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MEMORANDUM

February 10, 2014

TO: CONTRACT SUPPORT COST CLIENTS
FROM: HOBBS, STRAUS, DEAN & WALKER, LLP
RE: *IHS and BIA Discuss Plans to Fully Fund Contract Support Costs in FY 2014 and Challenges in Doing So*

The Indian Health Service (IHS) will fully fund contract support costs (CSC) in FY 2014, Acting Director Dr. Yvette Roubideaux confirmed in teleconferences with tribal leaders and the IHS CSC Workgroup last week. She cautioned, however, that doing so will leave the agency without sufficient funds to restore most programs to pre-sequester levels and that work needs to be done on a long-term CSC "solution."

The Bureau of Indian Affairs (BIA) will also pay full CSC, Assistant Secretary – Indian Affairs (AS-IA) Kevin Washburn said in a teleconference held by the White House in which Dr. Roubideaux also participated. Both agencies' CSC workgroups will meet in Washington, DC during the last week of February to help the agencies identify and meet CSC obligations both in FY 2014 in the future.

IHS Acting Director Describes Budget Situation with Full CSC Funding

Dr. Roubideaux held calls with the IHS CSC Workgroup on February 5 and with tribal leaders on February 7. In both calls she outlined the agency's FY 2014 appropriation and how full funding of CSC fit into it. Congress increased IHS's CSC appropriation by \$303 million over the FY 2013 post-sequester level. Of this amount, \$33 million is for the Facilities account and unavailable to pay CSC. The \$270 million Services increase must not only pay for the existing CSC shortfall but also an increase in Purchased/Referred Care (formerly Contract Health Services), staffing packages for facilities newly constructed by IHS or joint ventures between tribes and IHS, CSC associated with the new facilities, and CSC associated with new and expanded contracts. In broad strokes, then, the new Services funding breaks down as follows:

Services Increase	\$270 million
P/R Care (CHS)	(\$77 million)
New Staffing	(\$65 million)
CSC on New Staffing	(\$20 million)
Existing CSC Shortfall	<u>(\$110 million)</u>
Deficit	(\$2 million)

So taking into account only the existing CSC shortfall, which Dr. Roubideaux said was based on reliable FY 2013 data,¹ the funding increase is close to enough to pay for full CSC by itself. But this does not account for CSC associated with the assumption of new and expanded programs, functions, services, and activities (PFSAs) from IHS by tribes. Dr. Roubideaux said that this amount averages about \$10 million per year, but varies from \$5 million to \$20 million. Thus the total amount that IHS will have to come up with to pay full CSC, beyond the increase in appropriations, according to Dr. Roubideaux, will range between \$7 million and \$22 million.

Where will these additional funds come from? Dr. Roubideaux sought guidance on this question from tribal leaders, but IHS released no draft operating plan so specific recommendations were hard to make. In general terms, tribal priorities have been made clear: IHS should fully fund CSC, but not at the expense of program funding, which IHS should restore to pre-sequester levels. Attached to this report are letters from tribes and tribal organizations addressing the agencies' FY 2014 operating plans and CSC funding, including the following specific suggestions on funding CSC without hurting program funding.

- *Supplemental appropriation:* IHS was urged to seek additional funding from Congress to cover any shortfall. In the current budget environment, however, this would be politically challenging.
- *Tap savings from unfilled positions within the agency:* Dr. Roubideaux said this was a possibility, to the extent that such positions do not represent tribal shares of direct service tribes, which must not be reduced.
- *Shift funding committed to residual functions.*
- *Shift some discretionary grant funding.*
- *Reprogram funds from other HHS agencies.* This would require approval by the Secretary and, if necessary, Congress.
- *Tap unobligated funds from prior fiscal years.* Due to restrictions under federal appropriations law, this would likely require Congressional action.

Dr. Roubideaux said she would have to submit IHS's recommended operating plan to the Secretary by the end of the day on February 7. She noted that the Department and the Office of Management and Budget (OMB) would make the final decisions and decide whether to share the draft plan with tribes. Tribes may still be able to influence the plan through input to the Department.

Throughout Dr. Roubideaux's explanation of the budget and response to tribal leaders' questions, two related themes emerged: the difficulty in budgeting for new and expanded agreements, and the need for long-term solutions to avoid annual crises. When tribes propose to assume new or expanded PFSAs, the Indian Self-Determination and Education Assistance Act (ISDEAA) requires IHS to turn them over, along with

¹ This data has not been made available to tribes by IHS.

associated CSC, within 90 days (for Title I contracts) or 45 days (Title V) unless one of the narrow statutory exceptions applies. Since tribes can propose to assume new and expanded PFSAs at any time during the fiscal year, IHS (and BIA) can never be sure how much CSC will be required, making CSC spending a moving target. History provides some guidance, but as noted above, Dr. Roubideaux said CSC needs for new and expanded agreements have ranged from \$5 million to upwards of \$20 million in a given year. Dr. Roubideaux emphasized the “mismatch” between the tribal flexibility built into the ISDEAA and the inflexible nature of appropriations, which need to be budgeted and requested two years in advance.

In the long term, Dr. Roubideaux said, CSC spending must become more stable and predictable. She mentioned that the IHS CSC Workgroup is currently developing recommendations aimed at streamlining estimates of CSC need in the individual pre-award context. That group could recommend changes to the IHS CSC Policy, but of course any change to the ISDEAA provision of flexibility for tribes and consequent unpredictability for the agencies would have to come from Congress. Dr. Roubideaux suggested that the “work plan” Congress directed IHS to develop, in consultation with tribes, would include recommendations to amend not only IHS policy but the ISDEAA itself. Tribes will want to participate actively in the long-term “work plan” process.

BIA Intends to Pay Full CSC, May Face Harder Choices than IHS

AS-IA Washburn was not as vocal as Dr. Roubideaux last week, but he did affirm that Interior shares IHS’s interpretation of Congress’s directive to pay full CSC. Unlike IHS, however, BIA did not receive much of a funding increase. As Mr. Washburn explained during a White House call on February 3, Congress restored the agency to the FY 2012 funding level, but in that year BIA did not pay full CSC. It stands to reason, then, that in order to pay full CSC in FY 2014, BIA will have to reduce program funding. When asked how much would need to be transferred from programs to CSC, Mr. Washburn said “north of \$20 million.”² Some estimates have placed the deficit closer to \$40 million or higher. Like Dr. Roubideaux, Mr. Washburn emphasized that the full need is a moving target due to tribes’ ability to assume new and expanded PFSAs throughout the year.

Although BIA’s CSC shortfall is smaller than IHS’s in absolute terms, BIA received no substantial increase in appropriations. Therefore, BIA may have a harder time than IHS in making up the difference without sizable program cuts. Like IHS, BIA has not shared draft operating plans with tribes, making specific tribal input on these decisions virtually impossible. Still, tribes have made clear their general positions: (1) fully fund CSC, (2) without cutting services, and (3) reverse the sequestration cuts. Some of the attached letters make these points, along with more specific recommendations, to AS-IA Washburn as well as Dr. Roubideaux.

² The FY 2012 BIA CSC shortfall report showed a shortfall of just over \$12 million.

Upcoming CSC-Related Events

Looking beyond this year, Congress has instructed both IHS and BIA to submit, within 120 days of enactment of the appropriations (by mid-May), “work plans” that describe how the agencies will consult with tribes to develop “long-term accounting, budget, and legislative strategies to address the [CSC] situation.”³ Tribes and tribal organizations are beginning to formulate strategies with respect to the long-term CSC work plans as well as the FY 2014 operating plans. In the coming weeks, important CSC-related events include the following:

- Feb. 14, 2014: Webinar on CSC issues hosted by NCAI, the National Indian Health Board, and Self-Governance Communication and Education. The webinar will continue the conversation on how to pay for full funding of CSC in FY 2014 as well as long-term recommendations for FY 2015 and beyond.
- Feb. 24-25: IHS CSC Workgroup meets in Washington, DC. The Workgroup will focus primarily on estimates of CSC need in the pre-award context, but will also discuss issues arising from the FY 2014 Omnibus Appropriations Act such as the CSC work plan.
- Feb. 26-27: BIA CSC Workgroup meets in Washington, DC. The draft agenda for this meeting, developed by Tribal Co-Chair Jim Mackay of the Susanville Indian Rancheria, focuses squarely on the agency’s plan to provide full CSC and the Workgroup’s role in helping BIA develop its CSC work plan.
- March 11-13: Dr. Roubideaux said she will hold a listening session on CSC issues at the NCAI Executive Council Winter Session.

The coordination of the two CSC workgroup meetings on consecutive two-day periods resulted from tribal efforts, not from decisions by the agencies to coordinate their efforts to seek tribal input on these issues. Tribal representatives have called for joint meetings and consultation sessions with both agencies as the most efficient way to discuss and arrive at long-term approaches to CSC issues. The Administration has not yet indicated whether it agrees.

Conclusion

As always, we will report to you on the events above and other CSC-related developments. In the meantime, if you have any questions about this memorandum, please do not hesitate to contact Joe Webster (jwebster@hobbsstrauss.com, 202-822-8282), Geoff Strommer (gstrommer@hobbsstrauss.com, 503-242-1745), or Steve Osborne (sosborne@hobbsstrauss.com, 503-242-1745).

³ See our memorandum dated January 15, 2014 (describing Joint Explanatory Statement accompanying FY 2014 Appropriations Act).