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MEMORANDUM

August 8, 2023

TO: Contract Support Cost Clients

FROM: Hobbs, Straus, Dean & Walker, LLP /s/

RE: ***Updated Alert: Claims Against IHS for Contract Support Costs on Health Care Services Funded by Third-Party Revenues Due by September 30, 2023***

We write to alert you to an upcoming deadline for filing potential claims against the Indian Health Service (IHS) for contract support costs on health care services funded by third-party revenues. As we have reported, for several years Tribes and IHS have battled over whether IHS must pay CSC only on appropriated funds IHS transfers to the Tribes, as the agency contends, or must also pay CSC on the portion of a Tribe's health care program funded by third-party revenues, such as collections from Medicare, Medicaid, and private insurance. With the litigation likely to end up in the Supreme Court, Tribes should consider filing claims for FY 2017 **by September 30, 2023** in order to meet the six-year statute of limitations in the Contract Disputes Act. Tribes with calendar-year agreements would need to file CY 2017 claims by **December 31, 2023**. In this memo, we briefly explain the claims, how to file, and the rationale for doing so.¹

What Is the Legal Basis of the Claims?

The basic claim is that IHS breached its funding agreement and violated the Indian Self-Determination and Education Assistance Act (ISDEAA) by failing to pay the full CSC required under the statute. In the Tribes' reading, the ISDEAA demands that CSC be paid in support of the entire "Federal program" the Tribe carries out under its contract or compact.² When IHS provides services directly, it funds them with a blend of appropriations and third-party revenues. Both funding sources contribute to a unified federal program. By the same token, when a Tribe provides services under the ISDEAA, it must collect third-party revenues—or "program income," as the statute calls it—and expend those revenues on additional services within the scope of the ISDEAA agreement. Collecting and expending program income creates additional overhead costs of the kind CSC is designed to cover. IHS's refusal to pay CSC for services funded by third-party revenues gives rise to breach of contract claims under the Contract Disputes Act, which is incorporated into the ISDEAA.³

¹ This memo is an updated version of our memorandum dated August 22, 2022.

² See 25 U.S.C. § 5325(a)(3)(A)(i) and (ii).

³ 41 U.S.C. § 7101 et seq.; 25 U.S.C. § 5331(d) (applying Contract Disputes Act to ISDEAA).

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How Have Courts Ruled on These Claims?

In 2016, in the *Sage Memorial* case, a federal court in New Mexico ruled in favor of a tribal organization on this claim, holding that "expenditures made with third-party revenues in support of programs administered under [the ISDEAA] are spent on the federal program."⁴ For several years after that, however, courts ruled in favor of IHS on the same issue, notably the D.C. Circuit in the 2021 *Swinomish* decision.⁵ But recently the tide has turned in favor of Tribes. Both the Ninth Circuit, in the *San Carlos Apache Tribe* case, and the Tenth Circuit, in the *Northern Arapaho Tribe* case, have recently ruled that IHS must pay CSC in support of health care services funded by third-party revenues.⁶ With the appeals courts split 2-1 in favor of Tribes, the issue appears ripe for the U.S. Supreme Court to resolve. Barring an extension, the Government has until August 31 in the *Northern Arapaho* case, and until September 13 in the *San Carlos Apache* case, to file a request for a writ of certiorari to the Supreme Court. Given the circuit split and the amount of money at stake, the Government will almost certainly do so in one or both cases, and the chances are good that the Court will take the case(s).

So this issue may not be settled for some time. Whatever the ultimate outcome, though, it is clear that these claims are viable and should be preserved through the process described below.

Why File a Claim if the Supreme Court May Ultimately Invalidate It?

If IHS ultimately prevails on the central legal issue, these claims will be worthless. But filing a claim is a relatively easy and inexpensive process (as described below) that preserves the claim in case the tribal position prevails. For Tribes and tribal organizations that generate significant third-party revenues, these claims can be quite large, and thus worth the relatively small investment needed to preserve them.

How Do We File a Claim?

The first step is to file a request for a contracting officer's decision under the Contract Disputes Act.⁷ This is simply a letter setting forth the basis and amount of the claim. To help decide whether to file, you may wish to make a rough estimate of the size of your potential claims. The approximate size of the indirect-CSC component of the third-party revenue claims can be estimated by applying the following formula: $A \times B = C$, where A is the amount of third-party revenues used to provide services under the Tribe's funding agreement

⁴ *Navajo Health Found.—Sage Mem'l Hosp., Inc. v. Burwell*, 263 F. Supp. 3d 1083, 1162 (D.N.M. 2016).

⁵ *Swinomish Indian Tribal Cmty. v. Becerra*, 993 F.3d 917 (D.D.C. 2021).

⁶ *San Carlos Apache Tribe v. Becerra*, 53 F.4th 1236 (9th Cir. 2022); *Northern Arapaho Tribe v. Becerra*, 61 F.4th 810 (10th Cir. 2023). The U.S. requested rehearing in each cases, but both courts denied the request.

⁷ 41 U.S.C. § 7103.

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with IHS in a given year, B is the Tribe's indirect cost rate for that year, and C is the claim for unpaid indirect CSC. This formula yields a rough estimate only, as other variables such as exclusions and pass-through might affect the claim. Information on third-party expenditures is often available, at least in summary form, in the annual audits.

If you decide to file a claim, we recommend that you consider engaging a CSC consultant to help calculate the claims. We can suggest some possible consultants. Our firm would be happy to help with legal aspects such as drafting the claim letter and following up with the agency contracting officer.

Does Filing a Claim Commit Us to Litigation?

No. The Tribe can wait to see how IHS responds and how the litigation landscape evolves. It will probably take IHS several months to issue a decision denying the claim. At that point, a second statute of limitations in the Contract Disputes Act gives the Tribe one year from receiving the decision to decide whether to challenge the IHS decision in federal court.⁸ If the Supreme Court has ruled against Tribes by then, the Tribe can drop the claim. If the Court has yet to rule, it may be possible to challenge the IHS decision in federal district court, but seek a stay pending resolution of the issue in the Supreme Court.

Could the Claims Expire If Not Filed Soon?

Yes. As noted above, the Contract Disputes Act has a six-year statute of limitations. Claims accrue at the end of the fiscal year in question, so if you are on a federal fiscal year schedule, your oldest viable claim would be for FY 2017 and it would be due by September 30, 2023. Tribes on a calendar-year funding agreement could still file for CY 2017 through December 31, 2023. For later claims, the timing is not pressing and you could file now or wait to see how the litigation on this issue plays out over the coming year before facing the same deadlines for 2018 claims in 2024.

Conclusion

We hope this helps your Tribe or tribal organization evaluate its options with respect to these potential claims. 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).

⁸ Alternatively, the Tribe can appeal the decision in the Civilian Board of Contract Appeals within 90 days. 41 U.S.C. § 7104(a). We would recommend against this venue, however.