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MEMORANDUM

April 5, 2018

TO: Contract Support Cost Clients

FROM: Hobbs, Straus, Dean & Walker, LLP

Re: ***DOI and IHS Self-Governance Advisory Committees Discuss Suspension of the 97-3 Offset Policy and other CSC Issues with Agency Leadership***

On March 27–29, 2018, the Department of the Interior (Interior) Self-Governance Advisory Committee (SGAC) and the Indian Health Service (IHS) Tribal Self-Governance Advisory Committee (TSGAC) held their second quarterly meetings of 2018 in Washington, D.C. Tribal leaders met with federal officials to discuss current Interior and IHS policies and actions impacting self-governance tribes. This report provides a summary of the contract support cost (CSC) issues raised with the Acting Assistant Secretary – Indian Affairs and Deputy Director for Intergovernmental Affairs of the IHS during the course of those meetings.

IHS Suspension of the 97-3 Offset Policy

The TSGAC continued its candid conversation with IHS leadership about the recent suspension of the “97-3” offset policy for calculating indirect costs.¹ The policy was temporarily suspended on December 21, 2017, due to alleged concerns that implementing the policy as written may exceed reimbursement limitations under the Indian Self-Determination and Education Assistance Act (ISDEAA).

Terra Branson, Muscogee (Creek) Nation, and Melanie Fourkiller, Choctaw Nation of Oklahoma, provided an overview of the CSC Workgroup’s meeting with IHS Acting Director Michael Weahkee in early March 2018 to address the issue. They reported that the CSC Workgroup made two recommendations to the IHS: (1) to mitigate potential duplication concerns by adding clarifying language to Section 6-3.2E(3); and (2) to complete all pending indirect-type CSC negotiations. The proposed clarifying language addresses IHS’s concern that the 97-3 option results in overpayment when a duplication offset higher than 3% has been agreed to in a prior funding agreement. The new language, shown in bold, would state:

¹ For the full policy language, please see Section 6-3.2E(3) of the IHS Indian Health Manual on “Alternative Methods for Calculating IDC Associated with Recurring Service Unit Shares,” available at https://www.ihs.gov/ihm/index.cfm?module=dsp_ihm_pc_p6c3#6-3.2E.

Limited to the above circumstances, the awardee shall elect the method for determining the amount of IDC associated with the Service Unit shares and the remaining IDC that may be eligible for CSC funding, to identify duplication, if any, pursuant to 25 U.S.C. § 5325(a)(3), using one of two options listed below **or any other mutually acceptable approach**. **In connection with 3.iii, above, if an earlier funding agreement reflects a prior identification of duplicated Service Unit costs, then the parties shall negotiate a new duplicate amount considering the alternatives available under Alternative A, Alternative B, or any other mutually acceptable approach.**

Ms. Branson shared the Workgroup's understanding that Acting Director Weahkee agreed to the recommendations at the meeting and committed to issuing a Dear Tribal Leader letter followed by a 30-day comment period on the proposed Section 6-3.2E(3) language. Ms. Branson noted that it had been three weeks since the meeting and that no Dear Tribal Leader letter has yet been issued. She also reported that the IHS has refused to reinstate the suspended policy while the proposed amended language is under review.

TSGAC representatives admonished the IHS for failing to uphold the agreements that it makes with tribal leaders once the parties leave the negotiating table. Mickey Peercy, Choctaw Nation of Oklahoma, described the situation as "a slap in the face to the CSC Workgroup." He explained that the lack of an IHS response after a good faith effort to address the issue causes tribal leaders to question both the purpose of the tribal advisory process and the trustworthiness of the IHS. He predicted that the experience will make it difficult for the CSC Workgroup to agree on issues in the future.

Benjamin Smith, Deputy Director for Intergovernmental Affairs of the IHS, reported that Acting Director Weahkee did not agree to support the CSC Workgroup's recommendations during the March meeting, stating firmly that no commitments were made at the table. He reported that the IHS only agreed to two motions made during the Workgroup meeting: (1) to future consultation on the proposed amended language of the 97-3 offset policy; and (2) to reconvene the Workgroup within 45 days to discuss the amended language further. He stated that the purpose of the Workgroup is to generate policy recommendations for the Director's consideration, but it is not guaranteed that those recommendations will be adopted. He reported that the Acting Director is still considering the proposed amended language and a Dear Tribal Leader letter will be released when he makes a final decision.

TSGAC representatives pushed back against Mr. Smith's comments, reiterating that it was the Workgroup's impression that the recommendations would move forward. TSGAC Chairman Ron Allen, Jamestown S'Klallam Tribe, acknowledged that while the policy development process is "never perfect," tribes "clearly agree" that the policy needs to be updated. He urged the IHS to not let disagreement over one policy or action impede progress in other areas. He, thus, encouraged the IHS to complete all pending indirect-type CSC negotiations regardless of the amended language's status.

Mr. Smith recommended that the IHS and Workgroup identify specific action items and follow-up expectations as part of any future advisory meetings. He affirmed that the IHS is committed to paying full CSC. He stated that the IHS would like to avoid resolving this issue through litigation and a series of settlements with individual tribes.

TSGAC and IHS leadership discussed the possibility of holding a CSC Workgroup meeting during the upcoming Tribal Self-Governance Annual Consultation in Albuquerque, New Mexico, on April 22–26, but ultimately concluded that it would not be feasible given the time constraints of the consultation’s planned agenda.²

Federal Funding for CSC Under the FY 2018 Omnibus

As we reported to you previously, Congress provided full funding for CSC in the FY 2018 omnibus, with an estimated amount of \$718 million needed for IHS agreements and \$242 million for the Bureau of Indian Affairs.³ The Senate and House appropriations committees also “encourage” the IHS to cover CSC for domestic violence, substance abuse, and suicide prevention programs, among others, under ISDEAA agreements. TSGAC expressed concern that the discretionary nature of the word “encourage” continues to leave the door open to the IHS to deny CSC for these programs. The Committee requested information on how the IHS plans to act on this new direction from Congress to avoid perpetuating the status quo.

Mr. Smith reported that the IHS is interested in discussing the issue, but he cautioned that other issues – such as evolution of funding streams – present challenges. He recommended that the CSC Workgroup weigh in on whether transforming grants into tribal shares could be a viable option. Discretionary grants are currently ineligible for CSC. He admitted that such a change would likely exclude certain tribes that would need a legislative fix to be re-included. He reported that there would be tribal consultation on this issue, should it move forward.

Conclusion

If you have any questions about the matters discussed in this memorandum, please do not hesitate to contact Geoff Strommer (gstrommer@hobbsstrauss.com or 503-242-1745); Steve Osborne (sosborne@hobbsstrauss.com or 503-242-1745); or Joe Webster (jwebster@hobbsstrauss.com or 202-822-8282).

² Additional details on the upcoming Annual Consultation, including the draft agenda, are available online at <https://www.tribalseg.gov/events/event/2018-tribal-self-governance-annual-conference/>.

³ For a detailed analysis of the FY 2018 omnibus, please see our Contract Support Cost Clients Memorandum of March 27, 2018, titled “Omnibus Appropriations Act Retains Indefinite CSC Appropriations; Committee Report Calls for Payment of CSC on IHS Grants.”