



January 14, 2013

Dear Tribal Leader:

I am writing to provide an update on contract support costs (CSC) as a follow-up to my Tribal Leader Letter on September 24, 2012 (September DTLL). In that letter, I indicated that the Administration was reviewing the Supreme Court's decision in *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012) and the impact of that decision on the Indian Health Service (IHS or Agency), which was not a party to the *Ramah* case. As discussed in the September DTLL, the Supreme Court held in *Ramah* that the Indian Self-Determination and Education Assistance Act (ISDEAA) "mandates that the Secretary [of the Interior] shall pay the full amount of 'contract support costs' incurred by tribes in performing their contracts." *Id.* at 2186. From the responses we received to the September DTLL, however, I am concerned about some misconceptions and want to clarify several points, including the commitment of IHS to resolving Tribal claims for unpaid CSC in previous years and our dedication to ensuring that our CSC practices are efficient.

Resolution of Claims for Unpaid CSC in Previous Years

The IHS wants to affirm its commitment to resolving Tribal claims for unpaid CSC in an efficient and mutually agreeable manner. The IHS intends to proceed in a manner that is consistent with the Supreme Court's *Ramah* holding when processing claims. To reach our goal of resolving the claims, however, the IHS must follow certain procedures, including requirements under the ISDEAA and the Contract Disputes Act (CDA). I have attached relevant excerpts from both statutes to this letter.

The IHS is not a party to the *Ramah* class action, and therefore, is not a participant in the settlement discussions or other proceedings in that case with the Department of Interior. Moreover, the courts have not allowed a class action against the IHS. Accordingly, the IHS will continue with its longstanding process of reviewing individual claims and engaging in individual settlement discussions with each Tribe that presents its claims under the CDA. The IHS hopes to amicably resolve claims with each Tribe through such individual settlement discussions.

Under the CDA, Tribes must timely submit each claim, with appropriate support, to the Agency awarding official for review, and then the IHS must analyze and respond to the claim in accordance with the statute. The IHS is committed to finding ways to make this process as efficient as possible. Collaboration between the IHS and Tribes during the process is essential to resolving the claims in a timely manner. The claims processing stage requires documentation of the amount of CSC incurred under ISDEAA contracts in order to calculate any deficiencies in CSC funding under the contract. For example, documentation in support of a claim for additional direct CSC funding should show the actual amount of a Tribe's costs for the specific activities that the IHS and the Tribe agreed were allowable as direct CSC pursuant to the guidelines in section 6-3.2(D) and exhibit 6-3-H of the CSC policy (*Indian Health Manual*, part 6, chapter 3).

The IHS awards direct CSC funding for specific activities that are considered allowable; thus, the IHS needs documentation of the actual costs for those activities in order to properly evaluate a claim for direct CSC. The evaluation and documentation of CSC incurred by Tribes is consistent with our past practice, with the Supreme Court's decision in *Ramah*, and with the evaluation of CDA claims submitted by all government contractors. In addition to working collaboratively with Tribes to make this process more efficient, the IHS has hired a contractor to assist with the process. The goal is to expedite our processing of claims, especially in light of the increased volume of claims received since the *Ramah* decision.

According to the Supreme Court's decision in *Ramah*, the Judgment Fund is available to reimburse Tribes for unfunded CSC if the IHS has insufficient appropriations to pay the claims for such costs. However, pursuant to the CDA and the Judgment Fund's authorizing statute, the Judgment Fund is authorized to pay only under certain conditions, such as a settlement agreement between the parties (i.e., the IHS and the Tribe) *after* the Tribe has appealed the decision of the Agency's awarding official to the Civilian Board of Contract Appeals (Board) or to Federal court. This means that neither the IHS nor the Tribes can obtain payment from the Judgment Fund at the awarding official level – some additional appeal will be necessary. However, if the IHS and the Tribe work together to identify an agreed-upon amount of unpaid CSC during the awarding official's review of the claim, the parties may be able to undergo the necessary steps on appeal to the Board or Federal court more quickly in order to submit to the Judgment Fund a request for payment of any deficiency in funding for CSC incurred under Tribe's contracts.

We have heard that some Tribes are concerned that the IHS is not settling CSC claims since the *Ramah* decision. As you know, the IHS has been settling CSC claims for years and we want to assure you that the IHS has continued this activity since the *Ramah* decision. While the IHS cannot go into the details of such activities because we cannot discuss specific matters that are in litigation, the IHS and its attorneys are engaging in individual discussions with Tribes that wish to settle the claims they have presented to the IHS. If you are interested in engaging in such discussions regarding claims you have presented, you or your attorney may contact the Office of General Counsel (OGC) (or the Department of Justice if your claims are pending in Federal court) to schedule a settlement meeting.

In an additional effort to move forward with processing the CSC claims, the IHS authorized the OGC to organize a meeting with Tribal attorneys who represent Tribes that have presented their claims for additional CSC funding. The meeting was scheduled for November 1, 2012, but Tribal attorneys asked to reschedule the meeting. The meeting is currently scheduled for January 17, 2013. To date, more than 20 Tribal attorneys representing numerous Tribes have expressed interest in working with the IHS on this topic.

CSC Practices Going Forward

In addition to trying to resolve individual claims for unpaid CSC in previous years, the IHS has been working to find ways to make our CSC practices more efficient going forward. For example, we sought to reduce or eliminate disputes over CSC during contract negotiations after *Ramah*. In July 2012, the IHS negotiated contract language with Tribal attorneys. The language originally proposed by the IHS was a one-paragraph CSC provision that: (1) defined CSC, based on the statutory language; (2) estimated a Tribe's full CSC amount; (3) identified the amount the IHS planned to allocate to the Tribe from its annual appropriation; and (4) reserved the Tribe's right to file a claim for additional CSC funding.

In August 2012, after multiple exchanges with numerous Tribal attorneys, we reached agreement on a three-paragraph provision for use by Tribes that want to modify their CSC contract language post-*Ramah*. This language has been successfully negotiated and included in many different contracts/compacts since that time.

Despite the success of that negotiation, some Tribal attorneys recently began objecting to the inclusion of the estimated full CSC amount in the contract language. The IHS believes that including the estimated full amount for CSC in the contract is an important step in ensuring that the statute is followed. The ISDEAA describes CSC as reasonable, allowable, non-duplicative amounts for activities that must be carried on under the contract and that are not already included in the "Secretarial amount" of funding received by the Tribe. The funding is meant to cover the actual costs to Tribes of carrying out their ISDEAA contracts. Negotiating the estimated full amount for CSC at the beginning of the contract is beneficial because both parties reach agreement on principles such as the reasonableness and non-duplication of certain costs, and the Tribes will have an estimate for budget purposes. Negotiation of the CSC estimate is not a new concept and, while estimating the full amount of CSC may require some additional time and effort up front, the IHS believes that this effort is essential and beneficial to both parties, especially in light of the *Ramah* decision. We remain committed to working with each Tribe to estimate these amounts in the most accurate way, and of course, will provide technical assistance as needed.

Finally, while the claims process tends to focus on the past, we also need to consider how to implement the *Ramah* decision with regard to future budget proposals. Thank you for your input during last fall's budget formulation sessions on the impact of the Supreme Court's decision on IHS annual appropriations. We must work together to find a way to address the decision in light of other budget priorities and in the context of the difficult budget climate we are facing. I will review the input received during the budget formulation sessions and discuss options with the IHS Tribal budget formulation workgroup in February.

Thank you for your input to date. We know that this topic is important to Tribes, and we wanted to clear up any misconceptions about the process moving forward. The IHS has been and will continue to work with Tribes on resolving claims for unpaid CSC in previous years. I will continue to provide regular updates to ensure you have the most updated information.

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We welcome your input at any time on this important topic. Please send your input by e-mail to consultation@ihs.gov or by mail to Yvette Roubideaux, M.D., M.P.H., Director, Indian Health Service, 801 Thompson Avenue, Suite 440, Rockville, MD 20852 by March 14, 2013. Thank you for your input and partnership.

Sincerely,

/Yvette Roubideaux/
Yvette Roubideaux, M.D., M.P.H.
Director

Enclosure

Statutory Provisions Relevant to Contract Support Costs Claims

Indian Self-Determination and Education Assistance Act

25 U.S.C. §§ 450 *et. seq.*

25 U.S.C. § 450j-1(a). Contract funding and indirect costs

(2) There shall be added to the amount required by paragraph (1) contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor 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 his 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.

(3) (A) The contract support costs that are eligible costs for the purposes of receiving funding under this subchapter shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of--

(i) direct program expenses for the operation of the Federal program that is the subject of the contract, and

(ii) any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract, except that such funding shall not duplicate any funding provided under [25 U.S.C. § 450j-1(a)(1)].

25 U.S.C. § 450m-1. Contract disputes and claims

(a) Civil actions; concurrent jurisdiction; relief. The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this subchapter and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this subchapter. . . .

(d) Application of Contract Disputes Act. The Contract Disputes Act [41 U.S.C. §§ 7101 *et seq.*] shall apply to self-determination contracts, except that all administrative appeals relating to such contracts shall be heard by the [Civilian] Board of Contract Appeals established pursuant to [41 U.S.C. § 7105].

Contract Disputes Act
41 U.S.C. §§ 7101 *et seq.*

25 U.S.C. § 7103. Decision by contracting officer

(a) Claims generally.

(1) Submission of contractor's claims to contracting officer. Each claim by a contractor against the Federal Government relating to a contract shall be submitted to the contracting officer for a decision.

(2) Contractor's claims in writing. Each claim by a contractor against the Federal Government relating to a contract shall be in writing.

(3) Contracting officer to decide federal government's claims. Each claim by the Federal Government against a contractor relating to a contract shall be the subject of a written decision by the contracting officer.

(4) Time for submitting claims.

(A) In general. Each claim by a contractor against the Federal Government relating to a contract and each claim by the Federal Government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim.

(B) Exception. Subparagraph (A) of this paragraph does not apply to a claim by the Federal Government against a contractor that is based on a claim by the contractor involving fraud.

(5) Applicability. The authority of this subsection and subsections (c)(1), (d), and (e) does not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine.

(b) Certification of claims.

(1) Requirement generally. For claims of more than \$ 100,000 made by a contractor, the contractor shall certify that--

(A) the claim is made in good faith;

(B) the supporting data are accurate and complete to the best of the contractor's knowledge and belief;

(C) the amount requested accurately reflects the contract adjustment for which the contractor believes the Federal Government is liable; and

(D) the certifier is authorized to certify the claim on behalf of the contractor.

(2) Who may execute certification. The certification required by paragraph (1) may be executed by an individual authorized to bind the contractor with respect to the claim.

(3) Failure to certify or defective certification. A contracting officer is not obligated to render a final decision on a claim of more than \$ 100,000 that is not certified in accordance with paragraph (1) if, within 60 days after receipt of the claim, the contracting officer notifies the contractor in writing of the reasons why any attempted certification was found to be defective. A defect in the certification of a claim does not deprive a court or an agency board of jurisdiction over the claim. Prior to the entry of a final judgment by a court or a decision by an agency board, the court or agency board shall require a defective certification to be corrected.

(c) Fraudulent claims.

(1) No authority to settle. This section does not authorize an agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud.

(2) Liability of contractor. If a contractor is unable to support any part of the contractor's claim and it is determined that the inability is attributable to a misrepresentation of fact or fraud by the contractor, then the contractor is liable to the Federal Government for an amount equal to the unsupported part of the claim plus all of the Federal Government's costs attributable to reviewing the unsupported part of the claim. Liability under this paragraph shall be determined within 6 years of the commission of the misrepresentation of fact or fraud.

(d) Issuance of decision. The contracting officer shall issue a decision in writing and shall mail or otherwise furnish a copy of the decision to the contractor.

(e) Contents of decision. The contracting officer's decision shall state the reasons for the decision reached and shall inform the contractor of the contractor's rights as provided in [41 U.S.C. §§ 7101 *et seq.*]. Specific findings of fact are not required. If made, specific findings of fact are not binding in any subsequent proceeding.

(f) Time for issuance of decision.

(1) Claim of \$ 100,000 or less. A contracting officer shall issue a decision on any submitted claim of \$ 100,000 or less within 60 days from the contracting officer's receipt of a written request from the contractor that a decision be rendered within that period.

(2) Claim of more than \$ 100,000. A contracting officer shall, within 60 days of receipt of a submitted certified claim over \$ 100,000--

(A) issue a decision; or

(B) notify the contractor of the time within which a decision will be issued.

(3) General requirement of reasonableness. The decision of a contracting officer on submitted claims shall be issued within a reasonable time, in accordance with regulations prescribed by the agency, taking into account such factors as the size and complexity of the claim and the adequacy of information in support of the claim provided by the contractor.

(4) Requesting tribunal to direct issuance within specified time period. A contractor may request the tribunal concerned to direct a contracting officer to issue a decision in a specified period of time, as determined by the tribunal concerned, in the event of undue delay on the part of the contracting officer.

(5) Failure to issue decision within required time period. Failure by a contracting officer to issue a decision on a claim within the required time period is deemed to be a decision by the contracting officer denying the claim and authorizes an appeal or action on the claim as otherwise provided in [41 U.S.C. §§ 7101 *et seq.*]. However, the tribunal concerned may, at its option, stay the proceedings of the appeal or action to obtain a decision by the contracting officer.

(g) Finality of decision unless appealed. The contracting officer's decision on a claim is final and conclusive and is not subject to review by any forum, tribunal, or Federal Government agency, unless an appeal or action is timely commenced as authorized by [41 U.S.C. §§ 7101 *et seq.*]. This chapter [41 U.S.C. §§ 7101 *et seq.*] does not prohibit an executive agency from including a clause in a Federal Government contract requiring that, pending final decision of an appeal, action, or final settlement, a contractor shall proceed diligently with performance of the contract in accordance with the contracting officer's decision.

(h) Alternative means of dispute resolution.

(1) In general. Notwithstanding any other provision of [41 U.S.C. §§ 7101 *et seq.*], a contractor and a contracting officer may use any alternative means of dispute resolution under [5 U.S.C. §§ 571 *et seq.*], or other mutually agreeable procedures, for resolving claims. All provisions of [5 U.S.C. §§ 571 *et seq.*] apply to alternative means of dispute resolution under this subsection.

(2) Certification of claim. The contractor shall certify the claim when required to do so under subsection (b)(1) or other law.

(3) Rejecting request for alternative dispute resolution.

(A) Contracting officer. A contracting officer who rejects a contractor's request for alternative dispute resolution proceedings shall provide the contractor with a written explanation, citing one or more of the conditions in section 572(b) of title 5 or other specific reasons that alternative dispute resolution procedures are inappropriate.

(B) Contractor. A contractor that rejects an agency's request for alternative dispute resolution proceedings shall inform the agency in writing of the contractor's specific reasons for rejecting the request.

41 U.S.C. § 7104. Contractor's right of appeal from decision by contracting officer

(a) Appeal to agency board. A contractor, within 90 days from the date of receipt of a contracting officer's decision under section 7103 of this title, may appeal the decision to an agency board as provided in section 7105 of this title.

(b) Bringing an action de novo in Federal court.

(1) In general. Except as provided in paragraph (2), and in lieu of appealing the decision of a contracting officer under [41 U.S.C. § 7103] to an agency board, a contractor may bring an action directly on the claim in the United States Court of Federal Claims, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(3) Time for filing. A contractor shall file any action under paragraph (1) or (2) within 12 months from the date of receipt of a contracting officer's decision under [41 U.S.C. § 7103].

(4) De novo. An action under paragraph (1) or (2) shall proceed de novo in accordance with the rules of the appropriate court.

41 U.S.C. § 7108. Payment of claims

(a) Judgments. Any judgment against the Federal Government on a claim under [41 U.S.C. §§ 7101 et seq.] shall be paid promptly in accordance with the procedures provided by section 1304 of title 31.

(b) Monetary awards. Any monetary award to a contractor by an agency board shall be paid promptly in accordance with the procedures contained in subsection (a).

(c) Reimbursement. Payments made pursuant to subsections (a) and (b) shall be reimbursed to the fund provided by section 1304 of title 31 by the agency whose appropriations were used for the contract out of available amounts or by obtaining additional appropriations for purposes of reimbursement.