



516 SE Morrison Street, Suite 1200
Portland, OR 97214


T 503.242.1745
F 503.242.1072

HOBBSSTRAUS.COM

MEMORANDUM

April 18, 2018

TO: Contract Support Cost Clients

FROM: HOBBS, STRAUS, DEAN & WALKER, LLP  (by TAE)

RE: ***IHS Initiates Consultation on “97/3” Option for Determining Indirect Cost Funding Included in Service Unit Shares***

Some five months after unilaterally rescinding a key provision of its contract support cost (CSC) policy, the Indian Health Service (IHS) has initiated tribal consultation on the issue. In a letter dated April 13, 2018, a copy of which is attached, Acting Director RADM Michael Weahkee solicits input on proposed changes to the so-called “97/3” method for determining how much indirect cost funding is included in recurring service unit shares. As chronicled in our recent reports, this somewhat obscure topic has taken center stage in CSC discussions due largely to IHS’s heavy-handed process of abruptly revoking the 97/3 option, refusing to reinstate it pending consultation, and delaying the consultation process.

Like the familiar 80/20 split for Area and Headquarters tribal shares, the 97/3 method attempts to minimize duplication between indirect CSC and indirect cost funding contained in the Secretarial or program amount transferred to a tribe. Under the IHS CSC policy, when a duplication analysis is triggered by certain events, such as the assumption of a new program or a restructuring of the indirect cost pool, the Policy gives—or gave—tribes a choice between two methods: (1) a “case-by-case detailed analysis” of indirect costs transferred in the Secretarial amount; or (2) a 97/3 split, in which 97% of the expansion is deemed part of the direct cost base and 3% is deemed indirect cost funding (and thus excluded from the direct cost base and offset against indirect CSC otherwise due). IHS revoked the latter option because it determined that, in some cases, the 97/3 split did not go far enough to prevent all duplication, resulting in overpayments.

In the attached “Dear Tribal Leader” letter, IHS seeks comments on a few options for revising section 6-3.2E(3) of the CSC Policy, which includes the 97/3 option. The IHS CSC Workgroup developed recommended language narrowly targeted to address IHS’s concern that it should not be bound by a tribe’s election of 97/3 in cases where IHS knows the duplication offset should be greater than 3%. The Workgroup’s proposal would require the parties to negotiate a new duplicate amount and take away a tribe’s right to elect a 97/3 split—but only when an earlier funding agreement identified a duplication amount. IHS also proposes two more options, both of which go well beyond the Workgroup’s proposal by taking away the tribal right to elect 97/3 in *any* circumstance. Instead, the parties would

have to agree on the method and negotiate the offset—likely a lengthy and contentious process.

The comment period runs through May 18, 2018. We have attached a draft comment letter for your consideration. It urges IHS to adopt the Workgroup's recommendation and reject the more extreme proposals that would essentially render the 97/3 option moot. Please copy us on any comments you submit to IHS.

We will continue to follow CSC developments in both IHS and the Bureau of Indian Affairs 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).