

# IHS TRIBAL SELF-GOVERNANCE ADVISORY COMMITTEE

c/o Self-Governance Communication and Education

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Via email: [Denise.Turk@ihs.gov](mailto:Denise.Turk@ihs.gov)  
[Mary.Smith@ihs.gov](mailto:Mary.Smith@ihs.gov)

Mr. Robert McSwain, Principal Deputy Director  
Ms. Mary Smith, Deputy Director  
Indian Health Service  
The Reyes Building  
801 Thompson Avenue, Suite 400  
Rockville, MD 20852

**RE: Interpretation of Duplication Provision in 25 U.S.C. § 450j-1(a)(3)**

Dear Principal Deputy Director McSwain and Deputy Director Smith,

On behalf of Tribal Self-Governance Advisory Committee (TSGAC) and Self-Governance Tribes, we write to express our serious concern over the Indian Health Service's recent reinterpretation of the duplication provision found in the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. § 450 *et seq.* The agency's new position that duplication is based on categories of funding, rather than the actual dollars provided in the Secretarial amount, drastically lowers the amounts owed to Tribes and Tribal organizations and is not supported by the statute or IHS's own Manual.

We respectfully urge IHS to restore its prior position that funding for contract support costs will only be considered duplicative to the extent amounts for those items have been transferred in the Secretarial amount.

***I. The ISDA's Duplication Provision Forecloses the Agency's New Position on Duplicated Costs***

The ISDA provides that a Tribe's contract support cost requirement may not duplicate funds already being paid as part of the Secretarial amount. The Act could not be clearer that contract support costs include:

any additional administrative or other expense related to the overhead incurred by the Tribal contractor in connection with the operation of the [IHS program under] contract, except that such funding shall not duplicate any funding provided under subsection (a)(1) of this section.<sup>1</sup>

The focus on "funding," not functions, is beyond reasonable debate. It is funding amounts that are potentially duplicated, not functions.

This straightforward reading of the statute is confirmed by this provision's legislative history. Section 450j-1(a)(3)(A)(ii) was added to the ISDA in 1994 to "assure against any inadvertent double payment of contract support costs which duplicate the Secretarial amount already included in the

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<sup>1</sup> 25 U.S.C. § 450j-1(a)(3)(A)(ii) (emphasis added).

contract.”<sup>2</sup> Since the 1994 ISDA amendments expanded the definition of CSC, the duplication provision assured that, notwithstanding that expansion, Congress was not authorizing the agency to pay the same costs twice and thus make a “double payment.” That is all the duplication provision means; it is not a categorical bar against the payment of additional costs necessary to carry out a contract.

Section 450j-1(a)(3)(A)(ii)’s plain meaning is also supported by Congress’s overall motivation for expanding the definition of CSC in 1994. Congress amended the Act to make clear that “[i]n the event the Secretarial amount under section 106(a)(1) for a particular function proves to be insufficient in light of a contractor’s needs for prudent management of the contract, contract support costs are to be available to supplement such sums.”<sup>3</sup> Congress was concerned that if CSC could not “supplement such sums,” program funds would have to be used to cover the required costs:

[T]he Committee’s objective [was] to assure that there is no diminution in program resources when programs, services, functions or activities are transferred to Tribal operation. In the absence of the [amended section], a tribe would be compelled to divert program funds to prudently manage the contract, a result Congress has consistently sought to avoid.<sup>4</sup>

The Act and its legislative history are therefore abundantly clear that any duplication reduction of a Tribe’s CSC requirement must be based upon a showing of duplicate amounts already being funded within the Secretarial amount.

The agency’s new focus on duplicate functions produces the very result Congress in 1994 sought to avoid—the diversion of program dollars to pay overhead costs. This will occur because if, as a result of the agency’s new approach, a Tribe is denied a portion of the full funding it requires to carry out an overhead function, the Tribe will be forced to divert program funds to cover its higher costs. That outcome defeats the core purpose of the statute’s contract support cost provisions—which was to eliminate “the onerous choice [contracting Tribes confronted] of either reducing the level of services to pay for administrative costs, or else reducing their level of effort to maintain their administrative systems.”<sup>5</sup>

The agency’s new focus on duplicate functions is also illogical. The agency’s new approach makes no sense because it means that if the agency includes any sum for a particular overhead function in the original Secretarial amount—even just one dollar—that fact categorically bars the Tribe from being paid the remainder of the contract support costs necessary to perform that function. That nonsensical outcome is avoided when Congress is taken at its word, so that the duplication provision merely recognizes that some overhead and other CSC functions are partly funded by the Secretarial amount (albeit at levels below what a Tribe finds necessary to carry out those functions), with the

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<sup>2</sup> 140 CONG. REC. 28,326 (1994) (comments of Sen. McCain regarding proposed amendment of S. 2036); 140 CONG. REC. 28,629 (1994) (notes to Committee amendment of H.R. 4842) (emphasis added).

<sup>3</sup> 140 CONG. REC. 28,631 (1994) (section-by-section analysis of proposed amendments to the CSC provisions of the Act) (emphasis added).

<sup>4</sup> *Id.*

<sup>5</sup> S. REP. NO. 100-274, at 13 (1987); *see also* S. REP. NO. 103-374, at 9 (1994).

remainder of the required amount covered with CSC funds. After all, Congress emphasized that CSC funding “shall not duplicate any funding provided under subsection (a)(1),”<sup>6</sup> not that it shall not “duplicate any function funded under subsection (a)(1).”

The agency’s new focus on duplicate functions would also render the ISDA’s duplication provision superfluous. If no function funded through the Secretarial amount could ever also be funded through the contract support cost amount, there would be no need for the duplication provision in the first place. The duplication provision only makes sense, and can only be given meaningful effect, if it means that functions can be partially funded from both sources, so that it becomes necessary to assure against any “double payment.”

Finally, the agency’s new focus on duplicate functions is also contrary to other provisions of the Act. The ISDA states that contract support cost funding is intended to provide for a Tribe’s overhead and administrative costs in whatever amount is “reasonable” for activities that “must be carried on” in order to “ensure compliance with the terms of the contract and prudent management.”<sup>7</sup> There is nothing in the statute that limits the activities that CSC funding can cover, nor that caps the payment of any of these activities to the amount the Secretary once spent (or budgeted) for a particular overhead activity. If the agency’s new focus on duplicate functions were correct, a Tribe would have no contract support cost requirement other than for the very few unique costs that IHS never incurs (such as audit costs and workers compensation premiums)—a result that would eliminate most of the very costs that Congress declared shall be “eligible” contract support cost funding under 25 U.S.C. § 450j-1(a)(3).

In short, the agency’s new position is contrary to the Act. The correct rule is this: so long as the additional costs the Tribe claims are reasonable and necessary for the Tribe to prudently carry out the contract, then those additional costs are eligible for CSC funding.

***II. The IHS Manual, like Prior Agency Guidelines, Correctly Adopts a Duplicated Cost—and Not a Duplicated Function—Approach to Contract Support Cost Calculations***

Contrary to the agency’s new approach, the IHS CSC Manual<sup>8</sup> expresses the agency’s longstanding position that most CSC functions are funded by both the Secretarial amount and the CSC amount, and that this is the general rule rather than the exception. One of the best examples is found in the Manual’s treatment of direct contract support costs associated with personnel fringe benefits (an approach IHS just reaffirmed this year<sup>9</sup>). For instance, when IHS is administering a program, it routinely pays for various fringe benefits for agency employees, including retirement and insurance. A Tribe incurs the very same types of costs when carrying out an ISDA contract. When a given IHS program is contracted to a Tribe, typically fringe benefit dollars will be transferred to the Tribe as part of the Secretarial amount. Since a Tribe’s fringe benefit costs are usually higher than

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<sup>6</sup> 25 U.S.C. § 450j-1(a)(3).

<sup>7</sup> 25 U.S.C. § 450j-1(a)(2).

<sup>8</sup> See Indian Health Manual (IHM) Part 6, Chapter 3, Exh. 6-3-H.

<sup>9</sup> Tribal Leader Letter from Acting Director Robert G. McSwain (May 22, 2015) (implementing the Manual’s approach of offsetting federal fringe benefit amounts paid in the Secretarial amount against a Tribe’s fringe benefit amounts to compute a non-duplicated net Tribal CSC requirement for additional fringe benefit costs).

the agency's, the Manual provides that the Tribe's CSC requirement will be computed as the additional costs, over and above the federal fringe already paid to the Tribe, that the Tribe requires to cover its full fringe costs.<sup>10</sup>

The Manual's approach to computing direct contract support cost requirements for fringe benefits is utterly inconsistent with the agency's new approach to duplicated functions. This is the case because if duplicated "functions" were a disqualifier under the Act's duplicated cost provision, a Tribe would never be entitled to any CSC payments associated with most fringe benefits (contrary to the Manual's approach to this issue). The Manual's provisions are not a mere holdover from a now-discarded agency view of the law; only a few months ago IHS reaffirmed this approach to duplicated costs, agreeing that Tribes are eligible for additional CSC payments when the Secretarial amount paid for a particular DCSC fringe activity is insufficient to meet the Tribe's full requirement for that very same fringe activity.<sup>11</sup> Indeed, this has long been agency practice.<sup>12</sup>

Another example of duplicated functions is reflected in the Manual's provision for negotiating Tribal CSC requirements when a Tribe does not have an indirect cost rate, in order to determine a CSC amount for personnel, procurement, financial management and other administrative functions.<sup>13</sup> Even though IHS has the very same types of overhead costs, the Manual does not invoke a "duplicated function" rule and disqualify a Tribe from negotiating a CSC amount for these costs. Instead, the Manual contemplates just the opposite, a negotiation leading to a CSC payment to cover those Tribal costs.<sup>14</sup>

A last example is reflected in the Manual's treatment of Tribal share funding, where the Manual acknowledges that when Area and Headquarters "Tribal Shares" are paid to a Tribe as part of the Secretarial amount, they include a significant portion of administrative overhead costs. Under the Manual, the fact that Headquarters and Area Tribal Shares include some overhead costs does not disqualify a Tribe from seeking additional CSC for the same types of overhead costs. To the contrary, the Manual assumes a Tribe's costs are higher and specifies a shorthand calculation to determine the duplicate portion of the Headquarters and Area Tribal Shares amounts. In this shorthand method, 20% of the Headquarters and Area Tribal Shares are deemed to cover these types of overhead costs and therefore "[are] considered available for CSC."<sup>15</sup> This 20% portion is then credited to the agency

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<sup>10</sup> See, e.g., IHM Exh. 6-3-H ("Fringe benefits have historically constituted the majority of all DCSC [direct contract support costs]. The Agency reviews the documented amounts requested by the awardee and deducts the amount provided as part of the Section 106(a)(1) amount to the awardee.").

<sup>11</sup> Tribal Leader Letter from Acting Director Robert G. McSwain (May 22, 2015), at 3.

<sup>12</sup> See, e.g., Indian Health Service Circular 2004-03, Exh. 2004-03-H.

<sup>13</sup> See, e.g., IHM § 6-3.2E(2) (showing indirect contract support costs often include financial management, personnel management, records management, office services, etc.).

<sup>14</sup> See also 25 U.S.C. § 450j-1(a)(3)(A)(ii) (costs eligible for CSC include "any additional administrative or other expense related to the overhead incurred by the Tribal contractor in connection with the operation of the Federal program . . ." (emphasis added)).

<sup>15</sup> IHM § 6-3.2F(2).

as a dollar-for-dollar offset against the Tribe's total contract support cost need.<sup>16</sup> Here, again, the IHS Manual makes perfectly clear that it is not only permissible, but routine, for there to be overlapping categories of costs covered by both the Secretarial amount and the contract support cost amount. When such overlap occurs, the Manual calls for a dollar-for-dollar credit to eliminate any duplication in funding. The agency's new position on duplicated functions, rather than amounts, is therefore not only contrary to the Act but contrary to the agency's approach to this very issue in the agency's own Manual.

### **III. Conclusion**

The most natural reading of the ISDA's duplication provision, the one supported by its legislative history, and the one reflected in IHS's own Manual, is that subsection (a)(3) calls for a dollar-for-dollar offset when a category of CSC funding is duplicated in the Secretarial amount. The newly-developing agency position that would categorically disqualify all of a Tribe's CSC requirement for a function if any funding for that function was originally included in the Secretarial amount, is contrary to law, arbitrary, and inconsistent with the agency's longstanding and continuing practice under the IHS Manual. Not only must IHS administer ISDA contracts in conformity with the law; it must interpret any ambiguities in the law in favor of contracting and compacting Tribes.<sup>17</sup> IHS's new interpretation of the statutory duplication provision does not comply with this requirement.

**In closing**, we therefore respectfully request that the agency abandon its new interpretation of the ISDA's duplication provision. We look forward to your continued engagement with us on this critical matter. If you have any questions, you can reach me at (860) 862-6192; or via email: [lmalerba@moheganmail.com](mailto:lmalerba@moheganmail.com). Thank you.

Sincerely,



Chief Lynn Malerba, Mohegan Tribe  
Chairwoman, TSGAC

cc: P. Benjamin Smith, Director, Office of Tribal Self-Governance (OTSG)  
TSGAC Members and Technical Workgroup

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<sup>16</sup> IHM Exh. 6-3-C. This offset is applied in a similar manner if a Tribe does not wish to use the 80-20 shorthand formula for calculating the credit amount. In that case, the Manual specifies an alternative procedure for determining duplication: “[Area Office and Headquarters] Tribal shares will be reviewed to identify types of costs that are duplicative of costs that are already included in the awardee’s IDC [indirect cost] pool, or are proposed to be funded as DCSC. The costs already in the awardee’s IDC pool or DCSC budget will be considered as duplicative of the Tribal shares for purposes of funding IDC for administrative or ‘overhead’ purposes (Section 106(a)(3)(A)(ii)).” IHM § 6-3.2F(1). *See also* IHM Exh. 6-3-B (noting “assumption” in item 2 that an amount of “Tribal shares is similar in nature to costs included in Tribe B’s indirect cost pool,” and making a corresponding credit adjustment). This language again makes clear that overhead costs can appear both in the Secretarial amount for a Tribe’s Tribal share of the regional Area Office, and also in the Tribe’s contract support cost requirement, subject to a credit adjustment to eliminate any double payment.

<sup>17</sup> *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2191 (2012) (“Contracts made under the ISDA specify that ‘[e]ach provision of the [ISDA] and each provision of this Contract shall be liberally construed for the benefit of the Contractor . . . .’” (citing 25 U.S.C. § 450l(c) (Model Agreement, § 1(a)(2)))); *see also* 25 U.S.C. § 458aaa-11(f); 25 C.F.R. 900.3(a)(5), (b)(11); 42 U.S.C. § 137.2(d).



DEC 4 2015

Indian Health Service  
Rockville MD 20857

Ms. Marilyn Malerba  
Chairwoman  
Tribal Self-Governance Advisory Committee  
P.O. Box 1734  
McAlester, OK 74501

Dear Chairwoman Malerba:

I am responding to your November 3 letter regarding the Indian Health Service's (IHS) interpretation of the contract support costs (CSC) provisions concerning duplication in the Indian Self-Determination and Education Assistance Act (ISDEAA). While I appreciate the detail included in your letter, this letter responds only generally due to pending litigation on this specific issue.

The IHS interprets the ISDEAA as explicitly prohibiting activities funded in the Secretarial amount from also being funded with CSC, *see* 25 U.S.C. §§ 450j-1(a)(2)-(3). The ISDEAA requires that the Secretarial amount transferred shall "not be less than the appropriate Secretary would have otherwise provided for the operation of the program[] . . . without regard to any organizational level within the . . . Department of Health and Human Services, . . . at which the program, function, service, or activity [(PFSA)], including supportive administrative functions that are otherwise contractible, is operated." *Id.* § 450j-1(a)(1). However, CSC is only eligible to be paid for "reasonable costs for activities which must be carried on by a [Tribe] to ensure compliance with the terms of the contract and prudent management, but which—(A) normally are not carried on by the respective Secretary in [her] direct operation of the program; or (B) are provided by the Secretary in support of the contracted program from resources other than those under contract." *Id.* § 450j-1(a)(2).

Thus, where an activity is one normally carried on by the IHS and IHS transfers that activity in the Secretarial amount, the activity is not eligible for CSC. *Id.* The IHS recognizes that tribes may expend more funds on these activities when tribes have expanded program operation with tribal or other resources as permitted by the ISDEAA. However, IHS is not authorized to provide CSC for activities that IHS also carried out when operating the program.

The IHS CSC Policy is clear on this treatment of duplication. For example, the policy identifies numerous categories of activities that cannot be funded as direct CSC because the activity is one that normally would be carried on by the IHS in the direct operation of the program. Indian Health Manual, part 6, chapter 3, exhibit 6-3-H (identifying travel/vehicle lease, supplies and drugs, rent/utilities, etc., as among such activities).

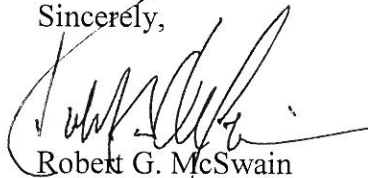
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Page 2 – Chairwoman Marilyn Malerba

CSC. I look forward to receiving recommendations from the Workgroup that will help us find ways to address CSC in a fair and efficient manner. The next CSC Workgroup meeting will be held on December 7 and 8 in Denver, Colorado.

I want to restate my commitment to working with the TSGAC, as I value your guidance and recommendations. I have sent a similar letter to Chairman W. Ron Allen.

Sincerely,

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Robert G. McSwain  
Principal Deputy Director



DEC 4 2015

Indian Health Service  
Rockville MD 20857

Mr. W. Ron Allen  
Chairman  
Tribal Self-Governance Advisory Committee  
P.O. Box 1734  
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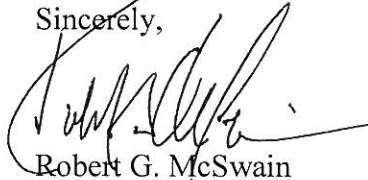


Page 2 – Chairman W. Ron Allen

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Robert G. McSwain  
Principal Deputy Director

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December 14, 2015

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MEMORANDUM NO. 43A- 2015

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^ALASKA AND CALIFORNIA BAR  
^^ALASKA AND ILLINOIS BAR

**TO: National Tribal Contract Support Cost Coalition**

**FROM: Sonosky, Chambers, Sachse, Miller & Munson, LLP** BY RAP

**SUBJECT: December 2015 IHS CSC Workgroup Meeting**

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This report is a follow up to the Memorandum we sent last month regarding IHS's commitment to updating its contract support cost manual setting forth the agency's CSC policy (see Memorandum 38A-2015). As we previously explained, new IHS Deputy Director Mary Smith announced the agency's commitment to promptly complete work on a revised policy, the tribal workgroup members proposed a comprehensive set of changes to the policy, and the full CSC Workgroup met on December 7 and 8 to begin discussions on that tribal draft. We summarize these meetings below.

But before doing so we note that the next CSC Workgroup meeting has been set for **January 14 and 15** in Washington, D.C. The meeting is open to the public. Before that meeting, the full Workgroup will have a conference call to flesh out the draft tribal provisions that IHS finds most objectionable. Before the end of December, IHS has also promised to provide a marked up version of the tribal draft. According to the timeline agreed upon by the CSC Workgroup, these policy revisions will be completed early next year and the Workgroup anticipates that a draft policy will be sent out to all Tribes for review by mid-February 2016.

## **CSC Policy Discussion**

### *Opening Remarks*

Mary Smith opened the meeting by renewing the agency's commitment to completing a new CSC policy before the next election. Ms. Smith made clear that the agency had heard and was responding to tribal concerns over past delays and agency positions. She said the Workgroup needed to create a process that was more efficient and fair for everyone, make sure the policy was not unduly burdensome for Tribes, and ensure the policy reflected a consensus between Tribes and IHS.

Ms. Smith cautioned that IHS had not finished discussing the tribal draft internally, and agency representatives were therefore not yet ready to provide suggestions on actual language. But she said IHS would be completing its review and would be open and honest about the areas the agency believed were sticking points. Ms. Smith explained that IHS was committed to working with Tribes to overcome all areas of disagreement and that, despite prior hard-line positions taken by the agency, all topics were on the table for discussion.

Tribal leaders conveyed their strong feelings of distrust and dismay with the agency, explaining that the relationship between IHS and Tribes was at its lowest point ever because Tribes had completely lost faith in IHS as their partner. Tribes explained to Ms. Smith that this process had been much harder than it needed to be, and the more time Tribes spend arguing about CSC, the less time and resources are available to provide services to tribal members.

Tribal Workgroup members conveyed particular frustration with IHS's refusal to share information, and the fact that IHS had moved forward with several new CSC policies that had never been vetted with the Workgroup. Tribes also demanded that the agency decision-maker needed to be present at all Workgroup meetings, and they emphasized that they would not tolerate a process where IHS agrees to concepts in tribal meetings only to later go back and renege on those agreements.

### *Substantive Discussion*

Not surprisingly, the two main substantive areas of disagreement identified by the agency concerned the application of the **incurred cost** method and **duplication**. The majority of the morning session's substantive discussion focused on duplication. IHS asked the tribal members a number of complex questions about the items that Tribes typically include in their indirect cost pools. The entire tenor of the conversation was one in which the agency and Tribes were opening discussion of an issue in order to explore a possible consensus.

But in the middle of the meetings tribal Workgroup members received a December 4 letter on the duplication issue from IHS Principal Deputy Director McSwain setting forth IHS's formal position on the duplication issue. In the letter IHS asserted the right to demand a duplication credit for any *activities* funded in the Secretarial amount (and not just a credit for

funding amounts paid)—a position directly contrary to the position advanced by Tribes and to the position currently set forth in the CSC policy.

The appearance of the letter in the midst of what had appeared to be a genuine negotiation threw the meeting into turmoil. Tribes immediately confronted IHS and said they felt betrayed because, despite the impression IHS was giving that the agency was willing to compromise on the issue, IHS had actually made up its mind on duplication and had no intention of compromising. To make matters much worse, it became immediately obvious that Deputy Director Smith did not know about the letter (although several of the key federal participants did).

This unfortunate incident may prove to be a watershed moment for the agency—but only if agency policymakers are able to prevail over rank and file civil servants. Tribal leaders explained this incident exemplifies why Tribes no longer trust the agency, and question IHS's commitment to moving forward collaboratively. Tribal members acknowledged Ms. Smith's genuine commitment, but emphasized that her own staff had just undercut her on a core issue at her very first meeting. Moreover, tribal members felt deeply insulted by the federal participants who knew about the letter all along—after all, many of the individuals who asked probing questions about tribal financial issues in an apparent show of openness and compromise had actually known all along that IHS had already adopted an official position on the matter and had no intent to compromise. It is a sad fact that at the beginning of the meeting tribal leaders had predicted to Ms. Smith that, despite her own personal commitment to the government-to-government relationship, agency people around her would set her up to fail. Unfortunately, this prediction came true all too soon.

#### *Moving Forward with a Parallel Policy Track*

In the end, Ms. Smith renewed her pledge to get a draft policy completed by February. Ms. Smith explained that, while the McSwain letter may represent IHS's litigation position, it cannot paralyze development of the CSC policy. Ms. Smith identified **incurred costs** and **duplication** as the two biggest issues holding up progress on the policy, and she stated that both issues are currently in litigation. Ms. Smith said that, while IHS did not want to undercut its litigation position, IHS would move forward on the CSC policy on a parallel track and in a different direction. Ms. Smith stated that both issues were up for discussion in developing the new policy. Ms. Smith acknowledged the dysfunction that exists within IHS and promised not to let that hamper progress. Ms. Smith asked the tribal leaders to stay at the meeting and allow her to make good on her promise to complete a new CSC policy.

Since Ms. Smith left after the first day of meetings, tribal Workgroup members questioned the point of holding a second day of meetings when they felt there was no agency representative left they could trust. In a tribal caucus the tribal members spoke directly to Principal Deputy Director McSwain by phone to discuss this concern. Mr. McSwain explained the December 4 letter had been reviewed by agency attorneys but that it does not reflect where the agency wants to be as a matter of policy. Echoing what Ms. Smith said the preceding day,

Mr. McSwain said the agency wants to find a middle ground where it can work through its litigation and simultaneously move forward with paying and closing out contracts.

Mr. McSwain also explained that in the claims settlement process IHS was focused on incurred costs because that process was a look-back, retrospective process. That is, the agency was examining financial documents and looking back on expenditures that had occurred years earlier. Mr. McSwain said this fact should not stop the agency from moving forward with a different process for pricing current contracts—after all, IHS knows how much it transfers to Tribes as the 106(a)(1) amount, and that amount, coupled with rates and direct costs, should be easy to compute. This was a very helpful statement.

Tribal leaders made plain that unless Mr. McSwain or Ms. Smith could attend all Workgroup meetings, it was unlikely the Workgroup would make any progress because Tribes could not trust other agency personnel. Tribal leaders also asked Mr. McSwain not to let agency attorneys dictate the conversation and drive the CSC policy. Mr. McSwain agreed, noting that federal people cannot sit at the table if they refuse to look forward. Tribal leaders also noted that CSC is a relatively minor issue in the context of critical health care programs that are severely underfunded. Mr. McSwain agreed that it was silly to quibble about CSC expenditures when the programs are funded at less than 60% of the level of need.

### **Changes to the ACC Tool and Closeout Discussion**

With Ms. Smith gone, tribal leaders revised the agenda to discuss revisions IHS had made to the ACC (CSC computation) tool without tribal consultation. They also requested more information about the anticipated 2014 and 2015 closeout process.

#### *Revisions to the ACC Tool*

IHS explained that the agency had engaged in a number of tribal consultations and meetings over the past year regarding the new ACC tool. IHS said that Tribes had requested more explanation showing where IHS got the numbers it was using in the ACC calculations. For instance, the original ACC tool showed an amount for passthroughs and exclusions, but it did not show the source document for that number.

IHS said that in response to these concerns, IHS developed a number of backup schedules to show where it got each number. Although this revised tool was presented to the smaller technical Workgroup, no Tribes were involved in the development of these schedules and the technical Workgroup expressed disagreement with many of them. IHS explained that the agency has not yet started using these backup schedules but plans to do so once it writes an instruction manual. IHS acknowledged that some of the ACC worksheets may need to change based on the final provisions of the CSC policy.

IHS created seven new worksheets that provide backup for the numbers used in the main ACC tool. We described these worksheets below:

- The first worksheet, labeled “funding support,” shows total program funding provided by level (Service Unit, Area Office, or Headquarters), and whether IHS considers that funding eligible or ineligible for CSC.
- The second worksheet, labeled “CSC funding,” tracks the total CSC payments a Tribe received during the year by type of CSC (i.e. direct CSC, indirect, startup or pre-award costs).
- The third worksheet, labeled “direct cost base,” shows how IHS will calculate passthroughs and exclusions and is a bit complicated. This worksheet sets out the passthroughs and exclusions from a Tribe’s IDC proposal, derives a ratio of IHS funding to other sources of health program funding, and then uses that ratio to determine the passthroughs and exclusions that will be applied for purposes of the CSC calculation. This is one of the worksheets technical Workgroup members suggested IHS revise.
- The fourth worksheet, labeled “duplication,” lists activities IHS believes it funded as part of the 106(a)(1) amount and the amounts for those activities contained in a Tribe’s indirect cost pool, i.e. the amounts IHS will subtract as a duplication credit. Tribal Workgroup members indicated they would not agree with this worksheet as long as the duplication credit claimed by IHS was based off activities included in the Secretarial amount and not amounts of funding.
- The fifth worksheet, labeled “indirect cost rate,” shows how the blended indirect cost rate was calculated for Tribes that have multiple rates.
- The sixth worksheet, labeled “DCSC need template” is optional and will be used to complete DCSC renegotiations, if a Tribe desires. IHS plans to update the agency information in this worksheet—IHS’s FICA, insurance, and retirement amounts—every year, so that a Tribe could plug in its own fringe information and determine whether they may want to renegotiate at that time.
- The last worksheet, labeled “indirect-type cost template,” is also an optional worksheet that will be used for Tribes that negotiate indirect-type costs with IHS rather than apply an indirect cost rate negotiated with a cognizant agency.

Many of these worksheets are meant to clarify how IHS treats certain funding, and will be useful for Tribes. Some of the worksheets, however, incorporate policy decisions Tribes oppose, such as the duplication page. Tribal representatives therefore explained that they cannot endorse these revisions to the ACC form. Although IHS reiterated that it is currently only using the one-page ACC form, IHS also said it is seeking internal agency comments on the supplemental schedules. IHS also emphasized that the tool is not a contract, and is only intended to show Tribes how IHS is currently calculating 100% CSC funding. Tribal Workgroup members asked IHS to share the draft instructions for these worksheets, and to allow Tribes to provide input on the development of these worksheets. IHS agreed to do so.

*FY 2014 and 2015 Closeout*

IHS shared that it has still not determined the closeout process for FY 2014 and FY 2015, but it is hoping the ACC tool can be used to close out these contracts. IHS stated that going forward IHS wants to find a way to close out amounts based on what the agency paid Tribes, but that also reflects updated information IHS receives throughout the contract year (such as new indirect cost rates). IHS said it wanted to reach agreement on final CSC amounts, but as part of that process IHS did not want to ask Tribes to waive their right to file claims. IHS also wanted some assurance that Tribes would spend (or have spent) all the amounts IHS paid for CSC on CSC purposes. IHS did not explain how the principles IHS laid out for closing out future years will apply to closing out 2014 and 2015, a situation where we are confident IHS will insist on continually updating data even if that occurs one or more years after the contract year ended.

The closeout conversation led to a larger discussion about the incurred cost method. IHS explained that it wanted to find a way for both IHS and Tribes to close out the contract shortly after the end of the contract year, but without having to compromise on legal positions. While this discussion suggested some flexibility on IHS's part (including an acknowledgement that Tribes may carry over funds from year to year), we will not know the extent to which IHS is willing to be flexible until IHS responds to the tribal draft policy.

**Conclusion**

This week's meetings were extremely frustrating, both for the Tribes and for Deputy Director Smith. For three years IHS has appeared paralyzed by a litigation defense mindset, and all aspects of CSC policy development have been viewed through the prism of litigation. As a result, trust between Tribes and IHS has suffered gravely. That said, it now appears that IHS *may* be prepared to show meaningful flexibility in its CSC positions. The period between now and February will be intense as the Workgroup hammers out the details of a new draft policy. We will continue to keep you informed of all significant developments.

Respectfully,

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