/TO submits the request to a Regional Office or other official, that office must forward the request to RPL. The supporting lease documentation RPL will review includes:

- A copy of the approved funding agreement which the lease will support, and the programs, functions, services, or activities (PFSAs) to be delivered or administered in the facility.
- Method for calculation of lease compensation, which includes either:
 - Fair market rental;
 - A combination of fair market rental and the 25 C.F.R. § 900.70 Cost Elements; or
 - Only the 25 C.F.R. § 900.70 Cost Elements.¹
- Identification of any federal funds the T/TO received previously and any federal funds it is currently receiving for the requested facility. The purpose of this request is to help the agency determine whether the proposed lease compensation would duplicate any amounts in the Secretarial amount, contract support costs, Operation and Maintenance (O&M) funding, or the indirect cost pool. The T/TO must also provide documentation supporting any federal funding received to fund construction of the facility, since the regulations allow depreciation only on construction or acquisition costs not financed with federal funds.
- Facility Description, including:
 - Location and address of the facility;
 - Architectural floorplan showing gross square footage for all floors;
 - In service date of the facility (i.e., certificate of occupancy date);
 - Certificate of Occupancy, which may have been provided to the requesting Tribe to ensure the facility conforms to departmental safety standards;
 - Identification of all programs/departments on the floor plan, and if more than one tenant occupies the facility, identification of square footage used in performance of the funding agreement;
 - A certified copy of the loan agreement, and principal and interest (P&I) payment schedule for the duration of the loan if requesting depreciation, and/or P&I;
 - Recent photos of the facility interior and exterior;
 - A recent inspection report of the condition of the facility; and
 - Tribal information regarding contract support cost considerations for the building identified in the lease to ensure no duplicative costs are claimed.
- Proof of ownership, including:
 - Proof of mortgage, title, or loan;
 - Quitclaim or warranty deed; or
 - Lease agreement if sub-leasing to BIA/BIE.

¹ The chapter notes that RPL must have a copy of the Tribal Resolution designating the official calculating these costs to act on behalf of the T/TO in this instance.

The RPL will then coordinate within the department to ensure the leased facility meets necessary program requirements, dimensions, square footage, and the purpose indicated in the Tribal request for the space, determine the availability of appropriations and obtain a legal sufficiency review from the Solicitor's Office. BIA/BIE will then conduct a final lease review, execute the lease, then distribute the lease funds to the T/TO.

The chapter notes that if a PFSA is reassumed by or retroceded to BIA/BIE, and a lease or a portion of a lease is based upon that PFSA, "the lease or the portion of the lease terminates automatically upon the reassumption or retrocession of the PFSA." The chapter also goes on to state that "Each lease must be negotiated in a manner which clearly attributes lease compensation to the PFSA upon which it is based, and each lease document must contain a provision which terminates a lease or a portion thereof upon reassumption or retrocession of the associated PFSA." This makes sense, since one of the statutory requirements for leases under section 105(I) is that the facility be used to deliver or administer services under the ISDEAA.

Previous Departmental guidance required submission of both a Tribal Resolution authorizing the tribal representative(s) to enter into the lease agreement on behalf of the Tribe and a Tribal CFO Certification that all financial and other information provided by the Tribe for purposes of negotiating the facility lease agreement or renewal is true and correct. The IAM chapter requires a resolution authorizing a Tribal representative to certify the costs, but not the resolution authorizing a tribal official to enter the lease itself on behalf of the Tribe.

Conclusion

If you have any questions, or would like to discuss this process further, please do not hesitate to contact Geoff Strommer (at gstrommer@hobbsstrauss.com or 503-242-1745) or Steve Osborne (at sosborne@hobbsstrauss.com or 503-242-1745).