



2120 L Street, NW, Suite 700  
Washington, DC 20037

T 202.822.8282  
F 202.296.8834

HOBBSSTRAUS.COM

## MEMORANDUM

August 28, 2013

TO: Contract Support Cost Clients

FROM: HOBBS, STRAUS, DEAN & WALKER, LLP /s/

RE: ***Amendment Proposed to Delete CSC "Caps" from Senate Appropriations Bill; BIA Convenes CSC Workgroup; Tribal CSC Summit Participants Issue Statement of Recommendations***

---

In this memorandum, we report on three new developments related to contract support costs (CSC): (1) a proposed amendment to the Senate's recently released draft FY 2014 Interior appropriations bill that would delete the "caps" on both aggregate CSC spending and the amounts available to each individual contract; (2) the first meeting of the Bureau of Indian Affairs (BIA) CSC Workgroup in well over a year; and (3) participants in the Tribal CSC Summit meeting in Portland issued a Statement of Recommendations.

### ***Amendment Proposed to Delete CSC "Caps" from Senate Appropriations Bill***

In our last report, we described the divergent approaches to CSC funding taken by the House and the Senate in their respective draft FY 2014 Department of the Interior, Environment, and Related Agencies Appropriations bill.<sup>1</sup> The Senate bill adopts the Administration's proposal to impose caps not only on aggregate CSC spending for BIA and the Indian Health Service (IHS), but also on every individual Indian Self-Determination Act (ISDA) agreement. By contrast, the House bill is completely silent as to CSC spending, with no caps on either individual agreements or overall spending. CSC would be paid from the multi-billion-dollar lump sum appropriation to each agency for carrying out the ISDA and other responsibilities.

Tribes and tribal organizations that contract and compact under the ISDA have been universally hostile to the Administration's proposal, made without tribal consultation. It would essentially impose line-item appropriation limits for every ISDA agreement, an approach meant to cut off Tribes' rights to recover CSC shortfalls through Contract Disputes Act claims. To avoid this outcome, participants in the recent Tribal CSC Summit in Portland discussed and approved a simple solution: an amendment that

---

<sup>1</sup> See our memorandum of August 14, 2013 at 1-2.

## MEMORANDUM

August 28, 2013

Page 2

would simply delete from the bill the following language regarding CSC appropriations for IHS, along with substantially identical language related to BIA:

*Provided further*, That not to exceed \$476,705,000 shall be available for payments of contract support costs associated with ongoing Indian Self-Determination Act agreements with the Indian Health Service for fiscal or calendar year 2014; *Provided further*, That, notwithstanding any other provision of law, the amount available for contract support costs associated with each ongoing Indian Self-Determination Act agreement with the Indian Health Service for fiscal or calendar year 2014 shall not exceed the amount identified in the "Indian Health Service Contract Support Costs" table submitted by the Secretary of Health and Human Services to the House and Senate Committees on Appropriations on June 14, 2013. . . .<sup>2</sup>

Attached is a copy of the draft amendment, along with the pages of the draft bill it would affect. We understand that Senate staff has confirmed that the amendment would accomplish its objective of conforming the CSC language to that of the House. Efforts are currently under way to identify sponsors and rally support for the amendment. For example, on August 26, 2013, the Jamestown S'Klallam Tribe sent the attached letter to Senator Patty Murray (D-WA) and a virtually identical one to Senator Cantwell (D-WA). If you would like assistance in drafting a letter urging your Senators to sponsor or support this amendment, please do not hesitate to contact us.

### ***BIA Convenes CSC Workgroup***

On August 20-21, 2013, the BIA CSC Workgroup met for the first time since March 2012, before the *Ramah* decision. The meeting in Albuquerque began on a sour note when BIA's legal advisor announced that the Federal Advisory Committee Act (FACA) required that only formal Workgroup members, and not technical advisors or members of the public, could speak during the session.<sup>3</sup> This announcement infuriated non-Workgroup-member tribal leaders who had traveled to attend the meeting, and a

---

<sup>2</sup> Caps would remain in place for amounts available for "new and expanded" agreements for each agency: \$1 million for BIA and \$500,000 for IHS.

<sup>3</sup> FACA imposes certain procedural requirements—e.g., Federal Register notice, records available for public inspection—that the Workgroup has never followed. *See* 5 U.S.C. App. II, §§ 2,5, 9-14. FACA contains an exemption, however, for groups whose meetings are held exclusively between federal officials and elected officers of state, local, or tribal governments (or their designated employees). *See* 2 U.S.C. § 1534(b) (provision of Unfunded Mandates Reform Act instituting FACA exemption). Over the past couple years, BIA and IHS have interpreted the FACA exemption to limit direct participation in advisory groups to formal members who are tribal officials or their designees. Non-compliance with FACA, the agencies have warned, nullifies a meeting and prevents the Government from paying for tribal members' travel. While tribal members dispute this interpretation, the most pragmatic solution has been to work with the agencies to find ways to formally comply while preserving the open dialogue that has typically been the hallmark of tribal-federal workgroups.

## MEMORANDUM

August 28, 2013

Page 3

tribal caucus was called. Fortunately, tribal representatives developed a FACA workaround to which BIA agreed. The Workgroup adjourned its formal session and operated informally, with everyone allowed to speak, until the last half hour of the second day, when a formal session reconvened to finalize the recommendations to Assistant Secretary – Indian Affairs (AS-IA) Kevin Washburn. As a result, the Workgroup had productive discussions, as summarized briefly below.

### *AS-IA Washburn Addresses Workgroup*

Mr. Washburn addressed the Workgroup by telephone from Washington, D.C., thanking tribal representatives for serving, and congratulating them for solving the FACA problem. He discussed his proposal that the CSC Workgroup be affiliated with the Tribal/Interior Budget Council (TIBC), which tribal representatives agreed was a good idea. The exact relationship of the two groups will be explored further, but at a minimum the Tribal Co-Chair will attend and report to TIBC. One suggestion was to maintain a seat on the TIBC Budget Subcommittee for the CSC Workgroup Tribal Co-Chair. AS-IA Washburn also agreed to push for CSC sessions at regional meetings coordinated by BIA (e.g., the Alaska Provider's Conference) to enhance communication of information from the Workgroup to tribes.

### *FY 2012 BIA Shortfall Report*

The Workgroup reviewed the final FY 2012 BIA CSC Shortfall Report submitted to Congress in July and recently posted to BIA's website (copy attached). The national CSC "deficiency" (i.e., shortfall) was \$12,218,386, for an average level of need funded (LNF) of 94.86%. Regionally, LNF varied from a low of 86.49% in the Alaska Region to a high of 100.58% in the Southern Plains Region (although the latter figure is suspect because the report also says the Southern Plains tribes were underpaid by \$6,647).

Tribal representatives insisted on the need, in future, for the Workgroup to review and comment on the report *before* it goes to Congress, as was the custom before the *Ramah* decision. Anomalies such as the Southern Plains figures cited above were routinely identified by tribal review and corrected. BIA representatives agreed to propose returning to that process. Additionally, the federal and tribal legal advisors to the Workgroup were charged with clarifying the definitions of columns C (total contract awarded under ISDA) and H (exclusions), as it appears the BIA Regions do not calculate these figures uniformly.

### *Projected Future CSC Shortfalls for BIA*

BIA issued projected CSC shortfall calculations for fiscal years 2013, 2014, and 2015 based on a methodology developed by BIA consultant Ron Demaray, as well as alternative projections for FYs 2013 and 2014 based on the House Survey and Investigation Team Methodology. The projections are attached. Both methodologies indicate that the shortfall will grow substantially, from \$12 million in FY 2012 to about

## MEMORANDUM

August 28, 2013

Page 4

\$30 million in FY 2013. The two calculations diverge somewhat in FY 2014, but both foresee smaller CSC shortfalls than in FY 2013, based on the CSC appropriation proposed in the President's budget and adopted, for now, in the Senate draft Interior appropriations bill.

### *FY 2014 CSC Appropriations*

The Workgroup discussed the Administration's proposal (discussed above) to "cap" both aggregate CSC spending and the amounts available for each individual ISDA agreement. Tribal members of the Workgroup decided to go on record as recommending that AS-IA Washburn oppose the caps, while recognizing that the AS-IA, as a representative of the Administration that issued the proposal, will not likely do so.

### *Alaska "30%" Guideline for Small Tribes*

BIA will continue to review the current policy to assign small Alaska tribes a lump-sum CSC requirement equivalent to 30% of their indirect cost bases. One suggestion was to assign a dollar minimum, similar to the "Small and Needy Tribes" floor for TPA. For now, BIA will stick with the 30% rule, but notify larger tribes using the default 30% amount that they need to negotiate an indirect cost rate or a lump-sum amount for indirect-type costs.

### *Direct CSC Pilot Project*

The Workgroup recommended (again) that BIA institute a pilot project to negotiate lump-sum DCSC requirements for four tribes.<sup>4</sup> At present, BIA calculates DCSC need at 15% of salaries. The four participants in the pilot project would be held harmless—i.e., if the lump-sum amount ends up less than the 15% amount, the participants would still be able to revert to the default 15%.

### *Proposed Edits to BIA CSC Policy*

BIA distributed a copy of the agency's CSC Policy with a number of comments and suggested edits. See attached. At first glance, the proposed changes seemed to the Workgroup to be of no substantive significance sufficient to trigger the consultation requirement for amending the Policy, but the Workgroup will consider them more carefully and make a recommendation later.

---

<sup>4</sup> See our reports dated March 29, 2012 at 2-3 (discussion of same topic at last Workgroup meeting) and May 9, 2012 (with attached letter from Workgroup to AS-IA recommending pilot project).

## **MEMORANDUM**

August 28, 2013

Page 5

### *New Tribal Co-Chair*

Tribal representatives on the Workgroup selected by acclamation Jim Mackay, Susanville Indian Rancheria, as the new Tribal Co-Chair. Mr. Mackay replaces long-time Co-Chair Rhonda Butcher.

### ***Tribal CSC Summit Participants Issue Statement of Recommendations***

On August 27, 2013, participants in the Tribal Contract Support Cost Summit issued a Statement of Recommendations on CSC issues. A copy is attached. The Summit, held in Portland, Oregon, on July 31 – August 1, allowed tribal representatives to discuss and form policy recommendations on a wide range of CSC issues. (For a detailed report on the Summit, please see our memorandum of August 14, 2013.) The attached document summarizes the recommendations of Summit participants on a range of issues, from the resolution of past claims to the proposed caps on FY 2014 CSC appropriations. As noted above, the Summit participants supported proposing an amendment to the Senate FY 2014 Interior appropriations bill that would remove all the CSC caps. The participants also recommended exploring fundamental changes in the IHS settlement process for past-year CSC claims, which so far has proceeded at a glacial pace. These and other recommendations are discussed in detail in the attached Statement, which also includes a list of Summit participants.

### ***Conclusion***

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