



806 SW Broadway, Suite 900
Portland, OR 97205

T 503.242.1745
F 503.242.1072

HOBBSSTRAUS.COM

MEMORANDUM

October 13, 2014

TO: CONTRACT SUPPORT COST CLIENTS
FROM: HOBBS, STRAUS, DEAN & WALKER, LLP
RE: *SGAC and TSGAC Discuss CSC Recommendations with Assistant Secretary and IHS Director at Quarterly Meetings*

On October 7 through 9, 2014, the Department of Interior (DOI) Self-Governance Advisory Committee (SGAC) and the Indian Health Service (IHS) Tribal Self-Governance Advisory Committee (TSGAC) met for quarterly meetings in Washington, D.C. Both committees discussed, and made recommendations with respect to, contract support costs (CSC) and related matters during the meetings. We report on those discussions below.

Grant Funding Trend and Federal Resistance to Tribal Self-Governance

A recurring theme at the SGAC quarterly meeting was perceived federal ambivalence and even resistance toward tribal self-governance – in particular, further expansion of self-governance – and the need for bureaucrats and government officials both within and outside of the Bureau of Indian Affairs (BIA) to understand and support tribal self-governance. One of the ways this resistance has surfaced is in the BIA's seeming preference to direct new funding to an increasing number of grant programs, rather than add to program base funding. DOI has generally taken the position that these annual grants are not eligible to be added to ISDEAA compacts and contracts.

As several SGAC tribal representatives noted, this growing practice harms self-governance in a number of ways – for example, the administrative burden on tribes to identify and apply for numerous individual grants on a recurring basis is much higher. Smaller or disadvantaged tribes that lack the administrative capacity to do so are at a disadvantage, and even tribes that have this capacity must divert more of their resources to those administrative tasks and away from providing direct services. It also limits the flexibility of tribes to reprogram funds to administer their programs in the most effective manner for their needs. And, with regard to CSC specifically, an obvious and significant effect of this practice is that indirect cost recovery must come from within the grant amount rather than add-on CSC. SGAC members also pointed out that a reduced program base drives up tribes' indirect cost rates, especially for tribes with smaller programs, even though tribes are not mismanaging their programs (as an inflated indirect cost rate might often suggest).

The SGAC expressed concern that the increased shift toward grant funding reflects an overall lack of commitment to growing and strengthening tribal self-governance. The Committee has encountered the issue both as a growing trend within the BIA, and as a stumbling block in efforts to expand self-governance within DOI and other Departments. For example, an SGAC member who has been working with the Fish and Wildlife Service (FWS) on an update to the FWS Native American Policy and has met with FWS to discuss expansion of self-governance into FWS reported that the agency is resisting the inclusion of any language directly referencing self-governance in the revised policy, and does not appear to be at all comfortable with the idea of moving away from a limited grant model toward compacting and contracting. The SGAC has also asked the Department of Justice to consider self-governance, but encountered resistance. Some members on the SGAC acknowledged that non-BIA and IHS agencies do not currently have their budgets set up to accommodate CSC, but expressed frustration at the lack of forthrightness on the part of the agencies to discuss with tribes whether CSC or some other problem is the source of their ambivalence toward embracing tribal self-governance.

While the Administration has stated that roughly \$19 billion in funding is available to tribes from throughout the federal government, the SGAC wondered what portion of that amount is actually available to contracting and compacting tribes, and conversely what portion is in fact composed of small, one-time grants and similar programs that present significant barriers to access and that do little to meaningfully advance tribal self-determination and self-governance. This is likely a conversation that the SGAC will take up in future meetings.

Within the BIA, in particular, some SGAC members felt that the directive to put new funding toward one-time grant programs is coming from the Office of Management and Budget (OMB). Thomas Thompson, Deputy Assistant Secretary for Management, said that in general the BIA itself does not advocate for increases in grant programs over service program funding. However, he noted that in the current budget climate it is difficult for federal agencies to predict future funding, and whether new funding will be recurring the next year. As an example, he said that Congress has chastised the Administration for certain climate change initiatives (which included grant funding for tribes), so funding for those initiatives may not reappear. In short, even the federal agencies do not know whether any increased funding will be recurring, and so they hesitate to put that funding toward programs other than one-time grant initiatives.

In discussions with Kevin Washburn, Assistant Secretary for Indian Affairs, some members of the SGAC also commented to the Assistant Secretary that the ISDEAA has sufficient means of identifying certain funds as non-recurring, so there is no reason to exclude funds from compacts and contracts merely because their recurrence is uncertain. They pointed to the *Cobell* Land Buy-Back Program as funding that they believed should have been available through contracts and compacts, but was determined not to be,

arguing that the exclusion of such important programs and services from the scope of ISDEAA contracts and compacts undermines tribal self-governance. SGAC members also noted that CSC is required by law and should be considered part of doing business, rather than an anomaly to be avoided where possible. Ron Allen, Chairman of the SGAC, also pointed out that the rise in CSC need should not be viewed as something negative, as it in fact is a sign of the growing *success* of tribal self-governance and self-determination under the ISDEAA.

The SGAC also discussed a recommendation put forward by the Tribal Interior Budget Council (TIBC) to transfer the approximately \$300 million in Department of Justice funding for Indian Country to the BIA, because DOJ releases the funding as grants whereas the BIA could add the funding to its programs and distribute it to tribes through their contracts and compacts. That recommendation was contrary to a recommendation issued by the Tribal Law and Order Commission to consolidate funding for tribal justice systems in DOJ because of the law enforcement expertise in that agency. Assistant Secretary Washburn said that neither scenario is likely to happen soon, but encouraged the SGAC to keep encouraging other agencies to move toward self-governance, saying it would require a cultural shift in many corners of the federal government, including OMB.

BIA Consideration of Long-Term CSC Recommendations

Vickie Hanvey, a member of the SGAC as well as the Bureau of Indian Affairs (BIA) CSC Workgroup, and Hankie Ortiz, Deputy Bureau Director for Indian Services in the BIA, provided an overview of the BIA CSC Workgroup's recommendations following its review of the results of the BIA's recent consultation on long-term solutions to the CSC funding crisis. We reported on these recommendations in our September 12, 2014 memorandum, and they are outlined in the attached meeting handout. Ms. Ortiz reported that DOI has met with the IHS to compare recommendations and discuss ways to jointly improve the CSC system and to achieve more consistency between the agencies – a task assigned by the OMB and the White House. She said that the two agencies are in the process of working together to evaluate the recommendations, though they recognize that there are some inherent differences between the agencies when it comes to CSC.

Ms. Hanvey said that a report requested by the Workgroup showed that approximately 70% of contracting and compacting tribes do not have a current IDC rate, meaning a rate that was negotiated for the current fiscal year. The SGAC felt that this was a problem caused in part by the tribes, but also in large part by the inability of the Interior Business Center to promptly respond to, negotiate, and process indirect rate proposals – a problem that would actually be exacerbated if all tribes were timely in submitting their proposals. The SGAC felt that, because of the IBC's role in the process, IBC needs to be active in the discussions seeking long-term solutions for CSC. Part of the overall problem, SGAC members felt, is that the IBC negotiation process and the

CSC appropriations and payment process happen on separate tracks that are not necessarily compatible with each other.

SGAC members asked Ms. Ortiz what the next steps would be as DOI considers and shares the recommendations with OMB. Ms. Ortiz thought that the BIA would want to share its initial thoughts with tribes, though the SGAC pointed out that BIA has heard the recommendations from tribes and their experts and SGAC members wanted to be sure that the agency would move forward with next steps toward concrete changes. The SGAC recommended that DOI next schedule a meeting with tribal experts and the Interior Business Center, and that BIA share a redline draft of policy changes for tribal review.

In a subsequent discussion with Larry Roberts, Principal Deputy Assistant Secretary for Indian Affairs, the SGAC discussed, and requested that the Administration adopt, some of the CSC Workgroup's recommendations, including seeking mandatory funding for CSC as a long-term solution and changing the policy to permit multi-year rates or lump sum agreements at a tribe's option, an approach the SGAC has endorsed in the past. The SGAC also reiterated the need for IBC to participate in face-to-face meetings and to find a way to increase the number of tribes with stable indirect cost rates that are timely negotiated.

Throughout the discussion, tribal representatives on the SGAC stated that while OMB needs to be included in discussions, the OMB circular requirements are not the problem. They pointed out that many other entities – including States, universities, and non-profit organizations – use the same process under the same circular, seemingly without many of the problems that arise with CSC under the ISDEAA context. They also noted that unlike other organizations, whose cognizant agency for rate negotiation purposes is whichever agency provides the most funding, tribes must use IBC as their cognizant agency, and annual rate negotiations are an IBC requirement. Thus, the focus should be on improving IBC and BIA policies, rather than creating a new process that treats tribes differently from other organizations with respect to indirect costs.

IHS Budget Update from Acting Director

As we reported in our memorandum of September 22, 2014, the IHS had thought in early September that it would need to reprogram up to \$48 million to cover unanticipated CSC need in FY 2014, but reduced that number to \$25.1 million more recently. At the TSGAC meeting, David Mather, technical advisor to the TSGAC, noted that according to the IHS the \$25.1 million figure includes \$8.1 million in overpayments to tribes that have not yet been recovered by the IHS, and so the true difference between the estimated amount and the actual need for FY 2014 was closer to \$17 million. Acting IHS Director Dr. Yvette Roubideaux reported that approximately 80% of the \$25.1 million amount was reprogrammed from the Headquarters level, with the remaining 20% coming from the Areas. She stated that the IHS is working on a report that will show

where the reprogrammed funds came from and what they would have been spent on in the absence of a CSC shortfall.

Dr. Roubideaux also reported that the IHS has presented to the Administration the TSGAC's recommendation to seek both restoration of the FY 2014 reprogrammed funding and an increased amount of FY 2015 CSC funding from Congress, and those recommendations are under discussion. She said that it is not yet known whether, after the current budget continuing resolution expires on December 11, Congress will pass a full appropriation or simply another continuing resolution.

IHS Consideration of Long-Term CSC Recommendations

Dr. Roubideaux also provided a broad overview of recommendations the IHS has received through its consultation over the past few months on long-term strategies for CSC funding. She reported that the various groups IHS has consulted with, including the TSGAC and the Direct Service Tribes Advisory Committee, have agreed on the general recommendations. First, she said, everyone agrees CSC should be fully funded, but not at the expense of the other parts of the IHS services budget. She acknowledged that a separate, mandatory funding account would solve that problem as well as the problems caused by the variability of CSC costs over time, and reported that the mandatory funding recommendation is under discussion by the Administration. She said that the remaining recommendations largely address the issue of predictability of CSC costs. Those recommendations, as we have reported in the past, include "x-year" funding (which remains available until expended) or two-year funding for CSC, as well as recommendations to alter existing timelines in the policy (for example, encouraging tribes to notify the IHS of its intention to contract for a new program, or renegotiate CSC, at an earlier point in time).

Dr. Roubideaux has repeatedly stated that changes to the policy timelines would help the IHS. She noted again at the TSGAC meeting that the ISDEAA allows tribes to submit requests for new and expanded programs until August 17, and does not set any deadlines for renegotiating CSC. She acknowledged that tribes have indicated they do not want to amend the ISDEAA, but said that new deadlines would have more weight if they were imposed by Congress, either in the ISDEAA or in appropriations language each year. She stated that if the deadlines were imposed only in the IHS policy, tribes might take the position that they are not binding and refuse to observe them. She stated that the issue should be considered further from a technical standpoint to ensure it is effective, and that what "kills the budget" for IHS is getting requests late in the fiscal year.

Mr. Mather commented that a huge amount of progress could be made just in clarifying the policy guidelines, without even adding new deadlines. He pointed out that the IHS's current practice is to award full startup costs and re-negotiated direct CSC for the entire fiscal year, regardless of when in the year the costs are negotiated. However,

he argued that the Policy does not state or require that practice, and neither does the ISDEAA itself. The IHS could clarify that both types of costs will be paid on a pro-rated basis when they are negotiated partway through the fiscal year, which would mitigate the impact of such negotiations near the end of the fiscal year. Lynn Malerba, Chair of the TSGAC, also pointed out that federal budgets are formulated two to three years in advance, so even with tighter timelines it is difficult to predict the amount of CSC that will be needed.

Ron Allen, Vice Chair of the TSGAC, reiterated several recommendations that the TSGAC had discussed in the last few meetings, including the option for tribes to negotiate a multi-year rate or lump sum amount, and perhaps a deadline for IDC rates, with mandatory funding as the long-term goal. He also reiterated that the ISDEAA should not be amended, and that the increase in CSC need overall should be seen as a positive sign of the success of the ISDEAA. Dr. Roubideaux responded that the current situation is "unique" because both Congress and the Administration have some understanding of CSC and the need to fully fund, but that funding is still subject to the budgetary process. For example, she said that IHS made its budget request for FY 2015 back in February, and IHS now realizes that a greater amount will most likely be needed. However, there is no guarantee that Congress will consider a request for an increase for FY 2015, let alone later years. She stated again that the IHS is very interested in seeing more ideas for CSC timelines, and how to better predict CSC need 2 and 3 years in advance.

Consistency in IHS Negotiations

Chairwoman Malerba told Dr. Roubideaux that the TSGAC has heard reports that there is still not consistency across the IHS regions in negotiations over both past CSC claims and annual funding agreements. Dr. Roubideaux responded that while the IHS's goal is to achieve consistency in settling past claims, that is made difficult because CSC negotiations were not handled with consistency in the past. She said that each tribe is different and its circumstances are different, so little is to be gained by comparing settlements to measure relative "fairness." She said that the IHS has streamlined the settlement process, and that there is a procedure to check that each proposed settlement offer was arrived at fairly and consistently, which the Director employs before approving any settlement. She also stated that the nature of litigation has affected the negotiations, and that both sides have litigation positions they need to protect – therefore, the experience may be less cooperative in nature than, for example, annual contract negotiations. She also acknowledged that the IHS is settling so many claims that it has run into scheduling difficulties, sometimes resulting in delay for individual tribes. However, she said that was a symptom of the overall progress that IHS is making in analyzing claims.

Conclusion

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), Steve Osborne (sosborne@hobbsstrauss.com or 503-242-1745), or Caroline Mayhew (cmayhew@hobbsstrauss.com or 202-822-8282).