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INDIAN HEALTH SERVICE
OFFICE OF
ENVIRONMENTAL
HEALTH AND
ENGINEERING

Technical Assistance Guide

Public Law 93-638 Construction

Department of Health and Human Services

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Cover photo: 638 construction worksite (Cheyenne River Sioux Tribe, South Dakota, 2009)

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SECTION 1 – INTRODUCTION

A. Purpose

The purpose of this guide is to provide Tribes and Tribal Organizations (herein referred to as "tribes") and Indian Health Service (IHS) personnel with technical assistance (TA) that will guide them through the process of a Title I (T-I) Construction Contract or Title V (T-V) Construction Project Agreement under the Indian Self-Determination and Education Assistance Act (ISDEAA), P.L. 93-638, as amended (the Act).

Throughout this guide T-I Construction Contracts are also referred to as Subpart J Construction Contracts and Title V as Subpart N, T-V Project Agreements.

This TA guide covers only construction projects performed by tribes under T-I or T-V.

This guide is not intended as policy, operating instructions, or to represent the view of the respective parties. This guide represents a compilation of tools that have been developed by tribes, tribal organizations, and IHS staff working with tribes on previous T-I Construction Contracts or T-V Construction Project Agreements.

B. Updates, Revisions, Additional Copies

Requests for electronic versions of documents, recommendations, or proposed revisions to the Technical Assistance Guide may be submitted to the Director, Division of Engineering Services, 2201 6th Avenue, M/S RX-24, Seattle, Washington 98121 or by e-mail comment.des.redbook@ihs.gov. The guide can also be accessed online: http://www.des.ihs.gov/index.cfm?module=dap

C. Funding of Construction Projects and Programs

As a federal agency, the Indian Health Service is dependent on Congress's annual appropriation of funds to conduct its day-to-day operations and to fund tribes that have entered into self-determination and self-governance agreements with the IHS. Congress can authorize withdrawal and spending of funds from the Treasury with legislation known as an "appropriation act". Through an appropriation act Congress limits the *amount* of money available to the agency and the *purpose* for which the money may be used. The IHS is not permitted to spend funds in excess of the amount contained in the appropriation act. It is also not permitted to deviate from the purposes dictated by Congress in the appropriation act. An agency faces steep penalties if it overspends or spends outside the purposes set forth by Congress.

Congress appropriates funds for the IHS in two lump-sum appropriation accounts, one for "Indian Health Services," and the other for "Indian Health Facilities." Funds in the services account are a general appropriation available for operating expenses associated with services provided by the IHS and the tribes. Facilities funds are a specific appropriation for "construction, repair, maintenance, improvement, and equipment of health and related auxiliary facilities…" Specific appropriations preclude the use of general appropriations even when the two appropriations come from different accounts. Thus, funds appropriated under the "Indian Health Services" lump sum appropriation are not available to be used for construction project costs and vice versa. The transfer of funds between two appropriation accounts is simply not permitted under most circumstances.

A federal agency cannot do indirectly (e.g., through the device of a contract or grant) what it is not permitted to do directly. In other words, appropriated funds flowing through the IHS to self-determination or self-governance tribes by means of contract or compact or FA are subject to the same constraints concerning *amount* and *purpose* that the IHS is subject to. An unauthorized transfer from the services appropriation account to the facilities appropriation account by the IHS or by a tribe may constitute a violation of the laws regarding congressional appropriations. Deviation from the basic framework discussed in the preceding paragraphs is only permissible when express authorization has been made by Congress.

The IHS Office of Environmental Health and Engineering ("OEHE") is responsible for construction related programs and projects. OEHE is funded under the Indian Health Facilities provision in the annual appropriation act, which contains recurring funds for programs and non-recurring project funds for specific prioritized projects. OEHE then allocates those funds between programs and projects that it operates directly (discussed in greater detail in part D below) and those managed by tribes and operated through service contracts and compacts, or through construction project agreements.

D. Construction Programs and Projects of the Indian Health Service

1) Maintenance and Improvement Program

Maintenance and Improvement ("M&I") funds are the primary source of funding to maintain, repair, and improve existing IHS facilities and Tribal health care facilities that are used to deliver and support healthcare services. M&I funding goes to federal, government-owned buildings and Tribally-owned space where healthcare services are provided pursuant to contracts or compacts executed under provisions of the ISDEAA.

M&I funds are necessary to achieve and maintain accreditation, to meet building codes and standards, to maintain and repair the physical condition of health care facilities, to modernize existing health care facilities to meet changing health care delivery needs, and to implement mandated requirements; e.g., energy conservation, seismic, environmental, handicapped accessibility, security, etc. Efficient and effective buildings and infrastructure are necessary to deliver health care in direct support of the IHS's mission and goal.

Specific M&I program objectives include: (1) providing routine maintenance for facilities; (2) achieving compliance with buildings and grounds accreditation standards of the Joint Commission or other applicable accreditation bodies; (3) providing improved facilities for patient care; (4) ensuring that health care facilities meet building codes and standards; and (5) ensuring compliance with executive orders and public laws relative to building requirements.

The physical condition of IHS-owned and many Tribally-owned facilities is evaluated through annual general surveys conducted by local facility personnel and IHS Area Office Engineers. In addition, comprehensive facility condition surveys are conducted every five years by a team of engineers and architects or other specialists. These surveys, together with routine observations by facilities personnel, identify deficiencies that are included in the Backlog of Essential Maintenance, Alterations, and Repair (BEMAR) database.

M&I funds are allocated into four categories: routine maintenance, M&I projects, environmental compliance, and demolition:

a. Routine Maintenance Funds –

These funds support activities that are generally classified as those needed for maintenance and minor repair to upkeep the facility in its current condition. Funding allocation is calculated using the IHS M&I distribution formula, which is based on the University of Oklahoma methodology to calculate routine maintenance costs. Routine M&I funds can be used to pay non-personnel costs for the following activities in IHS and tribally-owned health care facilities: emergency repairs, preventive maintenance activities, maintenance supplies and materials, building service equipment replacement, upkeep activities, training, and local projects.

The ISDEAA authorizes eligible Tribes or Tribal Organizations to receive these funds under a T-I, Section 108 services contract or T-V, Section 504 services compact.

NOTE: The following funds can only be included in a Title I construction contract or Title V construction project agreement.

b. M&I Project Funds –

These funds are used for major projects to reduce the BEMAR and make improvements

necessary to support healthcare delivery. Generally M&I projects in this category require levels of expertise not available at the local facility. Such projects accomplish major repairs and improvements of primary mechanical, electrical and other building systems, as well as public law compliance and program-related alterations. Program-related alteration projects include changes to existing facilities for more efficient utilization, for new patient care equipment, and to accommodate new treatment methodology. IHS Area Facilities Engineers develop priority lists of larger projects to reduce the BEMAR.

Funds are available to Tribes in a Title I Contract, or Title V Construction Project Agreement.

c. Environmental Compliance Funds –

These funds are used to address findings and recommendations from environmental audits, to improve energy efficiency and water efficiency, to increase renewable energy usage, to reduce consumption of fossil-fuel generated electricity, and to implement other sustainability initiatives. These funds are available to Federal and Tribal facilities on a national basis.

Funds are available to Tribes in a Title I Contract, or Title V Construction Project Agreement.

d. Demolition Funds –

The IHS has a number of Federally-owned buildings that are vacant, excess, or obsolete. Demolition funds are used to dispose of these excess assets. These funds may be augmented with Environmental Compliance Funds as available for demolition and disposal to the extent that the proposed action reduces hazards, environmental concerns, or liability to the Indian Health Service.

Funds are available to Tribes in a Title I Contract, or Title V Construction Project Agreement.

2) Sanitation Facilities Construction Program (SFC)

SFC is authorized under 25 USC 13 (the Snyder Act), 42 USC 2001 (the Transfer Act), 42 USC 2004a (P.L. 86-121, the Indian Sanitation Facilities Act) and P.L. 94-437, the Indian Health Care Improvement Act (IHCIA), as amended.

The four types of sanitation facilities projects funded through the IHS are (1) projects to serve new or like-new housing, such as Indian homes being constructed or rehabilitated by the BIA-Home Improvement Program (HIP), Tribes, individual homeowners, or other nonprofit organizations, (2) projects to serve existing housing, (3) special projects (studies, training, or other needs related to sanitation facilities construction), and (4) emergency projects. Projects that serve new or like-new housing are selected for funding based on a priority classification system known as the Housing Priority System where priority is established based on need, housing type and the timing of housing construction for new homes. Projects that serve existing housing are annually prioritized in each Area utilizing the Sanitation deficiency system (SDS). SDS is updated annually and is an inventory of need for all American Indian and Alaska Native communities and also then has a list of projects to meet the inventoried needs. All data in SDS are collected annually in consultation with tribes and the projects developed to meet the inventory of need are scored to reflect health impact, cost, operability, and tribal priority. Projects for existing housing are selected from the priority list of projects in priority order. Special and emergency projects are funded at the HQ level based on Area requests. Complete information on eligibility and funding methodologies can be found in the “Criteria for the Sanitation Facilities Construction Program”.

Sanitation facilities projects are carried out cooperatively with the tribes who are to be served by the facilities. Projects start with a Tribal Project Proposal, are selected for funding based on the priority systems described above, and implemented through execution of an agreement between the Tribe and IHS. In these agreements the Tribes also agree to assume ownership

responsibilities, including operation and maintenance. The overall SFC goals, eligibility criteria, and project funding priorities remain the same, regardless of the delivery methods chosen by a Tribe. More than 70 percent of all SFC is performed by Indian tribes or tribally owned organizations.

SFC projects can be managed by the IHS directly (Direct Service) or they can be managed by Tribes that elect to use the Subpart J Construction Contract under Title I of the ISDEAA or a Construction Project Agreement under Title V for planning, design and construction for sanitation facilities construction projects. Alternatively, Tribes may elect to enter into an agreement authorized by P.L. 86-121 with allocations made according to a needs-based system.

3) Health Care Facilities Construction Program

The IHS Health Care Facilities Construction (HCFC) program is authorized under 25 USC 13 (the Snyder Act), 42 USC 2001 (the Transfer Act) and P.L. 94-437, the Indian Health Care Improvement Act (IHCIA), as amended. The IHS carries out its responsibilities under this program by direct federal contract or ISDEAA construction contract or project agreement.

HCFC funds provide optimum availability of functional, modern IHS and tribally operated health care facilities and, where no suitable housing alternative is available, staff housing. The IHS is authorized to construct health care facilities and staff quarters; renovate/construct substance abuse regional treatment centers for youth; support tribal construction of facilities under the Joint Venture Construction Program; provide construction funding for Tribal small ambulatory care facilities projects; and provide funding to replace or provide new and replacement dental units.

Health care facilities construction is funded based on a national list of priorities for construction projects developed during FY 1990. In language accompanying the FY 2000 appropriations, the Congress directed IHS, in consultation with the Administration and the Tribes, to review and revise the Healthcare Facilities Construction Priority System (HFCPS). In June 2004, IHS prepared a draft revision to the HFCPS and sent it to all Tribes for review and comment. Following this review, IHS sought further input from the Facilities Appropriations Advisory Board (FAAB). The FAAB made initial recommendations in July 2005 and finalized recommendations in February 2007. During this FAAB review, each IHS Area completed a comprehensive Master Plan, which included identifying all healthcare facility needs for their Tribes. The IHS provided the final recommended HFCPS to the Department of Health and Human Services for review and approval in the fall of 2007 and is currently pending approval by Congress.

NOTE: The Dental Facilities Program, JVCP and SAP are not *construction programs* as defined at 25 USC §450b(a), rather they are mechanisms to fund construction projects selected using established criteria.

a. Dental Facilities Program

The House/Senate conference report on fiscal year 1994 appropriations for the Department of the Interior and Related Agencies contains language that make the IHS facilities program responsible for replacement and renovation of existing modular/mobile dental units. In fiscal year 1995 Congress expanded this to include new dental units at new sites.

The IHS has developed a methodology that includes guidelines and criteria to allocate these funds where they are the most needed. The evaluation criteria include analysis of the age, condition, and projected workload of the existing facility. It is expected that IHS will be able to replace approximately 2 to 3 modular dental units each year.

b. Joint Venture Construction Program (JVCP)

The JVCP allows IHS to enter into agreements with tribes that construct their own health facilities. Indian Tribes or tribal organizations would acquire or construct a health facility and lease it to the IHS, at no cost, for at least 20 years. The IHS would not provide

planning, design, or construction funding for these facilities; however, it would equip, staff, operate, and maintain them. The IHS carries out this program through joint projects with the Tribes.

Participants in this program would be selected competitively from among eligible applicants who agree to provide an appropriate facility to IHS under a no-cost, 20-year lease.

Proposals considered under this program would be evaluated against the following criteria:

- The need for space at the location is verifiable when evaluated by the Health Facilities Construction Priority System;
- The Tribe is able to fund and manage the proposed project;
- The project is consistent with the IHS Health Systems Planning Process (HSP); and
- The project is consistent with the IHS Area Health Facilities Master Plan.

c. Small Ambulatory Care Facility Program (SAP)

Section 306 of the Indian Health Care Improvement Act, Public Law 94-437 authorizes the IHS to make awards to Tribes or Tribal organizations for construction, expansion, or modernization of ambulatory health care facilities located apart from a hospital. Where non-Indians will be served in a facility, the funds awarded under this authority may be used only to support construction projects proportionate to services provided to eligible American Indians and Alaska Natives. Participants are selected competitively.

E. Summary of Construction Project Delivery Options

Construction Projects under programs described in paragraph D may be delivered as follows:

1) Direct Federal

- Construction projects may be carried out directly by the IHS through the programs described in paragraph D, above
- IHS managed and contracted under the Federal Acquisition Regulations (FAR)

2) ISDEAA -T-I, Subpart J Construction Contract

- Programs for the planning, design, construction, repair, improvement, and expansion of buildings or facilities
- Project support activities such as design and architectural/engineering services, construction project management, and the actual construction of the building or facility
- Managed and contracted under tribal procurement policies by the tribe
- Available to T-I and T-V Tribes

3) ISDEAA - T-V, Subpart N Construction Project Agreement

- Generally does not cover M&I Program or construction program functions
- Managed and contracted under tribal procurement policies by the tribe
- Available only to T-V Tribes

4) Memorandum of Agreement (MOA)

- May only be used for SFC projects described above in paragraph D(2).
- Available to all tribes
- Managed by the tribe utilizing force account or tribal procurement

5) ISDEAA T-I Services Contract or T-V Services Compact

- Routine M&I Program described above in paragraph D(1)(a)
- Program operation

SECTION 2 – PROJECT APPROVAL DOCUMENTS

A. Facility Construction

Program Justification Document (PJD)

The document is used to justify health care facilities projects over $1,000,000 in value. Approval is at the Headquarters level.

Program of Requirements (POR)

The engineering requirements of program services at new health care facilities and staff quarters $1,000,000 or more. The Health System Planning (HSP) process generates the POR. Approval is at the Headquarters level.

Project Summary Documents (PSD)

This document is used to justify, scope, and explain health care facilities projects over $25,000 and less than $1,000,000 in value. Approval is at the Area level.

The IHS Technical Handbook for Health Facilities, Volume II, Part 13 entitled Planning Documents and Reports provides additional guidance on preparation of the documents and forms. Also, the IHS website at: http://www.ihs.gov/NonMedicalPrograms/DFEE/index.cfm.

Thresholds for Projects requiring Facility Project Approval Agreements (FPAA)

For Federally owned facilities the Thresholds for projects requiring a FPAA (HHS Form 300) are:

IHS Operating Division (OPDIV) Approval Level

- Construction Projects – Total Project Cost less than $1M
- Improvement Projects – Total Project Cost less than $2M
- Repair Projects – Total Project Cost less than $5M
- Maintenance Projects – Unlimited
- Project with multiple categories (i.e. Maintenance and repair) - Total project cost less than $5M

Assistant Secretary for Administration (ASA) Approval Level

- Construction Projects – Total Project Cost $1M or greater.
- Improvement Projects – Total Project Cost $2M or greater.
- Repair Projects – Total Project Cost $5M or greater

Capital Investment Review Board (CIRB) Approval Level

- Construction, Improvement, Repair - Total Project Cost $10M or greater
- All Land Acquisitions
- Any other project impacting more than one HHS Component or high profile because of risks, O&M costs or visibility.

For more detailed information, refer to February 2, 2009 memo (located at the end of this section) from Howard Kelsey, Deputy Assistant Secretary, Office for Facilities Management and Policy concerning changes in thresholds for projects and sustainable building requirements, and HHS Facilities Program Manual Volume I, Section 2-1.

B. Sanitation Facilities Construction

Public Law 86-121 requires the SFC Program to work with tribes to develop and construct sanitation facilities. The SFC program has implemented a project management program and has developed a process that requires each project to have a project development plan (PDP), and an engineering project report prior (EPR) on record within the SDS system in order for a project to be eligible for funding through priority systems. A PDP is a document that describes the needed planning for a project and what resources may be needed to mitigate risks and to allow the development of an EPR. The EPR is a document that has reviewed risks and developed mitigation for risks, identifies alternatives considered for the project, establishes a well defined scope and an accurate cost estimate. The EPR provides the necessary information to allow allocation of funds through the priority systems. Once the funding is allocated by IHS for a specific project the document s required depend on the project delivery method chosen by the Tribe. For direct service an MOA, between the IHS and one or more interested parties (e.g., Tribally Designated Housing Entities, HUD, or EPA), is the agreement that establishes the overall relationship between the interested parties in accomplishing the work authorized under P.L. 86-121. As part of the MOA these is an additional document under direct service called the Project Summary which is an attachment to the MOA and defines the project including costs. In many cases the EPR will be the basis for development of a Project Summary. For Tribes that have assumed responsibility for the SFC program through a ISDEAA agreement the projects can be accomplished through the MOA instrument itself, or the work can be accomplished through other instruments such as a direct federal contract or a Title I subpart J construction contract or Title V Construction Project Agreement which are executed subsequent to the MOA or in some cases in place of the MOA. Almost every SFC project activity requires an agreement that describes project responsibilities of all parties and obligates the funding for the project.

Criteria for the Sanitation Facilities Construction Program are detailed in a comprehensive guide prepared by IHS on the SFC program. This guide may be located on the website: http://www.dsfc.ihs.gov/Documents/Criteria_June_1999.cfm

C. Howard Kelsey February 2, 2009 Memo Specifying Construction Approval Thresholds

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Washington, D C 20201

MEMORANDUM

February 2, 2009

TO: Facility Directors

FROM: Howard D. Kelsey, Deputy Assistant Secretary
Office for Facilities Management and Policy

SUBJECT: Changes in Thresholds for Projects and Sustainable Buildings Requirements

As part of its periodic review of the real property asset management program, OFMP has reviewed current thresholds and reporting requirements. Thresholds and reporting are also topics the PMA Tiger Team has considered. Effective as of this date, OFMP will implement the changes in thresholds summarized below.

Thresholds for Projects requiring Facility Project Approval Agreements (HHS Form 300)

- OPDIV Approval Level:
  - Construction projects – Total Project Cost less than $1M (no change)
  - Improvement projects – Total Project Cost less than $2M (increase from $1M)
  - Repair projects – Total Project Cost less than $5M (increase from $3M)
  - Maintenance projects – Unlimited (increase from $10M)
  - Lesser threshold controls for projects with multiple categories, i.e., a combined maintenance and repair project would have a threshold of less than $5M
- ASAM Approval Level:
  - Construction projects – Total Project Cost $1M or greater
  - Improvements projects – Total Project Cost $2M or greater
  - Repair projects – Total Project Cost $5M or greater
- CIRB Approval Level:
  - Construction, Improvement, Repair – Total Project Cost $10M or greater
  - All land acquisitions
  - Any other projects impacting more than one HHS component or high profile because of risks, O&M costs or visibility

Thresholds for Incorporating Sustainable Building Requirements

- All Owned and Direct Leased Buildings in the Federal Real Property Profile (from December 5, 2008 OMB Technical Guidance) – there are no exceptions provided based on sf or cost, however:
  - HHS Priority for existing buildings – HHS Capital Asset Threshold (CAT) is buildings 5,000 sf of more
  - Within OPDIV, a higher threshold for prioritization may be appropriate for incorporating Guiding Principles in existing inventory, but does not supplant

Page 2 – Changes in Thresholds

OMB requirement that 15% of all buildings (owned and direct leases) incorporate by 2015.

- Third Party Certification:
  - Construction, Housing & Improvement projects – Total Project Cost $10M or greater
  - Repair & Maintenance Projects – Not required

OFMP is in ongoing discussions with OFEE in terms of applying Sustainable Buildings requirements to the HHS inventory in the Federal Real Property Profile (FRPP). At the moment the current requirement remains that all owned and direct leases reported by HHS in the FRPP are included in the HHS existing building inventory. We are particularly concerned related to direct leases with Tribes under P.L 94-437 which represent about 50% of our direct leases, as well as facilities operated by the Tribes under P.L. 93-638. We are also committed to working with GSA's Office for High Performance and Sustainable Buildings to ensure incorporation of the Guiding Principles in GSA leases.

The above changes will be incorporated into the HHS Facilities Program Manual. At this time the thresholds for Post Occupancy Evaluations, reporting dispositions of real property, and other reporting requirements will remain the same. As the opportunity arises, OFMP will continue to pursue with OMB reducing reporting to semi-annual or annual basis.

If you have any questions or need further assistance, please contact Diane Stewart at (202) 205-4773.

SECTION 3 – FUNDING

A. IHS Facilities and Environmental Health and Engineering Program and Project Funding Overview

The IHS facilities program budget falls within the budget of the IHS Office of Environmental Health and Engineering (OEHE). The OEHE programs are funded by Congressional appropriation. Annual appropriations are different for program than for projects.

1) Program Funds

Program funds are for organized, continuous undertakings to accomplish ongoing or recurring program objectives. Ongoing objectives include staff salaries and benefits, training, technical assistance, program management, and program resource allocation, etc.

Program funds are appropriated annually on a recurring basis and distributed to the Area, service unit, and tribal levels program based upon project workloads and as calculated by the Resource Requirements Methodology (RRM).

FEHE program funds are in the IHS appropriation as Facilities and Environmental Health Support (FEHS) account.

2) Project Funds

Project funds are for organized non-continuous undertakings to complete a specific set of predetermined objectives. A project is characterized by defined start and completion dates, specific objectives, and a budget, all of which are included in a project-specific scope of work. Generally project funds are for new facilities. Appropriations for projects are not recurring and are justified on the basis of needs to be addressed by specific projects.

B. Funding Methodology for Construction Projects Under P.L. 93-638 Contracts or Construction Project Agreements

1) Introduction

The purpose of this section is to describe the methodology used to develop cost estimates for construction projects and how these are used relative to P.L. 93-638 construction contracts under Title I and Construction Project Agreements under Title V. This section also covers contract support cost (CSC) funds as they pertain to construction projects under either title. Throughout this section are citations from P.L. 93-638, as amended. The discussion is the same for Title I and Title V. Sections cited pertain to P.L. 93-638, as amended and are referred to herein as the “Act.”

The IHS health Facility Budget Estimating (FBE) system is used for new health care facilities and quarter’s construction projects.

The Sanitation Facilities Construction (SFC) Program uses a different construction cost estimating system and relies heavily on historic cost data for similar projects by location.

The FBE and SFC funding methodologies are covered in subsequent paragraphs in this section.

For all of the construction programs the goal of construction estimating is to establish the cost of a construction project to allow for budget justification for the annual federal budget cycle and to establish the final project budget which will lead to successful completion of the project.

2) Projects vs. Programs & Contract Support

Funding for construction activities comes from either the Indian Health Services or the Indian Health Facilities sections of the IHS appropriation. Construction projects are funded out of the facilities allocation and construction program administration from the services allocation. See

Section 1(D).

The ISDEAA Title V clearly delineates the distinction between construction projects and construction program activities. Section 501(a)(1), 25 U.S.C. § 458aaa(a)(1), defines "construction project" as "an organized noncontinuous undertaking to complete a specific set of predetermined objectives for the planning, environmental determination, design, construction, repair, improvement, or expansion of buildings or facilities, as described in a construction project agreement." Project funds do not include "construction program administration and activities described in paragraphs (1) through (3) of Section 4(m), 25 U.S.C. § 450b(m), that may otherwise be included in a funding agreement under this part." Title I makes a similar distinction (section 4(a) and 4(m), 25 U.S.C. § 450b(a),(m)). Construction program funding is included in the AFA, while construction projects are funded through Title I contracts or Title V construction project agreements.

IHS provides funding for construction program administration through tribal shares of the program funded under FEHS. These programs are eligible for Contract Support Costs (CSC) as discussed in this guide. Any indirect costs paid through the tribal shares or as indirect CSC are limited by ISDEAA Section 106(h), 25 U.S.C. § 450j-1(h). Section 106(h) prescribes that the calculation of indirect costs can only include costs associated with the administration of the contract and not those costs passed through to construction contractors and subcontractors.

Construction project funds, which are non-recurring, are calculated as the amount that the Secretary would have otherwise provided for the project (ISDEAA Section 106(a)(1) at 25 U.S.C. §450j-1(a)(1). The CSC —including start-up costs —referred to in ISDEAA Section 106(a)(2), 25 U.S.C. § 450j-1(a)(2), are NOT added to construction project budgets. Start-up costs are a subset of CSC and none will be funded for construction projects funded under ISDEAA contracts.

IHS methodologies establish a fair and reasonable price for the overall project. This is made up of all allowable costs of the Tribe, including costs of the tribe articulated in the process set forth at Section 105(m), 25 U.S.C. 450j(m). Because the construction project funds are all-inclusive of 106(a) funding, construction projects are not eligible for CSC funding under 106(a), including direct and indirect CSC, start-up costs and pre-award costs. ISDEAA §106(a)(2),(3),(5),(6), 25 U.S.C. § 450j-1(a)(2),(3),(5),(6).

Under 105(m), the total amount awarded under a contract shall reflect an overall fair and reasonable price to the parties, including the following costs:

1. The reasonable costs to the tribe or tribal organization of performing the contract, taking into consideration the terms of the contracts and the requirements of the ISDEAA and any other applicable law.
2. The costs of preparing the contract proposal and supporting cost data.
3. The costs associated with auditing the general and administrative costs of the tribal organization associated with the management of the construction contract.
4. In the case of a fixed-price contract, a fair profit determined by taking into consideration the relevant risks and local market conditions.

Estimating Methodology for Sanitation Facilities Construction

The "Criteria for Sanitation Facilities Construction Program" guide provides guidance on the SFC program and project funding. This guide may be located on the IHS website at: http://www.dsfc.ihs.gov/Documents/Criteria_June_1999.cfm

Estimating Methodology for New Facilities Construction

This section is applies only to the IHS Health Facility Budget (FBE) estimating system used for New Health Care Facilities and quarters construction projects.

For IHS New Facility and Quarters Construction Projects, the FBE system provides a budget estimate using a standardized procedure based on cost estimating industry standards. Unit costs are obtained from R.S. Means Building Construction and actual project cost data. Location factors are obtained from Marshall Valuation Service and from special studies for selected locations. Escalation factors are obtained for building types from the Engineering News Record, Building Cost Index (BCI). All factors are generally updated annually and reflect current economic conditions.

The FBE utilizes the following steps to determine the construction costs of new health care facilities:

- Unadjusted Unit Cost - The unadjusted unit cost (cost/square meter) by building type (e.g. hospitals, health centers, and etc.) is derived from a R.S. Means database of approximately 10,200 completed projects and includes all cost categories except architectural fees and land costs. All prime contractor and subcontractor costs are included. The unadjusted unit cost is adjusted for use in the FBE based upon the historical construction costs for each type of facility within IHS. The wage rates reflected in this unadjusted unit cost are representative of prevailing wage rates as the database is updated annually.
- Adjusted Unit Cost at Current Estimate Date - The Unadjusted Unit Cost is first adjusted for the overall building size of the specific project, and then escalated to the current estimate date.
- Total Base Building Cost - The adjusted unit cost is adjusted to reflect the specific departments and their sizes as established in the approved Program of Requirements (POR). This step includes evaluation of both new construction and renovation.
- Construction Cost at the Estimate Date - The POR and project specific information are used to identify the costs for special equipment, special programs, demolition/abatement of any existing facilities, site and utility costs. The cumulative costs are adjusted by the location factor to determine the project construction cost for a specific site at the estimate date.
- Construction Cost at Mid Point - A project schedule is then generated based on the complexity of the project and the anticipated funding. This schedule is used to escalate the cost to the mid-point of construction.
- Total Project Budget - Finally, the estimate is adjusted for applicable A/E fees, equipment costs, other miscellaneous costs/fees, taxes, and phased funding.

The total project budget for a specific project is updated annually until the first phase of construction is funded.

This method of estimating is used to establish an all inclusive project budget for successful completion of the project regardless of who manages the project or what type of contracts are awarded to complete the project. Since the overall project budget estimates are formulated using the FBE methodology above, specific cost objectives that would apply to resultant contracts are not itemized; they are inherent in the overall project funding methodology. During the budget formulation process, the specific acquisition plans are not known including whether a tribe plans to complete the work under a ‘638 contract. Once a project is funded, specific acquisition plans are made which would include the award of contracts at fair and reasonable prices to the parties.

The IHS FBE system is intended to provide an overall project budget that will justify enough funds for a successful result, regardless of acquisition method.

Funding Tribal Contracts under P.L. 93-638

P.L. 93-638 construction contract awards are currently funded from two sources of funding, line item project appropriations and OEH&E program administrative shares. Project funds are the funds appropriated for a specific project. Program funds are for the administrative functions supporting the project (administrative shares) at any IHS organizational level carrying out such functions. Tribes are eligible for contract support costs on the administrative shares.

Under P.L. 93-638 tribes may become involved in the project at any phase of construction. Phases include: preplanning, planning (includes developing project POR and budget cost estimates), design and construction. Once funds have been appropriated and allocated to IHS for the project at any phase, the tribes are given the opportunity to contract the project under P.L. 93-638.

P.L. 93-638 construction contracts are negotiated pursuant to section 105(m). Section 105 (m)(4)(A) prescribes that subject to subparagraph (B), in funding a fixed-price construction contract pursuant to section 106(a), the Secretary shall provide for the following:

(i) The reasonable costs to the tribe or tribal organization for general administration incurred in connection with the project that is the subject of the contract.
(ii) The ability of the contractor that carries out the construction contract to make a reasonable profit, taking into consideration the risks associated with carrying out the contract and other relevant considerations.

Part 105 (m)(4)(B) states that in establishing a contract budget for a construction project, the Secretary shall not be required to separately identify the components described in clauses (i) and (ii) of subparagraph (A).

Part 105 (m) (4) (C) states that the total amount awarded under the construction contract shall reflect an overall fair and reasonable price to the parties, including the following costs:

(i) The reasonable costs to the tribal organization of performing the contract, taking into consideration the terms of the contract and the requirements of this Act and any other applicable law.
(ii) The costs of preparing the contract proposal and supporting cost data.
(iii) The costs associated with auditing the general and administrative costs of the tribal organization associated with the management of the construction contract.
(iv) In the case of a fixed-price contract, a fair profit determined by taking into consideration the relevant risks and local market conditions.

The purpose of the project cost estimate (total project budget) is to determine the amount of funds likely to produce a favorable result. It is not intended to provide a fair and reasonable standard for the contract.

C. Difference between Cost-Reimbursement and Fixed Price

T-V, Subpart N Regulation 42 CFR 137.336 defines the difference between fixed price and cost-reimbursement agreements. This definition is also suitable for Title I, Subpart J contracts as follows:

(a) Cost-reimbursement agreements generally have one or more of the following characteristics:
  (1) Risk is shared between IHS and the Tribe;
  (2) The tribe is not required to perform beyond the amount of funds provided under the agreement;
  (3) Tribes establish budgets based on actual costs of the project and are not allowed to include profit;
  (4) Budgets are stated using broad budget categories such as planning, design, construction project administration, and contingency;
  (5) The agreement funding amount is stated as a “not to exceed” amount;
  (6) Tribes provide notice to the IHS if they expect to exceed the amount of funds obligated under the agreement and require more funds;
  (7) Excess funds remaining at the end of the project are considered savings; and
  (8) Actual costs are subject to applicable OMB circulars and cost principles.

(b) Fixed Price agreements generally have one or more of the following characteristics:
(1) Tribes assume the risk for performance;
(2) Tribes are entitled to make a reasonable profit
(3) Budgets may be stated as lump sum, unit cost pricing, or a combination thereof;
(4) For unit cost pricing, savings may occur if actual quantity is less than estimated; and
(5) Excess funds remaining at the end of a lump sum fixed price project are considered profit, unless, at the option of the tribe such amounts are reclassified in whole or in part as savings.

Depending on the organization and the type of contract, different cost objectives or terms apply. For example, in a fixed price contract, the contract price is usually stated in lump sum line items inclusive of all administrative cost and profit.

On fixed price P.L. 93-638 contracts, Tribes may express their administrative costs and profit margins within the lump sum price or itemize these price objectives in their budget. When IHS solicits bids on the open market, the overhead (including corporate, home office, job site overhead and all other administrative costs) and profit margins are never itemized.

Cost-reimbursement contracts allow cost objectives for tribal direct administrative and indirect costs in lieu of overhead and profit.

D. Other Sources of Funding

1) Health Services Funds

Under limited circumstances, Tribes may use funds remaining under services contracts for some construction projects. Since fiscal year 2000, the use of health services funds for certain types of construction has been authorized by Congress in its appropriation acts. Congress has been approving year end specific funds as part of the "Administrative Provisions" of the IHS appropriation for the "purchase, renovation and erection of modular buildings and renovation of existing facilities." This authority expires with the end of the appropriation year so the project manager must check the relevant appropriation year to ensure that the authority is there for any given year before adding a tribal contractor's Section 108 service funds to a construction agreement. The service funds may only be used to purchase, build or renovate modular buildings or renovate existing facilities.[1]

When funds remain throughout successful completion of a health services contract, a contracting Tribe may submit a proposal to modify the scope of the contract to include a construction project that falls within the categories authorized by an appropriation act, as stated above. The proposal to modify the contract must be submitted in accordance with 25 CFR 900.125 *What shall a construction contract proposal contain?* In these cases, the Tribe will not receive notification of fund allocation as required by 25 CFR 900.120, rather their proposal will need to identify all funds required to carry out the proposed scope of work including all planning, design, construction, construction contract administration, and all associated overhead or indirect costs. The funds identified for the project do not need to be returned to IHS and reobligated to the Tribe. The proposal to modify the contract must be submitted and a contract modification executed before funds are expended for any purpose related to construction, including planning.

1 For example, the following citations are to the IHS appropriation acts (generally entitled "Department of Interior and Related Agencies Appropriations Act) from fiscal year 2001 through 2010 that contain the authority given to use service funds for these specific construction activities (Congress failed to enact an appropriation act for FY 2007): FY 2001, see Public Law 106-291 at 114 Stat 980; FY 2002, see Public Law 107-63 at 115 Stat 458; FY 2003, see Public Law 108-7 at 117 Stat 263; FY 2004, see Public Law 108-108 at 117 Stat 1295; FY 2005, see Public Law 108-447 at 118 Stat 3086; FY 2006, see Public Law 109-54 at 119 Stat 541; FY 2008, see Public Law 110-161 at 121 Stat 2136; FY 2009 ("Omnibus Appropriations Act, 2009"), see Public Law 111-8 at 123 Stat 737; FY 2010, see Public Law 111-88 at 123 Stat 2947.

The contract must contain a statement that additional funds may not be made available for additional staffing, equipment or for any other increase in expenses associated with the tribally-initiated construction project.

The Tribe and IHS will need to negotiate and include in the contract modification provision of the planning document supporting the project (project summary document). The remainder of the contract and its requirements will be negotiated as a Subpart J construction contract.

SECTION 4 – COMPARISON TABLE FOR CONSTRUCTION PROJECTS (TITLE I, TITLE V, MOA)

ACTIVITY	Title-I, Subpart J CONSTRUCTION CONTRACT	Title-I, Subpart J SAP CONTRACT	Title-V CONSTRUCTION PROJECT AGREEMENT	MOA SFC PROGRAM ONLY
Notification	• Follow 105(m)/25 CFR 900.122 • Notification to tribes of project • Notification required within 30 days of allocation of funds	• Program Announcement to all tribes	• Follow 105(m) (3)/ 42 CFR 137.325 • Notification to tribes of project • Notification required within 30 days of allocation of funds	• Follow 105(m)/25 CFR 900.122 or 105(m)(3)/ 42 CFR 137.325 • Notification to tribes of project • Notification required within 30 days of allocation of funds
Pre-Award	• Letter of Intent from tribe • 30 days all available info to tribes • Pre-proposal phase/joint scoping sessions • Negotiation • Proposal approval/award or Declination (Sec. 102)	• SAP Application Competitive Process • Ranking and Rating of Applications • Project Selections based on highest scored applications within available line item appropriations	• Letter of Intent from tribe or proposal submission • 30 days all available info to tribes • Pre-proposal phase/joint scoping sessions • Negotiation • Proposal approval/award or rejection of offer/Rejection at 42 CFR 137.332	• Follow MOA Procedures • Draft Project Summary
Proposal	• Proposal Contents per 25 CFR 900.125	• SAP Application	• Project Agreement 42 CFR 137.280	• Tribal request to IHS to construct a sanitation facilities project through the MOA
Funding	• 106 (a): a. Direct Project Amount, except partial contingency, is retained by Government per regulations b. Administrative Shares at all levels of IHS Program • 106 (a)(2) No Contract Support Costs on project, maybe on program	• 106 (a): a. Direct funding is based on competitive process b. No Administrative Shares • No 106(a)(2) Contract Support Costs • No additional Contingency funds	• Same as Title-I • Except all contingency funds are provided to the tribe	• Direct project amount including administration and design (unless IHS completes design). Contingency funding may be retained by IHS until needed by the tribe

ACTIVITY	Title-I, Subpart J CONSTRUCTION CONTRACT	Title-I, Subpart J SAP CONTRACT	Title-V CONSTRUCTION PROJECT AGREEMENT	MOA SFC PROGRAM ONLY
Cost Overruns	• Cost reimbursement contracts: tribe not required to continue performance • Fixed Price: tribe is responsible for cost overruns	• Fixed Price: tribe is responsible for cost overruns	• Tribe is responsible for overall completion of the project. • Must notify IHS if cost overruns anticipated on CR Contracts	• Tribe is responsible for cost overruns. Options include revised utilization of tribal labor, equipment materials, and efficiency, reduction in scope of work, additional funding, changes to payment method, and IHS takeover of the project
Savings	• Applies to Cost-Reimbursement • Use of Savings determined by IHS after consultation with tribes • Fixed price: may result in a reasonable profit (25 CFR 900.127(c)(4)(ii))	• Not Applicable – All Fixed Price	• All unexpended funds including contingency considered savings • May be used for additional services for which funds originally appropriated. • No approval by IHS	• Any remaining funds returned to IHS or 3rd party, unless increased scope is approved • Profit is not allowed under an MOA
Interest on Advance Payments*	• Not accountable unless specifically budgeted in contract	• Not Accountable	• Not Accountable	• Interest in excess of $100 per year must be returned to the project account
NEPA (42 CFR 137.285 through 137.322) (25 USC 458aaa-8§ 509)	• Required – IHS makes determination	• Required – IHS makes determination	• Required • Tribes may only enter into Title-V agreements if they agree to assume environmental responsibilities for construction projects • Resolution designating a certifying officer to represent the tribe and assume status of a responsible Federal Official under NEPA/NHPA	• Required – IHS makes determination

*NOTE: Advance payments may only be invested in obligations or securities that are guaranteed or insured by the United States or mutual funds registered with the SEC that are guaranteed or secured by the United States (P.L. 108-447, 25 USC 450e-3).

ACTIVITY	Title-I, Subpart J CONSTRUCTION CONTRACT	Title-I, Subpart J SAP CONTRACT	Title-V CONSTRUCTION PROJECT AGREEMENT	MOA SFC PROGRAM ONLY
Design Reviews	• Concepts: Review • Schematics: Review and Approval • Design Development: Review • Final Construction Documents: Review and Approval (or as otherwise negotiated) • Reviews are for general compliance with the contract/POR	• Per Tribes SAP Proposal or at least one review and approval at final construction documents • Reviews are for general compliance with the SAP application and contract	• One opportunity to review and approve planning documents • One opportunity to review and approve design documents. Phase for review and approval must be negotiated	• If IHS completes the design, tribal reviews provided as per the MOA • If the Tribe completes the design, IHS reviews provided as per the MOA
Reports	• Quarterly Progress • Quarterly Financial	• None or per SAP • Quarterly Financial	• Semi-Annual Progress • Semi-Annual Financial	• On a "regular basis", the Tribe shall provide IHS an accounting of all charges for labor, administrative costs, equipment, materials, and procured services in an agreed format
Schedules	• Initial Performance Schedule and updates as they occur	• May require if there is substantial deviation	• Only to establish project phase start and completion dates. Updates only where there is substantial deviation	• IHS provides a work plan and priority for the scheduling of the project before construction begins. Tribal construction contract can require construction schedule
Advance Payments[2]	• 21 Days • NTE One Year or based on minimum amount of time elapsing between expenditure and payment	• 21 Days • One Year + or - • Split between one year and subsequent 1 year periods	• 10 Days • Based on Phase • All other – 1 Year	• IHS may provide in advance of construction to purchase or rent equipment and materials not to exceed 25% of project budget

2 PL 108-447 allows Tribes to earn interest on advance payments only in obligations or securities that are guaranteed or secured by the United States Government.

ACTIVITY	Title-I, Subpart J CONSTRUCTION CONTRACT	Title-I, Subpart J SAP CONTRACT	Title-V CONSTRUCTION PROJECT AGREEMENT	MOA SFC PROGRAM ONLY
Changes	• Tribe may not issue a change order that will cause the tribe to exceed performance period, funds, or that is a significant departure from the scope	• Tribe administers changes per process in individual SAP • Changes, which depart from SAP application, require notification	• Amendments -Add Additional Projects -Significant Scope Change or substantial departure in performance periods -Funds Added	• MOA Amendments initiated as necessary. All affected parties to the original MOA must approve and sign subsequent amendments
Real Property	• Tribe takes title unless otherwise stipulated • Trust land – Transfer Agreement conveys ownership to the Tribe • Federal land – Quitclaim deed conveys ownership to the Tribe	• Mandatory – Tribe takes title	• Tribe takes title unless otherwise stipulated in the project agreement, refer to T-V regulation in Tab 6-C, 42 CFR 137.373, p-35366 • Trust land – Transfer Agreement conveys ownership to the Tribe • Federal land – Quitclaim deed conveys ownership to the Tribe	• All sanitation facilities constructed including equipment, land and supplies are at no time the property of the IHS, but rather belong to the Tribe, until or unless transferred to other parties
Real Property Reports	• Required where IHS takes title • Data must be negotiated	• Not Required – Tribe takes title	• Required where IHS takes title • Data must be negotiated	• Not Required – Tribe owns all sanitation facilities provided by project
Davis Bacon Wages	• Required, except for work performed directly by tribes & tribal organizations	• Required, except for work performed directly by tribes and tribal organizations	• Required, except for work performed directly by tribes and tribal organizations	• Required, except for work performed directly by tribes and tribal organizations
Monitoring	• May conduct monthly on-site monitoring visits • Critical Milestones, as negotiated • Government accepts building (where Government owned) • Purpose is to determine general compliance with contract/POR	• May conduct monthly on-site monitoring visits. Overall intent is to not monitor unless determined necessary by PM	• Semi-annual or as otherwise negotiated and only with reasonable advance written notice. Purpose is to "view the progress" and provide a written report of visit to tribe	• MOA must clearly identify the IHS role in construction inspection and require tribal procurement documents also include the right of IHS employees to inspect the work

ACTIVITY	Title-I, Subpart J CONSTRUCTION CONTRACT	Title-I, Subpart J SAP CONTRACT	Title-V CONSTRUCTION PROJECT AGREEMENT	MOA SFC PROGRAM ONLY
Final Inspection	• May Conduct • Does conduct for purpose of accepting Government owned buildings	• May Conduct • Government does not make final acceptance. Inspection only to determine the tribe built project	• Not addressed in law or regulations • IHS should negotiate a final inspection if IHS owns and operates	• Tribe must conduct a final inspection and include the contractor, IHS representatives, and other interested parties
Close-out	• Final Quarterly Expenditure Report • Record plans and contract closeout report required	• Final Quarterly Expenditure Report • Plans & Close-out Report per SAP application	• Not addressed in law or regulations • Should be negotiated between the parties	• Final Report completed by IHS
Appeals	• 25 CFR 900 Subpart L	• 25 CFR 900 Subpart L	• 42 CFR 36 Subpart P	• MOA disputes are resolved among the parties through the IHS Area's established administrative procedures. If unsuccessful, an appeals board established at the IHS headquarters level will make a recommendation to the IHS Director, who will exercise final decision authority.

APPENDIX I

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

Public Law 93-638, as amended

[August 18, 2000]

Note: The most updated version of included legislation and legislation referenced herein can be accessed online at GPO Access or similar website.

Codification prepared by the Legal Affairs Branch,
Division of Regulatory & Legal Affairs,
and the Congressional and Legislative Affairs Office

Indian Health Service
Department of Health and Human Services

PUBLIC LAW 93-638, AS AMENDED [AUGUST 18, 2000]

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

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The following is a compilation of laws that constitute, amend, or modify the Indian Self-Determination and Education Assistance Act (ISDEAA). [1]

The Indian Self-Determination and Education Assistance Act
Public Law, 93-638, As Amended

AN ACT

To provide maximum Indian participation in the Government and education of the Indian people; to provide for the full participation of Indian tribes in programs and services conducted by the Federal Government for Indians and to encourage the development of human resources of the Indian people; to establish a program of assistance to upgrade Indian education; to support the right of Indian citizens to control their own educational activities; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, [t]hat this Act may be cited as the "Indian Self-Determination and Education Assistance Act."

Sec. 2. Congressional statement of findings [25 U.S.C. § 450]

(a) **Findings respecting historical and special legal relationship, and resultant responsibilities**

The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that—

(1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and

(2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.

(b) **Further findings**

The Congress further finds that—

(1) true self-determination in any society of people is dependent upon an educational process which will insure the development of qualified people to fulfill meaningful leadership roles;

(2) the Federal responsibility for and assistance to education of Indian children has not effected the desired level of educational achievement or created the diverse opportunities and personal satisfaction which education can and should provide; and

(3) parental and community control of the educational process is of crucial importance to the Indian people.

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[1] *There are provisions in the annual Interior and Related Agencies Appropriations Acts that affect the ISDEAA implementation but are not included in the compilation unless otherwise codified in the United States Code.*

Sec. 3. Congressional declaration of policy [25 U.S.C. § 450a]

(a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

(c) The Congress declares that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.

[Note: Public Law 103-435, codified at 25 U.S.C. § 450a-1, amended the Act to provide for Tribal and Federal advisory committees:

> Notwithstanding any other provision of law (including any regulation), the Secretary of the Interior and the Secretary of Health and Human Services are authorized to jointly establish and fund advisory committees or other advisory bodies composed of members of Indian tribes or members of Indian tribes and representatives of the Federal Government to ensure tribal participation in the implementation of the Indian Self-Determination and Education Assistance Act (Public Law 93-638) (25 U.S.C. § 450 et seq.)]

Sec. 4. Definitions [25 U.S.C. § 450b]

For purposes of this Act, the term—

(a) "construction programs" means programs for the planning, design, construction, repair, improvement, and expansion of buildings or facilities, including, but not limited to, housing, law enforcement and detention facilities, sanitation and water systems, roads, schools, administration and health facilities, irrigation and agricultural work, and water conservation, flood control, or port facilities;

(b) "contract funding base" means the base level from which contract funding needs are determined, including all contract costs;

(c) "direct program costs" means costs that can be identified specifically with a particular contract objective;

(d) "Indian" means a person who is a member of an Indian tribe;

(e) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat.

688) [43 U.S.C. § 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians;

(f) "indirect costs" means costs incurred for a common or joint purpose benefiting more than one contract objective, or which are not readily assignable to the contract objectives specifically benefited without effort disproportionate to the results achieved;

(g) "indirect cost rate" means the rate arrived at through negotiation between an Indian tribe or tribal organization and the appropriate Federal agency;

(h) "mature contract" means a self-determination contract that has been continuously operated by a tribal organization for three or more years, and for which there are no significant and material audit exceptions in the annual financial audit of the tribal organization: Provided, That upon the request of a tribal organization or the tribal organization's Indian tribe for purposes of section 102(a) of this Act [25 U.S.C. § 450f(a)], a contract of the tribal organization which meets this definition shall be considered to be a mature contract;

(i) "Secretary", unless otherwise designated, means either the Secretary of Health and Human Services or the Secretary of the Interior or both;

(j) "self-determination contract" means a contract (or grant or cooperative agreement utilized under section 9 of this Act [25 U.S.C. § 450e-1]) entered into under title I of this Act between a tribal organization and the appropriate Secretary for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law: Provided, That except as provided [in] the last proviso in section 105(a) of this Act [25 U.S.C. § 450j(a)], no contract (or grant or cooperative agreement utilized under section 9 of this Act [25 U.S.C. § 450e-1]) entered into under title I of this Act shall be construed to be a procurement contract;

(k) "State education agency" means the State board of education or other agency or officer primarily responsible for supervision by the State of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law;

(l) "tribal organization" means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: Provided, That in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant; and

(m) "construction contract" means a fixed-price or cost-reimbursement self-determination contract for a construction project, except that such term does not include any contract—

(1) that is limited to providing planning services and construction management services (or a combination of such services);

(2) for the Housing Improvement Program or roads maintenance program of the Bureau of Indian Affairs administered by the Secretary of the Interior; or

(3) for the health facility maintenance and improvement program administered by the Secretary of Health and Human Services.

Sec. 5. Reporting and audit requirements for recipients of Federal financial assistance [25 U.S.C. § 450c]

(a) Maintenance of records

(1) Each recipient of Federal financial assistance under this Act shall keep such records as the appropriate Secretary shall prescribe by regulation promulgated under sections 552 and 553 of title 5, United States Code, including records which fully disclose—

(A) the amount and disposition by such recipient of the proceeds of such assistance,

(B) the cost of the project or undertaking in connection with which such assistance is given or used,

(C) the amount of that portion of the cost of the project or undertaking supplied by other sources, and

(D) such other information as will facilitate an effective audit.

(2) For the purposes of this subsection, such records for a mature contract shall consist of quarterly financial statements for the purpose of accounting for Federal funds, the annual single-agency audit required by chapter 75 of title 31, United States Code [31 U.S.C. § 7501 et seq.], and a brief annual program report.

(b) Access to books, documents, papers, and records for audit and examination by Comptroller General, etc.

The Comptroller General and the appropriate Secretary, or any of their duly authorized representatives, shall, until the expiration of three years after completion of the project or undertaking referred to in the preceding subsection of this section, have access (for the purpose of audit and examination) to any books, documents, papers, and records of such recipients which in the opinion of the Comptroller General or the appropriate Secretary may be related or pertinent to the grants, contracts, subcontracts, subgrants, or other arrangements referred to in the preceding subsection.

(c) Availability by recipient of required reports and information to Indian People served or represented

Each recipient of Federal financial assistance referred to in subsection (a) of this section shall make such reports and information available to the Indian people served or represented by such recipient as and in a manner determined to be adequate by the appropriate Secretary.

(d) Repayment to Treasury by recipient of unexpended or unused funds

Except as provided in section 8 or 106(a)(3) of this Act [25 U.S.C. § 13a or 450j-1(a)(3)], funds paid to a financial assistance recipient referred to in subsection (a) of this section and not expended or used for the purposes for which paid shall be repaid to the Treasury of the United States through the respective Secretary.

(e) Annual report to tribes

The Secretary shall report annually in writing to each tribe regarding projected and actual staffing levels, funding obligations, and expenditures for programs operated directly by the Secretary serving that tribe.

(f) Single-agency audit report; additional information; declination criteria and procedures

(1) For each fiscal year during which an Indian tribal organization receives or expends funds pursuant to a contract entered into, or grant made, under this Act, the tribal

organization that requested such contract or grant shall submit to the appropriate Secretary a single-agency audit report required by chapter 75 of title 31, United States Code [31 U.S.C. § 7501 et seq.].

(2) In addition to submitting a single-agency audit report pursuant to paragraph (1), a tribal organization referred to in such paragraph shall submit such additional information concerning the conduct of the program, function, service, or activity carried out pursuant to the contract or grant that is the subject of the report as the tribal organization may negotiate with the Secretary.

(3) Any disagreement over reporting requirements shall be subject to the declination criteria and procedures set forth in section 102 [25 U.S.C. § 450f].

Sec. 6. Criminal activities involving grants, contracts, etc.; penalties [25 U.S.C. § 450d]

Whoever, being an officer, director, agent, or employee of, or connected in any capacity with, any recipient of a contract, subcontract, grant, or subgrant pursuant to this Act or the Act of April 16, 1934 (48 Stat. 596), as amended [25 U.S.C. § 452 et seq.], embezzles, willfully misapplies, steals, or obtains by fraud any of the money, funds, assets, or property which are the subject of such a grant, subgrant, contract, or subcontract, shall be fined not more than $ 10,000 or imprisoned for not more than two years, or both, but if the amount so embezzled, misapplied, stolen, or obtained by fraud does not exceed $ 100, he shall be fined not more than $ 1,000 or imprisoned not more than one year, or both.

Sec. 7. Wage and labor standards [25 U.S.C. § 450e]

(a) **Similar construction in locality**

All laborers and mechanics employed by contractors or subcontractors (excluding tribes and tribal organizations) in the construction, alteration, or repair, including painting or decorating of buildings or other facilities in connection with contracts or grants entered into pursuant to this Act, shall be paid wages at not less than those prevailing on similar construction in the locality, as determined by the Secretary of Labor in accordance with the Davis-Bacon Act of March 3, 1931 (46 Stat. 1494), as amended [40 U.S.C. § 276a et seq.]. With respect to construction, alteration, or repair work to which the Act of March 3, 1921 is applicable under the terms of this section, the Secretary of Labor shall have the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 64 Stat. 1267) [5 U.S.C. § 903 note] and section 2 of the Act of June 13, 1934 (48 Stat. 948, 40 U.S.C. § 276c).

(b) **Preferences requirements for wages and grants**

Any contract, subcontract, grant, or subgrant pursuant to this Act, the Act of April 16, 1934 (48 Stat. 596), as amended [25 U.S.C. § 452 et seq.], or any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians, shall require that to the greatest extent feasible—

(1) preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians; and

(2) preference in the award of subcontracts and subgrants in connection with the administration of such contracts or grants shall be given to Indian organizations and to Indian-owned economic enterprises as defined in section 3 of the Indian Financing Act of 1974 (88 Stat. 77) [25 U.S.C. § 1452].

(c) **Self-determination contract**

Notwithstanding subsections (a) and (b), with respect to any self-determination contract, or portion of a self-determination contract, that is intended to benefit one tribe, the tribal employment or contract preference laws adopted by such tribe shall govern with respect to the administration of the contract or portion of the contract.

Sec. 8. Carryover funding [25 U.S.C. § 13a]

Notwithstanding any other provision of law, any funds appropriated pursuant to the Act of November 2, 1921 (42 Stat. 208), for any fiscal year which are not obligated or expended prior to the beginning of the fiscal year succeeding the fiscal year for which such funds were appropriated shall remain available for obligation or expenditures during such succeeding fiscal year. In the case of amounts made available to a tribal organization under a self-determination contract, if the funds are to be expended in the succeeding fiscal year for the purpose for which they were originally appropriated, contracted or granted, or for which they are authorized to be used pursuant to the provisions of section 106(a)(3) [25 U.S.C. § 450 j-1(a)(3)], no additional justification or documentation of such purposes need be provided by the tribal organization to the Secretary as a condition of receiving or expending such funds.

Sec. 9. Grant and cooperative agreements [25 U.S.C. § 450e-1]

The provisions of this Act shall not be subject to the requirements of chapter 63 of title 31, United States Code [31 U.S.C. § 6301 et seq.]: Provided, That a grant agreement or a cooperative agreement may be utilized in lieu of a contract under sections 102 [25 U.S.C. § 450f] and 103 [25 U.S.C. § 450g][2] of this Act when mutually agreed to by the appropriate Secretary and the tribal organization involved.

[Note: Public Law 105-83, Title III, § 310, codified at 25 U.S.C. § 450e-2, amended the Act to limit use of excess funds from construction project costs, and provides:

> Beginning in fiscal year 1998 and thereafter, where the actual costs of construction projects under self-determination contracts, compacts, or grants, pursuant to Public Laws 93-638, 103-413, or 100-297, are less than the estimated costs thereof, use of the resulting excess funds shall be determined by the appropriate Secretary after consultation with the tribes.]

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[2] *As so in the original. Section 103(a) and (b) and the first sentence of section 103(c) of Pub.L. 93-638(25 U.S.C. §§ 450g(a), (b), and (c)) were repealed and the remainder of section 103(c) of Pub.L. 93-638 (25 U.S.C. § 450g(c)) was redesignated as section 102(d) of Pub.L. 93-638 (25 U.S.C. § 450f(d)) by Pub.L. 100-472, Title II, § 201(b)(1), Oct. 5, 1988, 102 Stat. 2289. Section 104 of Pub.L. 93-638 was renumbered as section 103 of Pub.L. 93-638 by section 202(a) of Pub.L. 100-472 and is classified to 25 U.S.C. § 450h.*

Title I – Indian Self-Determination Act

Sec. 101. Title

This title may be cited as the "Indian Self-Determination Act."

Sec. 102. Self-determination contracts [25 U.S.C. § 450f]

(a) **Request by tribe; authorized programs**

(1) The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs—[3]

(A) provided for in the Act of April 16, 1934 (48 Stat. 596) [25 U.S.C. § 452 et seq.], as amended;

(B) which the Secretary is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208) [25 U.S.C. § 13], and any Act subsequent thereto;

(C) provided by the Secretary of Health and Human Services under the Act of August 5, 1954 (68 Stat. 674) [42 U.S.C. § 2001 et seq.], as amended;

(D) administered by the Secretary for the benefit of Indians for which appropriations are made to agencies other than the Department of Health and Human Services or the Department of the Interior; and

(E) for the benefit of Indians because of their status as Indians without regard to the agency or office of the Department of Health and Human Services or the Department of the Interior within which it is performed.

The programs, functions, services, or activities that are contracted under this paragraph shall include administrative functions of the Department of the Interior and the Department of Health and Human Services (whichever is applicable) that support the delivery of services to Indians, including those administrative activities supportive of, but not included as part of, the service delivery programs described in this paragraph that are otherwise contractible. The administrative functions referred to in the preceding sentence shall be contractible without regard to the organizational level within the Department that carries out such functions.

(2) If so authorized by an Indian tribe under paragraph (1) of this subsection, a tribal organization may submit a proposal for a self-determination contract, or a proposal to amend or renew a self-determination contract, to the Secretary for review. Subject to the provisions of paragraph (4), the Secretary shall, within ninety days after receipt of the proposal, approve the proposal and award the contract unless the Secretary provides written notification to the applicant that contains a specific finding that clearly demonstrates that, or that is supported by a controlling legal authority that—

(A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;

(B) adequate protection of trust resources is not assured;

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[3] *Pub.L. 105-83, Pub.L. 105-277, § 351 and Pub.L. 106-260, § 12 have substantively modified tribal rights to enter ISDEAA agreements. Also, for tribes in Alaska's Ketchikan Gateway Borough, the ability to enter into health care agreements under the ISDEAA is further modified by Title II of Pub.L. 105-143, as amended.*

(C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract;

(D) the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 106(a) [25 U.S.C. § 450j-1(a)]; or

(E) the program, function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities covered under paragraph (1) because the proposal includes activities that cannot lawfully be carried out by the contractor.

Notwithstanding any other provision of law, the Secretary may extend or otherwise alter the 90-day period specified in the second sentence of this subsection,[4] if before the expiration of such period, the Secretary obtains the voluntary and express written consent of the tribe or tribal organization to extend or otherwise alter such period. The contractor shall include in the proposal of the contractor the standards under which the tribal organization will operate the contracted program, service, function, or activity, including in the area of construction, provisions regarding the use of licensed and qualified architects, applicable health and safety standards, adherence to applicable Federal, State, local, or tribal building codes and engineering standards. The standards referred to in the preceding sentence shall ensure structural integrity, accountability of funds, adequate competition for subcontracting under tribal or other applicable law, the commencement, performance, and completion of the contract, adherence to project plans and specifications (including any applicable Federal construction guidelines and manuals), the use of proper materials and workmanship, necessary inspection and testing, and changes, modifications, stop work, and termination of the work when warranted.

(3) Upon the request of a tribal organization that operates two or more mature self-determination contracts, those contracts may be consolidated into one single contract.

(4) The Secretary shall approve any severable portion of a contract proposal that does not support a declination finding described in paragraph (2). If the Secretary determines under such paragraph that a contract proposal—

(A) proposes in part to plan, conduct, or administer a program, function, service, or activity that is beyond the scope of programs covered under paragraph (1), or

(B) proposes a level of funding that is in excess of the applicable level determined under section 106(a) [25 U.S.C. § 450j-1(a)],

subject to any alteration in the scope of the proposal that the Secretary and the tribal organization agree to, the Secretary shall, as appropriate, approve such portion of the program, function, service, or activity as is authorized under paragraph (1) or approve a level of funding authorized under section 106(a) [25 U.S.C. § 450j-1(a)]. If a tribal organization elects to carry out a severable portion of a contract proposal pursuant to this paragraph, subsection (b) shall only apply to the portion of the contract that is declined by the Secretary pursuant to this subsection.

(b) **Procedure upon refusal of request to contract**

Whenever the Secretary declines to enter into a self-determination contract or contracts pursuant to subsection (a) of this section, the Secretary shall—

(1) state any objections in writing to the tribal organization,

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[4] *Reads so in the original. Probably should read "paragraph".*

(2) provide assistance to the tribal organization to overcome the stated objections, and

(3) provide the tribal organization with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter and the opportunity for appeal on the objections raised, under such rules and regulations as the Secretary may promulgate, except that the tribe or tribal organization may, in lieu of filing such appeal, exercise the option to initiate an action in a Federal district court and proceed directly to such court pursuant to section 110(a) [25 U.S.C. § 450m-1(a)].

(c) **Liability insurance; waiver of defense**

(1) Beginning in 1990, the Secretary shall be responsible for obtaining or providing liability insurance or equivalent coverage, on the most cost-effective basis, for Indian tribes, tribal organizations, and tribal contractors carrying out contracts, grant agreements and cooperative agreements pursuant to this Act. In obtaining or providing such coverage, the Secretary shall take into consideration the extent to which liability under such contracts or agreements are covered by the Federal Tort Claims Act.

(2) In obtaining or providing such coverage, the Secretary shall, to the greatest extent practicable, give a preference to coverage underwritten by Indian-owned economic enterprises as defined in section 3 of the Indian Financing Act of 1974 [25 U.S.C. § 1452] (88 Stat. 77; 25 U.S.C. § 1451 et seq.), except that, for the purposes of this subsection, such enterprises may include non-profit corporations.

(3)(A) Any policy of insurance obtained or provided by the Secretary pursuant to this subsection shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage or limits of the policy of insurance.

(B) No waiver of the sovereign immunity of an Indian tribe pursuant to this paragraph shall include a waiver to the extent of any potential liability for interest prior to judgment or for punitive damages or for any other limitation on liability imposed by the law of the State in which the alleged injury occurs.

(d) **Tribal organizations and Indian contractors deemed part of Public Health Service**

For purposes of section 224 of the Public Health Service Act of July 1, 1944 (42 U.S.C. § 233(a)), as amended by section 4 of the Act of December 31, 1970 (84 Stat. 1870), with respect to claims, by any person, initially filed on or after December 22, 1987, whether or not such person is an Indian or Alaska Native or is served on a fee basis or under other circumstances as permitted by Federal law or regulations for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations, or for purposes of section 2679, title 28, United States Code, with respect to claims by any such person, on or after the date of the enactment of the Indian Self-Determination and Education Assistance Act Amendments of 1990 [enacted Nov. 29, 1990], for personal injury, including death, resulting from the operation of an emergency motor vehicle, an Indian tribe, a tribal organization or Indian contractor carrying out a contract, grant agreement, or cooperative agreement under sections 102 or 103 of this Act [25 U.S.C. § 450f or 450h] is deemed to be part of the Public Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and its employees (including those acting on behalf of the organization or contractor as provided in section 2671 of title 28, United States

Code, and including an individual who provides health care services pursuant to a personal services contract with a tribal organization for the provision of services in any facility owned, operated, or constructed under the jurisdiction of the Indian Health Service) are deemed employees of the Service while acting within the scope of their employment in carrying out the contract or agreement: Provided, That such employees shall be deemed to be acting within the scope of their employment in carrying out such contract or agreement when they are required, by reason of such employment, to perform medical, surgical, dental or related functions at a facility other than the facility operated pursuant to such contract or agreement, but only if such employees are not compensated for the performance of such functions by a person or entity other than such Indian tribe, tribal organization or Indian contractor.

(e) **Burden of proof at hearing or appeal declining contract; final agency action**

(1) With respect to any hearing or appeal conducted pursuant to subsection (b)(3) or any civil action conducted pursuant to section 110(a) [25 U.S.C. § 450m-1(a)], the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal (or portion thereof).

(2) Notwithstanding any other provision of law, a decision by an official of the Department of the Interior or the Department of Health and Human Services, as appropriate (referred to in this paragraph as the "Department") that constitutes final agency action and that relates to an appeal within the Department that is conducted under subsection (b)(3) shall be made either—

(A) by an official of the Department who holds a position at a higher organizational level within the Department than the level of the departmental agency (such as the Indian Health Service or the Bureau of Indian Affairs) in which the decision that is the subject of the appeal was made; or

(B) by an administrative judge.

Sec. 103. Grants to tribal organizations or tribes [25 U.S.C. § 450h]

(a) **Request by tribe for contract or grant by Secretary of the Interior for improving, etc., tribal governmental, contracting, and program planning activities**

The Secretary of the Interior is authorized, upon the request of any Indian tribe (from funds appropriated for the benefit of Indians pursuant to the Act of November 2, 1921 (42 Stat. 208, 25 U.S.C. § 13), and any Act subsequent thereto) to contract with or make a grant or grants to any tribal organization for—

(1) the strengthening or improvement of tribal government (including, but not limited to, the development, improvement, and administration of planning, financial management, or merit personnel systems; the improvement of tribally funded programs or activities; or the development, construction, improvement, maintenance, preservation, or operation of tribal facilities or resources);

(2) the planning, training, evaluation of other activities designed to improve the capacity of a tribal organization to enter into a contract or contracts pursuant to section 102 of this Act [25 U.S.C. § 450f] and the additional costs associated with the initial years of operation under such a contract or contracts; or

(3) the acquisition of land in connection with items (1) and (2) above: Provided, That in the case of land within Indian country (as defined in chapter 53 of title 18, United States Code [18 U.S.C. § 1151 et seq.]) or which adjoins on at least two sides, lands

held in trust by the United States for the tribe or for individual Indians, the Secretary of Interior may (upon request of the tribe) acquire such land in trust for the tribe.

(b) **Grants by Secretary of Health and Human Services for development, maintenance, etc., of health facilities or services and improvement of contract capabilities implementing hospital and health facility functions**

The Secretary of Health and Human Services may, in accordance with regulations adopted pursuant to section 107 of this Act [25 U.S.C. § 450k], make grants to any Indian tribe or tribal organization for—

(1) the development, construction, operation, provision, or maintenance of adequate health facilities or services including the training of personnel for such work, from funds appropriated to the Indian Health Service for Indian health services or Indian health facilities; or

(2) planning, training, evaluation or other activities designed to improve the capacity of a tribal organization to enter into a contract or contracts pursuant to section 103 [25 U.S.C. § 450g] of this Act.[5]

(c) **Use as matching shares for other similar Federal grant programs**

The provisions of any other Act notwithstanding, any funds made available to a tribal organization under grants pursuant to this section may be used as matching shares for any other Federal grant programs which contribute to the purposes for which grants under this section are made.

(d) **Technical assistance**

The Secretary is directed, upon the request of any tribal organization and subject to the availability of appropriations, to provide technical assistance on a nonreimbursable basis to such tribal organization—

(1) to develop any new self-determination contract authorized pursuant to this Act;

(2) to provide for the assumption by such tribal organization of any program, or portion thereof, provided for in section 102(a)(1) of this Act [42 U.S.C. § 450f(a)(1)]; or

(3) to develop modifications to any proposal for a self-determination contract which the Secretary has declined to approve pursuant to section 102 of the Act [25 U.S.C. § 450f].

(e) **Grants for technical assistance and for planning, etc., Federal programs for tribe.**

The Secretary is authorized, upon the request of an Indian tribe, to make a grant to any tribal organization for—

(1) obtaining technical assistance from providers designated by the tribal organization, including tribal organizations that operate mature contracts, for the purposes of program planning and evaluation, including the development of any management systems necessary for contract management, and the development of cost allocation plans for indirect cost rates; and

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5 *As so in the original. Section 103(a) and (b) and the first sentence of section 103(c) of Pub.L. 93-638(25 U.S.C. §§ 450g(a), (b), and (c)) were repealed and the remainder of section 103(c) of Pub.L. 93-638 (25 U.S.C. § 450g(c)) was redesignated as section 102(d) of Pub.L. 93-638 (25 U.S.C. § 450f(d)) by Pub.L. 100-472, Title II, § 201(b)(1), Oct. 5, 1988, 102 Stat. 2289. Section 104 of Pub.L. 93-638 was renumbered as section 103 of Pub.L. 93-638 by section 202(a) of Pub.L. 100-472 and is classified to 25 U.S.C. § 450h.*

(2) the planning, designing, monitoring, and evaluating of Federal programs serving the tribe, including Federal administrative functions.

Sec. 104. Retention of Federal employee coverage, rights and benefits by employees of tribal organizations [25 U.S.C. § 450i]

[Note: Subsections (a-d) were omitted from Public Law 93-638, section 104. The relevant sections are codified elsewhere in various titles of the U.S. Code, and are provided here for convenience.]

(a) [To ensure federal coverage, rights and benefits for tribal employees, Section 3371(2) of Title 5 was amended to include the following in the definitions of "local government":

> any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village as defined in the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. § 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians and includes any tribal organization as defined in section 4 of the Indian Self-Determination and Education Assistance Act [25 U.S.C. § 450b]. 5 U.S.C. § 3371(2)(C).]

(b) [The Secretary's authority to assign commissioned officers to a service area is codified in Section 2004b of Title 42:

> In accordance with subsection (d) of section 214 of the Public Health Service Act (58 Stat. 690), as amended [42 U.S.C. § 215(d)], upon the request of any Indian tribe, band, group, or community, commissioned officers of the Service may be assigned by the Secretary for the purpose of assisting such Indian tribe, group, band, or community in carrying out the provisions of contracts with, or grants to, tribal organizations pursuant to sections 102 [25 U.S.C. § 450f] and 103 [25 U.S.C. § 450g][6] of the Indian Self-Determination and Education Assistance Act. 42 U.S.C. § 2004b.]

(c) [Commissioned officers' exemption from selective service registration is codified in Section 456 of Title 50, Appendix:

> Commissioned officers of the Public Health Service and members of the Reserve of the Public Health Service while on active duty and assigned to staff the various offices and bureaus of the Public Health Service, including the National Institutes of Health, or...who are assigned to assist Indian tribes, groups, bands, or communities pursuant to the Act of August 5, 1954 (68 Stat. 674), as amended [42 U.S.C. § 2001 et seq.], shall not be required to be registered under section 3 [50 U.S.C. App. § 453] and shall be relieved from liability for training and service under section 4 [50 U.S.C. App. § 454]. 50 U.S.C. App. § 456(a)(2).]

(d) [Tribal governments' status as local government for purposes of intergovernmental personnel programs is codified in Section 4762 of Title 42:

> Notwithstanding the population requirements of section 203(a) and 303(c) of this Act [42 U.S.C. §§ 4723(a) and 4743(c)], a "local government" and a "general local government" also mean the recognized governing body of an Indian tribe, band,

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[6] *As so in the original. Section 103(a) and (b) and the first sentence of section 103(c) of Pub.L. 93-638(25 U.S.C. §§ 450g(a), (b), and (c)) were repealed and the remainder of section 103(c) of Pub.L. 93-638 (25 U.S.C. § 450g(c)) was redesignated as section 102(d) of Pub.L. 93-638 (25 U.S.C. § 450f(d)) by Pub.L. 100-472, Title II, § 201(b)(1), Oct. 5, 1988, 102 Stat. 2289. Section 104 of Pub.L. 93-638 was renumbered as section 103 of Pub.L. 93-638 by section 202(a) of Pub.L. 100-472 and is classified to 25 U.S.C. § 450h.*

pueblo, or other organized group or community, including any Alaska Native village, as defined in the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. § 1601 et seq.], which performs substantial governmental functions. The requirements of sections 203(c) and 303(d) of this Act [42 U.S.C. §§ 4723(c) and 4743(d)], relating to reviews by the Governor of a State, do not apply to grant applications from the governing body of an Indian tribe, although nothing in this Act is intended to discourage or prohibit voluntary communication and cooperation between Indian tribes and State and local governments. 42 U.S.C. § 4762(5).]

(e) **Eligible employees; Federal employee programs subject to retention**

Notwithstanding the provisions of sections 8347(o), 8713, and 8914 of title 5, United States Code, executive order, or administrative regulation, an employee serving under an appointment not limited to one year or less who leaves Federal employment to be employed by a tribal organization, the city of St. Paul, Alaska, the city of St. George, Alaska, upon incorporation, or the Village Corporations of St. Paul and St. George Islands established pursuant to section 8 of the Alaska Native Claims Settlement Act (Public Law 92-203) [43 U.S.C. § 1607] in connection with governmental or other activities which are or have been performed by employees in or for Indian communities is entitled, if the employee and the tribal organization so elect, to the following:

(1) To retain coverage, rights, and benefits under subchapter I of chapter 81 ("Compensation for Work Injuries") of title 5, United States Code [5 U.S.C. § 8101 et seq.], and for this purpose his employment with the tribal organization shall be deemed employment by the United States. However, if an injured employee, or his dependents in case of his death, receives from the tribal organization any payment (including an allowance, gratuity, payment under an insurance policy for which the premium is wholly paid by the tribal organization, or other benefit of any kind) on account of the same injury or death, the amount of that payment shall be credited against any benefit payable under subchapter I of chapter 81 of title 5, United States Code [5 U.S.C. § 8101 et seq.], as follows:

(A) payments on account of injury or disability shall be credited against disability compensation payable to the injured employee; and

(B) payments on account of death shall be credited against death compensation payable to dependents of the deceased employee.

(2) To retain coverage, rights, and benefits under chapter 83 ("Retirement") or chapter 84 ("Federal Employees Retirement System") of title 5, United States Code [5 U.S.C. §§ 8301 et seq. or 8401 et seq.], if necessary employee deductions and agency contributions in payment for coverage, rights, and benefits for the period of employment with the tribal organization are currently deposited in the Civil Service Retirement and Disability Fund (section 8348 of title 5, United States Code); and the period during which coverage, rights, and benefits are retained under this paragraph is deemed creditable service under section 8332 of title 5, United States Code. Days of unused sick leave to the credit of an employee under a formal leave system at the time the employee leaves Federal employment to be employed by a tribal organization remain to his credit for retirement purposes during covered service with the tribal organization.

(3) To retain coverage, rights, and benefits under chapter 89 ("Health Insurance") of title 5, United States Code [5 U.S.C. § 8901 et seq.], if necessary employee deductions and agency contributions in payment for the coverage, rights, and benefits for the period of employment with the tribal organization are currently deposited in the Employee's Health Benefit Fund (section 8909 of title 5, United States Code); and the period during which coverage, rights, and benefits are retained under this paragraph is

deemed service as an employee under chapter 89 of title 5, United States Code [5 U.S.C. § 8901 et seq.].

(4) To retain coverage, rights, and benefits under chapter 87 ("Life Insurance") of title 5, United States Code [5 U.S.C. § 8701 et seq.], if necessary employee deductions and agency contributions in payment for the coverage, rights, and benefits for the period of employment with the tribal organizations are currently deposited in the Employee's Life Insurance Fund (section 8714 of title 5, United States Code); and the period during which coverage, rights, and benefits are retained under this paragraph is deemed service as an employee under chapter 87 of title 5, United States Code [5 U.S.C. § 8701 et seq.].

(f) **Deposit by tribal organization of employee deductions and agency contributions in appropriate funds**

During the period an employee is entitled to the coverage, rights, and benefits pursuant to the preceding subsection, the tribal organization employing such employee shall deposit currently in the appropriate funds the employee deductions and agency contributions required by paragraphs (2), (3), and (4) of such preceding subsection.

(g) **Election for retention by employee and tribal organization before date of employment by tribal organization; transfer of employee to another tribal organization**

An employee who is employed by a tribal organization under subsection (e) of this section and such tribal organization shall make the election to retain the coverages, rights, and benefits in paragraphs (1), (2), (3), and (4) of such subsection (e) before the date of his employment by a tribal organization. An employee who is employed by a tribal organization under subsection (e) of this section shall continue to be entitled to the benefits of such subsection if he is employed by another tribal organization to perform service in activities of the type described in such subsection.

(h) **"Employee" defined**

For the purposes of subsections (e), (f), and (g) of this section, the term "employee" means an employee as defined in section 2105 of title 5, United States Code.

(i) **Promulgation of implementation regulations by President**

The President may prescribe regulations necessary to carry out the provisions of subsections (e), (f), (g), and (h) of this section and to protect and assure the compensation, retirement, insurance, leave, reemployment rights, and such other similar civil service employment rights as he finds appropriate.

(j) **Additional employee employment rights**

Anything in sections 205 and 207 of title 18, United States Code to the contrary notwithstanding, officers and employees of the United States assigned to an Indian tribe as authorized under section 3372 of title 5, United States Code, or section 2072 of the Revised Statutes (25 U.S.C. § 48) and former officers and employees of the United States employed by Indian tribes may act as agents or attorneys for or appear on behalf of such tribes in connection w[i]th any matter pending before any department, agency, court, or commission, including any matter in which the United States is a party or has a direct and substantial interest: Provided, That each such officer or employee or former officer or employee must advise in writing the head of the department, agency, court, or commission with which he is dealing or appearing on behalf of the tribe of any personal and substantial involvement he may have had as an officer or employee of the United States in connection with the matter involved.

[Note: Subsections (k and l) were omitted from Public Law 93-638, section 104. The relevant sections are codified elsewhere in various titles of the U.S. Code, and are provided here for convenience.]

(k) [Assignment of replacement employees to or from tribal organizations is governed by Section 3372(a)(2) of Title 5, United States Code:

> If the assigned employee fails to complete the period of assignment and there is another employee willing and available to do so, the Secretary may assign the employee to complete the period of assignment and may execute an agreement with the tribal organization with respect to the replacement employee. That agreement may provide for a different period of assignment as may be agreed to by the Secretary and the tribal organization. [5 U.S.C. § 3372(a)(2).]

(l) [Employees assigned to tribal organizations are further governed by Section 3372 of Title 5, United States Code:

> (d) Where the employee is assigned to a tribal organization, the employee shall be eligible for promotions, periodic step-increases, and additional step-increases, as defined in chapter 53 of this title [5 U.S.C. § 5301 et seq.], on the same basis as other Federal employees. [5 U.S.C. § 3372(d).]

(m) **Conversion to career appointment**

The status of an Indian (as defined in section 19 of the Act of June 18, 1934 (48 Stat. 988; 25 U.S.C. § 479)) appointed (except temporary appointments) to the Federal service under an excepted appointment under the authority of section 12 of the Act of June 18, 1934 (25 U.S.C. § 472), or any other provision of law granting a preference to Indians in personnel actions, shall be converted to a career appointment in the competitive service after three years of continuous service and satisfactory performance. The conversion shall not alter the Indian's eligibility for preference in personnel actions.

Sec. 105. Contract or grant provisions and administration [25 U.S.C. § 450j]

(a) **Applicability of Federal contracting laws and regulations; waiver of requirements**

(1) Notwithstanding any other provision of law, subject to paragraph (3), the contracts and cooperative agreements entered into with tribal organizations pursuant to section 102 [25 U.S.C. § 450f] shall not be subject to Federal contracting or cooperative agreement laws (including any regulations), except to the extent that such laws expressly apply to Indian tribes.

(2) Program standards applicable to a nonconstruction self-determination contract shall be set forth in the contract proposal and the final contract of the tribe or tribal organization.

(3)(A) With respect to a construction contract (or a subcontract of such a construction contract), the provisions of the Office of Federal Procurement Policy Act (41 U.S.C. § 401 et seq.) and the regulations relating to acquisitions promulgated under such Act shall apply only to the extent that the application of such provision to the construction contract (or subcontract) is—

(i) necessary to ensure that the contract may be carried out in a satisfactory manner;

(ii) directly related to the construction activity; and

(iii) not inconsistent with this Act.

(B) A list of the Federal requirements that meet the requirements of clauses (i) through (iii) of subparagraph (A) shall be included in an attachment to the contract pursuant to negotiations between the Secretary and the tribal organization.

(C)(i) Except as provided in subparagraph (B), no Federal law listed in clause (ii) or any other provision of Federal law (including an Executive order) relating to acquisition by the Federal Government shall apply to a construction contract that a tribe or tribal organization enters into under this Act, unless expressly provided in such law.

(ii) The laws listed in this paragraph are as follows:

(I) The Federal Property and Administrative Services Act of 1949 (40 U.S.C. § 471 et seq.).

(II) Section 3709 of the Revised Statutes [41 U.S.C.A. § 5].

(III) Section 9(c) of the Act of Aug. 2, 1946 (60 Stat. 809, chapter 744).

(IV) Title III of the Federal Property and Administrative Services Act of 1949 (63 Stat. 393 et seq., chapter 288) [41 U.S.C. § 251 et seq.].

(V) Section 13 of the Act of Oct. 3, 1944 (58 Stat. 770; chapter 479) [50 App. U.S.C. § 1622].

(VI) Chapters 21, 25, 27, 29, and 31 of title 44, United States Code [44 U.S.C. §§ 2101 et seq., 2501 et seq., 2701 et seq., 2901 et seq. and 3101 et seq.].

(VII) Section 2 of the Act of June 13, 1934 (48 Stat 948, chapter 483) [40 U.S.C. § 276c].

(VIII) Sections 1 through 12 of the Act of June 30, 1936 (49 Stat. 2036 et seq. chapter 881) [41 U.S.C. §§ 35-45].

(IX) The Service Control Act of 1965[7] (41 U.S.C. § 351 et seq.).

(X) The Small Business Act (15 U.S.C. § 631 et seq.).

(XI) Executive Order Nos. 12138 [15 U.S.C. § 631 note], 11246 [42 U.S.C. § 2000e note], 11701 [38 U.S.C. § 4212 note] and 11758 [29 U.S.C. § 701 note].

(b) **Payments; transfer of funds by Treasury for disbursement by Tribal organization; accountability for interest accrued prior to disbursement.**

Payments of any grants or under any contracts pursuant to sections 102 and 103 of this Act [25 U.S.C. §§ 450f and 450h] may be made in advance or by way of reimbursement and in such installments and on such conditions as the appropriate Secretary deems necessary to carry out the purposes of this title. The transfer of funds shall be scheduled consistent with program requirements and applicable Treasury regulations, so as to minimize the time elapsing between the transfer of such funds from the United States Treasury and the disbursement thereof by the tribal organization, whether such disbursement occurs prior to or subsequent to such transfer of funds. Tribal organizations shall not be held accountable for interest earned on such funds, pending their disbursement by such organization.

(c) **Term of self-determination contracts; annual renegotiation**

(1) A self-determination contract shall be—

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[7] *The reference to "The Service Control Act of 1965" is probably a typographical error. The title of the Act codified at 41 U.S.C. § 351 et seq. is "The Service Contract Act of 1965."*

(A) for a term not to exceed three years in the case of other than a mature contract, unless the appropriate Secretary and the tribe agree that a longer term would be advisable, and

(B) for a definite or an indefinite term, as requested by the tribe (or, to the extent not limited by tribal resolution, by the tribal organization), in the case of a mature contract.

The amounts of such contracts shall be subject to the availability of appropriations.

(2) The amounts of such contracts may be renegotiated annually to reflect changed circumstances and factors, including, but not limited to, cost increases beyond the control of the tribal organization.

(d) **Calendar year basis for contracts**

(1) Beginning in fiscal year 1990, upon the election of a tribal organization, the Secretary shall use the calendar year as the basis for any contracts or agreements under this Act, unless the Secretary and the Indian tribe or tribal organization agree on a different period.

(2) The Secretary shall, on or before April 1 of each year beginning in 1992, submit a report to the Congress on the amounts of any additional obligation authority needed to implement this subsection in the next following fiscal year.

(e) **Effective date for retrocession of contract**

If an Indian tribe, or a tribal organization authorized by a tribe, requests retrocession of the appropriate Secretary for any contract or portion of a contract entered into pursuant to this Act, unless the tribe or tribal organization rescinds the request for retrocession, such retrocession shall become effective on—

(1) the earlier of—

(A) the date that is 1 year after the date the Indian tribe or tribal organization submits such request; or

(B) the date on which the contract expires; or

(2) such date as may be mutually agreed by the Secretary and the Indian tribe.

(f) **Use of existing school buildings, hospitals, and other facilities and equipment therein; acquisition and donation of excess or surplus Government personal property**

In connection with any self-determination contract or grant made pursuant to section 102 or 103 of this Act [25 U.S.C. § 450f or 450h], the appropriate Secretary may—

(1) permit an Indian tribe or tribal organization in carrying out such contract or grant, to utilize existing school buildings, hospitals, and other facilities and all equipment therein or appertaining thereto and other personal property owned by the Government within the Secretary's jurisdiction under such terms and conditions as may be agreed upon for their use and maintenance;

(2) donate to an Indian tribe or tribal organization title to any personal or real property found to be excess to the needs of the Bureau of Indian Affairs, the Indian Health Service, or the General Services Administration, except that—

(A) subject to the provisions of subparagraph (B), title to property and equipment furnished by the Federal Government for use in the performance of the contract or purchased with funds under any self-determination contract or grant agreement

shall, unless otherwise requested by the tribe or tribal organization, vest in the appropriate tribe or tribal organization;

(B) if property described in subparagraph (A) has a value in excess of $ 5,000 at the time of the retrocession, rescission, or termination of the self-determination contract or grant agreement, at the option of the Secretary, upon the retrocession, rescission, or termination, title to such property and equipment shall revert to the Department of the Interior or the Department of Health and Human Services, as appropriate; and

(C) all property referred to in subparagraph (A) shall remain eligible for replacement on the same basis as if title to such property were vested in the United States; and

(3) acquire excess or surplus Government personal or real property for donation to an Indian tribe or tribal organization if the Secretary determines the property is appropriate for use by the tribe or tribal organization for a purpose for which a self-determination contract or grant agreement is authorized under this Act.

(g) **Performance of personal services**

The contracts authorized under section 102 of this Act [25 U.S.C. § 450f] and grants pursuant to section 103 of this Act [25 U.S.C. § 450h] may include provisions for the performance of personal services which would otherwise be performed by Federal employees including, but in no way limited to, functions such as determination of eligibility of applicants for assistance, benefits, or services, and the extent or amount of such assistance, benefits, or services to be provided and the provisions of such assistance, benefits, or services, all in accordance with the terms of the contract or grant and applicable rules and regulations of the appropriate Secretary: Provided, That the Secretary shall not make any contract which would impair his ability to discharge his trust responsibilities to any Indian tribe or individuals.

(h) **Fair and uniform provision by tribal organization of services and assistance to covered Indians**

Contracts and grants with tribal organizations pursuant to sections 102 and 103 of this Act [25 U.S.C. §§ 450f and 450h] shall include provisions to assure the fair and uniform provision by such tribal organizations of the services and assistance they provide to Indians under such contracts and grants.

(i) **Division of administration of program**

(1) If a self-determination contract requires the Secretary to divide the administration of a program that has previously been administered for the benefit of a greater number of tribes than are represented by the tribal organization that is a party to the contract, the Secretary shall take such action as may be necessary to ensure that services are provided to the tribes not served by a self-determination contract, including program redesign in consultation with the tribal organization and all affected tribes.

(2) Nothing in this title shall be construed to limit or reduce in any way the funding for any program, project, or activity serving a tribe under this or other applicable Federal law. Any tribe or tribal organization that alleges that a self-determination contract is in violation of this section may apply the provisions of section 110 [25 U.S.C. § 450m-1].

(j) **Proposal to redesign program, activity, function, or service**

Upon providing notice to the Secretary, a tribal organization that carries out a nonconstruction self-determination contract may propose a redesign of a program, activity, function, or service carried out by the tribal organization under the contract, including any

nonstatutory program standard, in such manner as to best meet the local geographic, demographic, economic, cultural, health, and institutional needs of the Indian people and tribes served under the contract. The Secretary shall evaluate any proposal to redesign any program, activity, function, or service provided under the contract. With respect to declining to approve a redesigned program, activity, function, or service under this subsection, the Secretary shall apply the criteria and procedures set forth in section 102 [25 U.S.C. § 450f].

(k) **Access to Federal sources of supply**

For purposes of section 201(a) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. § 481(a)) (relating to Federal sources of supply, including lodging providers, airlines and other transportation providers), a tribal organization carrying out a contract, grant, or cooperative agreement under this Act shall be deemed an executive agency and part of the Indian Health Service when carrying out such contract, grant, or agreement and the employees of the tribal organization shall be eligible to have access to such sources of supply on the same basis as employees of an executive agency have such access. For purposes of carrying out such contract, grant, or agreement, the Secretary shall, at the request of an Indian tribe, enter into an agreement for the acquisition, on behalf of the Indian tribe, of any goods, services, or supplies available to the Secretary from the General Services Administration or other Federal agencies that are not directly available to the Indian tribe under this section or under any other Federal law, including acquisitions from prime vendors. All such acquisitions shall be undertaken through the most efficient and speedy means practicable, including electronic ordering arrangements.

(l) **Lease of facility used for administration and delivery of services**

(1) Upon the request of an Indian tribe or tribal organization, the Secretary shall enter into a lease with the Indian tribe or tribal organization that holds title to, a leasehold interest in, or a trust interest in, a facility used by the Indian tribe or tribal organization for the administration and delivery of services under this Act.

(2) The Secretary shall compensate each Indian tribe or tribal organization that enters into a lease under paragraph (1) for the use of the facility leased for the purposes specified in such paragraph. Such compensation may include rent, depreciation based on the useful life of the facility, principal and interest paid or accrued, operation and maintenance expenses, and such other reasonable expenses that the Secretary determines, by regulation, to be allowable.

(m) **Statutory requirements; technical assistance; precontract negotiation phase; fixed price construction contract**

(1) Each construction contract requested, approved, or awarded under this Act shall be subject to—

(A) except as otherwise provided in this Act, the provisions of this Act, other than sections 102(a)(2), 106(l), 108 and 109 [25 U.S.C. §§ 450f(a)(2), 450j-1(l), 450l and 450m]; and

(B) section 314 of the Department of the Interior and Related Agencies Appropriations Act, 1991 (104 Stat. 1959) [25 U.S.C. § 450f note].

(2) In providing technical assistance to tribes and tribal organizations in the development of construction contract proposals, the Secretary shall provide, not later than 30 days after receiving a request from a tribe or tribal organization, all information available to the Secretary regarding the construction project, including construction drawings, maps, engineering reports, design reports, plans of requirements, cost estimates, environmental assessments or environmental impact reports, and archaeological reports.

(3) Prior to finalizing a construction contract proposal pursuant to section 102(a) [25 U.S.C. § 450f(a)], and upon request of the tribe or tribal organization that submits the proposal, the Secretary shall provide for a precontract negotiation phase in the development of a contract proposal. Such phase shall include, at a minimum, the following elements:

(A) The provision of technical assistance pursuant to section 103 [25 U.S.C. § 450h] and paragraph (2).

(B) A joint scoping session between the Secretary and the tribe or tribal organization to review all plans, specifications, engineering reports, cost estimates, and other information available to the parties, for the purpose of identifying all areas of agreement and disagreement.

(C) An opportunity for the Secretary to revise the plans, designs, or cost estimates of the Secretary in response to concerns raised, or information provided by, the tribe or tribal organization.

(D) A negotiation session during which the Secretary and the tribe or tribal organization shall seek to develop a mutually agreeable contract proposal.

(E) Upon the request of the tribe or tribal organization, the use of an alternative dispute resolution mechanism to seek resolution of all remaining areas of disagreement pursuant to the dispute resolution provisions under subchapter IV of chapter 5 of title 5 [5 U.S.C. § 571 et seq.], United States Code.

(F) The submission to the Secretary by the tribe or tribal organization of a final contract proposal pursuant to section 102(a) [25 U.S.C. § 450f(a)].

(4)(A) Subject to subparagraph (B), in funding a fixed-price construction contract pursuant to section 106(a) [25 U.S.C. § 450j-1(a)], the Secretary shall provide for the following:

(i) The reasonable costs to the tribe or tribal organization for general administration incurred in connection with the project that is the subject of the contract.

(ii) The ability of the contractor that carries out the construction contract to make a reasonable profit, taking into consideration the risks associated with carrying out the contract and other relevant considerations.

(B) In establishing a contract budget for a construction project, the Secretary shall not be required to separately identify the components described in clauses (i) and (ii) of subparagraph (A).

(C) The total amount awarded under a construction contract shall reflect an overall fair and reasonable price to the parties, including the following costs:

(i) The reasonable costs to the tribal organization of performing the contract, taking into consideration the terms of the contract and the requirements of this Act and any other applicable law.

(ii) The costs of preparing the contract proposal and supporting cost data.

(iii) The costs associated with auditing the general and administrative costs of the tribal organization associated with the management of the construction contract.

(iv) In the case of a fixed-price contract, a fair profit determined by taking into consideration the relevant risks and local market conditions.

(v) If the Secretary and the tribe or tribal organization are unable to develop a mutually agreeable construction contract proposal pursuant to the procedures set forth

in this subsection, the tribe or tribal organization may submit a final contract proposal to the Secretary. Not later than 30 days after receiving such final contract proposal, the Secretary shall approve the contract proposal and award the contract, unless, during such period the Secretary declines the proposal pursuant to sections 102(a)(2) and 102(b) of section 102 [25 U.S.C. § 450f(a)(2) and (b)] (including providing opportunity for an appeal pursuant to section 102(b) [25 U.S.C. § 450f(b)]).

(n) **Rental rates for housing for Government employees in Alaska**

Notwithstanding any other provision of law, the rental rates for housing provided to an employee by the Federal Government in Alaska pursuant to a self-determination contract shall be determined on the basis of—

(1) the reasonable value of the quarters and facilities (as such terms are defined under section 5911 of title 5, United States Code) to such employee, and

(2) the circumstances under which such quarters and facilities are provided to such employee,

as based on the cost of comparable private rental housing in the nearest established community with a year-round population of 1,500 or more individuals.

(o) **Patient records**

(1) **In general**

At the option of an Indian tribe or tribal organization, patient records may be deemed to be Federal records under those provisions of title 44, United States Code, that are commonly referred to as the "Federal Records Act of 1950" for the limited purposes of making such records eligible for storage by Federal Records Centers to the same extent and in the same manner as other Department of Health and Human Services patient records.

(2) **Treatment of records**

Patient records that are deemed to be Federal records under those provisions of title 44, United States Code, that are commonly referred to as the "Federal Records Act of 1950" pursuant to this subsection shall not be considered Federal records for the purposes of chapter 5 of title 5, United States Code [5 U.S.C. § 500 et seq.].

Sec. 106. Contract funding and indirect costs [25 U.S.C. § 450j-1]

(a) **Amount of funds provided**

(1) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this Act shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, without regard to any organizational level within the Department of the Interior or the Department of Health and Human Services, as appropriate, at which the program, function, service, or activity or portion thereof, including supportive administrative functions that are otherwise contractable, is operated.

(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 Act 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 section 106(a)(1).

(B) On an annual basis, during such period as a tribe or tribal organization operates a Federal program, function, service, or activity pursuant to a contract entered into under this Act, the tribe or tribal organization shall have the option to negotiate with the Secretary the amount of funds that the tribe or tribal organization is entitled to receive under such contract pursuant to this paragraph.

(4) For each fiscal year during which a self-determination contract is in effect, any savings attributable to the operation of a Federal program, function, service, or activity under a self-determination contract by a tribe or tribal organization (including a cost reimbursement construction contract) shall—

(A) be used to provide additional services or benefits under the contract; or

(B) be expended by the tribe or tribal organization in the succeeding fiscal year, as provided in section 8 [25 U.S.C. § 13a].

(5) Subject to paragraph (6), during the initial year that a self-determination contract is in effect, the amount required to be paid under paragraph (2) shall include startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis pursuant to the contract necessary—

(A) to plan, prepare for, and assume operation of the program, function, service, or activity that is the subject of the contract; and

(B) to ensure compliance with the terms of the contract and prudent management.

(6) Costs incurred before the initial year that a self-determination contract is in effect may not be included in the amount required to be paid under paragraph (2) if the Secretary does not receive a written notification of the nature and extent of the costs prior to the date on which such costs are incurred.

(b) **Reductions and increases in amount of funds provided**

The amount of funds required by subsection (a)—

(1) shall not be reduced to make funding available for contract monitoring or administration by the Secretary;

(2) shall not be reduced by the Secretary in subsequent years except pursuant to—

(A) a reduction in appropriations from the previous fiscal year for the program or function to be contracted;

(B) a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution;

(C) a tribal authorization;

(D) a change in the amount of pass-through funds needed under a contract; or

(E) completion of a contracted project, activity, or program;

(3) shall not be reduced by the Secretary to pay for Federal functions, including, but not limited to, Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring;

(4) shall not be reduced by the Secretary to pay for the costs of Federal personnel displaced by a self-determination contract; and

(5) may, at the request of the tribal organization, be increased by the Secretary if necessary to carry out this Act or as provided in section 105(c) [25 U.S.C. § 450j(c)].

Notwithstanding any other provision in this Act, the provision of funds under this Act is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this Act.

(c) **Annual reports**

Not later than May 15 of each year, the Secretary shall prepare and submit to Congress an annual report on the implementation of this Act. Such report shall include—

(1) an accounting of the total amounts of funds provided for each program and the budget activity for direct program costs and contract support costs of tribal organizations under self-determination;

(2) an accounting of any deficiency in funds needed to provide required contract support costs to all contractors for the fiscal year for which the report is being submitted;

(3) the indirect cost rate and type of rate for each tribal organization that has been negotiated with the appropriate Secretary;

(4) the direct cost base and type of base from which the indirect cost rate is determined for each tribal organization;

(5) the indirect cost pool amounts and the types of costs included in the indirect cost pool; and

(6) an accounting of any deficiency in funds needed to maintain the preexisting level of services to any Indian tribes affected by contracting activities under this Act, and a statement of the amount of funds needed for transitional purposes to enable contractors to convert from a Federal fiscal year accounting cycle, as authorized by section 105(d) [25 U.S.C. § 450j(d)].

(d) **Treatment of shortfalls in indirect and cost recoveries**

(1) Where a tribal organization's allowable indirect cost recoveries are below the level of indirect costs that the tribal organizations should have received for any given year pursuant to its approved indirect cost rate, and such shortfall is the result of lack of full indirect cost funding by any Federal, State, or other agency, such shortfall in recoveries shall not form the basis for any theoretical over-recovery or other adverse adjustment to any future years' indirect cost rate or amount for such tribal organization, nor shall any agency seek to collect such shortfall from the tribal organization.

(2) Nothing in this subsection shall be construed to authorize the Secretary to fund less than the full amount of need for indirect costs associated with a self-determination contract.

(e) **Liability for indebtedness incurred before fiscal year 1992**

Indian tribes and tribal organizations shall not be held liable for amounts of indebtedness attributable to theoretical or actual under-recoveries or theoretical over-recoveries of indirect costs, as defined in Office of Management and Budget Circular A-87, incurred for fiscal years prior to fiscal year 1992.

(f) **Limitation on remedies relating to costs disallowances**

Any right of action or other remedy (other than those relating to a criminal offense) relating to any disallowance of costs shall be barred unless the Secretary has given notice of any such disallowance within three hundred and sixty-five days of receiving any required annual single agency audit report or, for any period covered by law or regulation in force prior to enactment of chapter 75 of title 31, United States Code [31 U.S.C. § 7501 et seq.] [enacted Oct. 19, 1984], any other required final audit report. Such notice shall set forth the right of appeal and hearing to the board of contract appeals pursuant to section 110 [25 U.S.C. § 450m-1]. For the purpose of determining the 365-day period specified in this paragraph, an audit report shall be deemed to have been received on the date of actual receipt by the Secretary, if, within 60 days after receiving the report, the Secretary does not give notice of a determination by the Secretary to reject the single-agency report as insufficient due to noncompliance with chapter 75 of title 31 [31 U.S.C. § 7501 et seq.], United States Code, or noncompliance with any other applicable law. Nothing in this subsection shall be deemed to enlarge the rights of the Secretary with respect to section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. § 476).

(g) **Addition to contract of full amount contractor entitled; adjustment**

Upon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under section 106(a), subject to adjustments for each subsequent year that such tribe or tribal organization administers a Federal program, function, service, or activity under such contract.

(h) **Indirect costs for contracts for construction programs**

In calculating the indirect costs associated with a self-determination contract for a construction program, the Secretary shall take into consideration only those costs associated with the administration of the contract and shall not take into consideration those moneys actually passed on by the tribal organization to construction contractors and subcontractors.

(i) **Indian Health Service and Bureau of Indian Affairs budget consultations**

On an annual basis, the Secretary shall consult with, and solicit the participation of, Indian tribes and tribal organizations in the development of the budget for the Indian Health Service and the Bureau of Indian Affairs (including participation of Indian tribes and tribal organizations in formulating annual budget requests that the Secretary submits to the President for submission to Congress pursuant to section 1105 of title 31, United States Code).

(j) **Use of funds for matching or cost participation requirements**

Notwithstanding any other provision of law, a tribal organization may use funds provided under a self-determination contract to meet matching or cost participation requirements under other Federal and non-Federal programs.

(k) **Allowable uses of funds without approval of Secretary**

Without intending any limitation, a tribal organization may, without the approval of the Secretary, expend funds provided under a self-determination contract for the following purposes, to the extent that the expenditure of the funds is supportive of a contracted program:

(1) Depreciation and use allowances not otherwise specifically prohibited by law, including the depreciation of facilities owned by the tribe or tribal organization.

(2) Publication and printing costs.

(3) Building, realty, and facilities costs, including rental costs or mortgage expenses.

(4) Automated data processing and similar equipment or services.

(5) Costs for capital assets and repairs.

(6) Management studies.

(7) Professional services, other than services provided in connection with judicial proceedings by or against the United States.

(8) Insurance and indemnification, including insurance covering the risk of loss of or damage to property used in connection with the contract without regard to the ownership of such property.

(9) Costs incurred to raise funds or contributions from non-Federal sources for the purpose of furthering the goals and objectives of the self-determination contract.

(10) Interest expenses paid on capital expenditures such as buildings, building renovation, or acquisition or fabrication of capital equipment, and interest expenses on loans necessitated due to delays by the Secretary in providing funds under a contract.

(11) Expenses of a governing body of a tribal organization that are attributable to the management or operation of programs under this Act.

(12) Costs associated with the management of pension funds, self-insurance funds, and other funds of the tribal organization that provide for participation by the Federal Government.

(l) **Suspension, withholding, or delay in payment of funds**

(1) The Secretary may only suspend, withhold, or delay the payment of funds for a period of 30 days beginning on the date the Secretary makes a determination under this paragraph to a tribal organization under a self-determination contract, if the Secretary determines that the tribal organization has failed to substantially carry out the contract without good cause. In any such case, the Secretary shall provide the tribal organization with reasonable advance written notice, technical assistance (subject to available resources) to assist the tribal organization, a hearing on the record not later than 10 days after the date of such determination or such later date as the tribal organization shall approve, and promptly release any funds withheld upon subsequent compliance.

(2) With respect to any hearing or appeal conducted pursuant to this subsection, the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for suspending, withholding, or delaying payment of funds.

(m) **Use of program income earned**

The program income earned by a tribal organization in the course of carrying out a self-determination contract—

(1) shall be used by the tribal organization to further the general purposes of the contract; and

(2) shall not be a basis for reducing the amount of funds otherwise obligated to the contract.

(n) **Reduction of administrative and other responsibilities of the Secretary; use of savings**

To the extent that programs, functions, services, or activities carried out by tribal organizations pursuant to contracts entered into under this Act reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings that have not otherwise been included in the amount of contract funds determined under subsection (a), the Secretary shall make such savings available for the provision of additional services to program beneficiaries, either directly or through contractors, in a manner equitable to both direct and contracted programs.

(o) **Rebudgeting by tribal organization**

Notwithstanding any other provision of law (including any regulation), a tribal organization that carries out a self-determination contract may, with respect to allocations within the approved budget of the contract, rebudget to meet contract requirements, if such rebudgeting would not have an adverse effect on the performance of the contract.

Indian Health Service Funds; permissible uses [25 U.S.C. § 450j-2]

That, heretofore and hereafter and notwithstanding any other provision of law, funds available to the Indian Health Service in this Act[8] or any other Act for Indian self-determination or self-governance contract or grant support costs may be expended only for costs directly attributable to contracts, grants and compacts pursuant to the Indian Self-Determination Act and no funds appropriated by this or any other Act shall be available for any contract support costs or indirect costs associated with any contract, grant, cooperative agreement, self-governance compact, or funding agreement entered into between an Indian tribe or tribal organization and any entity other than the Indian Health Service.

Indian self-determination or self-governance contract or grant support cost funds; permissible uses [25 U.S.C. § 450j-3]

Notwithstanding any other provision of law, including but not limited to the Indian Self-Determination Act of 1975, as amended, hereafter funds available to the Department of the Interior for Indian self-determination or self-governance contract or grant support costs may be expended only for costs directly attributable to contracts, grants and compacts pursuant to the Indian Self-Determination Act of 1975 and hereafter funds appropriated in this title[9] shall not be available for any contract support costs or indirect costs associated with any contract, grant, cooperative agreement, self-governance compact or funding agreement entered into between an Indian tribe or tribal organization and any entity other than an agency of the Department of the Interior.

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[8] *This Act, referred to in text, is Department of the Interior and Related Agencies Appropriations Act, 1999, Pub.L. 105-277, Div. A, §101(e), Oct. 21, 1998, 112 Stat. 2681-231. 25 U.S.C.A. § 450j-2 note.*

[9] *This title, referred to in text, means Pub.L. 106-113, Div. B, § 1000(a)(3) [Title I], Nov. 29, 1999, 113 Stat. 1535, 1501A-135. 25 U.S.C.A. § 450j-3 note.*

Sec. 107. Rules and Regulations [25 U.S.C. § 450k]

(a) Authority of Secretaries of the Interior and of Health and Human Services to promulgate rules and regulations; time restriction

(1) Except as may be specifically authorized in this subsection, or in any other provision of this Act, the Secretary of the Interior and the Secretary of Health and Human Services may not promulgate any regulation, nor impose any nonregulatory requirement, relating to self-determination contracts or the approval, award, or declination of such contracts, except that the Secretary of the Interior and the Secretary of Health and Human Services may promulgate regulations under this Act relating to chapter 171 of title 28 [28 U.S.C. § 2671 et seq.], United States Code, commonly known as the "Federal Tort Claims Act", the Contract Disputes Act of 1978 (41 U.S.C. § 601 et seq.), declination and waiver procedures, appeal procedures, reassumption procedures, discretionary grant procedures for grants awarded under section 103 [25 U.S.C. § 450h], property donation procedures arising under section 105(f) [25 U.S.C. § 450j(f)], internal agency procedures relating to the implementation of this Act, retrocession and tribal organization relinquishment procedures, contract proposal contents, conflicts of interest, construction, programmatic reports and data requirements, procurement standards, property management standards, and financial management standards.

(2)(A) The regulations promulgated under this Act, including the regulations referred to in this subsection, shall be promulgated—

(i) in conformance with sections 552 and 553 of title 5, United States Code and subsections (c), (d), and (e) of this section; and

(ii) as a single set of regulations in title 25 of the Code of Federal Regulations.

(B) The authority to promulgate regulations set forth in this Act shall expire if final regulations are not promulgated within 20 months after the date of enactment of the Indian Self-Determination Contract Reform Act of 1994 [enacted Oct. 25, 1994].

(b) Conflicting laws and regulations

The provisions of this Act shall supersede any conflicting provisions of law (including any conflicting regulations) in effect on the day before the date of enactment of the Indian Self-Determination Contract Reform Act of 1994 [enacted Oct. 25, 1994], and the Secretary is authorized to repeal any regulation inconsistent with the provisions of this Act.

(c) Revisions and amendments; procedures applicable

The Secretary of the Interior and the Secretary of Health and Human Services are authorized, with the participation of Indian tribes and tribal organizations, to revise and amend any rules or regulations promulgated pursuant to this section: Provided, That prior to any revision or amendment to such rules or regulations, the respective Secretary or Secretaries shall present the proposed revision or amendment to the Committee on Energy and Natural Resources of the Senate and the Committee on Natural Resources of the House of Representatives and shall, to the extent practicable, consult with appropriate national or regional Indian organizations and shall publish any proposed revisions in the Federal Register not less than sixty days prior to the effective date of such rules and regulations in order to provide adequate notice to, and receive comments from, other interested parties.

(d) Consultation in drafting and promulgating; negotiation process; interagency committees; extension of deadlines

(1) In drafting and promulgating regulations as provided in subsection (a) (including drafting and promulgating any revised regulations), the Secretary of the Interior and the

Secretary of Health and Human Services shall confer with, and allow for active participation by, representatives of Indian tribes, tribal organizations, and individual tribal members.

(2)(A) In carrying out rulemaking processes under this Act, the Secretary of the Interior and the Secretary of Health and Human Services shall follow the guidance of—

(i) subchapter III of chapter 5 of title 5 [5 U.S.C. § 571 et seq.], United States Code, commonly known as the "Negotiated Rulemaking Act of 1990"; and

(ii) the recommendations of the Administrative Conference of the United States numbered 82-4 and 85-5 entitled "Procedures for Negotiating Proposed Regulations" under sections 305.82-4 and 305.85-5 of title 1, Code of Federal Regulations, and any successor recommendation or law (including any successor regulation).

(B) The tribal participants in the negotiation process referred to in subparagraph (A) shall be nominated by and shall represent the groups described in this paragraph and shall include tribal representatives from all geographic regions.

(C) The negotiations referred to in subparagraph (B) shall be conducted in a timely manner. Proposed regulations to implement the amendments made by the Indian Self-Determination Contract Reform Act of 1994 shall be published in the Federal Register by the Secretary of the Interior and the Secretary of Health and Human Services not later than 180 days after the date of enactment of such Act [enacted Oct. 25, 1994].

(D) Notwithstanding any other provision of law (including any regulation), the Secretary of the Interior and the Secretary of Health and Human Services are authorized to jointly establish and fund such interagency committees or other interagency bodies, including advisory bodies comprised of tribal representatives, as may be necessary or appropriate to carry out the provisions of this Act.

(E) If the Secretary determines that an extension of the deadlines under subsection (a)(2)(B) and subparagraph (C) of this paragraph is appropriate, the Secretary may submit proposed legislation to Congress for the extension of such deadlines.

(e) **Exceptions in or waiver of regulations**

The Secretary may, with respect to a contract entered into under this Act, make exceptions in the regulations promulgated to carry out this Act, or waive such regulations, if the Secretary finds that such exception or waiver is in the best interest of the Indians served by the contract or is consistent with the policies of this Act, and is not contrary to statutory law. In reviewing each request, the Secretary shall follow the timeline, findings, assistance, hearing, and appeal procedures set forth in section 102 [25 U.S.C. § 450f].

Sec. 108. Contract or grant specifications [25 U.S.C. § 450l]

(a) **Terms**

Each self-determination contract entered into under this Act shall—

(1) contain, or incorporate by reference, the provisions of the model agreement described in subsection (c) (with modifications where indicated and the blanks appropriately filled in), and

(2) contain such other provisions as are agreed to by the parties.

(b) **Payments; Federal records**

Notwithstanding any other provision of law, the Secretary may make payments pursuant to section 1(b)(6) of such model agreement. As provided in section 1(b)(7) of the model agreement, the records of the tribal government or tribal organization specified in such

section shall not be considered Federal records for purposes of chapter 5 of title 5 [5 U.S.C. § 500 et seq.], United States Code.

(c) **Model agreement**

The model agreement referred to in subsection (a)(1) reads as follows:

"Section 1. Agreement between the Secretary and the _____Tribal Government.

"(a) **Authority and purpose.—**

"(1) **Authority**.—This agreement, denoted a Self-Determination Contract (referred to in this agreement as the 'Contract'), is entered into by the Secretary of the Interior or the Secretary of Health and Human Services (referred to in this agreement as the 'Secretary'), for and on behalf of the United States pursuant to title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450 et seq.) and by the authority of the _____ tribal government or tribal organization (referred to in this agreement as the 'Contractor'). The provisions of title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450 et seq.) are incorporated in this agreement.

"(2) **Purpose**.—Each provision of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450 et seq.) and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the following related functions, services, activities, and programs (or portions thereof), that are otherwise contractable under section 102(a) of such Act [25 U.S.C. § 450f(a)], including all related administrative functions, from the Federal Government to the Contractor: (List functions, services, activities, and programs).

"(b) **Terms, provisions, and conditions**.—

"(1) **Term**.--Pursuant to section 105(c)(1) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450j(c)(1)), the term of this contract shall be -- years. Pursuant to section 105(d)(1) of such Act (25 U.S.C. § 450j(d)) [25 U.S.C. § 450j(d)(1)], upon the election by the Contractor, the period of this Contract shall be determined on the basis of a calendar year, unless the Secretary and the Contractor agree on a different period in the annual funding agreement incorporated by reference in subsection (f)(2).

"(2) **Effective date**.—This Contract shall become effective upon the date of the approval and execution by the Contractor and the Secretary, unless the Contractor and the Secretary agree on an effective date other than the date specified in this paragraph.

"(3) **Program standard**.—The Contractor agrees to administer the program, services, functions and activities (or portions thereof) listed in subsection (a)(2) of the Contract in conformity with the following standards: (list standards).

"(4) **Funding amount**.—Subject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement incorporated by reference in subsection (f)(2). Such amount shall not be less than the applicable amount determined pursuant to section 106(a) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450j-1) [25 U.S.C. § 450j-1(a)].

"(5) **Limitation of costs**.—The Contractor shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds awarded under this Contract. If, at any time, the Contractor has reason to believe that the total amount required for performance of this Contract or a specific activity

conducted under this Contract would be greater than the amount of funds awarded under this Contract, the Contractor shall provide reasonable notice to the appropriate Secretary. If the appropriate Secretary does not take such action as may be necessary to increase the amount of funds awarded under this Contract, the Contractor may suspend performance of the Contract until such time as additional funds are awarded.

"(6) **Payment**.—

"(A) **In general**.—Payments to the Contractor under this Contract shall—

"(i) be made as expeditiously as practicable; and

"(ii) include financial arrangements to cover funding during periods covered by joint resolutions adopted by Congress making continuing appropriations, to the extent permitted by such resolutions.

"(B) **Quarterly, semiannual, lump-sum, and other methods of payment**.—

"(i) **In general**.—Pursuant to section 108(b) of the Indian Self-Determination and Education Assistance Act [subsec. (b) of this section], and notwithstanding any other provision of law, for each fiscal year covered by this Contract, the Secretary shall make available to the Contractor the funds specified for the fiscal year under the annual funding agreement incorporated by reference pursuant to subsection (f)(2) by paying to the Contractor, on a quarterly basis, one-quarter of the total amount provided for in the annual funding agreement for that fiscal year, in a lump-sum payment or as semiannual payments, or any other method of payment authorized by law, in accordance with such method as may be requested by the Contractor and specified in the annual funding agreement.

"(ii) **Method of quarterly payment**.--If quarterly payments are specified in the annual funding agreement incorporated by reference pursuant to subsection (f)(2), each quarterly payment made pursuant to clause (i) shall be made on the first day of each quarter of the fiscal year, except that in any case in which the Contract year coincides with the Federal fiscal year, payment for the first quarter shall be made not later than the date that is 10 calendar days after the date on which the Office of Management and Budget apportions the appropriations for the fiscal year for the programs, services, functions, and activities subject to this Contract.

"(iii) **Applicability**.—Chapter 39 of title 31 [31 U.S.C. § 3901 et seq.], United States Code, shall apply to the payment of funds due under this Contract and the annual funding agreement referred to in clause (i).

"(7) **Records and monitoring**.—

"(A) **In general**.—Except for previously provided copies of tribal records that the Secretary demonstrates are clearly required to be maintained as part of the recordkeeping system of the Department of the Interior or the Department of Health and Human Services (or both), records of the Contractor shall not be considered Federal records for purposes of chapter 5 of title 5 [5 U.S.C. § 500 et seq.], United States Code.

"(B) **Recordkeeping system**.—The Contractor shall maintain a recordkeeping system and, upon reasonable advance request, provide reasonable access to such records to the Secretary.

"(C) **Responsibilities of Contractor**.—The Contractor shall be responsible for managing the day-to-day operations conducted under this Contract and for monitoring activities conducted under this Contract to ensure compliance with the

Contract and applicable Federal requirements. With respect to the monitoring activities of the Secretary, the routine monitoring visits shall be limited to not more than one performance monitoring visit for this Contract by the head of each operating division, departmental bureau, or departmental agency, or duly authorized representative of such head unless—

"(i) the Contractor agrees to one or more additional visits; or

"(ii) the appropriate official determines that there is reasonable cause to believe that grounds for reassumption of the Contract, suspension of Contract payments, or other serious Contract performance deficiency may exist.

No additional visit referred to in clause (ii) shall be made until such time as reasonable advance notice that includes a description of the nature of the problem that requires the additional visit has been given to the Contractor.

"(8) **Property**.—

"(A) **In general**.—As provided in section 105(f) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450j(f)), at the request of the Contractor, the Secretary may make available, or transfer to the Contractor, all reasonably divisible real property, facilities, equipment, and personal property that the Secretary has used to provide or administer the programs, services, functions, and activities covered by this Contract. A mutually agreed upon list specifying the property, facilities, and equipment so furnished shall also be prepared by the Secretary, with the concurrence of the Contractor, and periodically revised by the Secretary, with the concurrence of the Contractor.

"(B) **Records**.—The Contractor shall maintain a record of all property referred to in subparagraph (A) or other property acquired by the Contractor under section 105(f)(2)(A) of such Act [25 U.S.C. § 450j(f)(2)(A)] for purposes of replacement.

"(C) **Joint use agreements**.—Upon the request of the Contractor, the Secretary and the Contractor shall enter into a separate joint use agreement to address the shared use by the parties of real or personal property that is not reasonably divisible.

"(D) **Acquisition of property**.—The Contractor is granted the authority to acquire such excess property as the Contractor may determine to be appropriate in the judgment of the Contractor to support the programs, services, functions, and activities operated pursuant to this Contract.

"(E) **Confiscated or excess property**.—The Secretary shall assist the Contractor in obtaining such confiscated or excess property as may become available to tribes, tribal organizations, or local governments.

"(F) **Screener identification card**.—A screener identification card (General Services Administration form numbered 2946) shall be issued to the Contractor not later than the effective date of this Contract. The designated official shall, upon request, assist the Contractor in securing the use of the card.

"(G) **Capital equipment**.—The Contractor shall determine the capital equipment, leases, rentals, property, or services the Contractor requires to perform the obligations of the Contractor under this subsection, and shall acquire and maintain records of such capital equipment, property rentals, leases, property, or services through applicable procurement procedures of the Contractor.

"(9) **Availability of funds**.—Notwithstanding any other provision of law, any funds provided under this Contract—

"(A) shall remain available until expended; and

"(B) with respect to such funds, no further—

"(i) approval by the Secretary, or

"(ii) justifying documentation from the Contractor,

shall be required prior to the expenditure of such funds.

"(10) **Transportation**.—Beginning on the effective date of this Contract, the Secretary shall authorize the Contractor to obtain interagency motor pool vehicles and related services for performance of any activities carried out under this Contract.

"(11) **Federal program guidelines, manuals, or policy directives**.—Except as specifically provided in the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450 et seq.) the Contractor is not required to abide by program guidelines, manuals, or policy directives of the Secretary, unless otherwise agreed to by the Contractor and the Secretary, or otherwise required by law.

"(12) **Disputes**.—

"(A) **Third-party mediation defined**.—For the purposes of this Contract, the term 'third-party mediation' means a form of mediation whereby the Secretary and the Contractor nominate a third party who is not employed by or significantly involved with the Secretary of the Interior, the Secretary of Health and Human Services, or the Contractor, to serve as a third-party mediator to mediate disputes under this Contract.

"(B) **Alternative procedures**.—In addition to, or as an alternative to, remedies and procedures prescribed by section 110 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450m-1), the parties to this Contract may jointly—

"(i) submit disputes under this Contract to third-party mediation;

"(ii) submit the dispute to the adjudicatory body of the Contractor, including the tribal court of the Contractor;

"(iii) submit the dispute to mediation processes provided for under the laws, policies, or procedures of the Contractor; or

"(iv) use the administrative dispute resolution processes authorized in subchapter IV of chapter 5 of title 5 [5 U.S.C. § 571 et seq.], United States Code.

"(C) **Effect of decisions**.—The Secretary shall be bound by decisions made pursuant to the processes set forth in subparagraph (B), except that the Secretary shall not be bound by any decision that significantly conflicts with the interests of Indians or the United States.

"(13) **Administrative procedures of Contractor**.—Pursuant to the Indian Civil Rights Act of 1968 (25 U.S.C. § 1301 et seq.), the laws, policies, and procedures of the Contractor shall provide for administrative due process (or the equivalent of administrative due process) with respect to programs, services, functions, and activities that are provided by the Contractor pursuant to this Contract.

"(14) **Successor annual funding agreement**.—

"(A) **In general**.—Negotiations for a successor annual funding agreement, provided for in subsection (f)(2), shall begin not later than 120 days prior to the

conclusion of the preceding annual funding agreement. Except as provided in section 105(c)(2) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450j(c)(2)) the funding for each such successor annual funding agreement shall only be reduced pursuant to section 106(b) of such Act (25 U.S.C. § 450j-1(b)).

"(B) **Information.**—The Secretary shall prepare and supply relevant information, and promptly comply with any request by the Contractor for information that the Contractor reasonably needs to determine the amount of funds that may be available for a successor annual funding agreement, as provided for in subsection (f)(2) of this Contract.

"(15) **Contract requirements; approval by Secretary.**—

"(A) **In general.**—Except as provided in subparagraph (B), for the term of the Contract, section 2103 of the Revised Statutes (25 U.S.C. § 81), section 16 of the Act of June 18, 1934 (48 Stat. 987, chapter 576; 25 U.S.C. § 476), and the Act of July 3, 1952 (25 U.S.C. § 82a), shall not apply to any contract entered into in connection with this Contract.

"(B) **Requirements.**—Each Contract entered into by the Contractor with a third party in connection with performing the obligations of the Contractor under this Contract shall—

"(i) be in writing;

"(ii) identify the interested parties, the authorities of such parties, and purposes of the Contract;

"(iii) state the work to be performed under the Contract; and

"(iv) state the process for making any claim, the payments to be made, and the terms of the Contract, which shall be fixed.

"(c) **Obligation of the Contractor.**—

"(1) **Contract performance.**—Except as provided in subsection (d)(2), the Contractor shall perform the programs, services, functions, and activities as provided in the annual funding agreement under subsection (f)(2) of this Contract.

"(2) **Amount of funds.**—The total amount of funds to be paid under this Contract pursuant to section 106(a) [25 U.S.C. § 450j-1(a)] shall be determined in an annual funding agreement entered into between the Secretary and the Contractor, which shall be incorporated into this Contract.

"(3) **Contracted programs.**—Subject to the availability of appropriated funds, the Contractor shall administer the programs, services, functions, and activities identified in this Contract and funded through the annual funding agreement under subsection (f)(2).

"(4) **Trust services for individual Indians.**—

"(A) **In general.**—To the extent that the annual funding agreement provides funding for the delivery of trust services to individual Indians that have been provided by the Secretary, the Contractor shall maintain at least the same level of service as the Secretary provided for such individual Indians, subject to the availability of appropriated funds for such services.

"(B) **Trust services to individual Indians.**—For the purposes of this paragraph only, the term 'trust services for individual Indians' means only those services that pertain to land or financial management connected to individually held allotments.

"(5) **Fair and uniform services.**—The Contractor shall provide services under this Contract in a fair and uniform manner and shall provide access to an administrative or judicial body empowered to adjudicate or otherwise resolve complaints, claims, and grievances brought by program beneficiaries against the Contractor arising out of the performance of the Contract.

"(d) **Obligation of the United States.**—

"(1) **Trust responsibility.**—

"(A) **In general.**—The United States reaffirms the trust responsibility of the United States to the -- Indian tribe(s) to protect and conserve the trust resources of the Indian tribe(s) and the trust resources of individual Indians.

"(B) **Construction of contract.**--Nothing in this Contract may be construed to terminate, waive, modify, or reduce the trust responsibility of the United States to the tribe(s) or individual Indians. The Secretary shall act in good faith in upholding such trust responsibility.

"(2) **Good faith.**—To the extent that health programs are included in this Contract, and within available funds, the Secretary shall act in good faith in cooperating with the Contractor to achieve the goals set forth in the Indian Health Care Improvement Act (25 U.S.C. § 1601 et seq.).

"(3) **Programs retained.**—As specified in the annual funding agreement, the United States hereby retains the programs, services, functions, and activities with respect to the tribe(s) that are not specifically assumed by the Contractor in the annual funding agreement under subsection (f)(2).

"(e) **Other Provisions.**—

"(1) **Designated officials.**—Not later than the effective date of this Contract, the United States shall provide to the Contractor, and the Contractor shall provide to the United States, a written designation of a senior official to serve as a representative for notices, proposed amendments to the Contract, and other purposes for this Contract.

"(2) **Contract modifications or amendment.**—

"(A) **In general.**—Except as provided in subparagraph (B), no modification to this Contract shall take effect unless such modification is made in the form of a written amendment to the Contract, and the Contractor and the Secretary provide written consent for the modification.

"(B) **Exception.**—The addition of supplemental funds for programs, functions, and activities (or portions thereof) already included in the annual funding agreement under subsection (f)(2), and the reduction of funds pursuant to section 106(b)(2) [25 U.S.C. § 450j-1(b)(2)], shall not be subject to subparagraph (A).

"(3) **Officials not to benefit.**—No Member of Congress, or resident commissioner, shall be admitted to any share or part of any contract executed pursuant to this Contract, or to any benefit that may arise from such contract. This paragraph may not be construed to apply to any contract with a third party entered into under this Contract if such contract is made with a corporation for the general benefit of the corporation.

"(4) **Covenant against contingent fees.**—The parties warrant that no person or selling agency has been employed or retained to solicit or secure any contract executed pursuant to this Contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide

established commercial or selling agencies maintained by the Contractor for the purpose of securing business.

"(f) **Attachments.**—

"(1) **Approval of contract.**—Unless previously furnished to the Secretary, the resolution of the -- Indian tribe(s) authorizing the contracting of the programs, services, functions, and activities identified in this Contract is attached to this Contract as attachment 1.

"(2) **Annual funding agreement.**—

"(A) **In general.**—The annual funding agreement under this Contract shall only contain—

"(i) terms that identify the programs, services, functions, and activities to be performed or administered, the general budget category assigned, the funds to be provided, and the time and method of payment; and

"(ii) such other provisions, including a brief description of the programs, services, functions, and activities to be performed (including those supported by financial resources other than those provided by the Secretary), to which the parties agree.

"(B) **Incorporation by reference.**—The annual funding agreement is hereby incorporated in its entirety in this Contract and attached to this Contract as attachment 2."

Sec. 109. Rescission of contract or grant and assumption of control of program, etc.; authority; grounds; procedure; correction of violation as prerequisite to new contract or grant agreement; construction with occupational safety and health requirements [25 U.S.C. § 450m]

Each contract or grant agreement entered into pursuant to sections 102 [25 U.S.C. § 450f], 103 [25 U.S.C. § 450h], and 104[10] of this Act shall provide that in any case where the appropriate Secretary determines that the tribal organization's performance under such contract or grant agreement involves (1) the violation of the rights or endangerment of the health, safety, or welfare of any persons; or (2) gross negligence or mismanagement in the handling or use of funds provided to the tribal organization pursuant to such contract or grant agreement, or in the management of trust fund, trust lands or interests in such lands pursuant to such contract or grant agreement, such Secretary may, under regulations prescribed by him and after providing notice and a hearing on the record to such tribal organization, rescind such contract or grant agreement, in whole or in part, and assume or resume control or operation of the program, activity, or service involved if he determines that the tribal organization has not taken corrective action as prescribed by the Secretary to remedy the contract deficiency, except that the appropriate Secretary may, upon written notice to a tribal organization, and the tribe served by the tribal organization, immediately rescind a contract or grant, in whole or in part, and resume control or operation of a program, activity, function, or service, if the Secretary finds that (i) there is an immediate threat of imminent harm to the safety of any person, or imminent substantial and irreparable harm to trust funds, trust lands, or interests in such lands, and (ii) such threat arises from the failure of the contractor to fulfill the requirements of the contract. In such

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[10] *As so in the original. Section 103(a) and (b) and the first sentence of section 103(c) of Pub.L. 93-638(25 U.S.C. §§ 450g(a), (b), and (c)) were repealed and the remainder of section 103(c) of Pub.L. 93-638 (25 U.S.C. § 450g(c)) was redesignated as section 102(d) of Pub.L. 93-638 (25 U.S.C. § 450f(d)) by Pub.L. 100-472, Title II, § 201(b)(1), Oct. 5, 1988, 102 Stat. 2289. Section 104 of Pub.L. 93-638 was renumbered as section 103 of Pub.L. 93-638 by section 202(a) of Pub.L. 100-472 and is classified to 25 U.S.C. § 450h.*

cases, the Secretary shall provide the tribal organization with a hearing on the record within ten days or such later date as the tribal organization may approve. Such Secretary may decline to enter into a new contract or grant agreement and retain control of such program, activity, or service until such time as he is satisfied that the violations of rights or endangerment of health, safety, or welfare which necessitated the rescission has been corrected. In any hearing or appeal provided for under this section, the Secretary shall have the burden of proof to establish, by clearly demonstrating the validity of the grounds for rescinding, assuming, or reassuming the contract that is the subject of the hearing. Nothing in this section shall be construed as contravening the Occupational Safety and Health Act of 1970 (84 Stat. 1590), as amended (29 U.S.C. § 651 [et seq.]).

Sec. 110. Contract disputes and claims [25 U.S.C. § 450m-1]

(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 Act 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 Act. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this Act or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this Act or regulations promulgated hereunder (including immediate injunctive relief to reverse a declination finding under section 102(a)(2) [25 U.S.C. § 450f(a)(2)] or to compel the Secretary to award and fund an approved self-determination contract).

(b) **Revision of contracts**

The Secretary shall not revise or amend a self-determination contract with a tribal organization without the tribal organization's consent.

(c) **Application of laws to administrative appeals**

The Equal Access to Justice Act (Publ[i]c Law 96-481, Act of October 1, 1980; 92 Stat. 2325, as amended)[11], section 504 of title 5, United States Code, and section 2412 of title 28, United States Code shall apply to administrative appeals pending on or filed after the date of enactment of the Indian Self-Determination and Education Assistance Act Amendments of 1988 [enacted Oct. 5, 1988] by tribal organizations regarding self-determination contracts.

(d) **Application of Contract Disputes Act**

The Contract Disputes Act (Public Law 95-563, Act of November 1, 1978; 92 Stat. 2383, as amended) [41 U.S.C. § 601 et seq.] shall apply to self-determination contracts, except that all administrative appeals relating to such contracts shall be heard by the Interior Board of Contract Appeals established pursuant to section 8 of such Act (41 U.S.C. § 607).

(e) **Application of subsection (d)**

Subsection (d) of this section shall apply to any case pending or commenced on or after March 17, 1986, before the Boards of Contract Appeals of the Department of the Interior or the Department of Health and Human Services except that in any such cases finally

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[11] *As so in the original. The correct cite to the Equal Access to Justice Act, referred to in subsec. (c), is Pub.L. 96-481, Title II, Oct. 21, 1980, 94 Stat. 21325.*

disposed of before the date of enactment of these amendments [enacted Oct. 5, 1988], the thirty-day period referred to in section 504(a)(2) of title 5, United States Code, shall be deemed to commence on the date of enactment of this subsection [enacted Oct. 5, 1988].

Sec. 111. Sovereign immunity and trusteeship rights unaffected [25 U.S.C. § 450n]

Nothing in this Act shall be construed as—

(1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe; or

(2) authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people.

Title V – Tribal Self-Governance Amendments of 2000

An Act

To amend the Indian Self-Determination and Education Assistance Act to provide for further self-governance by Indian tribes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Sec. 1. Short Title [25 U.S.C. § 450 note]

This Act may be cited as the "Tribal Self-Governance Amendments of 2000".

Sec. 2. Findings [25 U.S.C. § 458aaa note]

Congress finds that—

(1) the tribal right of self-government flows from the inherent sovereignty of Indian tribes and nations;

(2) the United States recognizes a special government-to-government relationship with Indian tribes, including the right of the Indian tribes to self-governance, as reflected in the Constitution, treaties, Federal statutes, and the course of dealings of the United States with Indian tribes;

(3) although progress has been made, the Federal bureaucracy, with its centralized rules and regulations, has eroded tribal self-governance and dominates tribal affairs;

(4) the Tribal Self-Governance Demonstration Project, established under title III of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450f note) [Repealed by Pub.L. 106-260, § 10, Aug. 18, 2000, 114 Stat. 734] was designed to improve and perpetuate the government-to-government relationship between Indian tribes and the United States and to strengthen tribal control over Federal funding and program management;

(5) although the Federal Government has made considerable strides in improving Indian health care, it has failed to fully meet its trust responsibilities and to satisfy its obligations to the Indian tribes under treaties and other laws; and

(6) Congress has reviewed the results of the Tribal Self-Governance Demonstration Project and finds that transferring full control and funding to tribal governments, upon tribal request, over decision making for Federal programs, services, functions, and activities (or portions thereof)—

(A) is an appropriate and effective means of implementing the Federal policy of government-to-government relations with Indian tribes; and

(B) strengthens the Federal policy of Indian self-determination.

Sec. 3. Declaration of Policy [25 U.S.C. § 458aaa note]

It is the policy of Congress—

(1) to permanently establish and implement tribal self-governance within the Department of Health and Human Services;

(2) to call for full cooperation from the Department of Health and Human Services and its constituent agencies in the implementation of tribal self-governance—

(A) to enable the United States to maintain and improve its unique and continuing relationship with, and responsibility to, Indian tribes;

(B) to permit each Indian tribe to choose the extent of its participation in self-governance in accordance with the provisions of the Indian Self-Determination and Education Assistance Act [25 U.S.C. § 450 et seq.] relating to the provision of Federal services to Indian tribes;

(C) to ensure the continuation of the trust responsibility of the United States to Indian tribes and Indian individuals;

(D) to affirm and enable the United States to fulfill its obligations to the Indian tribes under treaties and other laws;

(E) to strengthen the government-to-government relationship between the United States and Indian tribes through direct and meaningful consultation with all tribes;

(F) to permit an orderly transition from Federal domination of programs and services to provide Indian tribes with meaningful authority, control, funding, and discretion to plan, conduct, redesign, and administer programs, services, functions, and activities (or portions thereof) that meet the needs of the individual tribal communities;

(G) to provide for a measurable parallel reduction in the Federal bureaucracy as programs, services, functions, and activities (or portion thereof) are assumed by Indian tribes;

(H) to encourage the Secretary to identify all programs, services, functions, and activities (or portions thereof) of the Department of Health and Human Services that may be managed by an Indian tribe under this Act [25 U.S.C. § 458 et seq.] and to assist Indian tribes in assuming responsibility for such programs, services, functions, and activities (or portions thereof); and

(I) to provide Indian tribes with the earliest opportunity to administer programs, services, functions, and activities (or portions thereof) from throughout the Department of Health and Human Services.

Sec. 4. Tribal Self-Governance

The Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450 et seq.) is amended by adding at the end the following:

Sec. 501. Definitions [25 U.S.C. § 458aaa]

(a) **In general**

In this title [25 U.S.C. § 458aaa et seq.]:

(1) **Construction project**

The term "construction project"—

(A) means an organized noncontinuous undertaking to complete a specific set of predetermined objectives for the planning, environmental determination, design, construction, repair, improvement, or expansion of buildings or facilities, as described in a construction project agreement; and

(B) does not include construction program administration and activities described in paragraphs (1) through (3) of section 4(m) [25 U.S.C. § 450b(m)], that may otherwise be included in a funding agreement under this title [25 U.S.C. § 458aaa et seq.].

(2) **Construction project agreement**

The term "construction project agreement" means a negotiated agreement between the Secretary and an Indian tribe, that at a minimum—

(A) establishes project phase start and completion dates;

(B) defines a specific scope of work and standards by which it will be accomplished;

(C) identifies the responsibilities of the Indian tribe and the Secretary;

(D) addresses environmental considerations;

(E) identifies the owner and operations and maintenance entity of the proposed work;

(F) provides a budget;

(G) provides a payment process; and

(H) establishes the duration of the agreement based on the time necessary to complete the specified scope of work, which may be 1 or more years.

(3) **Gross mismanagement**

The term "gross mismanagement" means a significant, clear, and convincing violation of a compact, funding agreement, or regulatory, or statutory requirements applicable to Federal funds transferred to an Indian tribe by a compact or funding agreement that results in a significant reduction of funds available for the programs, services, functions, or activities (or portions thereof) assumed by an Indian tribe.

(4) **Inherent Federal functions**

The term "inherent Federal functions" means those Federal functions which cannot legally be delegated to Indian tribes.

(5) **Inter-tribal consortium**

The term "inter-tribal consortium" means a coalition of two more separate Indian tribes that join together for the purpose of participating in self-governance, including tribal organizations.

(6) **Secretary**

The term "Secretary" means the Secretary of Health and Human Services.

(7) **Self-governance**

The term "self-governance" means the program of self-governance established under section 502 [25 U.S.C. § 458aaa-1].

(8) **Tribal share**

The term "tribal share" means an Indian tribe's portion of all funds and resources that support secretarial programs, services, functions, and activities (or portions thereof) that are not required by the Secretary for performance of inherent Federal functions.

(b) **Indian tribe**

In any case in which an Indian tribe has authorized another Indian tribe, an inter-tribal consortium, or a tribal organization to plan for or carry out programs, services, functions, or activities (or portions thereof) on its behalf under this title [25 U.S.C. § 458aaa et seq.], the authorized Indian tribe, inter-tribal consortium, or tribal organization shall have the rights and responsibilities of the authorizing Indian tribe (except as otherwise provided in the authorizing resolution or in this title [25 U.S.C. § 458aaa et seq.]). In such event, the term "Indian tribe" as used in this title [25 U.S.C. § 458aaa et seq.] shall include such other authorized Indian tribe, inter-tribal consortium, or tribal organization.

Sec. 502. Establishment [25 U.S.C. § 458aaa-1]

The Secretary shall establish and carry out a program within the Indian Health Service of the Department of Health and Human Services to be known as the "Tribal Self-Governance Program" in accordance with this title [25 U.S.C. § 458aaa et seq.].

Sec. 503. Selection of participating Indian tribes [25 U.S.C. § 458aaa-2][13]

(a) **Continuing participation**

Each Indian tribe that is participating in the Tribal Self-Governance Demonstration Project under title III [Repealed by Pub.L. 106-260, § 10, Aug. 18, 2000, 114 Stat. 734] on the date of the enactment of this title [enacted Aug. 18, 2000] may elect to participate in self-governance under this title [25 U.S.C. § 458aaa et seq.] under existing authority as reflected in tribal resolution.

(b) **Additional participants**

(1) **In general**

In addition to those Indian tribes participating in self-governance under subsection (a), each year an additional 50 Indian tribes that meet the eligibility criteria specified in subsection (c) shall be entitled to participate in self-governance.

(2) **Treatment of certain Indian tribes**

(A) **In general.** An Indian tribe that has withdrawn from participation in an inter-tribal consortium or tribal organization, in whole or in part, shall be entitled to participate in self-governance provided the Indian tribe meets the eligibility criteria specified in subsection (c).

(B) **Effect of withdrawal.** If an Indian tribe has withdrawn from participation in an inter-tribal consortium or tribal organization, that Indian tribe shall be entitled to its tribal share of funds supporting those programs, services, functions, and activities (or portions thereof) that the Indian tribe will be carrying out under the compact and funding agreement of the Indian tribe.

(C) **Participation in self-governance.** In no event shall the withdrawal of an Indian tribe from an inter-tribal consortium or tribal organization affect the eligibility of the inter-tribal consortium or tribal organization to participate in self-governance.

(c) **Applicant pool**

(1) **In general**

The qualified applicant pool for self-governance shall consist of each Indian tribe that—

(A) successfully completes the planning phase described in subsection (d);

(B) has requested participation in self-governance by resolution or other official action by the governing body of each Indian tribe to be served; and

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[13] *Section 12 of the Tribal Self-Governance Amendments of 2000 states that nothing in the Act is meant to affect certain rights or prohibitions applicable to tribes in Alaska. With regard to health programs in Alaska, Pub.L. 105-83, § 325 and Pub.L. 105-277, § 351 have substantially modified tribal rights to enter ISDEAA agreements.*

For tribes in Alaska's Ketchican Gateway Borough, the ability to enter into health care agreements under the ISDEAA is further modified by Title II of Pub.L. 105-143, as amended.

(C) has demonstrated, for 3 fiscal years, financial stability and financial management capability.

(2) **Criteria for determining financial stability and financial management capacity**

For purposes of this subsection, evidence that, during the 3-year period referred to in paragraph (1)(C), an Indian tribe had no uncorrected significant and material audit exceptions in the required annual audit of the Indian tribe's self-determination contracts or self-governance funding agreements with any Federal agency shall be conclusive evidence of the required stability and capability.

(d) **Planning phase**

Each Indian tribe seeking participation in self-governance shall complete a planning phase. The planning phase shall be conducted to the satisfaction of the Indian tribe and shall include—

(1) legal and budgetary research; and

(2) internal tribal government planning and organizational preparation relating to the administration of health care programs.

(e) **Grants**

Subject to the availability of appropriations, any Indian tribe meeting the requirements of paragraph (1)(B) and (C) of subsection (c) shall be eligible for grants—

(1) to plan for participation in self-governance; and

(2) to negotiate the terms of participation by the Indian tribe or tribal organization in self-governance, as set forth in a compact and a funding agreement.

(f) **Receipt of grant not required**

Receipt of a grant under subsection (e) shall not be a requirement of participation in self-governance.

Sec. 504. Compacts [25 U.S.C. § 458aaa-3]

(a) **Compact required**

The Secretary shall negotiate and enter into a written compact with each Indian tribe participating in self-governance in a manner consistent with the Federal Government's trust responsibility, treaty obligations, and the government-to-government relationship between Indian tribes and the United States.

(b) **Contents**

Each compact required under subsection (a) shall set forth the general terms of the government-to-government relationship between the Indian tribe and the Secretary, including such terms as the parties intend shall control year after year. Such compacts may only be amended by mutual agreement of the parties.

(c) **Existing compacts**

An Indian tribe participating in the Tribal Self-Governance Demonstration Project under title III [Repealed by Pub.L. 106-260, § 10, Aug. 18, 2000, 114 Stat. 734] on the date of the enactment of this title [enacted Aug. 18, 2000] shall have the option at any time after the date of the enactment of this title [enacted Aug. 18, 2000] to—

(1) retain the Tribal Self-Governance Demonstration Project compact of that Indian tribe (in whole or in part) to the extent that the provisions of that funding agreement are not directly contrary to any express provision of this title; or

(2) instead of retaining a compact or portion thereof under paragraph (1), negotiate a new compact in a manner consistent with the requirements of this title.

(d) **Term and effective date**

The effective date of a compact shall be the date of the approval and execution by the Indian tribe or another date agreed upon by the parties, and shall remain in effect for so long as permitted by Federal law or until terminated by mutual written agreement, retrocession, or reassumption.

Sec. 505. Funding agreements [25 U.S.C. § 458aaa-4]

(a) **Funding agreement required**

The Secretary shall negotiate and enter into a written funding agreement with each Indian tribe participating in self-governance in a manner consistent with the Federal Government's trust responsibility, treaty obligations, and the government-to-government relationship between Indian tribes and the United States.

(b) **Contents**

(1) **In general**

Each funding agreement required under subsection (a) shall, as determined by the Indian tribe, authorize the Indian tribe to plan, conduct, consolidate, administer, and receive full tribal share funding, including tribal shares of discretionary Indian Health Service competitive grants (excluding congressionally earmarked competitive grants), for all programs, services, functions, and activities (or portions thereof), that are carried out for the benefit of Indians because of their status as Indians without regard to the agency or office of the Indian Health Service within which the program, service, function, or activity (or portion thereof) is performed.

(2) **Inclusion of certain programs, services, functions, and activities**

Such programs, services, functions, or activities (or portions thereof) include all programs, services, functions, activities (or portions thereof), including grants (which may be added to a funding agreement after an award of such grants), with respect to which Indian tribes or Indians are primary or significant beneficiaries, administered by the Department of Health and Human Services through the Indian Health Service and all local, field, service unit, area, regional, and central headquarters or national office functions so administered under the authority of—

(A) the Act of November 2, 1921 (42 Stat. 208; chapter 115; 25 U.S.C. § 13);

(B) the Act of April 16, 1934 (48 Stat. 596; chapter 147; 25 U.S.C. § 452 et seq.);

(C) the Act of August 5, 1954 (68 Stat. 674; chapter 658) [42 U.S.C. § 2001 et seq.];

(D) the Indian Health Care Improvement Act (25 U.S.C. § 1601 et seq.);

(E) the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986 (25 U.S.C. § 2401 et seq.);

(F) any other Act of Congress authorizing any agency of the Department of Health and Human Services to administer, carry out, or provide financial assistance to such a program, service, function or activity (or portions thereof) described in this

section that is carried out for the benefit of Indians because of their status as Indians; or

(G) any other Act of Congress authorizing such a program, service, function, or activity (or portions thereof) carried out for the benefit of Indians under which appropriations are made available to any agency other than an agency within the Department of Health and Human Services, in any case in which the Secretary administers that program, service, function, or activity (or portion thereof).

(c) **Inclusion in compact or funding agreement**

It shall not be a requirement that an Indian tribe or Indians be identified in the authorizing statute for a program or element of a program to be eligible for inclusion in a compact or funding agreement under this title [25 U.S.C. §§ 458aaa et seq.].

(d) **Funding agreement terms**

Each funding agreement under this title [25 U.S.C. §§ 458aaa et seq.] shall set forth—

(1) terms that generally identify the programs, services, functions, and activities (or portions thereof) to be performed or administered; and

(2) for the items identified in paragraph (1)—

(A) the general budget category assigned;

(B) the funds to be provided, including those funds to be provided on a recurring basis;

(C) the time and method of transfer of the funds;

(D) the responsibilities of the Secretary; and

(E) any other provision with respect to which the Indian tribe and the Secretary agree.

(e) **Subsequent funding agreements**

Absent notification from an Indian tribe that is withdrawing or retroceding the operation of one or more programs, services, functions, or activities (or portions thereof) identified in a funding agreement, or unless otherwise agreed to by the parties, each funding agreement shall remain in full force and effect until a subsequent funding agreement is executed, and the terms of the subsequent funding agreement shall be retroactive to the end of the term of the preceding funding agreement.

(f) **Existing funding agreements**

Each Indian tribe participating in the Tribal Self-Governance Demonstration Project established under title III [Repealed by Pub.L. 106-260, § 10, Aug. 18, 2000, 114 Stat. 734] on the date of the enactment of this title [enacted Aug. 18, 2000] shall have the option at any time thereafter to—

(1) retain the Tribal Self-Governance Demonstration Project funding agreement of that Indian tribe (in whole or in part) to the extent that the provisions of that funding agreement are not directly contrary to any express provision of this title [25 U.S.C. § 458aaa et seq.]; or

(2) instead of retaining a funding agreement or portion thereof under paragraph (1), negotiate a new funding agreement in a manner consistent with the requirements of this title [25 U.S.C. § 458aaa et seq.].

(g) **Stable base funding**

At the option of an Indian tribe, a funding agreement may provide for a stable base budget specifying the recurring funds (including, for purposes of this provision, funds available under section 106(a) [25 U.S.C. § 450j-1(a)]) to be transferred to such Indian tribe, for such period as may be specified in the funding agreement, subject to annual adjustment only to reflect changes in congressional appropriations by sub-sub activity excluding earmarks.

Sec. 506. General provisions [25 U.S.C. § 458aaa-5]

(a) **Applicability**

The provisions of this section shall apply to compacts and funding agreements negotiated under this title [25 U.S.C. § 458aaa et seq.] and an Indian tribe may, at its option, include provisions that reflect such requirements in a compact or funding agreement.

(b) **Conflicts of interest**

Indian tribes participating in self-governance under this title [25 U.S.C. § 458aaa et seq.] shall ensure that internal measures are in place to address conflicts of interest in the administration of self-governance programs, services, functions, or activities (or portions thereof).

(c) **Audits**

(1) **Single Agency Audit Act**

The provisions of chapter 75 of title 31, United States Code [31 U.S.C. § 7501 et seq.], requiring a single agency audit report shall apply to funding agreements under this title [25 U.S.C. § 458aaa et seq.].

(2) **Cost principles**

An Indian tribe shall apply cost principles under the applicable Office of Management and Budget circular, except as modified by section 106 [25 U.S.C. § 450j-1][,] other provisions of law, or by any exemptions to applicable Office of Management and Budget circulars subsequently granted by the Office of Management and Budget. No other audit or accounting standards shall be required by the Secretary. Any claim by the Federal Government against the Indian tribe relating to funds received under a funding agreement based on any audit under this subsection shall be subject to the provisions of section 106(f) [25 U.S.C. § 450j-1(f)].

(d) **Records**

(1) **In general**

Unless an Indian tribe specifies otherwise in the compact or funding agreement, records of the Indian tribe shall not be considered Federal records for purposes of chapter 5 of title 5, United States Code [5 U.S.C. § 500 et seq.].

(2) **Recordkeeping system**

The Indian tribe shall maintain a recordkeeping system, and, after 30 days advance notice, provide the Secretary with reasonable access to such records to enable the Department of Health and Human Services to meet its minimum legal recordkeeping system requirements under sections 3101 through 3106 of title 44, United States Code.

(e) **Redesign and consolidation**

An Indian tribe may redesign or consolidate programs, services, functions, and activities (or portions thereof) included in a funding agreement under section 505 [25 U.S.C. § 458aaa-4] and reallocate or redirect funds for such programs, services, functions, and activities (or portions thereof) in any manner which the Indian tribe deems to be in the best interest of the health and welfare of the Indian community being served, only if the redesign or consolidation does not have the effect of denying eligibility for services to population groups otherwise eligible to be served under applicable Federal law.

(f) **Retrocession**

An Indian tribe may retrocede, fully or partially, to the Secretary programs, services, functions, or activities (or portions thereof) included in the compact or funding agreement. Unless the Indian tribe rescinds the request for retrocession, such retrocession will become effective within the timeframe specified by the parties in the compact or funding agreement. In the absence of such a specification, such retrocession shall become effective on—

(1) the earlier of—

(A) 1 year after the date of submission of such request; or

(B) the date on which the funding agreement expires; or

(2) such date as may be mutually agreed upon by the Secretary and the Indian tribe.

(g) **Withdrawal**

(1) **Process**

(A) **In general**

An Indian tribe may fully or partially withdraw from a participating inter-tribal consortium or tribal organization its share of any program, function, service, or activity (or portions thereof) included in a compact or funding agreement.

(B) **Effective date**

The withdrawal referred to in subparagraph (A) shall become effective within the timeframe specified in the resolution which authorizes transfer to the participating tribal organization or inter-tribal consortium. In the absence of a specific timeframe set forth in the resolution, such withdrawal shall become effective on—

(i) the earlier of—

(I) 1 year after the date of submission of such request; or

(II) the date on which the funding agreement expires; or

(ii) such date as may be mutually agreed upon by the Secretary, the withdrawing Indian tribe, and the participating tribal organization or inter-tribal consortium that has signed the compact or funding agreement on behalf of the withdrawing Indian tribe, inter-tribal consortium, or tribal organization.

(2) **Distribution of funds**

When an Indian tribe or tribal organization eligible to enter into a self-determination contract under title I or a compact or funding agreement under this title [25 U.S.C. § 458aaa et seq.] fully or partially withdraws from a participating inter-tribal consortium or tribal organization—

(A) the withdrawing Indian tribe or tribal organization shall be entitled to its tribal share of funds supporting those programs, services, functions, or activities (or

portions thereof) that the Indian tribe will be carrying out under its own self-determination contract or compact and funding agreement (calculated on the same basis as the funds were initially allocated in the funding agreement of the inter-tribal consortium or tribal organization); and

(B) the funds referred to in subparagraph (A) shall be transferred from the funding agreement of the inter-tribal consortium or tribal organization, on the condition that the provisions of sections 102 and 105(i) [25 U.S.C. § 450f and § 450j(i)], as appropriate, shall apply to that withdrawing Indian tribe.

(3) **Regaining mature contract status**

If an Indian tribe elects to operate all or some programs, services, functions, or activities (or portions thereof) carried out under a compact or funding agreement under this title [25 U.S.C. § 458aaa et seq.] through a self-determination contract under title I, at the option of the Indian tribe, the resulting self-determination contract shall be a mature self-determination contract.

(h) **Nonduplication**

For the period for which, and to the extent to which, funding is provided under this title [25 U.S.C. § 458aaa et seq.] or under the compact or funding agreement, the Indian tribe shall not be entitled to contract with the Secretary for such funds under section 102 [25 U.S.C. § 450f], except that such Indian tribe shall be eligible for new programs on the same basis as other Indian tribes.

Sec. 507. Provisions relating to the Secretary [25 U.S.C. § 458aaa-6]

(a) **Mandatory provisions.**

(1) **Health status reports**

Compacts or funding agreements negotiated between the Secretary and an Indian tribe shall include a provision that requires the Indian tribe to report on health status and service delivery—

(A) to the extent such data is not otherwise available to the Secretary and specific funds for this purpose are provided by the Secretary under the funding agreement; and

(B) if such reporting shall impose minimal burdens on the participating Indian tribe and such requirements are promulgated under section 517[25 U.S.C. § 458aaa-16]

(2) **Reassumption.**

(A) **In general**

Compacts or funding agreements negotiated between the Secretary and an Indian tribe shall include a provision authorizing the Secretary to reassume operation of a program, service, function, or activity (or portions thereof) and associated funding if there is a specific finding relative to that program, service, function, or activity (or portion thereof) of—

(i) imminent endangerment of the public health caused by an act or omission of the Indian tribe, and the imminent endangerment arises out of a failure to carry out the compact or funding agreement; or

(ii) gross mismanagement with respect to funds transferred to a tribe by a compact or funding agreement, as determined by the Secretary in consultation with the Inspector General, as appropriate.

(B) **Prohibition**

The Secretary shall not reassume operation of a program, service, function, or activity (or portions thereof) unless—

(i) the Secretary has first provided written notice and a hearing on the record to the Indian tribe; and

(ii) the Indian tribe has not taken corrective action to remedy the imminent endangerment to public health or gross mismanagement.

(C) **Exception**

(i) **In general**

Notwithstanding subparagraph (B), the Secretary may, upon written notification to the Indian tribe, immediately reassume operation of a program, service, function, or activity (or portion thereof) if—

(I) the Secretary makes a finding of imminent substantial and irreparable endangerment of the public health caused by an act or omission of the Indian tribe; and

(II) the endangerment arises out of a failure to carry out the compact or funding agreement.

(ii) **Reassumption**

If the Secretary reassumes operation of a program, service, function, or activity (or portion thereof) under this subparagraph, the Secretary shall provide the Indian tribe with a hearing on the record not later than 10 days after such reassumption.

(D) **Hearings**

In any hearing or appeal involving a decision to reassume operation of a program, service, function, or activity (or portion thereof), the Secretary shall have the burden of proof of demonstrating by clear and convincing evidence the validity of the grounds for the reassumption.

(b) **Final offer**

In the event the Secretary and a participating Indian tribe are unable to agree, in whole or in part, on the terms of a compact or funding agreement (including funding levels), the Indian tribe may submit a final offer to the Secretary. Not more than 45 days after such submission, or within a longer time agreed upon by the Indian tribe, the Secretary shall review and make a determination with respect to such offer. In the absence of a timely rejection of the offer, in whole or in part, made in compliance with subsection (c), the offer shall be deemed agreed to by the Secretary.

(c) **Rejection of final offers**

(1) **In general**

If the Secretary rejects an offer made under subsection (b) (or one or more provisions or funding levels in such offer), the Secretary shall provide—

(A) a timely written notification to the Indian tribe that contains a specific finding that clearly demonstrates, or that is supported by a controlling legal authority, that—

(i) the amount of funds proposed in the final offer exceeds the applicable funding level to which the Indian tribe is entitled under this title [25 U.S.C. § 458aaa et seq.];

(ii) the program, function, service, or activity (or portion thereof) that is the subject of the final offer is an inherent Federal function that cannot legally be delegated to an Indian tribe;

(iii) the Indian tribe cannot carry out the program, function, service, or activity (or portion thereof) in a manner that would not result in significant danger or risk to the public health; or

(iv) the Indian tribe is not eligible to participate in self-governance under section 503 [25 U.S.C. § 458aaa-2];

(B) technical assistance to overcome the objections stated in the notification required by subparagraph (A);

(C) the Indian tribe with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter and the opportunity for appeal on the objections raised, except that the Indian tribe may, in lieu of filing such appeal, directly proceed to initiate an action in a Federal district court pursuant to section 110(a) [25 U.S.C. § 450m-1(a)]; and

(D) the Indian tribe with the option of entering into the severable portions of a final proposed compact or funding agreement, or provision thereof, (including a lesser funding amount, if any), that the Secretary did not reject, subject to any additional alterations necessary to conform the compact or funding agreement to the severed provisions.

(2) **Effect of exercising certain option**

If an Indian tribe exercises the option specified in paragraph (1)(D), that Indian tribe shall retain the right to appeal the Secretary's rejection under this section, and subparagraphs (A), (B), and (C) of that paragraph shall only apply to that portion of the proposed final compact, funding agreement, or provision thereof that was rejected by the Secretary.

(d) **Burden of proof**

With respect to any hearing or appeal or civil action conducted pursuant to this section, the Secretary shall have the burden of demonstrating by clear and convincing evidence the validity of the grounds for rejecting the offer (or a provision thereof) made under subsection (b).

(e) **Good faith**

In the negotiation of compacts and funding agreements the Secretary shall at all times negotiate in good faith to maximize implementation of the self-governance policy. The Secretary shall carry out this title [25 U.S.C. § 458aaa et seq.] in a manner that maximizes the policy of tribal self-governance, in a manner consistent with the purposes specified in section 3 of the Tribal Self-Governance Amendments of 2000 [25 U.S.C. § 458aaa note].

(f) **Savings**

To the extent that programs, functions, services, or activities (or portions thereof) carried out by Indian tribes under this title [25 U.S.C. § 458aaa et seq.] reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings that have not otherwise been included in the amount of tribal shares and other funds determined under section 508(c) [25 U.S.C. § 458aaa-7(c)], the Secretary

shall make such savings available to the Indian tribes, inter-tribal consortia, or tribal organizations for the provision of additional services to program beneficiaries in a manner equitable to directly served, contracted, and compacted programs.

(g) **Trust responsibility**

The Secretary is prohibited from waiving, modifying, or diminishing in any way the trust responsibility of the United States with respect to Indian tribes and individual Indians that exists under treaties, Executive orders, other laws, or court decisions.

(h) **Decisionmaker**

A decision that constitutes final agency action and relates to an appeal within the Department of Health and Human Services conducted under subsection (c) shall be made either—

(1) by an official of the Department who holds a position at a higher organizational level within the Department than the level of the departmental agency in which the decision that is the subject of the appeal was made; or

(2) by an administrative judge.

Sec. 508. Transfer of funds [25 U.S.C. § 458aaa-7]

(a) **In general**

Pursuant to the terms of any compact or funding agreement entered into under this title [25 U.S.C. § 458aaa et seq.], the Secretary shall transfer to the Indian tribe all funds provided for in the funding agreement, pursuant to subsection (c), and provide funding for periods covered by joint resolution adopted by Congress making continuing appropriations, to the extent permitted by such resolutions. In any instance where a funding agreement requires an annual transfer of funding to be made at the beginning of a fiscal year, or requires semiannual or other periodic transfers of funding to be made commencing at the beginning of a fiscal year, the first such transfer shall be made not later than 10 days after the apportionment of such funds by the Office of Management and Budget to the Department, unless the funding agreement provides otherwise.

(b) **Multiyear funding**

The Secretary is authorized to employ, upon tribal request, multiyear funding agreements. References in this title [25 U.S.C. § 458aaa et seq.] to funding agreements shall include such multiyear funding agreements.

(c) **Amount of funding**

The Secretary shall provide funds under a funding agreement under this title [25 U.S.C. § 458aaa et seq.] in an amount equal to the amount that the Indian tribe would have been entitled to receive under self-determination contracts under this Act, including amounts for direct program costs specified under section 106(a)(1) [25 U.S.C. § 450j-1(a)(1)] and amounts for contract support costs specified under section 106(a) (2), (3), (5), and (6) [25 U.S.C. § 450j-1(a)(2), (3), (5), and (6)], including any funds that are specifically or functionally related to the provision by the Secretary of services and benefits to the Indian tribe or its members, all without regard to the organizational level within the Department where such functions are carried out.

(d) **Prohibitions**

(1) **In general**

Except as provided in paragraph (2), the Secretary is expressly prohibited from—

(A) failing or refusing to transfer to an Indian tribe its full share of any central, headquarters, regional, area, or service unit office or other funds due under this Act, except as required by Federal law;

(B) withholding portions of such funds for transfer over a period of years; and

(C) reducing the amount of funds required under this Act—

(i) to make funding available for self-governance monitoring or administration by the Secretary;

(ii) in subsequent years, except pursuant to—

(I) a reduction in appropriations from the previous fiscal year for the program or function to be included in a compact or funding agreement;

(II) a congressional directive in legislation or accompanying report;

(III) a tribal authorization;

(IV) a change in the amount of pass-through funds subject to the terms of the funding agreement; or

(V) completion of a project, activity, or program for which such funds were provided;

(iii) to pay for Federal functions, including Federal pay costs, Federal employee retirement benefits, automated data processing, technical assistance, and monitoring of activities under this Act; or

(iv) to pay for costs of Federal personnel displaced by self-determination contracts under this Act or self-governance;

(2) **Exception**

The funds described in paragraph (1)(C) may be increased by the Secretary if necessary to carry out this Act or as provided in section 105(c)(2) [25 U.S.C. § 450j(c)(2)].

(e) **Other resources**

In the event an Indian tribe elects to carry out a compact or funding agreement with the use of Federal personnel, Federal supplies (including supplies available from Federal warehouse facilities), Federal supply sources (including lodging, airline transportation, and other means of transportation including the use of interagency motor pool vehicles) or other Federal resources (including supplies, services, and resources available to the Secretary under any procurement contracts in which the Department is eligible to participate), the Secretary shall acquire and transfer such personnel, supplies, or resources to the Indian tribe.

(f) **Reimbursement to Indian Health Service**

With respect to functions transferred by the Indian Health Service to an Indian tribe, the Indian Health Service shall provide goods and services to the Indian tribe, on a reimbursable basis, including payment in advance with subsequent adjustment. The reimbursements received from those goods and services, along with the funds received from the Indian tribe pursuant to this title [25 U.S.C. § 458aaa et seq.], may be credited to the same or subsequent appropriation account which provided the funding, such amounts to remain available until expended.

(g) **Prompt Payment Act**

Chapter 39 of title 31, United States Code [31 U.S.C. § 3901 et seq.], shall apply to the transfer of funds due under a compact or funding agreement authorized under this title [25 U.S.C. § 458aaa et seq.].

(h) **Interest or other income on transfers**

An Indian tribe is entitled to retain interest earned on any funds paid under a compact or funding agreement to carry out governmental or health purposes and such interest shall not diminish the amount of funds the Indian tribe is authorized to receive under its funding agreement in the year the interest is earned or in any subsequent fiscal year. Funds transferred under this title [25 U.S.C. § 458aaa et seq.] shall be managed using the prudent investment standard.

(i) **Carryover of funds**

All funds paid to an Indian tribe in accordance with a compact or funding agreement shall remain available until expended. In the event that an Indian tribe elects to carry over funding from 1 year to the next, such carryover shall not diminish the amount of funds the Indian tribe is authorized to receive under its funding agreement in that or any subsequent fiscal year.

(j) **Program income**

All Medicare, Medicaid, or other program income earned by an Indian tribe shall be treated as supplemental funding to that negotiated in the funding agreement. The Indian tribe may retain all such income and expend such funds in the current year or in future years except to the extent that the Indian Health Care Improvement Act (25 U.S.C. § 1601 et seq.) provides otherwise for Medicare and Medicaid receipts. Such funds shall not result in any offset or reduction in the amount of funds the Indian tribe is authorized to receive under its funding agreement in the year the program income is received or for any subsequent fiscal year.

(k) **Limitation of costs**

An Indian tribe shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds transferred under a compact or funding agreement. If at any time the Indian tribe has reason to believe that the total amount provided for a specific activity in the compact or funding agreement is insufficient the Indian tribe shall provide reasonable notice of such insufficiency to the Secretary. If the Secretary does not increase the amount of funds transferred under the funding agreement, the Indian tribe may suspend performance of the activity until such time as additional funds are transferred.

Sec. 509. Construction projects [25 U.S.C. § 458aaa-8]

(a) **In general**

Indian tribes participating in tribal self-governance may carry out construction projects under this title [25 U.S.C. § 458aaa et seq.] if they elect to assume all Federal responsibilities under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), the National Historic Preservation Act (16 U.S.C. 470 et seq.), and related provisions of law that would apply if the Secretary were to undertake a construction project, by adopting a resolution—

(1) designating a certifying officer to represent the Indian tribe and to assume the status of a responsible Federal official under such laws; and

(2) accepting the jurisdiction of the Federal court for the purpose of enforcement of the responsibilities of the responsible Federal official under such environmental laws.

(b) **Negotiations**

Construction project proposals shall be negotiated pursuant to the statutory process in section 105(m) [25 U.S.C. § 450j(m)] and resulting construction project agreements shall be incorporated into funding agreements as addenda.

(c) **Codes and standards**

The Indian tribe and the Secretary shall agree upon and specify appropriate building codes and architectural and engineering standards (including health and safety) which shall be in conformity with nationally recognized standards for comparable projects.

(d) **Responsibility for completion**

The Indian tribe shall assume responsibility for the successful completion of the construction project in accordance with the negotiated construction project agreement.

(e) **Funding**

Funding for construction projects carried out under this title [25 U.S.C. § 458aaa et seq.] shall be included in funding agreements as annual advance payments, with semiannual payments at the option of the Indian tribe. Annual advance and semiannual payment amounts shall be determined based on mutually agreeable project schedules reflecting work to be accomplished within the advance payment period, work accomplished and funds expended in previous payment periods, and the total prior payments. The Secretary shall include associated project contingency funds with each advance payment installment. The Indian tribe shall be responsible for the management of the contingency funds included in funding agreements.

(f) **Approval**

The Secretary shall have at least one opportunity to approve project planning and design documents prepared by the Indian tribe in advance of construction of the facilities specified in the scope of work for each negotiated construction project agreement or amendment thereof which results in a significant change in the original scope of work. The Indian tribe shall provide the Secretary with project progress and financial reports not less than semiannually. The Secretary may conduct onsite project oversight visits semiannually or on an alternate schedule agreed to by the Secretary and the Indian tribe.

(g) **Wages**

All laborers and mechanics employed by contractors and subcontractors (excluding tribes and tribal organizations) in the construction, alteration, or repair, including painting or decorating of a building or other facilities in connection with construction projects funded by the United States under this Act shall be paid wages at not less than those prevailing wages on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act of March 3, 1931 (46 Stat. 1494) [40 U.S.C. § 276a et seq.]. With respect to construction alteration, or repair work to which the Act of March 3, 1931 [40 U.S.C. § 276a et seq.], is applicable under this section, the Secretary of Labor shall have the authority and functions set forth in the Reorganization Plan numbered 14, of 1950 [5 U.S.C. § 903 note], and section 2 of the Act of June 13, 1934 (48 Stat. 948) [40 U.S.C. § 276c].

(h) **Application of other laws**

Unless otherwise agreed to by the Indian tribe, no provision of the Office of Federal Procurement Policy Act, the Federal Acquisition Regulations issued pursuant thereto, or any other law or regulation pertaining to Federal procurement (including Executive orders) shall apply to any construction project conducted under this title [25 U.S.C. § 458aaa et seq.].

Sec. 510. Federal procurement laws and regulations [25 U.S.C. § 458aaa-9]

Regarding construction programs or projects, the Secretary and Indian tribes may negotiate for the inclusion of specific provisions of the Office of Federal Procurement and Policy Act (41 U.S.C. § 401 et seq.) and Federal acquisition regulations in any funding agreement entered into under this part [title] [25 U.S.C. §§ 458aaa et seq.]. Absent a negotiated agreement, such provisions and regulatory requirements shall not apply.

Sec. 511. Civil actions [25 U.S.C. § 458aaa-10]

(a) **Contract defined**

For the purposes of section 110 [25 U.S.C. § 450m-1], the term "contract" shall include compacts and funding agreements entered into under this title [25 U.S.C. § 458aaa et seq.].

(b) **Applicability of certain laws**

Section 2103 of the Revised Statutes (25 U.S.C. § 81) and section 16 of the Act of June 18, 1934 (48 Stat. 987; chapter 576; 25 U.S.C. § 476), shall not apply to attorney and other professional contracts entered into by Indian tribes participating in self-governance under this title [25 U.S.C. § 458aaa et seq.].

(c) **References**

All references in this Act to section 1 of the Act of June 26, 1936 (49 Stat. 1967; chapter 831) [25 U.S.C. § 501] are hereby deemed to include the first section of the Act of July 3, 1952 (66 Stat. 323; chapter 549; 25 U.S.C. § 82a).

Sec. 512. Facilitation [25 U.S.C. § 458aaa-11]

(a) **Secretarial interpretation**

Except as otherwise provided by law, the Secretary shall interpret all Federal laws, Executive orders, and regulations in a manner that will facilitate—

(1) the inclusion of programs, services, functions, and activities (or portions thereof) and funds associated therewith, in the agreements entered into under this section;

(2) the implementation of compacts and funding agreements entered into under this title [25 U.S.C. § 458aaa et seq.]; and

(3) the achievement of tribal health goals and objectives.

(b) **Regulation waiver.**

(1) **In general**

An Indian tribe may submit a written request to waive application of a regulation promulgated under section 517 [25 U.S.C. § 458aaa-16] or the authorities specified in section 505(b) [25 U.S.C. § 458aaa-4(b)] for a compact or funding agreement entered into with the Indian Health Service under this title [25 U.S.C. § 458aaa et seq.], to the Secretary identifying the applicable Federal regulation sought to be waived and the basis for the request.

(2) **Approval**

Not later than 90 days after receipt by the Secretary of a written request by an Indian tribe to waive application of a regulation for a compact or funding agreement entered into under this title [25 U.S.C. § 458aaa et seq.], the Secretary shall either approve or deny the requested waiver in writing. A denial may be made only upon a specific finding by the Secretary that identified language in the regulation may not be waived because such waiver is prohibited by Federal law. A failure to approve or deny a waiver request not later than 90 days after receipt shall be deemed an approval of such request. The Secretary's decision shall be final for the Department.

(c) **Access to Federal property**

In connection with any compact or funding agreement executed pursuant to this title [25 U.S.C. § 458aaa et seq.] or an agreement negotiated under the Tribal Self-Governance Demonstration Project established under title III [Repealed by Pub.L. 106-260, § 10, Aug. 18, 2000, 114 Stat. 734], as in effect before the enactment of the Tribal Self-Governance Amendments of 2000 [enacted Aug. 18, 2000], upon the request of an Indian tribe, the Secretary—

(1) shall permit an Indian tribe to use existing school buildings, hospitals, and other facilities and all equipment therein or appertaining thereto and other personal property owned by the Government within the Secretary's jurisdiction under such terms and conditions as may be agreed upon by the Secretary and the Indian tribe for their use and maintenance;

(2) may donate to an Indian tribe title to any personal or real property found to be excess to the needs of any agency of the Department, or the General Services Administration, except that—

(A) subject to the provisions of subparagraph (B), title to property and equipment furnished by the Federal Government for use in the performance of the compact or funding agreement or purchased with funds under any compact or funding agreement shall, unless otherwise requested by the Indian tribe, vest in the appropriate Indian tribe;

(B) if property described in subparagraph (A) has a value in excess of $ 5,000 at the time of retrocession, withdrawal, or reassumption, at the option of the Secretary upon the retrocession, withdrawal, or reassumption, title to such property and equipment shall revert to the Department of Health and Human Services; and

(C) all property referred to in subparagraph (A) shall remain eligible for replacement, maintenance, and improvement on the same basis as if title to such property were vested in the United States; and

(3) shall acquire excess or surplus Government personal or real property for donation to an Indian tribe if the Secretary determines the property is appropriate for use by the Indian tribe for any purpose for which a compact or funding agreement is authorized under this title [25 U.S.C. § 458aaa et seq.].

(d) **Matching or cost-participation requirement**

All funds provided under compacts, funding agreements, or grants made pursuant to this Act, shall be treated as non-Federal funds for purposes of meeting matching or cost participation requirements under any other Federal or non-Federal program.

(e) **State facilitation**

States are hereby authorized and encouraged to enact legislation, and to enter into agreements with Indian tribes to facilitate and supplement the initiatives, programs, and policies authorized by this title [25 U.S.C. § 458aaa et seq.] and other Federal laws benefiting Indians and Indian tribes.

(f) **Rules of construction**

Each provision of this title [25 U.S.C. § 458aaa et seq.] and each provision of a compact or funding agreement shall be liberally construed for the benefit of the Indian tribe participating in self-governance and any ambiguity shall be resolved in favor of the Indian tribe.

Sec. 513. Budget request [25 U.S.C. § 458aaa-12]

(a) **Requirement of annual budget request**

(1) **In general**

The President shall identify in the annual budget request submitted to Congress under section 1105 of title 31, United States Code, all funds necessary to fully fund all funding agreements authorized under this title [25 U.S.C. § 458aaa et seq.], including funds specifically identified to fund tribal base budgets. All funds so appropriated shall be apportioned to the Indian Health Service. Such funds shall be provided to the Office of Tribal Self-Governance which shall be responsible for distribution of all funds provided under section 505 [25 U.S.C. § 458aaa-4].

(2) **Rule of construction**

Nothing in this subsection shall be construed to authorize the Indian Health Service to reduce the amount of funds that a self-governance tribe is otherwise entitled to receive under its funding agreement or other applicable law, whether or not such funds are apportioned to the Office of Tribal Self-Governance under this section.

(b) **Present funding; shortfalls**

In such budget request, the President shall identify the level of need presently funded and any shortfall in funding (including direct program and contract support costs) for each Indian tribe, either directly by the Secretary of Health and Human Services, under self-determination contracts, or under compacts and funding agreements authorized under this title [25 U.S.C. § 458aaa et seq.].

Sec. 514. Reports [25 U.S.C. § 458aaa-13]

(a) **Annual report**

(1) **In general**

Not later than January 1 of each year after the date of the enactment of the Tribal Self-Governance Amendments of 2000 [enacted Aug. 18, 2000], the Secretary shall submit to the Committee on Indian Affairs of the Senate and the Committee on Resources of the House of Representatives a written report regarding the administration of this title [25 U.S.C. § 458aaa et seq.].

(2) **Analysis**

The report under paragraph (1) shall include a detailed analysis of the level of need being presently funded or unfunded for each Indian tribe, either directly by the Secretary, under self-determination contracts under title I, or under compacts and funding agreements authorized under this Act. In compiling reports pursuant to this

section, the Secretary may not impose any reporting requirements on participating Indian tribes or tribal organizations, not otherwise provided in this Act.

(b) **Contents**

The report under subsection (a) shall—

(1) be compiled from information contained in funding agreements, annual audit reports, and data of the Secretary regarding the disposition of Federal funds; and

(2) identify—

(A) the relative costs and benefits of self-governance;

(B) with particularity, all funds that are specifically or functionally related to the provision by the Secretary of services and benefits to self-governance Indian tribes and their members;

(C) the funds transferred to each self-governance Indian tribe and the corresponding reduction in the Federal bureaucracy;

(D) the funding formula for individual tribal shares of all headquarters funds, together with the comments of affected Indian tribes or tribal organizations, developed under subsection (c); and

(E) amounts expended in the preceding fiscal year to carry out inherent Federal functions, including an identification of those functions by type and location;

(3) contain a description of the method or methods (or any revisions thereof) used to determine the individual tribal share of funds controlled by all components of the Indian Health Service (including funds assessed by any other Federal agency) for inclusion in self-governance compacts or funding agreements;

(4) before being submitted to Congress, be distributed to the Indian tribes for comment (with a comment period of no less than 30 days, beginning on the date of distribution); and

(5) include the separate views and comments of the Indian tribes or tribal organizations.

(c) **Report on fund distribution method**

Not later than 180 days after the date of the enactment of the Tribal Self-Governance Amendments of 2000 [enacted Aug. 18, 2000], the Secretary shall, after consultation with Indian tribes, submit a written report to the Committee on Resources of the House of Representatives and the Committee on Indian Affairs of the Senate that describes the method or methods used to determine the individual tribal share of funds controlled by all components of the Indian Health Service (including funds assessed by any other Federal agency) for inclusion in self-governance compacts or funding agreements.

Sec. 515. Disclaimers [25 U.S.C. § 458aaa-14]

(a) **No funding reduction**

Nothing in this title [25 U.S.C. § 458aaa et seq.] shall be construed to limit or reduce in any way the funding for any program, project, or activity serving an Indian tribe under this or other applicable Federal law. Any Indian tribe that alleges that a compact or funding agreement is in violation of this section may apply the provisions of section 110 [25 U.S.C. § 450m-1].

(b) **Federal trust and treaty responsibilities**

Nothing in this Act shall be construed to diminish in any way the trust responsibility of the United States to Indian tribes and individual Indians that exists under treaties, Executive orders, or other laws and court decisions.

(c) **Obligations of the United States**

The Indian Health Service under this Act shall neither bill nor charge those Indians who may have the economic means to pay for services, nor require any Indian tribe to do so.

Sec. 516. Application of other sections of the Act [25 U.S.C. § 458aaa-15]

(a) **Mandatory application**

All provisions of sections 5(b), 6, 7, 102(c) and (d), 104, 105(k) and (l), 106(a) through (k), and 111 of this Act [25 U.S.C. § 450c(b), 450d, 450e, 450f(c) and (d), 450i, 450j(k) and (l), 450j-1(a)-(k), and 450n] and section 314 of Public Law 101-512 [25 U.S.C. § 450f note] (coverage under chapter 171 of title 28, United States Code [28 U.S.C. § 2671 et seq.], commonly known as the "Federal Tort Claims Act"), to the extent not in conflict with this title [25 U.S.C. § 458aaa et seq.], shall apply to compacts and funding agreements authorized by this title [25 U.S.C. § 458aaa et seq.].

(b) **Discretionary application**

At the request of a participating Indian tribe, any other provision of title I, to the extent such provision is not in conflict with this title [25 U.S.C. § 458aaa et seq.], shall be made a part of a funding agreement or compact entered into under this title [25 U.S.C. § 458aaa et seq.]. The Secretary is obligated to include such provision at the option of the participating Indian tribe or tribes. If such provision is incorporated it shall have the same force and effect as if it were set out in full in this title [25 U.S.C. § 458aaa et seq.]. In the event an Indian tribe requests such incorporation at the negotiation stage of a compact or funding agreement, such incorporation shall be deemed effective immediately and shall control the negotiation and resulting compact and funding agreement.

Sec. 517. Regulations [25 U.S.C. § 458aaa-16]

(a) **In general**

(1) **Promulgation**

Not later than 90 days after the date of the enactment of the Tribal Self-Governance Amendments of 2000 [enacted Aug. 18, 2000], the Secretary shall initiate procedures under subchapter III of chapter 5 of title 5, United States Code [5 U.S.C. § 561 et seq.], to negotiate and promulgate such regulations as are necessary to carry out this title [25 U.S.C. § 458aaa et seq.].

(2) **Publication of proposed regulations**

Proposed regulations to implement this title [25 U.S.C. § 458aaa et seq.] shall be published in the Federal Register by the Secretary no later than 1 year after the date of the enactment of the Tribal Self-Governance Amendments of 2000 [enacted Aug. 18, 2000].

(3) **Expiration of authority**

The authority to promulgate regulations under paragraph (1) shall expire 21 months after the date of the enactment of the Tribal Self-Governance Amendments of 2000 [enacted Aug. 18, 2000].

(b) **Committee**

(1) **In general**

A negotiated rulemaking committee established pursuant to section 565 of title 5, United States Code, to carry out this section shall have as its members only Federal and tribal government representatives, a majority of whom shall be nominated by and be representatives of Indian tribes with funding agreements under this Act.

(2) **Requirements**

The committee shall confer with, and accommodate participation by, representatives of Indian tribes, inter-tribal consortia, tribal organizations, and individual tribal members.

(c) **Adaptation of procedures**

The Secretary shall adapt the negotiated rulemaking procedures to the unique context of self-governance and the government-to-government relationship between the United States and Indian tribes.

(d) **Effect**

The lack of promulgated regulations shall not limit the effect of this title [25 U.S.C. § 458aaa et seq.].

(e) **Effect of circulars, policies, manuals, guidances, and rules**

Unless expressly agreed to by the participating Indian tribe in the compact or funding agreement, the participating Indian tribe shall not be subject to any agency circular, policy, manual, guidance, or rule adopted by the Indian Health Service, except for the eligibility provisions of section 105(g) [25 U.S.C. § 450j(g)] and regulations promulgated under section 517 [this section].

Sec. 518. Appeals [25 U.S.C. § 458aaa-17]

In any appeal (including civil actions) involving decisions made by the Secretary under this title [25 U.S.C. § 458aaa et seq.], the Secretary shall have the burden of proof of demonstrating by clear and convincing evidence—

(1) the validity of the grounds for the decision made; and

(2) that the decision is fully consistent with provisions and policies of this title [25 U.S.C. § 458aaa et seq.].

Sec. 519. Authorization of appropriations [25 U.S.C. § 458aaa-18]

(a) **In general**

There are authorized to be appropriated such sums as may be necessary to carry out this title [25 U.S.C. § 458aaa et seq.].

(b) **Availability of appropriations**

Notwithstanding any other provision of this Act, the provision of funds under this Act shall be subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe in order to make funds available to another tribe or tribal organization under this Act.

APPENDIX II

TITLE I

APPENDIX II – TITLE I

A. Title I, Award Process for Subpart J Construction Contracts

I. Planning

1) **Consultation.** Prior to spending any funds on planning, design, construction or renovation project, the IHS must consult with any Tribe that would be significantly affected and provide the following information (25 CFR 900.119):

   A. Size

   B. Location

2) **Notification to Tribes** within 30 days after allocation of funds for planning phase, design phase, or construction contract phase activities for a specific project by registered mail with return receipt including the following information (25 CFR 900.120):

   A. Available Funds

3) **Approved Project**

   A. SFC Project has been selected for funding from SDS or PDS and Notification letter has been sent.

   B. Facilities – Approved PSD or POR

4) **Identify Project Leadership Team Members**

   Reference Sample Communication Protocol Chart in Section 5-D

5) **Schedule Internal Planning Meeting – ALL Team Members**

6) **Meeting Objectives**

   A. Agree on Team Members

      i. Negotiation Team

      ii. Proposal Reviewers

      iii. Other Program

      iv. Design Phase Reviews (concept, schematic, design development, final construction documents)

   B. Define Roles and Responsibilities of each team member

   C. Define Communication Protocol

   D. Review Project

      i. Identify contractible functions by the Tribe

      ii. Identify functions retained by IHS

   E. Review Subpart J procedures as necessary.

   F. Identify available info to be furnished to the Tribe and assign responsibility:

      i. Construction Drawings

      ii. Maps

      iii. Engineering Reports

      iv. Design Reports

v. Plans of Requirements

vi. Cost Estimates

vii. Environmental Assessments or Environmental Impact Reports

viii. Archeological Reports

G. Develop proposed pre-proposal conference agenda.

H. Project Budget (amount Secretary would otherwise spend)

II. Review and Negotiation

1) Letter of Intent

2) Pre-proposal Conference

3) Tribe prepares it's contract proposal (may request technical assistance)

4) Secretary provides all available information (within 30 days)

5) Negotiation Phase during the development of proposal (25 CFR 900.122)

A. Development of Negotiation Schedule

B. Technical Assistance

C. Joint Scoping Session – Review of (as applicable)

i. Plans

ii. Specifications

iii. Engineering Reports

iv. Cost Estimates

v. All other available information

vi. Identify all areas of disagreement

D. Secretarial Revisions to Plans, Designs, Cost Estimates

E. Negotiation Sessions to Develop Mutually Agreeable Contract Proposal

F. Alternative Dispute Resolution

i. May be requested by Tribe before submission of Proposal.

ii. Resolve Areas of Disagreement.

III. Proposal Submission

1) Tribe & IHS develop mutually agreeable proposal under 25 CFR 900.122 – Approved and awarded w/in 30 days

2) Tribe & IHS Disagree – Declination within 30 days.

A. Declination criteria apply

B. Follow 25 CFR 900.123

IV. Post Award

1) Post Award Conference (Optional)

A. Schedule

i. New Team Members

ii. A/E Contract Awarded (review design, review criteria)

2) Design Phase Activities

A. Monthly Job Progress

i. Meetings/conference calls

ii. Tribe, A/E, IHS PO, IHS SU

3) Design

A. Construction Documents will be produced in accordance with the POR and/or Scope of Work (SOW).

B. The Secretary reviews for general compliance with the contract requirements:

i. Concepts

a. 21 day review and comment

ii. Schematics

a. 21 day review and approval

iii. Design Development

a. 21 day review and comment

iv. Final Construction Documents

a. 21 day review and approval

C. Monitor Schedule

D. Monitor Advance Payments

E. Monitor Quarterly Progress Reports

F. Monitor Submission of Quarterly Progress Reports

i. Financial

ii. Job Progress Reports

4) Construction – Post Award Conference

A. Schedule

i. New team members

ii. Construction Contract Awarded

B. Construction Phase

i. The facility will be built in accordance with the construction documents provided as a part of design activities

ii. Monthly Job Progress Meetings and monitoring visits

a. Attendance

1. Tribe
2. A/E
3. Construction Contractor
4. IHS: PO, SUD, CO, Area

b. Monitoring

1. Review Construction for Material Compliance
2. Review Schedule
3. Review (25 CFR 900.130)
4. Contracts
5. Major subcontracts
6. Modifications (**MUST BE BILATERAL** reference P.L 93-638 Sec. 110(b))
7. Construction Documents
8. Change orders
9. Shop drawings
10. Equipment cut sheets
11. Inspections reports
12. Testing reports
13. Current redline drawings
14. Review concerns of all parties
15. Monthly report (by IHS Designated Official)

C. Final Inspection and acceptance – It is preferable for the Tribe to accept the facility from the subcontractor and IHS to accept the facility from the Tribe at the same time. This coordination avoids differences in warranty dates, responsibility for utilities, site security, etc.

D. Warranty Phase

E. Contract Closeout

i. Final report – Tribe

a. Inspection

b. Report

ii. Personal property disposition

iii. Final acceptance – IHS

iv. Final financial report and release of claims

v. Financial reconciliation- Obligations, payments, financial reports

vi. Disposition of savings (cost reimbursement contracts)

vii. Final acceptance letter to Tribe if title vests with IHS

F. Project Close-out – IHS Program

i. Real Property Report - Facilities

B. Title I Regulations; 25 CFR Part 900 Indian Self-Determination and Education Assistance Act Amendments; Final Rule

Code of Federal Regulations (CFR) Title 25: Indians, Part 900 – Contracts Under the Indian Self-Determination and Education Assistance Act

Subpart A – General Provisions

§ 900.1 Authority.

These regulations are prepared, issued, and maintained jointly by the Secretary of Health and Human Services and the Secretary of the Interior, with the active participation and representation of Indian tribes, tribal organizations, and individual tribal members pursuant to the guidance of the Negotiated Rulemaking procedures required by section 107 of the Indian Self-Determination and Education Assistance Act.

§ 900.2 Purpose and scope.

(a) *General.* These regulations codify uniform and consistent rules for contracts by the Department of Health and Human Services (DHHS) and the Department of the Interior (DOI) in implementing title I of the Indian Self-Determination and Education Assistance Act, Public Law 93–638, 25 U.S.C. 450 et seq., as amended and sections 1 through 9 preceding that title.

(b) *Programs funded by other Departments and agencies.* Included under this part are programs administered (under current or future law or interagency agreement) by the DHHS and the DOI for the benefit of Indians for which appropriations are made to other Federal agencies.

(c) *This part included in contracts by reference.* Each contract, including grants and cooperative agreements in lieu of contracts awarded under section 9 of the Act, shall include by reference the provisions of this part, and any amendment thereto, and they are binding on the Secretary and the contractor except as otherwise specifically authorized by a waiver under section 107(e) of the Act.

(d) *Freedom of Information.* Access to records maintained by the Secretary is governed by the Freedom of Information Act (5 U.S.C. 552) and other applicable Federal law. Except for previously provided copies of tribal records that the Secretary demonstrates are clearly required to be maintained as part of the record keeping systems of the DHHS or the DOI, or both, records of the contractors (including archived records) shall not be considered Federal records for the purpose of the Freedom of Information Act. The Freedom of Information Act does not apply to records maintained solely by Indian tribes and tribal organizations.

(e) *Privacy Act.* Section 108(b) of the Indian Self-Determination Act states that records of the tribal government or tribal organizations shall not be considered Federal records for the purposes of the Privacy Act.

(f) *Information collection.* The Office of Management and Budget has approved, under 44 U.S.C. chapter 35, the information collection requirements in part 900 under assigned control number 1076–0136. The information for part 900 is being collected and used by the Departments to determine applicant eligibility, evaluate applicant capabilities, protect the service population, safeguard Federal funds and other resources, and permit the Departments to administer and evaluate contract programs.

§ 900.3 Policy statements.

(a) *Congressional policy.*

(1) Congress has recognized the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction, planning, conduct and administration of educational as well as other Federal programs and services to Indian communities so as to render such programs and services more responsive to the needs and desires of those communities.

(2) Congress has declared its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the

development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

(3) Congress has declared that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.

(4) Congress has declared that the programs, functions, services, or activities that are contracted and funded under this Act shall include administrative functions of the Department of the Interior and the Department of Health and Human Services (whichever is applicable) that support the delivery of services to Indians, including those administrative activities supportive of, but not included as part of, the service delivery programs described in this paragraph that are otherwise contractible. The administrative functions referred to in the preceding sentence shall be contractible without regard to the organizational level within the Department that carries out such functions. Contracting of the administrative functions described herein shall not be construed to limit or reduce in any way the funding for any program, function, service, or activity serving any other tribe under the Act or any other law. The Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another Indian tribe or tribal organization under this Act.

(5) Congress has further declared that each provision of the Act and each provision of contracts entered into thereunder shall be liberally construed for the benefit of the tribes or tribal organizations to transfer the funding and the related functions, services, activities, and programs (or portions thereof), that are otherwise contractible under the Act, including all related administrative functions, from the Federal government to the contractor.

(6) Congress has declared that one of the primary goals of the 1994 amendments to the Act was to minimize the reporting requirements applicable to tribal contractors and to eliminate excessive and burdensome reporting requirements. Reporting requirements over and above the annual audit report are to be negotiated with disagreements subject to the declination procedures of section 102 of the Act.

(7) Congress has declared that there not be any threshold issues which would avoid the declination, contract review, approval, and appeal process.

(8) Congress has declared that all self-determination contract proposals must be supported by the resolution of an Indian tribe(s).

(9) Congress has declared that to the extent that programs, functions, services, and activities carried out by tribes and tribal organizations pursuant to contracts entered into under this Act reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings that have not otherwise been included in the amount of contract funds determined under section 106(a) of the Act, the Secretary shall make such savings available for the provision of additional services to program beneficiaries, either directly or through contractors, in a manner equitable to both direct and contracted programs.

(b) *Secretarial policy*.

(1) It is the policy of the Secretary to facilitate the efforts of Indian tribes and tribal organizations to plan, conduct and administer programs, functions, services and activities, or portions thereof, which the Departments are authorized to administer for the benefit of Indians because of their status as Indians. The Secretary shall make best efforts to remove any obstacles which might hinder Indian tribes and tribal organizations including obstacles that hinder tribal autonomy and flexibility in the administration of such programs.

(2) It is the policy of the Secretary to encourage Indian tribes and tribal organizations to become increasingly knowledgeable about the Departments' programs administered for the benefit of Indians by providing information on such programs, functions and activities and the opportunities Indian tribes have regarding them.

(3) It is the policy of the Secretary to provide a uniform and consistent set of rules for contracts under the Act. The rules contained herein are designed to facilitate and encourage Indian tribes to participate in the planning, conduct, and administration of those Federal programs serving Indian people. The Secretary shall afford Indian tribes and tribal organizations the flexibility, information, and discretion necessary to design contractible programs to meet the needs of their communities consistent with their diverse demographic, geographic, economic, cultural, health, social, religious and institutional needs.

(4) The Secretary recognizes that contracting under the Act is an exercise by Indian tribes of the government-to-government relationship between the United States and the Indian tribes. When an Indian tribe contracts, there is a transfer of the responsibility with the associated funding. The tribal contractor is accountable for managing the

day-to-day operations of the contracted Federal programs, functions, services, and activities. The contracting tribe thereby accepts the responsibility and accountability to the beneficiaries under the contract with respect to use of the funds and the satisfactory performance of the programs, functions, services and activities funded under the contract. The Secretary will continue to discharge the trust responsibilities to protect and conserve the trust resources of Indian tribes and the trust resources of individual Indians.

(5) The Secretary recognizes that tribal decisions to contract or not to contract are equal expressions of self-determination.

(6) The Secretary shall maintain consultation with tribal governments and tribal organizations in the Secretary's budget process relating to programs, functions, services and activities subject to the Act. In addition, on an annual basis, the Secretary shall consult with, and solicit the participation of, Indian tribes and tribal organizations in the development of the budget for the Indian Health Service and the Bureau of Indian Affairs (including participation of Indian tribes and tribal organizations in formulating annual budget requests that the Secretary submits to the President for submission to Congress pursuant to section 1105 of title 31, United States Code).

(7) The Secretary is committed to implementing and fully supporting the policy of Indian self-determination by recognizing and supporting the many positive and successful efforts and directions of tribal governments and extending the applicability of this policy to all operational components within the Department. By fully extending Indian self-determination contracting to all operational components within the Department having programs or portions of programs for the benefit of Indians under section 102(a)(1) (A) through (D) and for the benefit of Indians because of their status as Indians under section 102(a)(1)(E), it is the Secretary's intent to support and assist Indian tribes in the development of strong and stable tribal governments capable of administering quality programs that meet the tribally determined needs and directions of their respective communities. It is also the policy of the Secretary to have all other operational components within the Department work cooperatively with tribal governments on a government-to-government basis so as to expedite the transition away from Federal domination of Indian programs and make the ideals of Indian self-government and self-determination a reality.

(8) It is the policy of the Secretary that the contractibility of programs under this Act should be encouraged. In this regard, Federal laws and regulations should be interpreted in a manner that will facilitate the inclusion of those programs or portions of those programs that are for the benefit of Indians under section 102(a)(1) (A) through (D) of the Act, and that are for the benefit of Indians because of their status of Indians under section 102(a)(1)(E) of the Act.

(9) It is the Secretary's policy that no later than upon receipt of a contract proposal under the Act (or written notice of an Indian tribe or tribal organization's intention to contract), the Secretary shall commence planning such administrative actions, including but not limited to transfers or reductions in force, transfers of property, and transfers of contractible functions, as may be necessary to ensure a timely transfer of responsibilities and funding to Indian tribes and tribal organizations.

(10) It is the policy of the Secretary to make available to Indian tribes and tribal organizations all administrative functions that may lawfully be contracted under the Act, employing methodologies consistent with the methodology employed with respect to such functions under titles III and IV of the Act.

(11) The Secretary's commitment to Indian self-determination requires that these regulations be liberally construed for the benefit of Indian tribes and tribal organizations to effectuate the strong Federal policy of self-determination and, further, that any ambiguities herein be construed in favor of the Indian tribe or tribal organization so as to facilitate and enable the transfer of services, programs, functions, and activities, or portions thereof, authorized by the Act.

§ 900.4 Effect on existing tribal rights.

Nothing in these regulations shall be construed as:

(a) Affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by Indian tribes;

(b) Terminating, waiving, modifying, or reducing the trust responsibility of the United States to the Indian tribe(s) or individual Indians. The Secretary shall act in good faith in upholding this trust responsibility;

(c) Mandating an Indian tribe to apply for a contract(s) or grant(s) as described in the Act; or

(d) Impeding awards by other Departments and agencies of the United States to Indian tribes to administer Indian programs under any other applicable law.

§ 900.5 Effect of these regulations on Federal program guidelines, manual, or policy directives.

Except as specifically provided in the Act, or as specified in subpart J, an Indian tribe or tribal organization is not required to abide by any unpublished requirements such as program guidelines, manuals, or policy directives of the Secretary, unless otherwise agreed to by the Indian tribe or tribal organization and the Secretary, or otherwise required by law.

Subpart B – Definitions

§ 900.6 Definitions.

Unless otherwise provided in this part:

Act means secs. 1 through 9, and title I of the Indian Self-Determination and Education Assistance Act of 1975, Public Law 93–638, as amended.

Annual funding agreement means a document that represents the negotiated agreement of the Secretary to fund, on an annual basis, the programs, services, activities and functions transferred to an Indian tribe or tribal organization under the Act.

Appeal means a request by an Indian tribe or tribal organization for an administrative review of an adverse Agency decision.

Awarding official means any person who by appointment or delegation in accordance with applicable regulations has the authority to enter into and administer contracts on behalf of the United States of America and make determinations and findings with respect thereto. Pursuant to the Act, this person can be any Federal official, including but not limited to, contracting officers.

BIA means the Bureau of Indian Affairs of the Department of the Interior.

Contract means a self-determination contract as defined in section 4(j) of the Act.

Contract appeals board means the Civilian Board of Contract Appeals (CBCA).

Contractor means an Indian tribe or tribal organization to which a contract has been awarded.

Days means calendar days; except where the last day of any time period specified in these regulations falls on a Saturday, Sunday, or a Federal holiday, the period shall carry over to the next business day unless otherwise prohibited by law.

Department(s) means the Department of Health and Human Services (HHS) or the Department of the Interior (DOI), or both.

IHS means the Indian Health Service of the Department of Health and Human Services.

Indian means a person who is a member of an Indian Tribe.

Indian tribe means any Indian tribe, band, nation, or other organized group, or community, including pueblos, rancherias, colonies and any Alaska Native Village, or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Indirect cost rate means the rate(s) arrived at through negotiation between an Indian tribe or tribal organization and the appropriate Federal Agency.

Indirect costs means costs incurred for a common or joint purpose benefiting more than one contract objective or which are not readily assignable to the contract objectives specifically benefitted without effort disproportionate to the results achieved.

Initial contract proposal means a proposal for programs, functions, services, or activities that the Secretary is authorized to perform but which the Indian tribe or tribal organization is not now carrying out.

Real property means any interest in land together with the improvements, structures, and fixtures and appurtenances thereto.

Reassumption means rescission, in whole or in part, of a contract and assuming or resuming control or operation of the contracted program by the Secretary without consent of the Indian tribe or tribal organization pursuant to the notice and other procedures set forth in subpart P.

Retrocession means the voluntary return to the Secretary of a contracted program, in whole or in part, for any reason, before the expiration of the term of the contract.

Secretary means the Secretary of Health and Human Services (HHS) or the Secretary of the Interior (DOI), or both (and their respective delegates).

Tribal organization means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: provided, that, in any case where a contract is let or a grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant.

Trust resources means an interest in land, water, minerals, funds, or other assets or property which is held by the United States in trust for an Indian tribe or an individual Indian or which is held by an Indian tribe or Indian subject to a restriction on alienation imposed by the United States.

Subpart C – Contract Proposal Contents

§ 900.7 What technical assistance is available to assist in preparing an initial contract proposal?

The Secretary shall, upon request of an Indian tribe or tribal organization and subject to the availability of appropriations, provide technical assistance on a non-reimbursable basis to such Indian tribe or tribal organization to develop a new contract proposal or to provide for the assumption by the Indian tribe or tribal organization of any program, service, function, or activity (or portion thereof) that is contractible under the Act. The Secretary may also make a grant to an Indian tribe or tribal organization for the purpose of obtaining technical assistance, as provided in section 103 of the Act. An Indian tribe or tribal organization may also request reimbursement for pre-award costs for obtaining technical assistance under sections 106(a) (2) and (5) of the Act.

§ 900.8 What must an initial contract proposal contain?

An initial contract proposal must contain the following information:

(a) The full name, address and telephone number of the Indian tribe or tribal organization proposing the contract.

(b) If the tribal organization is not an Indian tribe, the proposal must also include:

(1) A copy of the tribal organization's organizational documents (e.g., charter, articles of incorporation, bylaws, etc.).

(2) The full name(s) of the Indian tribe(s) with which the tribal organization is affiliated.

(c) The full name(s) of the Indian tribe(s) proposed to be served.

(d) A copy of the authorizing resolution from the Indian tribe(s) to be served.

(1) If an Indian tribe or tribal organization proposes to serve a specified geographic area, it must provide authorizing resolution(s) from all Indian tribes located within the specific area it proposes to serve. However, no resolution is required from an Indian tribe located outside the area proposed to be served whose members reside within the proposed service area.

(2) If a currently effective authorizing resolution covering the scope of an initial contract proposal has already been provided to the agency receiving the proposal, a reference to that resolution.

(e) The name, title, and signature of the authorized representative of the Indian tribe or tribal organization submitting the contract proposal.

(f) The date of submission of the proposal.

(g) A brief statement of the programs, functions, services, or activities that the tribal organization proposes to perform, including:

(1) A description of the geographical service area, if applicable, to be served.

(2) The estimated number of Indian people who will receive the benefits or services under the proposed contract.

(3) An identification of any local, Area, regional, or national level departmental programs, functions, services, or activities to be contracted, including administrative functions.

(4) A description of the proposed program standards;

(5) An identification of the program reports, data and financial reports that the Indian tribe or tribal organization will provide, including their frequency.

(6) A description of any proposed redesign of the programs, services, functions, or activities to be contracted,

(7) Minimum staff qualifications proposed by the Indian tribe and tribal organization, if any; and

(8) A statement that the Indian tribe or tribal organization will meet the minimum procurement, property and financial management standards set forth in subpart F, subject to any waiver that may have been granted under subpart K.

(h) The amount of funds requested, including:

(1) An identification of the funds requested by programs, functions, services, or activities, under section 106(a)(1) of the Act, including the Indian tribe or tribal organization's share of funds related to such programs, functions, services, or activities, if any, from any Departmental local, area, regional, or national level.

(2) An identification of the amount of direct contract support costs, including one-time start-up or preaward costs under section 106(a)(2) and related provisions of the Act, presented by major categories such as:

(i) Personnel (differentiating between salary and fringe benefits);

(ii) Equipment;

(iii) Materials and supplies;

(iv) Travel;

(v) Subcontracts; and

(vi) Other appropriate items of cost.

(3) An identification of funds the Indian tribe or tribal organization requests to recover for indirect contract support costs. This funding request must include either:

(i) A copy of the most recent negotiated indirect cost rate agreement; or

(ii) An estimated amount requested for indirect costs, pending timely establishment of a rate or negotiation of administrative overhead costs.

(4) To the extent not stated elsewhere in the budget or previously reported to the Secretary, any preaward costs, including the amount and time period covered or to be covered; and

(5) At the option of the Indian tribe or tribal organization, an identification of programs, functions, services, or activities specified in the contract proposal which will be funded from sources other than the Secretary.

(i) The proposed starting date and term of the contract.

(j) In the case of a cooperative agreement, the nature and degree of Federal programmatic involvement anticipated during the term of the agreement.

(k) The extent of any planned use of Federal personnel and Federal resources.

(l) Any proposed waiver(s) of the regulations in this part; and

(m) A statement that the Indian tribe or tribal organization will implement procedures appropriate to the programs, functions, services or activities proposed to be contracted, assuring the confidentiality of medical records and of information relating to the financial affairs of individual Indians obtained under the proposal contract, or as otherwise required by law.

§ 900.9 May the Secretary require an Indian tribe or tribal organization to submit any other information beyond that identified in §900.8?

No.

§ 900.10 How does an Indian tribe or tribal organization secure a list of all Federal property currently in use in carrying out the programs, functions, services, or activities that benefit the Indian tribe or tribal organization to assist in negotiating a contract?

The Indian tribe or tribal organization submits a written request to the Secretary. The Secretary shall provide the requested information, including the condition of the property, within 60 days.

§ 900.11 What should an Indian tribe or tribal organization that is proposing a contract do about specifying the Federal property that the Indian tribe or tribal organization may wish to use in carrying out the contract?

The Indian tribe or tribal organization is encouraged to provide the Secretary, as early as possible, with:

(a) A list of the following Federal property intended for use under the contract:

(1) Equipment;

(2) Furnishings;

(3) Facilities; and

(4) Other real and personal property.

(b) A statement of how the Indian tribe or tribal organization will obtain each item by transfer of title under section 105(f)(2) of the Act and section 1(b)(8) of the model agreement set forth in section 108(c) of the Act, through a temporary use permit, similar arrangement, or otherwise; and

(c) Where equipment is to be shared by contracted and non-contracted programs, services, functions, or activities, a proposal outlining proposed equipment sharing or other arrangements.

§ 900.12 Are the proposal contents requirements the same for renewal of a contract that is expiring and for securing an annual funding agreement after the first year of the funding agreement?

No. In these situations, an Indian tribe or tribal organization should submit a renewal proposal (or notification of intent not to renew) or an annual funding agreement proposal at least 90 days before the expiration date of the contract or existing annual funding agreement. The proposal shall provide funding information in the same detail and format as the original proposal and may also identify any significant proposed changes.

§ 900.13 Does the contract proposal become part of the final contract?

No, unless the parties agree.

Subpart D – Review and Approval of Contract Proposals

§ 900.14 What does this subpart cover?

This subpart covers any proposal to enter into a self-determination contract, to amend an existing self-determination contract, to renew an existing self-determination contract, or to redesign a program through a self-determination contract.

§ 900.15 What shall the Secretary do upon receiving a proposal?

Upon receipt of a proposal, the Secretary shall:

(a) Within two days notify the applicant in writing that the proposal has been received;

(b) Within 15 days notify the applicant in writing of any missing items required by §900.8 and request that the items be submitted within 15 days of receipt of the notification; and

(c) Review the proposal to determine whether there are declination issues under section 102(a)(2) of the Act.

§ 900.16 How long does the Secretary have to review and approve the proposal and award the contract, or decline a proposal?

The Secretary has 90 days after receipt of a proposal to review and approve the proposal and award the contract or decline the proposal in compliance with section 102 of the Act and subpart E. At any time during the review period the Secretary may approve the proposal and award the requested contract.

§ 900.17 Can the statutory 90-day period be extended?

Yes, with written consent of the Indian tribe or tribal organization. If consent is not given, the 90-day deadline applies.

§ 900.18 What happens if a proposal is not declined within 90 days after it is received by the Secretary?

A proposal that is not declined within 90 days (or within any agreed extension under §900.17) is deemed approved and the Secretary shall award the contract or any amendment or renewal within that 90-day period and add to the contract the full amount of funds pursuant to section 106(a) of the Act.

§ 900.19 What happens when a proposal is approved?

Upon approval the Secretary shall award the contract and add to the contract the full amount of funds to which the contractor is entitled under section 106(a) of the Act.

Subpart E – Declination Procedures

§ 900.20 What does this subpart cover?

This subpart explains how and under what circumstances the Secretary may decline a proposal to contract, to amend an existing contract, to renew an existing contract, to redesign a program, or to waive any provisions of these regulations. For annual funding agreements, see §900.32.

§ 900.21 When can a proposal be declined?

As explained in §§900.16 and 900.17, a proposal can only be declined within 90 days after the Secretary receives the proposal, unless that period is extended with the voluntary and express written consent of the Indian tribe or tribal organization.

§ 900.22 For what reasons can the Secretary decline a proposal?

The Secretary may only decline to approve a proposal for one of five specific reasons:

(a) The service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;

(b) Adequate protection of trust resources is not assured;

(c) The proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract;

(d) The amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 106(a) of the Act; or

(e) The program, function, service, or activity (or a portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities covered under section 102(a)(1) of the Act because the proposal includes activities that cannot lawfully be carried out by the contractor.

§ 900.23 Can the Secretary decline a proposal where the Secretary's objection can be overcome through the contract?

No. The Secretary may not decline to enter into a contract with an Indian tribe or tribal organization based on any objection that will be overcome through the contract.

§ 900.24 Can a contract proposal for an Indian tribe or tribal organization's share of administrative programs, functions, services, and activities be declined for any reason other than the five reasons specified in §900.22?

No. The Secretary may only decline a proposal based upon one or more of the five reasons listed above. If a contract affects the preexisting level of services to any other tribe, the Secretary shall address that effect in the Secretary's annual report to Congress under section 106(c)(6) of the Act.

§ 900.25 What if only a portion of a proposal raises one of the five declination criteria?

The Secretary must approve any severable portion of a proposal that does not support a declination finding described in §900.20, subject to any alteration in the scope of the proposal that the Secretary and the Indian tribe or tribal organization approve.

§ 900.26 What happens if the Secretary declines a part of a proposal on the ground that the proposal proposes in part to plan, conduct, or administer a program, function, service or activity that is beyond the scope of programs

covered under section 102(a) of the Act, or proposes a level of funding that is in excess of the applicable level determined under section 106(a) of the Act?

In those situations the Secretary is required, as appropriate, to approve the portion of the program, function, service, or activity that is authorized under section 102(a) of the Act, or approve a level of funding that is authorized under section 106(a) of the Act. As noted in §900.25, the approval is subject to any alteration in the scope of the proposal that the Secretary and the Indian tribe or tribal organization approve.

§ 900.27 If an Indian tribe or tribal organization elects to contract for a severable portion of a proposal, does the Indian tribe or tribal organization lose its appeal rights to challenge the portion of the proposal that was declined?

No, but the hearing and appeal procedures contained in these regulations only apply to the portion of the proposal that was declined.

§ 900.28 Is technical assistance available to an Indian tribe or tribal organization to avoid declination of a proposal?

Yes. In accordance with section 103(d) of the Act, upon receiving a proposal, the Secretary shall provide any necessary requested technical assistance to an Indian tribe or tribal organization, and shall share all relevant information with the Indian tribe or tribal organization, in order to avoid declination of the proposal.

§ 900.29 What is the Secretary required to do if the Secretary decides to decline all or a portion of a proposal?

If the Secretary decides to decline all or a severable portion of a proposal, the Secretary is required:

(a) To advise the Indian tribe or tribal organization in writing of the Secretary's objections, including a specific finding that clearly demonstrates that (or that is supported by a controlling legal authority that) one of the conditions set forth in §900.22 exists, together with a detailed explanation of the reason for the decision to decline the proposal and, within 20 days, any documents relied on in making the decision; and

(b) To advise the Indian tribe or tribal organization in writing of the rights described in §900.31.

§ 900.30 When the Secretary declines all or a portion of a proposal, is the Secretary required to provide an Indian tribe or tribal organization with technical assistance?

Yes. The Secretary shall provide additional technical assistance to overcome the stated objections, in accordance with section 102(b) of the Act, and shall provide any necessary requested technical assistance to develop any modifications to overcome the Secretary's stated objections.

§ 900.31 When the Secretary declines all or a portion of a proposal, is an Indian tribe or tribal organization entitled to any appeal?

Yes. The Indian tribe or tribal organization is entitled to an appeal on the objections raised by the Secretary, with an agency hearing on the record, and the right to engage in full discovery relevant to any issue raised in the matter. The procedures for appeals are in subpart L of these regulations. Alternatively, at its option the Indian tribe or tribal organization has the right to sue in Federal district court to challenge the Secretary's decision.

§ 900.32 Can the Secretary decline an Indian tribe or tribal organization's proposed successor annual funding agreement?

No. If it is substantially the same as the prior annual funding agreement (except for funding increases included in appropriations acts or funding reductions as provided in section 106(b) of the Act) and the contract is with DHHS or the BIA, the Secretary shall approve and add to the contract the full amount of funds to which the contractor is entitled, and may not decline, any portion of a successor annual funding agreement. Any portion of an annual funding agreement proposal which is not substantially the same as that which was funded previously (e.g., a redesign proposal; waiver proposal; different proposed funding amount; or different program, service, function, or activity), or any annual funding agreement proposal which pertains to a contract with an agency of DOI other than the BIA, is subject to the declination criteria and procedures in subpart E. If there is a disagreement over the availability of appropriations, the Secretary may decline the proposal in part under the procedure in subpart E.

§ 900.33 Are all proposals to renew term contracts subject to the declination criteria?

Department of Health and Human Services and the Bureau of Indian Affairs will not review the renewal of a term contract for declination issues where no material and substantial change to the scope or funding of a program, functions, services, or activities has been proposed by the Indian tribe or tribal organization. Proposals to renew term contracts with DOI agencies other than the Bureau of Indian Affairs may be reviewed under the declination criteria.

Subpart F – Standards for Tribal or Tribal Organization Management Systems

General

§ 900.35 What is the purpose of this subpart?

This subpart contains the minimum standards for the management systems used by Indian tribes or tribal organizations when carrying out self-determination contracts. It provides standards for an Indian tribe or tribal organization's financial management system, procurement management system, and property management system.

§ 900.36 What requirements are imposed upon Indian tribes or tribal organizations by this subpart?

When carrying out self-determination contracts, Indian tribes and tribal organizations shall develop, implement, and maintain systems that meet these minimum standards, unless one or more of the standards have been waived, in whole or in part, under section 107(e) of the Act and subpart K.

§ 900.37 What provisions of Office of Management and Budget (OMB) circulars or the "common rule" apply to self-determination contracts?

The only provisions of OMB Circulars and the only provisions of the "common rule" that apply to self-determination contracts are the provisions adopted in these regulations, those expressly required or modified by the Act, and those negotiated and agreed to in a self-determination contract.

§ 900.38 Do these standards apply to the subcontractors of an Indian tribe or tribal organization carrying out a self-determination contract?

An Indian tribe or tribal organization may require that some or all of the standards in this subpart be imposed upon its subcontractors when carrying out a self-determination contract.

§ 900.39 What is the difference between a standard and a system?

(a) Standards are the minimum baseline requirements for the performance of an activity. Standards establish the "what" that an activity should accomplish.

(b) Systems are the procedural mechanisms and processes for the day-to-day conduct of an activity. Systems are "how" the activity will be accomplished.

§ 900.40 When are Indian tribe or tribal organization management standards and management systems evaluated?

(a) Management standards are evaluated by the Secretary when the Indian tribe or tribal organization submits an initial contract proposal.

(b) Management systems are evaluated by an independent auditor through the annual single agency audit report that is required by the Act and OMB Circular A–128.

§ 900.41 How long must an Indian tribe or tribal organization keep management system records?

The Indian tribe or tribal organization must retain financial, procurement and property records for the minimum periods described below. Electronic, magnetic or photographic records may be substituted for hard copies.

(a) *Financial records.* Financial records include documentation of supporting costs incurred under the contract. These records must be retained for three years from the date of submission of the single audit report to the Secretary.

(b) *Procurement records.* Procurement records include solicitations, purchase orders, contracts, payment histories and records applicable of significant decisions. These records must be retained for three years after the Indian tribe or tribal organization or subcontractors make final payment and all other pending matters are closed.

(c) *Property management records.* Property management records of real and personal property transactions must be retained for three years from the date of disposition, replacement, or transfer.

(d) *Litigation, audit exceptions and claims.* Records pertaining to any litigation, audit exceptions or claims requiring management systems data must be retained until the action has been completed.

Standards for Financial Management Systems

§ 900.42 What are the general financial management system standards that apply to an Indian tribe carrying out a self-determination contract?

An Indian tribe shall expend and account for contract funds in accordance with all applicable tribal laws, regulations, and procedures.

§ 900.43 What are the general financial management system standards that apply to a tribal organization carrying out a self-determination contract?

A tribal organization shall expend and account for contract funds in accordance with the procedures of the tribal organization.

§ 900.44 What minimum general standards apply to all Indian tribe or tribal organization financial management systems when carrying out a self-determination contract?

The fiscal control and accounting procedures of an Indian tribe or tribal organization shall be sufficient to:

(a) Permit preparation of reports required by a self-determination contract and the Act; and

(b) Permit the tracing of contract funds to a level of expenditure adequate to establish that they have not been used in violation of any restrictions or prohibitions contained in any statute that applies to the self-determination contract.

§ 900.45 What specific minimum requirements shall an Indian tribe or tribal organization's financial management system contain to meet these standards?

An Indian tribe or tribal organization's financial management system shall include provisions for the following seven elements.

(a) *Financial reports.* The financial management system shall provide for accurate, current, and complete disclosure of the financial results of self-determination contract activities. This includes providing the Secretary a completed Financial Status Report, SF 269A, as negotiated and agreed to in the self-determination contract.

(b) *Accounting records.* The financial management system shall maintain records sufficiently detailed to identify the source and application of self-determination contract funds received by the Indian tribe or tribal organization. The system shall contain sufficient information to identify contract awards, obligations and unobligated balances, assets, liabilities, outlays, or expenditures and income.

(c) *Internal controls.* The financial management system shall maintain effective control and accountability for all self-determination contract funds received and for all Federal real property, personal property, and other assets furnished for use by the Indian tribe or tribal organization under the self-determination contract.

(d) *Budget controls.* The financial management system shall permit the comparison of actual expenditures or outlays with the amounts budgeted by the Indian tribe or tribal organization for each self-determination contract.

(e) *Allowable costs.* The financial management system shall be sufficient to determine the reasonableness, allowability, and allocability of self-determination contract costs based upon the terms of the self-determination contract and the Indian tribe or tribal organization's applicable OMB cost principles, as amended by the Act and these regulations. (The following chart lists certain OMB Circulars and suggests the entities that may use each, but the final selection of the applicable circular may differ from those shown, as agreed to by the Indian tribe or tribal organization and the Secretary. Agreements between an Indian tribe or tribal organization and the Secretary currently in place do not require renegotiation.) Copies of these circulars are available from the Executive Office of the President, Publications Service, 725 17th Street N. W., Washington, D. C. 20503.

Type of tribal organization	Applicable OMB cost circular
Tribal Government	A-87, “Cost Principles for State, Local and Indian Tribal Governments.”
Tribal private non-profit other than: (1) an institution of higher education, (2) a hospital, or (3) an organization named in OMB Circular A- 122 as not subject to that circular.	A-122, “Cost Principles for Non-Profit Organizations.”
Tribal educational institution	A-21, “Cost Principles for Educational Institutions.”

(f) *Source documentation.* The financial management system shall contain accounting records that are supported by source documentation, e.g., canceled checks, paid bills, payroll records, time and attendance records, contract award documents, purchase orders, and other primary records that support self-determination contract fund expenditures.

(g) *Cash management.* The financial management system shall provide for accurate, current, and complete disclosure of cash revenues disbursements, cash-on-hand balances, and obligations by source and application for each Indian tribe or tribal organization, and subcontractor if applicable, so that complete and accurate cash transactions may be prepared as required by the self-determination contract.

§ 900.46 What requirements are imposed upon the Secretary for financial management by these standards?

The Secretary shall establish procedures, consistent with Treasury regulations as modified by the Act, for the transfer of funds from the United States to the Indian tribe or tribal organization in strict compliance with the self-determination contract and the annual funding agreement.

Procurement Management System Standards

§ 900.47 When procuring property or services with self-determination contract funds, can an Indian tribe or tribal organization follow the same procurement policies and procedures applicable to other Indian tribe or tribal organization funds?

Indian tribes and tribal organizations shall have standards that conform to the standards in this subpart. If the Indian tribe or tribal organization relies upon standards different than those described below, it shall identify the standards it will use as a proposed waiver in the initial contract proposal or as a waiver request to an existing contract.

§ 900.48 If the Indian tribe or tribal organization does not propose different standards, what basic standards shall the Indian tribe or tribal organization follow?

(a) The Indian tribe or tribal organization shall ensure that its vendors and/or subcontractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(b) The Indian tribe or tribal organization shall maintain written standards of conduct governing the performance of its employees who award and administer contracts.

(1) No employee, officer, elected official, or agent of the Indian tribe or tribal organization shall participate in the selection, award, or administration of a procurement supported by Federal funds if a conflict of interest, real or apparent, would be involved.

(2) An employee, officer, elected official, or agent of an Indian tribe or tribal organization, or of a subcontractor of the Indian tribe or tribal organization, is not allowed to solicit or accept gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to sub-agreements, with the following exemptions. The Indian tribe or tribal organization may exempt a financial interest that is not substantial or a gift that is an unsolicited item of nominal value.

(3) These standards shall also provide for penalties, sanctions, or other disciplinary actions for violations of the standards.

(c) The Indian tribe or tribal organization shall review proposed procurements to avoid buying unnecessary or duplicative items and ensure the reasonableness of the price. The Indian tribe or tribal organization should consider consolidating or breaking out procurement to obtain more economical purchases. Where appropriate, the Indian tribe or tribal organization shall compare leasing and purchasing alternatives to determine which is more economical.

(d) The Indian tribe or tribal organization shall conduct all major procurement transactions by providing full and open competition, to the extent necessary to assure efficient expenditure of contract funds and to the extent feasible in the local area.

(1) Indian tribes or tribal organizations shall develop their own definition for “major procurement transactions.”

(2) As provided in sections 7 (b) and (c) of the Act, Indian preference and tribal preferences shall be applied in any procurement award.

(e) The Indian tribe or tribal organization shall make procurement awards only to responsible entities who have the ability to perform successfully under the terms and conditions of the proposed procurement. In making this judgment, the Indian tribe or tribal organization will consider such matters as the contractor's integrity, its compliance with public policy, its record of past performance, and its financial and technical resources.

(f) The Indian tribe or tribal organization shall maintain records on the significant history of all major procurement transactions. These records may include, but are not limited to, the rationale for the method of procurement, the selection of contract type, the contract selection or rejection, and the basis for the contract price.

(g) The Indian tribe or tribal organization is solely responsible, using good administrative practice and sound business judgment, for processing and settling all contractual and administrative issues arising out of a procurement. These issues include, but are not limited to, source evaluation, protests, disputes, and claims.

(1) The settlement of any protest, dispute, or claim shall not relieve the Indian tribe or tribal organization of any obligations under a self-determination contract.

(2) Violations of law shall be referred to the tribal or Federal authority having proper jurisdiction.

§ 900.49 What procurement standards apply to subcontracts?

Each subcontract entered into under the Act shall at a minimum:

(a) Be in writing;

(b) Identify the interested parties, their authorities, and the purposes of the contract;

(c) State the work to be performed under the contract;

(d) State the process for making any claim, the payments to be made, and the terms of the contract, which shall be fixed; and

(e) Be subject to sections 7 (b) and (c) of the Act.

§ 900.50 What Federal laws, regulations, and Executive Orders apply to subcontractors?

Certain provisions of the Act as well as other applicable Federal laws, regulations, and Executive Orders apply to subcontracts awarded under self-determination contracts. As a result, subcontracts should contain a provision informing the recipient that their award is funded with Indian Self-Determination Act funds and that the recipient is responsible for identifying and ensuring compliance with applicable Federal laws, regulations, and Executive Orders. The Secretary and the Indian tribe or tribal organization may, through negotiation, identify all or a portion of such requirements in the self-determination contract and, if so identified, these requirements should be identified in subcontracts.

Property Management System Standards

§ 900.51 What is an Indian tribe or tribal organization's property management system expected to do?

An Indian tribe or tribal organization's property management system shall account for all property furnished or transferred by the Secretary for use under a self-determination contract or acquired with contract funds. The property management system shall contain requirements for the use, care, maintenance, and disposition of Federally-owned and other property as follows:

(a) Where title vests in the Indian tribe, in accordance with tribal law and procedures; or

(b) In the case of a tribal organization, according to the internal property procedures of the tribal organization.

§ 900.52 What type of property is the property management system required to track?

The property management system of the Indian tribe or tribal organization shall track:

(a) Personal property with an acquisition value in excess of $5,000 per item;

(b) Sensitive personal property, which is all personal property that is subject to theft and pilferage, as defined by the Indian tribe or tribal organization. All firearms shall be considered sensitive personal property; and

(c) Real property provided by the Secretary for use under the contract.

§ 900.53 What kind of records shall the property management system maintain?

The property management system shall maintain records that accurately describe the property, including any serial number or other identification number. These records should contain information such as the source, titleholder, acquisition date, cost, share of Federal participation in the cost, location, use and condition of the property, and the date of disposal and sale price, if any.

§ 900.54 Should the property management system prescribe internal controls?

Yes. Effective internal controls should include procedures:

(a) For the conduct of periodic inventories;

(b) To prevent loss or damage to property; and

(c) To ensure that property is used for an Indian tribe or tribal organization's self-determination contract(s) until the property is declared excess to the needs of the contract consistent with the Indian tribe or tribal organization's property management system.

§ 900.55 What are the standards for inventories?

A physical inventory should be conducted at least once every 2 years. The results of the inventory shall be reconciled with the Indian tribe or tribal organization's internal property and accounting records.

§ 900.56 What maintenance is required for property?

Required maintenance includes the performance of actions necessary to keep the property in good working condition, the procedures recommended by equipment manufacturers, and steps necessary to protect the interests of the contractor and the Secretary in any express warranties or guarantees covering the property.

§ 900.57 What if the Indian tribe or tribal organization chooses not to take title to property furnished or acquired under the contract?

If the Indian tribe or tribal organization chooses not to take title to property furnished by the government or acquired with contract funds, title to the property remains vested in the Secretary. A list of Federally-owned property to be used under the contract shall be included in the contract.

§ 900.58 Do the same accountability and control procedures described above apply to Federal property?

Yes, except that requirements for the inventory and disposal of Federal property are different.

§ 900.59 How are the inventory requirements for Federal property different than for tribal property?

There are three additional requirements:

(a) The Indian tribe or tribal organization shall conduct a physical inventory of the Federally-owned property and reconcile the results with the Indian tribe or tribal organization's property records annually, rather than every 2 years;

(b) Within 90 days following the end of an annual funding agreement, the Indian tribe or tribal organization shall certify and submit to the Secretary an annual inventory of all Federally-owned real and personal property used in the contracted program; and

(c) The inventory shall report any increase or decrease of $5,000 or more in the value of any item of real property.

§ 900.60 How does an Indian tribe or tribal organization dispose of Federal personal property?

The Indian tribe or tribal organization shall report to the Secretary in writing any Federally-owned personal property that is worn out, lost, stolen, damaged beyond repair, or no longer needed for the performance of the contract.

(a) The Indian tribe or tribal organization shall state whether the Indian tribe or tribal organization wants to dispose of or return the property.

(b) If the Secretary does not respond within 60 days, the Indian tribe or tribal organization may return the property to the Secretary, who shall accept transfer, custody, control, and responsibility for the property (together with all associated costs).

Subpart G – Programmatic Reports and Data Requirements

§ 900.65 What programmatic reports and data shall the Indian tribe or tribal organization provide?

Unless required by statute, there are no mandatory reporting requirements. Each Indian tribe or tribal organization shall negotiate with the Secretary the type and frequency of program narrative and program data report(s) which respond to the needs of the contracting parties and that are appropriate for the purposes of the contract. The extent of available resources will be a consideration in the negotiations.

§ 900.66 What happens if the Indian tribe or tribal organization and the Secretary cannot come to an agreement concerning the type and/or frequency of program narrative and/or program data report(s)?

Any disagreements over reporting requirements are subject to the declination criteria and procedures in section 102 of the Act and subpart E.

§ 900.67 Will there be a uniform data set for all IHS programs?

IHS will work with Indian tribe or tribal organization representatives to develop a mutually defined uniform subset of data that is consistent with Congressional intent, imposes a minimal reporting burden, and which responds to the needs of the contracting parties.

§ 900.68 Will this uniform data set be required of all Indian tribe or tribal organizations contracting with the IHS under the Act?

No. The uniform data set, applicable to the services to be performed, will serve as the target for the Secretary and the Indian tribes or tribal organizations during individual negotiations on program data reporting requirements.

Subpart H – Lease of Tribally-Owned Buildings by the Secretary

§ 900.69 What is the purpose of this subpart?

Section 105(l) of the Act requires the Secretary, at the request of an Indian tribe or tribal organization, to enter into a lease with the Indian tribe or tribal organization for a building owned or leased by the tribe or tribal organization that is used for administration or delivery of services under the Act. The lease is to include compensation as provided in the statute as well as "such other reasonable expenses that the Secretary determines, by regulation, to be allowable." This subpart contains requirements for these leases.

§ 900.70 What elements are included in the compensation for a lease entered into between the Secretary and an Indian tribe or tribal organization for a building owned or leased by the Indian tribe or tribal organization that is used for administration or delivery of services under the Act?

To the extent that no element is duplicative, the following elements may be included in the lease compensation:

(a) Rent (sublease);

(b) Depreciation and use allowance based on the useful life of the facility based on acquisition costs not financed with Federal funds;

(c) Contributions to a reserve for replacement of facilities;

(d) Principal and interest paid or accrued;

(e) Operation and maintenance expenses, to the extent not otherwise included in rent or use allowances, including, but not limited to, the following:

(1) Water, sewage;

(2) Utilities;

(3) Fuel;

(4) Insurance;

(5) Building management supervision and custodial services;

(6) Custodial and maintenance supplies;

(7) Pest control;

(8) Site maintenance (including snow and mud removal);

(9) Trash and waste removal and disposal;

(10) Fire protection/fire fighting services and equipment;

(11) Monitoring and preventive maintenance of building structures and systems, including but not limited to:

(i) Heating/ventilation/air conditioning;

(ii) Plumbing;

(iii) Electrical;

(iv) Elevators;

(v) Boilers;

(vi) Fire safety system;

(vii) Security system; and

(viii) Roof, foundation, walls, floors.

(12) Unscheduled maintenance;

(13) Scheduled maintenance (including replacement of floor coverings, lighting fixtures, repainting);

(14) Security services;

(15) Management fees; and

(16) Other reasonable and necessary operation or maintenance costs justified by the contractor;

(f) Repairs to buildings and equipment;

(g) Alterations needed to meet contract requirements;

(h) Other reasonable expenses; and

(i) The fair market rental for buildings or portions of buildings and land, exclusive of the Federal share of building construction or acquisition costs, or the fair market rental for buildings constructed with Federal funds exclusive of fee or profit, and for land.

§ 900.71 What type of reserve fund is anticipated for funds deposited into a reserve for replacement of facilities as specified in §900.70(c)?

Reserve funds must be accounted for as a capital project fund or a special revenue fund.

§ 900.72 Who is the guardian of the fund and may the funds be invested?

(a) The Indian tribe or tribal organization is the guardian of the fund.

(b) Funds may be invested in accordance with the laws, regulations and policies of the Indian tribe or tribal organization subject to the terms of the lease or the self-determination contract.

§ 900.73 Is a lease with the Secretary the only method available to recover the types of cost described in §900.70?

No. With the exception of paragraph (i) in §900.70, the same types of costs may be recovered in whole or in part under section 106(a) of the Act as direct or indirect charges to a self-determination contract.

§ 900.74 How may an Indian tribe or tribal organization propose a lease to be compensated for the use of facilities?

There are three options available:

(a) The lease may be based on fair market rental.

(b) The lease may be based on a combination of fair market rental and paragraphs (a) through (h) of §900.70, provided that no element of expense is duplicated in fair market rental.

(c) The lease may be based on paragraphs (a) through (h) of §900.70 only.

Subpart I – Property Donation Procedures

General

§ 900.85 What is the purpose of this subpart?

This subpart implements section 105(f) of the Act regarding donation of Federal excess and surplus property to Indian tribes or tribal organizations and acquisition of property with funds provided under a self-determination contract or grant.

§ 900.86 How will the Secretary exercise discretion to acquire and donate BIA or IHS excess property and excess and surplus Federal property to an Indian tribe or tribal organization?

The Secretary will exercise discretion in a way that gives maximum effect to the requests of Indian tribes or tribal organizations for donation of BIA or IHS excess property and excess or surplus Federal property, provided that the requesting Indian tribe or tribal organization shall state how the requested property is appropriate for use for any purpose for which a self-determination contract or grant is authorized.

Government-Furnished Property

§ 900.87 How does an Indian tribe or tribal organization obtain title to property furnished by the Federal government for use in the performance of a contract or grant agreement pursuant to section 105(f)(2)(A) of the Act?

(a) For government-furnished personal property made available to an Indian tribe or tribal organization before October 25, 1994:

(1) The Secretary, in consultation with each Indian tribe or tribal organization, shall develop a list of the property used in a self-determination contract.

(2) The Indian tribe or tribal organization shall indicate any items on the list to which the Indian tribe or tribal organization wants the Secretary to retain title.

(3) The Secretary shall provide the Indian tribe or tribal organization with any documentation needed to transfer title to the remaining listed property to the Indian tribe or tribal organization.

(b) For government-furnished real property made available to an Indian tribe or tribal organization before October 25, 1994:

(1) The Secretary, in consultation with the Indian tribe or tribal organization, shall develop a list of the property furnished for use in a self-determination contract.

(2) The Secretary shall inspect any real property on the list to determine the presence of any hazardous substance activity, as defined in 41 CFR 101–47.202.2(b)(10). If the Indian tribe or tribal organization desires to take title to any real property on the list, the Indian tribe or tribal organization shall inform the Secretary, who shall take such steps as necessary to transfer title to the Indian tribe or tribal organization.

(c) For government-furnished real and personal property made available to an Indian tribe or tribal organization on or after October 25, 1994:

(1) The Indian tribe or tribal organization shall take title to all property unless the Indian tribe or tribal organization requests that the United States retain the title.

(2) The Secretary shall determine the presence of any hazardous substance activity, as defined in 41 CFR 101–47.202.2(b)(10).

§ 900.88 What should the Indian tribe or tribal organization do if it wants to obtain title to government-furnished real property that includes land not already held in trust?

If the land is owned by the United States but not held in trust for an Indian tribe or individual Indian, the Indian tribe or tribal organization shall specify whether it wants to acquire fee title to the land or whether it wants the land to be held in trust for the benefit of a tribe.

(a) If the Indian tribe or tribal organization requests fee title, the Secretary shall take the necessary action under Federal law and regulations to transfer fee title.

(b) If the Indian tribe or tribal organization requests beneficial ownership with fee title to be held by the United States in trust for an Indian tribe:

(1) The Indian tribe or tribal organization shall submit with its request a resolution of support from the governing body of the Indian tribe in which the beneficial ownership is to be registered.

(2) If the request is submitted to the Secretary of Health and Human Services for land under the jurisdiction of that Secretary, the Secretary shall take all necessary steps to effect a transfer of the land to the Secretary of the Interior and shall also forward the Indian tribe or tribal organization's request and the tribe's resolution.

(3) The Secretary of the Interior shall expeditiously process all requests in accordance with applicable Federal law and regulations.

(4) The Secretary shall not require the Indian tribe or tribal organization to furnish any information in support of a request other than that required by law or regulation.

§ 900.89 When may the Secretary elect to reacquire government-furnished property whose title has been transferred to an Indian tribe or tribal organization?

(a) Except as provided in paragraph (b) of this section, when a self-determination contract or grant agreement, or portion thereof, is retroceded, reassumed, terminated, or expires, the Secretary shall have the option to take title to any item of government-furnished property:

(1) That title has been transferred to an Indian tribe or tribal organization;

(2) That is still in use in the program; and

(3) That has a current fair market value, less the cost of improvements borne by the Indian tribe or tribal organization in excess of $5,000.

(b) If property referred to in paragraph (a) of this section is shared between one or more ongoing contracts or grant agreements and a contract or grant agreement that is retroceded, reassumed, terminated or expires and the Secretary wishes to use such property in the retroceded or reassumed program, the Secretary and the contractor or grantee using such property shall negotiate an acceptable arrangement for continued sharing of such property and for the retention or transfer of title.

§ 900.90 Does government-furnished real property to which an Indian tribe or tribal organization has taken title continue to be eligible for facilities operation and maintenance funding from the Secretary?

Yes.

Contractor-Purchased Property

§ 900.91 Who takes title to property purchased with funds under a self-determination contract or grant agreement pursuant to section 105(f)(2)(A) of the Act?

The contractor takes title to such property, unless the contractor chooses to have the United States take title. In that event, the contractor must inform the Secretary of the purchase and identify the property and its location in such manner as the contractor and the Secretary deem necessary. A request for the United States to take title to any item of contractor-purchased property may be made at any time. A request for the Secretary to take fee title to real property shall be expeditiously processed in accordance with applicable Federal law and regulation.

§ 900.92 What should the Indian tribe or tribal organization do if it wants contractor-purchased real property to be taken into trust?

The contractor shall submit a resolution of support from the governing body of the Indian tribe in which the beneficial ownership is to be registered. If the request to take contractor-purchased real property into trust is submitted to the Secretary of Health and Human Services, that Secretary shall transfer the request to the Secretary of the Interior. The Secretary of the Interior shall expeditiously process all requests in accord with applicable Federal law and regulation.

§ 900.93 When may the Secretary elect to acquire title to contractor-purchased property?

(a) Except as provided in paragraph (b) of this section when a self-determination contract or grant agreement, or portion thereof, is retroceded, reassumed, terminated, or expires, the Secretary shall have the option to take title to any item of government-furnished property:

(1) Whose title has been transferred to an Indian tribe or tribal organization;

(2) That is still in use in the program; and

(3) That has a current fair market value, less the cost of improvements borne by the Indian tribe or tribal organization, in excess of $5,000.

(b) If property referred to in paragraph (a) of this section is shared between one or more ongoing contracts or grant agreements and a contract or grant agreement that is retroceded, reassumed, terminated or expires and the Secretary wishes to use such property in the retroceded or reassumed program, the Secretary and the contractor or grantee using such property shall negotiate an acceptable arrangement for continued sharing of such property and for the retention or transfer of title.

§ 900.94 Is contractor-purchased real property to which an Indian tribe or tribal organization holds title eligible for facilities operation and maintenance funding from the Secretary?

Yes.

BIA and IHS Excess Property

§ 900.95 What is BIA or IHS excess property?

BIA or IHS excess property means property under the jurisdiction of the BIA or IHS that is excess to the agency's needs and the discharge of its responsibilities.

§ 900.96 How can Indian tribes or tribal organizations learn about BIA and IHS excess property?

The Secretary shall not less than annually send to Indian tribes and tribal organizations a listing of all excess BIA or IHS personal property before reporting the property to GSA or to any other Federal agency as excess. The listing shall identify the agency official to whom a request for donation shall be submitted.

§ 900.97 How can an Indian tribe or tribal organization acquire excess BIA or IHS property?

(a) The Indian tribe or tribal organization shall submit to the appropriate Secretary a request for specific property that includes a statement of how the property is intended for use in connection with a self-determination contract or grant. The Secretary shall expeditiously process the request and shall exercise discretion in a way that gives maximum effect to the request of Indian tribes or tribal organizations for the donation of excess BIA or IHS property.

(b) If more than one request for the same item of personal property is submitted, the Secretary shall award the item to the requestor whose request is received on the earliest date. If two or more requests are received on the same date, the Secretary shall award the item to the requestor with the lowest transportation costs. The Secretary shall make the donation as expeditiously as possible.

(c) If more than one request for the same parcel of real property is submitted, the Secretary shall award the property to the Indian tribe or tribal organization whose reservation or trust land is closest to the real property requested.

§ 900.98 Who takes title to excess BIA or IHS property donated to an Indian tribe or tribal organization?

The Indian tribe or tribal organization takes title to donated excess BIA or IHS property. The Secretary shall provide the Indian tribe or tribal organization with all documentation needed to vest title in the Indian tribe or tribal organization.

§ 900.99 Who takes title to any land that is part of excess BIA or IHS real property donated to an Indian tribe or tribal organization?

(a) If an Indian tribe or tribal organization requests donation of fee title to excess real property that includes land not held in trust for an Indian tribe, the Indian tribe or tribal organization shall so specify in its request for donation. The Secretary shall take the necessary action under Federal law and regulations to transfer the title to the Indian tribe or tribal organization.

(b) If an Indian tribe or tribal organization asks the Secretary to donate excess real property that includes land and requests that fee title to the land be held by the United States in trust for an Indian tribe, the requestor shall submit a resolution of support from the governing body of the Indian tribe in which the beneficial ownership is to be registered.

(1) If the donation request is submitted to the Secretary of Health and Human Services, that Secretary shall take all steps necessary to transfer the land to the Secretary of the Interior with the Indian tribe or tribal organization's request and the Indian tribe's resolution. The Secretary of the Interior shall expeditiously process all requests in accordance with applicable Federal law and regulations.

(2) The Secretary shall not require the Indian tribe or tribal organization to furnish any information in support of a request other than that required by law or regulation.

§ 900.100 May the Secretary elect to reacquire excess BIA or IHS property whose title has been transferred to an Indian tribe or tribal organization?

Yes. When a self-determination contract or grant agreement, or portion—thereof, is retroceded, reassumed, terminated, or expires, the Secretary shall have the option to take title to any item of the property;

(a) Except as provided in paragraph (b) of this section when a self-determination contract or grant agreement, or portion thereof, is retroceded, reassumed, terminated, or expires, the Secretary shall have the option to take title to any item of government-furnished property:

(1) Whose title has been transferred to an Indian tribe or tribal organization;

(2) That is still in use in the program; and

(3) That has a current fair market value, less the cost of improvements borne by the Indian tribe or tribal organization, in excess of $5,000.

(b) To the extent that any property referred to in paragraph (a) of this section is shared between one or more ongoing contracts or grant agreements and a contract or grant agreement that is retroceded, reassumed, terminated or expires and the Secretary wishes to use such property in the retroceded or reassumed program, the Secretary and the contractor or grantee using such property shall negotiate an acceptable arrangement for continued sharing of such property and for the retention or transfer of title.

§ 900.101 Is excess BIA or IHS real property to which an Indian tribe or tribal organization has taken title eligible for facilities operation and maintenance funding from the Secretary?

Yes.

Excess or Surplus Government Property of Other Agencies

§ 900.102 What is excess or surplus government property of other agencies?

(a) "Excess government property" is real or personal property under the control of a Federal agency, other than BIA and IHS, which is not required for the agency's needs and the discharge of its responsibilities.

(b) "Surplus government property" means excess real or personal property that is not required for the needs of and the discharge of the responsibilities of all Federal agencies that has been declared surplus by the General Services Administration (GSA).

§ 900.103 How can Indian tribes or tribal organizations learn about property that has been designated as excess or surplus government property?

The Secretary shall furnish, not less than annually, to Indian tribes or tribal organizations listings of such property as may be made available from time to time by GSA or other Federal agencies, and shall obtain listings upon the request of an Indian tribe or tribal organization.

§ 900.104 How may an Indian tribe or tribal organization receive excess or surplus government property of other agencies?

(a) The Indian tribe or tribal organization shall file a request for specific property with the Secretary, and shall state how the property is appropriate for use for a purpose for which a self-determination contract or grant is authorized under the Act.

(b) The Secretary shall expeditiously process such request and shall exercise discretion to acquire the property in the manner described in §900.86 of this subpart.

(c) Upon approval of the Indian tribe or tribal organization's request, the Secretary shall immediately request acquisition of the property from the GSA or the holding agency, as appropriate, by submitting the necessary documentation in order to acquire the requested property prior to the expiration of any "freeze" placed on the property by the Indian tribe or tribal organization.

(d) The Secretary shall specify that the property is requested for donation to an Indian tribe or tribal organization pursuant to authority provided in section 105(f)(3) of the Act.

(e) The Secretary shall request a waiver of any fees for transfer of the property in accordance with applicable Federal regulations.

§ 900.105 Who takes title to excess or surplus Federal property donated to an Indian tribe or tribal organization?

(a) Title to any donated excess or surplus Federal personal property shall vest in the Indian tribe or tribal organization upon taking possession.

(b) Legal title to donated excess or surplus Federal real property shall vest in the Indian tribe or tribal organization upon acceptance by the Indian tribe or tribal organization of a proper deed of conveyance.

(c) If the donation of excess or surplus Federal real property includes land owned by the United States but not held in trust for an Indian tribe, the Indian tribe or tribal organization shall specify whether it wants to acquire fee title to the land or whether it wants the land to be held in trust for the benefit of an Indian tribe.

(1) If the Indian tribe or tribal organization requests fee title, the Secretary shall take the necessary action under Federal law and regulations to transfer fee title to the Indian tribe or tribal organization.

(2) If the Indian tribe or tribal organization requests beneficial ownership with fee title to be held by the United States in trust for an Indian tribe:

(i) The Indian tribe or tribal organization shall submit with its request a resolution of support from the governing body of the Indian tribe in which the beneficial ownership is to be registered.

(ii) If the donation request of the Indian tribe or tribal organization is submitted to the Secretary of Health and Human Services, that Secretary shall take all necessary steps to acquire the land and transfer it to the Secretary of the Interior and shall also forward the Indian tribe or tribal organization's request and the Indian tribe's resolution.

(iii) The Secretary of the Interior shall expeditiously process all requests in accord with applicable Federal law and regulations.

(iv) The Secretary shall not require submission of any information other than that required by Federal law and regulation.

§ 900.106 If a contract or grant agreement or portion thereof is retroceded, reassumed, terminated, or expires, may the Secretary reacquire title to excess or surplus Federal property of other agencies that was donated to an Indian tribe or tribal organization?

No. Section 105(f)(3) of the Act does not give the Secretary the authority to reacquire title to excess or surplus government property acquired from other agencies for donation to an Indian tribe or tribal organization.

Property Eligible for Replacement Funding

§ 900.107 What property to which an Indian tribe or tribal organization obtains title under this subpart is eligible for replacement funding?

Government-furnished property, contractor-purchased property and excess BIA and IHS property donated to an Indian tribe or tribal organization to which an Indian tribe or tribal organization holds title shall remain eligible for replacement funding to the same extent as if title to that property were held by the United States.

Subpart J – Construction

§ 900.110 What does this subpart cover?

(a) This subpart establishes requirements for issuing fixed-price or cost-reimbursable contracts to provide: design, construction, repair, improvement, expansion, replacement, erection of new space, or demolition and other related work for one or more Federal facilities. It applies to tribal facilities where the Secretary is authorized by law to design, construct and/or renovate, or make improvements to such tribal facilities.

(b) Activities covered by construction contracts under this subpart are: design and architectural/engineering services, construction project management, and the actual construction of the building or facility in accordance with the construction documents, including all labor, materials, equipment, and services necessary to complete the work defined in the construction documents.

(1) Such contracts may include the provision of movable equipment, telecommunications and data processing equipment, furnishings (including works of art), and special purpose equipment, when part of a construction contract let under this subpart.

(2) While planning services and construction management services as defined in §900.113 may be included in a construction contract under this subpart, they may also be contracted separately using the model agreement in section 108 of the Act.

§ 900.111 What activities of construction programs are contractible?

The Secretary shall, upon the request of any Indian tribe or tribal organization authorized by tribal resolution, enter into a self-determination contract to plan, conduct, and administer construction programs or portions thereof.

§ 900.112 What are construction phases?

(a) Construction programs generally include the following activities in phases which can vary by funding source (an Indian tribe or tribal organization should contact its funding source for more information regarding the conduct of its program):

(1) *The preplanning phase*. The phase during which an initial assessment and determination of project need is made and supporting information collected for presentation in a project application. This project application process is explained in more detail in §900.122;

(2) *The planning phase.* The phase during which planning services are provided. This phase can include conducting and preparing a detailed needs assessment, developing justification documents, completing and/or verifying master plans, conducting predesign site investigations and selection, developing budget cost estimates, conducting feasibility studies, and developing a project Program of Requirements (POR);

(3) *The design phase.* The phase during which licensed design professional(s) using the POR as the basis for design of the project, prepare project plans, specifications, and other documents that are a part of the construction documents used to build the project. Site investigation and selection activities are completed in this phase if not conducted as part of the planning phase.

(4) *The construction phase.* The phase during which the project is constructed. The construction phase includes providing the labor, materials, equipment, and services necessary to complete the work in accordance with the construction documents prepared as part of the design phase.

(b) The following activities may be part of phases described in paragraphs (a)(2), (a)(3), and (a)(4) of this section:

(1) Management; and

(2) Environmental, archeological, cultural resource, historic preservation, and similar assessments and associated activities.

§ 900.113 Definitions.

(a) *Construction contract* means a fixed-price or cost-reimbursement self-determination contract for a construction project, except that such term does not include any contract:

(1) That is limited to providing planning services and construction management services (or a combination of such services);

(2) For the Housing Improvement Program or roads maintenance program of the Bureau of Indian Affairs administered by the Secretary of the Interior; or

(3) For the health facility maintenance and improvement program administered by the Secretary of Health and Human Services.

(b) *Construction management services* (CMS) means activities limited to administrative support services; coordination; and monitoring oversight of the planning, design, and construction process. An Indian tribe or tribal organization's employee or construction management services consultant (typically an engineer or architect) performs such activities as:

(1) Coordination and information exchange between the Indian tribe or tribal organization and the Federal government;

(2) Preparation of Indian tribe or tribal organization's construction contract proposals;

(3) Indian tribe or tribal organization subcontract scope of work identification and subcontract preparation, and competitive selection of Indian tribe or tribal organization construction contract subcontractors (see §900.110);

(4) Review of work to ensure compliance with the POR and/or the construction contract. This does not involve construction project management as defined in paragraph (d) of this section.

(c) *Construction programs* include programs for the planning, design, construction, repair, improvement, and expansion of buildings or facilities, including but not limited to, housing, law enforcement and detention facilities, sanitation and water systems, roads, schools, administration and health facilities, irrigation and agricultural work, water conservation, flood control, and port facilities, and environmental, archeological, cultural resource, historic preservation, and conduct of similar assessments.

(d) *Construction project management* means direct responsibility for the construction project through day-to-day on-site management and administration of the project. Activities may include cost management, project budgeting, project scheduling, procurement services.

(e) *Design* means services performed by licensed design professionals related to preparing drawings, specifications, and other design submissions specified in the contract, as well as services provided by or for licensed design professionals during the bidding/negotiating, construction, and operational phases of the project.

(f) *Planning services* means activities undertaken to support agency and/or Congressional funding of a construction project. Planning services may include performing a needs assessment, completing and/or verifying master plans,

developing justification documents, conducting pre-design site investigations, developing budget cost estimates, conducting feasibility studies as needed and completion of approved justification documents and a program of requirements (POR) for the project.

(g) *Program of Requirements* (POR) is a planning document developed during the planning phase for an individual project. It provides background about the project; site information; programmatic needs; and, for facilities projects, a detailed room-by-room listing of spaces, including net and gross sizes, finish materials to be used, furnishings and equipment, and other information and design criteria on which to base the construction project documents.

(h) *Scope of work* means the description of the work to be provided through a contract issued under this subpart and the methods and processes to be used to accomplish that work. A scope of work is typically developed based on criteria provided in a POR during the design phase, and project construction documents (plans and specifications) during the construction phase.

§ 900.114 Why is there a separate subpart in these regulations for construction contracts and grants?

There is a separate subpart because the Act differentiates between construction contracts and the model agreement in section 108 of the Act which is required for contracting other activities. Construction contracts are separately defined in the Act and are subject to a separate proposal and review process.

§ 900.115 How do self-determination construction contracts relate to ordinary Federal procurement contracts?

(a) A self-determination construction contract is a government-to-government agreement that transfers control of the construction project, including administrative functions, to the contracting Indian tribe or tribal organization to facilitate effective and meaningful participation by the Indian tribe or tribal organization in planning, conducting, and administering the construction project, and so that the construction project is responsive to the true needs of the Indian community. The Secretary's role in the conduct of a contracted construction project is limited to the Secretary's responsibilities set out in §900.131.

(b) Self-determination construction contracts are not traditional “procurement” contracts.

(1) With respect to a construction contract (or a subcontract of such a construction contract), the provisions of the Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.) and the regulations promulgated under that Act, shall apply to a construction contract or subcontract only to the extent that application of the provision is:

(i) Necessary to ensure that the contract may be carried out in a satisfactory manner;

(ii) Directly related to the construction activity; and

(iii) Not inconsistent with the Act.

(2) A list of the Federal requirements that meet the requirements of this paragraph shall be included in an attachment to the contract under negotiations between the Secretary and the Indian tribe or tribal organization.

(3) Except as provided in paragraph (b)(2) of this section, no Federal law listed in section 105(3)(C)(ii) of the Act or any other provision of Federal law (including an Executive order) relating to acquisition by the Federal government shall apply to a construction contract that an Indian tribe or tribal organization enters into under this Act, unless expressly provided in the law.

(c) Provisions of a construction contract under this subpart shall be liberally construed in favor of the contracting Indian tribe or tribal organization.

§ 900.116 Are negotiated fixed-price contracts treated the same as cost-reimbursable contracts?

Yes, except that in negotiated fixed-price construction contracts, appropriate clauses shall be negotiated to allocate properly the contract risks between the government and the contractor.

§ 900.117 Do these “construction contract” regulations apply to planning services?

(a) These regulations apply to planning services contracts only as provided in this section.

(1) The Indian tribe or tribal organization shall submit to the Secretary for review and approval the POR documents produced as a part of a model contract under section 108 of the Act or under a construction contract under this subpart.

(i) Within 60 days after receipt of the POR from the Indian tribe or tribal organization for a project that has achieved priority ranking or that is funded, the Secretary shall:

(A) Approve the POR;

(B) Notify the Indian tribe or tribal organization of and make available any objections to the POR that the Secretary may have; or

(C) Notify the Indian tribe or tribal organization of the reasons why the Secretary will be unable either to approve the POR or to notify the Indian tribe or tribal organization of any objections within 60 days, and state the time within which the notification will be made, provided that the extended time shall not exceed 60 additional days.

(ii) Within a maximum of 180 days after receipt of a POR from an Indian tribe or tribal organization for a project that is not funded and is not described in paragraph (a)(1)(i) of this section, the Secretary shall:

(A) Approve the POR; or

(B) Notify the Indian tribe or tribal organization of and make available any objections to the POR; or

(C) Notify the Indian tribe or tribal organization of the reasons why the Secretary will be unable either to approve the POR or to notify the Indian tribe or tribal organization of any objections within 180 days, and state the time within which the notification will be made, provided that the extended time shall not exceed 60 additional days.

(2) Any failure of the Secretary to act on a POR within the applicable period required in paragraph (a)(1) of this section will be deemed a rejection of the POR and will authorize the commencement of any appeal as provided in section 110 of the Act, or, if a model agreement under section 108 of the Act is used, the disputes provision of that agreement.

(3) If an Indian tribe or tribal organization elects to provide planning services as part of a construction contract rather than under a model agreement as set out in section 108 of the Act, the regulations in this subpart shall apply.

(b) The parties to the contract are encouraged to consult during the development of the POR and following submission of the POR to the Secretary.

§ 900.118 Do these "construction contract" regulations apply to construction management services?

No. Construction management services may be contracted separately under section 108 of the Act. Construction management services consultants and/or Indian tribe or tribal organization employees assist and advise the Indian tribe or tribal organization to implement construction contracts, but have no contractual relationship with or authority to direct construction contract subcontractors.

(a) If the Indian tribe or tribal organization chooses to contract solely for construction management services, these services shall be limited to:

(1) Coordination and exchange of information between the Indian tribe or tribal organization and the Secretary;

(2) Review of work produced by the Secretary to determine compliance with:

(i) The POR and design contract during the design stage; or

(ii) The project construction documents during the construction stage;

(3) Disputes shall be resolved in accordance with the disputes clause of the CMS contract.

(b) If the Indian tribe or tribal organization conducts CMS under section 108 of the Act and the Indian tribe or tribal organization contracts separately under this subpart for all or some of the activities in §900.110, the contracted activities shall be limited to:

(1) Coordination and exchange of information between the Indian tribe or tribal organization and Secretary;

(2) Preparation of tribal or tribal organization construction subcontract scope of work identification and subcontract preparation, and competitive selection of tribal or tribal organization construction contract subcontractors;

(3) Review of work produced by tribal or tribal organization construction subcontractors to determine compliance with:

(i) The POR and the design contract during the design stage; or

(ii) The project construction documents during the construction stage.

§ 900.119 To what extent shall the Secretary consult with affected Indian tribes before spending funds for any construction project?

Before spending any funds for a planning, design, construction, or renovation project, whether subject to a competitive application and ranking process or not, the Secretary shall consult with any Indian tribe or tribal organization(s) that would be significantly affected by the expenditure to determine and to follow tribal preferences to the greatest extent feasible concerning: size, location, type, and other characteristics of the project.

§ 900.120 How does an Indian tribe or tribal organization find out about a construction project?

Within 30 days after the Secretary's allocation of funds for planning phase, design phase, or construction phase activities for a specific project, the Secretary shall notify, by registered mail with return receipt in order to document mailing, the Indian tribe or tribal organization(s) to be benefitted by the availability of the funds for each phase of a project. The Secretarial notice of fund allocation shall offer technical assistance in the preparation of a contract proposal.

(a) The Secretary shall, within 30 days after receiving a request from an Indian tribe or tribal organization, furnish the Indian tribe or tribal organization with all information available to the Secretary about the project including, but not limited to: construction drawings, maps, engineering reports, design reports, plans of requirements, cost estimates, environmental assessments, or environmental impact reports and archeological reports.

(b) An Indian tribe or tribal organization is not required to request this information prior to submitting a notification of intent to contract or a contract proposal.

(c) The Secretary shall have a continuing responsibility to furnish information.

§ 900.121 What happens during the preplanning phase and can an Indian tribe or tribal organization perform any of the activities involved in this process?

(a) The application and ranking process for developing a priority listing of projects varies between agencies. There are, however, steps in the selection process that are common to most selection processes. An Indian tribe or tribal organization that wishes to secure a construction project should contact the appropriate agency to determine the specific steps involved in the application and selection process used to fund specific types of projects. When a priority process is used in the selection of construction projects, the steps involved in the application and ranking process are as follows:

(1) *Application.* The agency solicits applications from Indian tribes or tribal organizations. In the request for applications, the Secretary provides specific information regarding the type of project to be funded, the objective criteria that will be used to evaluate applications, the points or weight that each criterion will be assigned, and the time when applications are due. An Indian tribe or tribal organization may prepare the application (technical assistance from the agency, within resources available, shall be provided upon request from an Indian tribe or tribal organization) or may rely upon the agency to prepare the application.

(2) *Ranking/Prioritization.* The Secretary evaluates the applications based on the criteria provided as part of the application preparation process. The Secretary applies only criteria and weights assigned to each criteria that were disclosed to the Indian tribe or tribal organization during the application stage. The applications are then ranked in order from the application that best meets application criteria to the application that least meet the application criteria.

(3) *Validation.* Before final acceptance of a ranked application, the information, such as demographic information, deficiency levels reported in application, the condition of existing facilities, and program housing needs, is validated. During this process, additional information may be developed by the Indian tribe or tribal organization in support of the original information or the Secretary may designate a representative of the Department to conduct an on-site review of the information contained in the application.

(b) [Reserved]

§ 900.122 What does an Indian tribe or tribal organization do if it wants to secure a construction contract?

(a) The Act establishes a special process for review and negotiation of proposals for construction contracts which is different than that for other self-determination contract proposals. The Indian tribe or tribal organization should notify the Secretary of its intent to contract. After notification, the Indian tribe or tribal organization should prepare its contract proposal in accordance with the sections of this subpart. While developing its construction contract proposal, the Indian

tribe or tribal organization can request technical assistance from the Secretary. Not later than 30 days after receiving a request from an Indian tribe or tribal organization, the Secretary shall provide to the Indian tribe or tribal organization all information available about the construction project, including construction drawings, maps, engineering reports, design reports, plans of requirements, cost estimates, environmental assessments, or environmental impact reports, and archaeological reports. The responsibility of the Secretary to furnish this information shall be a continuing one.

(b) At the request of the Indian tribe or tribal organization and before finalizing its construction contract proposal, the Secretary shall provide for a precontract negotiation phase during the development of a contract proposal. Within 30 days the Secretary shall acknowledge receipt of the proposal and, if requested by the Indian tribe or tribal organization, shall confer with the Indian tribe or tribal organization to develop a negotiation schedule. The negotiation phase shall include, at a minimum:

(1) The provision of technical assistance under section 103 of the Act and paragraph (a) of this section;

(2) A joint scoping session between the Secretary and the Indian tribe or tribal organization to review all plans, specifications, engineering reports, cost estimates, and other information available to the parties, for the purpose of identifying all areas of agreement and disagreement;

(3) An opportunity for the Secretary to revise plans, designs, or cost estimates of the Secretary in response to concerns raised, or information provided by, the Indian tribe or tribal organization;

(4) A negotiation session during which the Secretary and the Indian tribe or tribal organization shall seek to develop a mutually agreeable contract proposal; and

(5) Upon the request of the Indian tribe or tribal organization, the use of alternative dispute resolution to resolve remaining areas of disagreement under the dispute resolution provisions under subchapter IV of chapter 5 of the United States Code.

§ 900.123 What happens if the Indian tribe or tribal organization and the Secretary cannot develop a mutually agreeable contract proposal?

(a) If the Secretary and the Indian tribe or tribal organization are unable to develop a mutually agreeable construction contract proposal under the procedures in §900.122, the Indian tribe or tribal organization may submit a final contract proposal to the Secretary. Not later than 30 days after receiving the final contract proposal, the Secretary shall approve the contract proposal and award the contract, unless, during the period the Secretary declines the proposal under sections 102(a)(2) and 102(b) of the Act (including providing opportunity for an appeal under section 102(b)).

(b) Whenever the Secretary declines to enter into a self-determination contract or contracts under section 102(a)(2) of the Act, the Secretary shall:

(1) State any objections to the contract proposal (as submitted by the Indian tribe or tribal organization) in writing and provide all documents relied on in making the declination decision within 20 days of such decision to the Indian tribe or tribal organization;

(2) Provide assistance to the Indian tribe or tribal organization to overcome the stated objections;

(3) Provide the Indian tribe or tribal organization with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter and the opportunity for appeal on the objections raised, under the regulations set forth in subpart L, except that the Indian tribe or tribal organization may, in lieu of filing the appeal, initiate an action in a Federal district court and proceed directly under section 110(a) of the Act.

§ 900.124 May the Indian tribe or tribal organization elect to use a grant in lieu of a contract?

Yes. A grant agreement or a cooperative agreement may be used in lieu of a contract under sections 102 and 103 of the Act when agreed to by the Secretary and the Indian tribe or tribal organization. Under the grant concept, the grantee will assume full responsibility and accountability for design and construction performance within the funding limitations. The grantee will manage and administer the work with minimal involvement by the government. The grantee will be expected to have acceptable management systems for finance, procurement, and property. The Secretary may issue Federal construction guidelines and manuals applicable to its construction programs, and the government shall accept tribal proposals for alternatives which are consistent with or exceed Federal guidelines or manuals applicable to construction programs.

§ 900.125 What shall a construction contract proposal contain?

(a) In addition to the full name, address, and telephone number of the Indian tribe or tribal organization submitting the construction proposal, a construction contract proposal shall contain descriptions of the following standards under which they propose to operate the contract:

(1) The use of licensed and qualified architects;

(2) Applicable health and safety standards;

(3) Adherence to applicable Federal, State, local, or tribal building codes and engineering standards;

(4) Structural integrity;

(5) Accountability of funds;

(6) Adequate competition for subcontracting under tribal or other applicable law;

(7) The commencement, performance, and completion of the contract;

(8) Adherence to project plans and specifications (including any applicable Federal construction guidelines and manuals and the Secretary shall accept tribal proposals for alternatives which are consistent with or exceed Federal guidelines or manuals applicable to construction programs);

(9) The use of proper materials and workmanship;

(10) Necessary inspection and testing;

(11) With respect to the self-determination contract between the Indian tribe or tribal organization and Federal government, a process for changes, modifications, stop work, and termination of the work when warranted;

(b) In addition to provisions regarding the program standards listed in paragraph (a) of this section or the assurances listed in paragraph (c) of this section, the Indian tribe or tribal organization shall also include in its construction contract proposal the following:

(1) In the case of a contract for design activities, this statement, "Construction documents produced as part of this contract will be produced in accordance with the Program of Requirements and/or Scope of Work," and the POR and/or Scope of Work shall be attached to the contract proposal. If tribal construction procedures, standards and methods (including national, regional, state, or tribal building codes or construction industry standards) are consistent with or exceed applicable Federal standards then the Secretary shall accept the tribally proposed standards; and

(2) In the case of a contract for construction activities, this statement, "The facility will be built in accordance with the construction documents produced as a part of design activities. The project documents, including plans and specifications, are hereby incorporated into this contract through this reference." If tribal construction procedures, standards and methods (including national, regional, state, or tribal building codes or construction industry standards) are consistent with or exceed applicable Federal standards then the Secretary shall accept the tribally proposed standards; and

(3) Proposed methods to accommodate the responsibilities of the Secretary provided in §900.131; and

(4) Proposed methods to accommodate the responsibilities of the Indian tribe or tribal organization provided in §900.130 unless otherwise addressed in paragraph (a) of this section and minimum staff qualifications proposed by the Indian tribe or tribal organization, if any;

(5) A contract budget as described in §900.127; and

(6) A period of performance for the conduct of all activities to be contracted;

(7) A payment schedule as described in §900.132;

(8) A statement indicating whether or not the Indian tribe or tribal organization has a CMS contract related to this project;

(9) Current (unrevoked) authorizing resolutions in accordance with §900.5(d) from all Indian tribes benefitting from the contract proposal; and

(10) Any responsibilities, in addition to the Federal responsibilities listed in §900.131, which the Indian tribe or tribal organization proposes the Federal government perform to assist with the completion of the scope of work;

(c) The Indian tribe or tribal organization will provide the following assurances in its contract proposal:

(1) If the Indian tribe or tribal organization elects not to take title (pursuant to subpart I) to Federal property used in carrying out the contract, "The Indian tribe or tribal organization will not dispose of, modify the use of, or change the terms of the real property title, or other interest in the site and facilities without permission and instructions from the awarding agency. The Indian tribe or tribal organization will record the Federal interest in the title of real property in accordance with awarding agency directives and will include a covenant in the title of real property acquired in whole or in part with Federal assistance funds to assure nondiscrimination during the useful life of the project"; and

(2) "The Indian tribe or tribal organization will comply with the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4801 et seq.)" which prohibits the use of lead based paint in construction or rehabilitation of residential structures;

(3) "The Indian tribe or tribal organization will comply, or has already complied, with the requirements of titles II and III of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Pub. L. 91–646)," which provides for fair and equitable treatment of persons displaced or whose property is acquired as a result of Federal participation in purchases; and

(4) "Except for work performed by tribal or tribal organization employees, the Indian tribe or tribal organization will comply, as applicable, with the provisions of the Davis-Bacon Act (40 U.S.C. 276c and 18 U.S.C. 874)," for Federally assisted construction subagreements;

(5) "The Indian tribe or tribal organization will comply with the flood insurance purchase requirements of section 102(a) of the Flood Disaster Protection Act of 1973 (Pub. L. 93–234)," which requires recipients in a special flood hazard area to participate in the program and to purchase flood insurance if the total cost of insurable construction and acquisition is $10,000 or more;

(6) "The Indian tribe or tribal organization will comply with all applicable Federal environmental laws, regulations, and Executive Orders;"

(7) "The Indian tribe or tribal organization will comply with the Wild and Scenic Rivers Act of 1968 (16 U.S.C. 1271 et seq.) related to protecting the components or potential components of the national wild and scenic rivers system;"

(8) "The Indian tribe or tribal organization will assist the awarding agency in assuring compliance with section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470), EO 11593 (identification and preservation of historic properties), and the Archaeological and Historic Preservation Act of 1974 (16 U.S.C. 469a–1 et seq.)."

(d) The Indian tribe or tribal organization and the Secretary will both make a good faith effort to identify any other applicable Federal laws, Executive Orders, or regulations applicable to the contract, share them with the other party, and refer to them in the construction contract. The parties will make a good faith effort to identify tribal laws, ordinances, and resolutions which may affect either party in the performance of the contract.

§ 900.126 Shall a construction contract proposal incorporate provisions of Federal construction guidelines and manuals?

Each agency may provide or the Indian tribe or tribal organization may request Federal construction guidelines and manuals for consideration by the Indian tribe or tribal organization in the preparation of its contract proposal. If tribal construction procedures, standards and methods (including national, regional, State, or tribal building codes or construction industry standards) are consistent with or exceed applicable Federal standards, the Secretary shall accept the tribally proposed standards.

§ 900.127 What can be included in the Indian tribe or tribal organization's contract budget?

(a) The costs incurred will vary depending on which phase (see §900.112) of the construction process the Indian tribe or tribal organization is conducting and the type of contract that will be used. The total amount awarded under a construction contract shall reflect an overall fair and reasonable price to the parties (see §900.129).

(b) Costs for activities under this subpart that have not been billed, allocated, or recovered under a contract issued under section 108 of the Act should be included.

(c) The Indian tribe or tribal organization's budget should include the cost elements that reflect an overall fair and reasonable price. These costs include:

(1) The reasonable costs to the Indian tribe or tribal organization of performing the contract, taking into consideration the terms of the contract and the requirements of the Act and any other applicable law;

(2) The costs of preparing the contract proposal and supporting cost data;

(3) The costs associated with auditing the general and administrative costs of the Indian tribe or tribal organization associated with the management of the construction contract; and

(4) In cases where the Indian tribe or tribal organization is submitting a fixed-price construction contract:

(i) The reasonable costs to the Indian tribe or tribal organization for general administration incurred in connection with the project that is the subject of the contract;

(ii) The ability of the contractor that carries out the construction contract to make a reasonable profit, taking into consideration the risks associated with carrying out the contract, local market conditions, and other relevant considerations.

(d) In establishing a contract budget for a construction project, the Secretary shall not be required to identify separately the components described in paragraphs (c)(4)(i) and (c)(4)(ii) of this section.

(e) The Indian tribe or tribal organization's budget proposal includes a detailed budget breakdown for performing the scope of work including a total “not to exceed” dollar amount with which to perform the scope of work. Specific budget line items, if requested by the Indian tribe or tribal organization, can include the following:

(1) The administrative costs the Indian tribe or tribal organization may incur including:

(i) Personnel needed to provide administrative oversight of the contract;

(ii) Travel costs incurred, both local travel incurred as a direct result of conducting the contract and remote travel necessary to review project status with the Secretary;

(iii) Meeting costs incurred while meeting with community residents to develop project documents;

(iv) Fees to be paid to consultants, such as demographic consultants, planning consultants, attorneys, accountants, and personnel who will provide construction management services;

(2) The fees to be paid to architects and engineers to assist in preparing project documents and to assist in oversight of the construction process;

(3) The fees to be paid to develop project surveys including topographical surveys, site boundary descriptions, geotechnical surveys, archeological surveys, and NEPA compliance, and;

(4) In the case of a contract to conduct project construction activities, the fees to provide a part-time or full-time on-site inspector, depending on the terms of the contract, to monitor construction activities;

(5) In the case of a contract to conduct project construction activities, project site development costs;

(6) In the case of a contract to conduct project construction activities, project construction costs including those costs described in paragraph (c)(4), of this section;

(7) The cost of securing and installing moveable equipment, telecommunications and data processing equipment, furnishings, including works of art, and special purpose equipment when part of a construction contract;

(8) A contingency amount for unanticipated conditions of the construction phase of cost-reimbursable contracts. The amount of the contingency provided shall be 3 percent of activities being contracted or 50 percent of the available contingency funds, whichever is greater. In the event provision of required contingency funds will cause the project to exceed available project funds, the discrepancy shall be reconciled in accordance with §900.129(e). Any additional contingency funds for the construction phase will be negotiated on an as-needed basis subject to the availability of funds and the nature, scope, and complexity of the project. Any contingency for other phases will be negotiated on a contract-by-contract basis. Unused contingency funds obligated to the contract and remaining at the end of the contract will be considered savings.

(9) Other costs incurred that are directly related to the conduct of contract activities.

§ 900.128 What funding shall the Secretary provide in a construction contract?

The Secretary shall provide an amount under a construction contract that reflects an overall fair and reasonable price to the parties. These costs include:

(a) The reasonable costs to the Indian tribe or tribal organization of performing the contract, taking into consideration the terms of the contract and the requirements of the Act and any other applicable law;

(b) The costs of preparing the contract proposal and supporting cost data; and

(c) The costs associated with auditing the general and administrative costs of the tribal organization associated with the management of the construction contract; and

(d) If the Indian tribe or tribal organization is submitting a fixed-price construction contract:

(1) The reasonable costs to the Indian tribe or tribal organization for general administration incurred in connection with the project that is the subject of the contract;

(2) The ability of the contractor that carries out the construction contract to make a reasonable profit, taking into consideration the risks associated with carrying out the contract, local market conditions, and other relevant considerations including but not limited to contingency.

(3) In establishing a contract budget for a construction project, the Secretary is not required to identify separately the components described in paragraph (d) (1) and (d) (2) of this sections.

§ 900.129 How do the Secretary and Indian tribe or tribal organization arrive at an overall fair and reasonable price for the performance of a construction contract?

(a) Throughout the contract award process, the Secretary and Indian tribe or tribal organization shall share all construction project cost information available to them in order to facilitate reaching agreement on an overall fair and reasonable price for the project or part thereof. In order to enhance this communication, the government's estimate of an overall fair and reasonable price shall:

(1) Contain a level of detail appropriate to the nature and phase of the work and sufficient to allow comparisons to the Indian tribe or tribal organization's estimate;

(2) Be prepared in a format coordinated with the Indian tribe or tribal organization; and

(3) Include the cost elements contained in section 105(m)(4) of the Act.

(b) The government's cost estimate shall be an independent cost estimate based on such information as the following:

(1) Prior costs to the government for similar projects adjusted for comparison to the target location, typically in unit costs, such as dollars per pound, square meter cost of building, or other unit cost that can be used to make a comparison;

(2) Actual costs previously incurred by the Indian tribe or tribal organization for similar projects;

(3) Published price lists, to include regional adjustment factors, for materials, equipment, and labor; and

(4) Projections of inflation and cost trends, including projected changes such as labor, material, and transportation costs.

(c) The Secretary shall provide the initial government cost estimate to the Indian tribe or tribal organization and make appropriate revisions based on concerns raised or information provided by the Indian tribe or tribal organization. The Secretary and the Indian tribe or tribal organization shall continue to revise, as appropriate, their respective cost estimates based on changed or additional information such as the following:

(1) Actual subcontract bids;

(2) Changes in inflation rates and market conditions, including local market conditions;

(3) Cost and price analyses conducted by the Secretary and the Indian tribe or tribal organization during negotiations;

(4) Agreed-upon changes in the size, scope and schedule of the construction project; and

(5) Agreed-upon changes in project plans and specifications.

(d) Considering all of the information available, the Secretary and the Indian tribe or tribal organization shall negotiate the amount of the construction contract. The objective of the negotiations is to arrive at an amount that is fair under current market conditions and reasonable to both the government and the Indian tribe or tribal organization. As a result, the agreement does not necessarily have to be in strict conformance with either party's cost estimate nor does agreement have

to be reached on every element of cost, but only on the overall fair and reasonable price of each phase of the work included in the contract.

(e) If the fair and reasonable price arrived at under paragraph (d) of this section would exceed the amount available to the Secretary, then:

(1) If the Indian tribe or tribal organization elects to submit a final proposal, the Secretary may decline the proposal under section 105(m)(4)(C)(v) of the Act or if the contract has been awarded, dispute the matter under the Contract Disputes Act; or

(2) If requested by the Indian tribe or tribal organization:

(i) The Indian tribe or tribal organization and the Secretary may jointly explore methods of expanding the available funds through the use of contingency funds, advance payments in accordance with §900.132, rebudgeting, or seeking additional appropriations; or

(ii) The Indian tribe or tribal organization may elect to propose a reduction in project scope to bring the project price within available funds; or

(iii) The Secretary and Indian tribe or tribal organization may agree that the project be executed in phases.

§ 900.130 What role does the Indian tribe or tribal organization play during the performance of a self-determination construction contract?

(a) The Indian tribe or tribal organization is responsible for the successful completion of the project in accordance with the approved contract documents.

(b) If the Indian tribe or tribal organization is contracting to perform design phase activities, the Indian tribe or tribal organization shall have the following responsibilities:

(1) The Indian tribe or tribal organization shall subcontract with or provide the services of licensed and qualified architects and other consultants needed to accomplish the self-determination construction contract.

(2) The Indian tribe or tribal organization shall administer and disburse funds provided through the contract in accordance with subpart F, §900.42 through §900.45 and implement a property management system in accordance with subpart F, §900.51 through §900.60.

(3) The Indian tribe or tribal organization shall direct the activities of project architects, engineers, and other project consultants, facilitate the flow of information between the Indian tribe or tribal organization and its subcontractors, resolve disputes between the Indian tribe or tribal organization and its subcontractors or between its subcontractors, and monitor the work produced by its subcontractors to ensure compliance with the POR.

(4) The Indian tribe or tribal organization shall direct the work of its subcontractors so that work produced is provided in accordance with the contract budget and contract performance period as negotiated between and agreed to by the parties.

(5) The Indian tribe or tribal organization shall provide the Secretary with an opportunity to review and provide written comments on the project plans and specifications only at the concept phase, the schematic phase (or the preliminary design), the design development phase, and the final construction documents phase and approve the project plans and specifications for general compliance with contract requirements only at the schematic phase (or the preliminary design) and the final construction documents phase or as otherwise negotiated.

(6) The Indian tribe or tribal organization shall provide the Secretary with the plans and specifications after their final review so, if needed, the Secretary may obtain an independent government cost estimate in accordance with §900.131(b)(4) for the construction of the project.

(7) The Indian tribe or tribal organization shall retain project records and design documents for a minimum of 3 years following completion of the contract.

(8) The Indian tribe or tribal organization shall provide progress reports and financial status reports quarterly, or as negotiated, that contain a narrative of the work accomplished, including but not limited to descriptions of contracts, major subcontracts, and modifications implemented during the report period and A/E service deliverables, the percentage of the work completed, a report of funds expended during the reporting period, and total funds expended for the project. The Indian tribe or tribal organization shall also provide copies, for the information of the Secretary, of an initial work and payment schedule and updates as they may occur.

(c) If the Indian tribe or tribal organization is contracting to perform project construction phase activities, the Indian tribe or tribal organization shall have the following responsibilities:

(1) The Indian tribe or tribal organization shall subcontract with or provide the services of licensed and qualified architects and other consultants as needed to accomplish the self-determination construction contract.

(2) The Indian tribe or tribal organization shall administer and dispense funds provided through the contract in accordance with subpart F, §900.42 through §900.45 and implement a property management system in accordance with subpart F, §900.51 through §900.60.

(3) The Indian tribe or tribal organization shall subcontract with or provide the services of construction contractors or provide its own forces to conduct construction activities in accordance with the project construction documents or as otherwise negotiated between and agreed to by the parties.

(4) The Indian tribe or tribal organization shall direct the activities of project architects, engineers, construction contractors, and other project consultants, facilitate the flow of information between the Indian tribe or tribal organization and its subcontractors, resolve disputes between itself and its subcontractors or between its subcontractors, and monitor the work produced by its subcontractors to assure compliance with the project plans and specifications.

(5) The Indian tribe or tribal organization shall manage or provide for the management of day-to-day activities of the contract including the issuance of construction change orders to subcontractors except that, unless the Secretary agrees:

(i) The Indian tribe or tribal organization may not issue a change order to a construction subcontractor that will cause the Indian tribe or tribal organization to exceed its self-determination contract budget;

(ii) The Indian tribe or tribal organization may not issue a change order to a construction subcontractor that will cause the Indian tribe or tribal organization to exceed the performance period in its self-determination contract budget; or

(iii) The Indian tribe or tribal organization may not issue to a construction subcontractor a change order that is a significant departure from the scope or objective of the project.

(6) The Indian tribe or tribal organization shall direct the work of its subcontractors so that work produced is provided in accordance with the contract budget and performance period as negotiated between and agreed to by the parties.

(7) The Indian tribe or tribal organization shall provide to the Secretary progress and financial status reports.

(i) The reports shall be provided quarterly, or as negotiated, and shall contain a narrative of the work accomplished, the percentage of the work completed, a report of funds expended during the reporting period, and total funds expended for the project.

(ii) The Indian tribe or tribal organization shall also provide copies, for the information of the Secretary, of an initial schedule of values and updates as they may occur, and an initial construction schedule and updates as they occur.

(8) The Indian tribe or tribal organization shall maintain on the job-site or project office, and make available to the Secretary during monitoring visits: contracts, major subcontracts, modifications, construction documents, change orders, shop drawings, equipment cut sheets, inspection reports, testing reports, and current redline drawings.

(d) Upon completion of the project, the Indian tribe or tribal organization shall provide to the Secretary a reproducible copy of the record plans and a contract closeout report.

(e) For cost-reimbursable projects, the Indian tribe or tribal organization shall not be obligated to continue performance that requires an expenditure of more funds than were awarded under the contract. If the Indian tribe or tribal organization has a reason to believe that the total amount required for performance of the contract will be greater than the amount of funds awarded, it shall provide reasonable notice to the Secretary. If the Secretary does not increase the amount of funds awarded under the contract, the Indian tribe or tribal organization may suspend performance of the contract until sufficient additional funds are awarded.

§ 900.131 What role does the Secretary play during the performance of a self-determination construction contract?

(a) If the Indian tribe or tribal organization is contracting solely to perform construction management services either under this subpart or section 108 of the Act, the Secretary has the following responsibilities:

(1) The Secretary is responsible for the successful completion of the project in accordance with the approved contract documents. In fulfilling those responsibilities, the Secretary shall consult with the Indian tribe or tribal organization on a regular basis as agreed to by the parties to facilitate the exchange of information between the Indian tribe or tribal organization and Secretary;

(2) The Secretary shall provide the Indian tribe or tribal organization with regular opportunities to review work produced to determine compliance with the following documents:

(i) The POR, during the conduct of design phase activities. The Secretary shall provide the Indian tribe or tribal organization with an opportunity to review the project construction documents at the concept phase, the schematic phase, the design development phase, and the final construction documents phase, or as otherwise negotiated. Upon receipt of project construction documents for review, the Indian tribe or tribal organization shall not take more than 21 days to make available to the Secretary any comments or objections to the construction documents as submitted by the Secretary. Resolution of any comments or objections shall be in accordance with dispute resolution procedures as agreed to by the parties and contained in the contract; or

(ii) The project construction documents, during conduct of the construction phase activities. The Indian tribe or tribal organization shall have the right to conduct monthly or critical milestone on-site monitoring visits or as negotiated with the Secretary;

(b) If the Indian tribe or tribal organization is contracting to perform design and/or construction phase activities, the Secretary shall have the following responsibilities:

(1) In carrying out the responsibilities of this section, and specifically in carrying out review, comment, and approval functions under this section, the Secretary shall provide for full tribal participation in the decision making process and shall honor tribal preferences and recommendations to the greatest extent feasible. This includes promptly notifying the Indian tribe or tribal organization of any concerns or issues in writing that may lead to disapproval, meeting with the Indian tribe or tribal organization to discuss these concerns and issues and to share relevant information and documents, and making a good faith effort to resolve all issues and concerns of the Indian tribe or tribal organization. The time allowed for Secretarial review, comment, and approval shall be no more than 21 days per review unless a different time period is negotiated and specified in individual contracts. The 21-day time period may be extended if the Indian tribe or tribal organization agrees to the extension in writing. Disagreements over the Secretary's decisions in carrying out these responsibilities shall be handled under subpart N governing contract disputes under the Contract Disputes Act.

(2) To the extent the construction project is subject to NEPA or other environmental laws, the appropriate Secretary shall make the final determination under such laws. All other environmentally related functions are contractible.

(3) If the Indian tribe or tribal organization conducts planning activities under this subpart, the Secretary shall review and approve final planning documents for the project to ensure compliance with applicable planning standards.

(4) When a contract or portion of a contract is for project construction activities, the Secretary may rely on the Indian tribe or tribal organization's cost estimate or the Secretary may obtain an independent government cost estimate that is derived from the final project plans and specifications. The Secretary shall obtain the cost estimate, if any, within 90 days or less of receiving the final plans and specifications from the Indian tribe or tribal organization and shall provide all supporting documentation of the independent cost estimate to the Indian tribe or tribal organization within the 90 day time limit.

(5) If the contracted project involves design activities, the Secretary shall have the authority to review for general compliance with the contract requirements and provide written comments on the project plans and specifications only at the concept phase, the schematic phase, the design development phase and the final construction documents phase, and approve for general compliance with contract requirements the project plans and specifications only at the schematic phase and the final construction documents phase or as otherwise negotiated.

(6) If the contracted project involves design activities, the Secretary reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, for Federal government purposes:

(i) The copyright in any work developed under a contract or subcontract of this subpart; and

(ii) Any rights of copyright to which an Indian tribe or tribal organization or a tribal subcontractor purchases ownership through this contract.

(7) Changes that require an increase to the negotiated contract budget or an increase in the negotiated performance period or are a significant departure from the scope or objective of the project shall require approval of the Secretary.

(8) Review and comment on specific shop drawings as negotiated and specified in individual contracts.

(9) The Secretary may conduct monthly on-site monitoring visits, or alternatively if negotiated with the Indian tribe or tribal organization, critical milestone on-site monitoring visits.

(10) The Secretary retains the right to conduct final project inspections jointly with the Indian tribe or tribal organization and to accept the building or facility. If the Secretary identifies problems during final project inspections the information shall be provide to the Indian tribe or tribal organization and shall be limited to items that are materially noncompliant.

(11) The Secretary can require an Indian tribe or tribal organization to suspend work under a contract in accordance with this paragraph. The Secretary may suspend a contract for no more than 30 days unless the Indian tribe or tribal organization has failed to correct the reason(s) for the suspension or unless the cause of the suspension cannot be resolved through either the efforts of the Secretary or the Indian tribe or tribal organization.

(i) The following are reasons the Secretary may suspend work under a self-determination contract for construction:

(A) Differing site conditions encountered upon commencement of construction activities that impact health or safety concerns or shall require an increase in the negotiated project budget;

(B) The Secretary discovers materially non-compliant work;

(C) Funds allocated for the project that is the subject of this contract are rescinded by Congressional action; or

(D) Other Congressional actions occur that materially affect the subject matter of the contract.

(ii) If the Secretary wishes to suspend the work, the Secretary shall first provide written notice and an opportunity for the Indian tribe or tribal organization to correct the problem. The Secretary may direct the Indian tribe or tribal organization to suspend temporarily work under a contract only after providing a minimum of 5 working days' advance written notice to the Indian tribe or tribal organization describing the nature of the performance deficiencies or imminent safety, health or environmental issues which are the cause for suspending the work.

(iii) The Indian tribe or tribal organization shall be compensated for reasonable costs, including but not limited to overhead costs, incurred due to any suspension of work that occurred through no fault of the Indian tribe or tribal organization.

(iv) Disputes arising as a result of a suspension of the work by the Secretary shall be subject to the Contract Disputes Act or any other alternative dispute resolution mechanism as negotiated between and agreed to by the parties and contained in the contract.

(12) The Secretary can terminate the project for cause in the event non-compliant work is not corrected through the suspension process specified in paragraph (11) of this section.

(13) The Secretary retains authority to terminate the project for convenience for the following reasons:

(i) Termination for convenience is requested by the Indian tribe or tribal organization;

(ii) Termination for convenience is requested by the Secretary and agreed to by the Indian tribe or tribal organization;

(iii) Funds allocated for the project that is the subject of the contract are rescinded by Congressional action;

(iv) Other Congressional actions take place that affect the subject matter of the contract;

(v) If the Secretary terminates a self-determination construction contract for convenience, the Secretary shall provide the Indian tribe or tribal organization 21 days advance written notice of intent to terminate a contract for convenience; or

(vi) The Indian tribe or tribal organization shall be compensated for reasonable costs incurred due to termination of the contract.

§ 900.132 Once a contract and/or grant is awarded, how will the Indian tribe or tribal organization receive payments?

(a) A schedule for advance payments shall be developed based on progress, need, and other considerations in accordance with applicable law. The payment schedule shall be negotiated by the parties and included in the contract. The payment schedule may be adjusted as negotiated by the parties during the course of the project based on progress and need.

(b) Payments shall be made to the Indian tribe or tribal organization according to the payment schedule contained in the contract. If the contract does not provide for the length of each allocation period, the Secretary shall make payments to the Indian tribe or tribal organization at least quarterly. Each allocation shall be adequate to provide funds for the contract activities anticipated to be conducted during the allocation period, except that:

(1) The first allocation may be greater than subsequent allocations and include mobilization costs, and contingency funds described in §900.128(e)(8); and

(2) Any allocation may include funds for payment for materials that will be used during subsequent allocation periods.

(c) The Indian tribe or tribal organization may propose a schedule of payment amounts measured by time or measured by phase of the project (e.g., planning, design, construction).

(d) The amount of each payment allocation shall be stated in the Indian tribe or tribal organization's contract proposal. Upon award of the contract, the Secretary shall transfer the amount of the first allocation to the Indian tribe or tribal organization within 21 days after the date of contract award. The second allocation shall be made not later than 7 days before the end of the first allocation period.

(e) Not later than 7 days before the end of each subsequent allocation period after the second allocation, the Secretary shall transfer to the Indian tribe or tribal organization the amount for the next allocation period, unless the Indian tribe or tribal organization is delinquent in submission of allocation period progress reports and financial reports or the Secretary takes action to suspend or terminate the contract in accordance with §900.131(b)(11), §900.131(b)(12), or §900.131(b)(13).

§ 900.133 Does the declination process or the Contract Dispute Act apply to construction contract amendments proposed either by an Indian tribe or tribal organization or the Secretary?

The Contract Disputes Act generally applies to such amendments. However, the declination process and the procedures in §900.122 and §900.123 apply to the proposal by an Indian tribe or tribal organization when the proposal is for a new project, a new phase or discreet stage of a phase of a project, or an expansion of a project resulting from an additional allocation of funds by the Secretary under §900.120.

§ 900.134 At the end of a self-determination construction contract, what happens to savings on a cost-reimbursement contract?

Reference P.L. 93-638 Section 9 (25 U.S.C. § 450e-2)

[Note: Public Law 105-83, Title III, § 310, codified at 25 U.S.C. § 450e-2, amended the Act to limit use of excess funds from construction project costs, and provides:

> Beginning in fiscal year 1998 and thereafter, where the actual costs of construction projects under self-determination contracts, compacts, or grants, pursuant to Public Laws 93-638, 103-413, or 100-297, are less than the estimated costs thereof, use of the resulting excess funds shall be determined by the appropriate Secretary after consultation with the tribes.]

§ 900.135 May the time frames for action set out in this subpart be reduced?

Yes. The time frames in this subpart are intended to be maximum times and may be reduced based on urgency and need, by agreement of the parties. If the Indian tribe or tribal organization requests reduced time frames for action due to

unusual or special conditions (such as limited construction periods), the Secretary shall make a good faith effort to accommodate the requested time frames.

§ 900.136 Do tribal employment rights ordinances apply to construction contracts and subcontracts?

Yes. Tribal employment rights ordinances do apply to construction contracts and subcontracts pursuant to section 7(b) and section 7(c) of the Act.

§ 900.137 Do all provisions of the other subparts apply to contracts awarded under this subpart?

Yes, except as otherwise provided in this subpart and unless excluded as follows: programmatic reports and data requirements, reassumption, contract review and approval process, contract proposal contents, and §900.150 (d) and (e) of these regulations.

Subpart K – Waiver Procedures

§ 900.140 Can any provision of the regulations under this part be waived?

Yes. Upon the request of an Indian tribe or tribal organization, the Secretary shall waive any provision of these regulations, including any cost principles adopted by the regulations under this part, if the Secretary finds that granting the waiver is either in the best interest of the Indians served by the contract, or is consistent with the policies of the Act and is not contrary to statutory law.

§ 900.141 How does an Indian tribe or tribal organization get a waiver?

To obtain a waiver, an Indian tribe or tribal organization shall submit a written request to the Secretary identifying the regulation to be waived and the basis for the request. The Indian tribe or tribal organization shall explain the intended effect of the waiver, the impact upon the Indian tribe or tribal organization if the waiver is not granted, and the specific contract(s) to which the waiver will apply.

§ 900.142 Does an Indian tribe or tribal organization's waiver request have to be included in an initial contract proposal?

No. Although a waiver request may be included in a contract proposal, it can also be submitted separately.

§ 900.143 How is a waiver request processed?

The Secretary shall approve or deny a waiver within 90 days after the Secretary receives a written waiver request. The Secretary's decision shall be in writing. If the requested waiver is denied, the Secretary shall include in the decision a full explanation of the basis for the decision.

§ 900.144 What happens if the Secretary makes no decision within the 90-day period?

The waiver request is deemed approved.

§ 900.145 On what basis may the Secretary deny a waiver request?

Consistent with section 107(e) of the Act, the Secretary may only deny a waiver request based on a specific written finding. The finding must clearly demonstrate (or be supported by controlling legal authority) that if the waiver is granted:

(a) The service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;

(b) Adequate protection of trust resources is not assured;

(c) The proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract;

(d) The amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 106(a) of the Act; or

(e) The program, function, service, or activity (or portion of it) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities that are contractible under the Act because the proposal includes activities that cannot lawfully be carried out by the contractor.

§ 900.146 Is technical assistance available for waiver requests?

Yes. Technical assistance is available as provided in §900.7 to prepare a waiver request or to overcome any stated objection which the Secretary might have to the request.

§ 900.147 What appeal rights are available?

If the Secretary denies a waiver request, the Indian tribe or tribal organization has the right to appeal the decision and request a hearing on the record under the procedures for hearings and appeals contained in subpart L of these regulations. Alternatively, the Indian tribe or tribal organization may sue in Federal district court to challenge the Secretary's action.

§ 900.148 How can an Indian tribe or tribal organization secure a determination that a law or regulation has been superseded by the Indian Self-Determination Act, as specified in section 107(b) of the Act?

Any Indian tribe or tribal organization may at any time submit a request to the Secretary for a determination that any law or regulation has been superseded by the Act and that the law has no applicability to any contract or proposed contract under the Act. The Secretary is required to provide an initial decision on such a request within 90 days after receipt. If such a request is denied, the Indian tribe or tribal organization may appeal under subpart L of these regulations. The Secretary shall provide notice of each determination made under this subpart to all Indian tribes and tribal organizations.

Subpart L – Appeals

Appeals Other Than Emergency Reassumption and Suspension, Withholding or Delay in Payment

§ 900.150 What decisions can an Indian tribe or tribal organization appeal under this subpart?

(a) A decision to decline to award a self-determination contract, or a portion thereof, under section 102 of the Act;

(b) A decision to decline to award a construction contract, or a portion thereof, under sections 105(m) and 102 of the Act;

(c) A decision to decline a proposed amendment to a self-determination contract, or a portion thereof, under section 102 of the Act;

(d) A decision not to approve a proposal, in whole or in part, to redesign a program;

(e) A decision to rescind and reassume a self-determination contract, in whole or in part, under section 109 of the Act except for emergency reassumptions;

(f) A decision to refuse to waive a regulation under section 107(e) of the Act;

(g) A disagreement between an Indian tribe or tribal organization and the Federal government over proposed reporting requirements;

(h) A decision to refuse to allow an Indian tribe or tribal organization to convert a contract to mature status, under section 4(h) of the Act;

(i) All other appealable pre-award decisions by a Federal official as specified in these regulations, whether an official of the Department of the Interior or the Department of Health and Human Services; or

(j) A decision relating to a request for a determination that a law or regulation has been superseded by the Act.

§ 900.151 Are there any appeals this subpart does not cover?

This subpart does not cover:

(a) Disputes which arise after a self-determination contract has been awarded, or emergency reassumption of self-determination contracts or suspension of payments under self-determination contracts, which are covered under §900.170 through §900.176 of these regulations.

(b) Other post-award contract disputes, which are covered under subpart N.

(c) Denials under the Freedom of Information Act, 5 U.S.C. 552, which may be appealed under 43 CFR 2 for the Department of the Interior and 45 CFR 5 for the Department of Health and Human Services; and

(d) Decisions relating to the award of discretionary grants under section 103 of the Act, which may be appealed under 25 CFR 2 for the Department of the Interior, and under 45 CFR 5 for the Department of Health and Human Services.

§ 900.152 How does an Indian tribe or tribal organization know where and when to file its appeal from decisions made by agencies of DOI or DHHS?

Every decision in any of the ten areas listed above shall contain information which shall tell the Indian tribe or tribal organization where and when to file the Indian tribe or tribal organization's appeal. Each decision shall include the following statement:

Within 30 days of the receipt of this decision, you may request an informal conference under 25 CFR 900.154, or appeal this decision under 25 CFR 900.158 to the Interior Board of Indian Appeals (IBIA). Should you decide to appeal this decision, you may request a hearing on the record. An appeal to the IBIA under 25 CFR 900.158 shall be filed with the IBIA by certified mail or by hand delivery at the following address: Board of Indian Appeals, U.S. Department of the Interior, 801 North Quincy Street, Arlington, VA 22203. You shall serve copies of your Notice of Appeal on the Secretary and on the official whose decision is being appealed. You shall certify to the IBIA that you have served these copies.

§ 900.153 Does an Indian tribe or tribal organization have any options besides an appeal?

Yes. The Indian tribe or tribal organization may request an informal conference. An informal conference is a way to resolve issues as quickly as possible, without the need for a formal hearing. The Indian tribe or tribal organization may also choose to sue in U.S. District Court under section 102(b)(3) and section 110(a) of the Act.

§ 900.154 How does an Indian tribe or tribal organization request an informal conference?

The Indian tribe or tribal organization shall file its request for an informal conference with the office of the person whose decision it is appealing, within 30 days of the day it receives the decision. The Indian tribe or tribal organization may either hand-deliver the request for an informal conference to that person's office, or mail it by certified mail, return receipt requested. If the Indian tribe or tribal organization mails the request, it will be considered filed on the date the Indian tribe or tribal organization mailed it by certified mail.

§ 900.155 How is an informal conference held?

(a) The informal conference shall be held within 30 days of the date the request was received, unless the Indian tribe or tribal organization and the authorized representative of the Secretary agree on another date.

(b) If possible, the informal conference will be held at the Indian tribe or tribal organization's office. If the meeting cannot be held at the Indian tribe or tribal organization's office and is held more than fifty miles from its office, the Secretary shall arrange to pay transportation costs and per diem for incidental expenses to allow for adequate representation of the Indian tribe or tribal organization.

(c) The informal conference shall be conducted by a designated representative of the Secretary.

(d) Only people who are the designated representatives of the Indian tribe or tribal organization, or authorized by the Secretary of Health and Human Services or by the appropriate agency of the Department of the Interior, are allowed to make presentations at the informal conference.

§ 900.156 What happens after the informal conference?

(a) Within 10 days of the informal conference, the person who conducted the informal conference shall prepare and mail to the Indian tribe or tribal organization a written report which summarizes what happened at the informal conference and a recommended decision.

(b) Every report of an informal conference shall contain the following language:

Within 30 days of the receipt of this recommended decision, you may file an appeal of the initial decision of the DOI or DHHS agency with the Interior Board of Indian Appeals (IBIA) under 25 CFR 900.158. You may request a hearing on the record. An appeal to the IBIA under 25 CFR 900.158 shall be filed with the IBIA by certified mail or hand delivery at the following address: Board of Indian Appeals, U.S. Department of the Interior, 801 North Quincy Street, Arlington, VA 22203. You shall serve copies of your Notice of Appeal on the Secretary and on the official whose decision is being appealed. You shall certify to the IBIA that you have served these copies.

§ 900.157 Is the recommended decision always final?

No. If the Indian tribe or tribal organization is dissatisfied with the recommended decision, it may still appeal the initial decision within 30 days of receiving the recommended decision and the report of the informal conference. If the Indian tribe or tribal organization does not file a notice of appeal within 30 days, or before the expiration of the extension it has received under §900.159, the recommended decision becomes final.

§ 900.158 How does an Indian tribe or tribal organization appeal the initial decision, if it does not request an informal conference or if it does not agree with the recommended decision resulting from the informal conference?

(a) If the Indian tribe or tribal organization decides to appeal, it shall file a notice of appeal with the IBIA within 30 days of receiving either the initial decision or the recommended decision.

(b) The Indian tribe or tribal organization may either hand-deliver the notice of appeal to the IBIA, or mail it by certified mail, return receipt requested. If the Indian tribe or tribal organization mails the Notice of Appeal, it will be considered filed on the date the Indian tribe or tribal organization mailed it by certified mail. The Indian tribe or tribal organization should mail the notice of appeal to: Board of Indian Appeals, U.S. Department of the Interior, 801 North Quincy Street, Arlington, VA 22203.

(c) The Notice of Appeal shall:

(1) Briefly state why the Indian tribe or tribal organization thinks the initial decision is wrong;

(2) Briefly identify the issues involved in the appeal; and

(3) State whether the Indian tribe or tribal organization wants a hearing on the record, or whether the Indian tribe or tribal organization wants to waive its right to a hearing.

(d) The Indian tribe or tribal organization shall serve a copy of the notice of appeal upon the official whose decision it is appealing. The Indian tribe or tribal organization shall certify to the IBIA that it has done so.

(e) The authorized representative of the Secretary of Health and Human Services or the authorized representative of the Secretary of the Interior will be considered a party to all appeals filed with the IBIA under the Act.

§ 900.159 May an Indian tribe or tribal organization get an extension of time to file a notice of appeal?

Yes. If the Indian tribe or tribal organization needs more time, it can request an extension of time to file its Notice of Appeal within 60 days of receiving either the initial decision or the recommended decision resulting from the informal conference. The request of the Indian tribe or tribal organization shall be in writing, and shall give a reason for not filing its notice of appeal within the 30-day time period. If the Indian tribe or tribal organization has a valid reason for not filing its notice of appeal on time, it may receive an extension from the IBIA.

§ 900.160 What happens after an Indian tribe or tribal organization files an appeal?

(a) Within 5 days of receiving the Indian tribe or tribal organization's notice of appeal, the IBIA will decide whether the appeal falls under §900.150(a) through §900.150(g). If so, the Indian tribe or tribal organization is entitled to a hearing.

(1) If the IBIA determines that the appeal of the Indian tribe or tribal organization falls under §900.150(h), §900.150(i), or §900.150(j), and the Indian tribe or tribal organization has requested a hearing, the IBIA will grant the request for a hearing unless the IBIA determines that there are no genuine issues of material fact to be resolved.

(2) If the IBIA cannot make that decision based on the information included in the notice of appeal, the IBIA may ask for additional statements from the Indian tribe or tribal organization, or from the appropriate Federal agency. If the IBIA asks for more statements, it will make its decision within 5 days of receiving those statements.

(b) If the IBIA decides that the Indian tribe or tribal organization is not entitled to a hearing or if the Indian tribe or tribal organization has waived its right to a hearing on the record, the IBIA will ask for the administrative record under 43 CFR 4.335. The IBIA shall tell the parties that the appeal will be considered under the regulations at 43 CFR 4, subpart D, except the case shall be docketed immediately, without waiting for the 20-day period described in 43 CFR 4.336.

§ 900.161 How is a hearing arranged?

(a) If a hearing is to be held, the IBIA will refer the Indian tribe or tribal organization's case to the Hearings Division of the Office of Hearings and Appeals of the U.S. Department of the Interior. The case will then be assigned to an Administrative Law Judge (ALJ), appointed under 5 U.S.C. 3105.

(b) Within 15 days of the date of the referral, the ALJ will hold a pre-hearing conference, by telephone or in person, to decide whether an evidentiary hearing is necessary, or whether it is possible to decide the appeal based on the written record. At the pre-hearing conference the ALJ will provide for:

(1) A briefing and discovery schedule;

(2) A schedule for the exchange of information, including, but not limited to witness and exhibit lists, if an evidentiary hearing is to be held;

(3) The simplification or clarification of issues;

(4) The limitation of the number of expert witnesses, or avoidance of similar cumulative evidence, if an evidentiary hearing is to be held;

(5) The possibility of agreement disposing of all or any of the issues in dispute; and

(6) Such other matters as may aid in the disposition of the appeal.

(c) The ALJ shall order a written record to be made of any conference results that are not reflected in a transcript.

§ 900.162 What happens when a hearing is necessary?

(a) The ALJ shall hold a hearing within 60 days of the date of the order referring the appeal to the ALJ, unless the parties agree to have the hearing on a later date.

(b) At least 30 days before the hearing, the government agency shall file and serve the Indian tribe or tribal organization with a response to the notice of appeal.

(c) If the hearing is held more than 50 miles from the Indian tribe or tribal organization's office, the Secretary shall arrange to pay transportation costs and per diem for incidental expenses to allow for adequate representation of the Indian tribe or tribal organization.

(d) The hearing shall be conducted in accordance with the Administrative Procedure Act, 5 U.S.C. 556.

§ 900.163 What is the Secretary's burden of proof for appeals from decisions under §900.150(a) through §900.150(g)?

For those appeals, the Secretary has the burden of proof (as required by section 102(e)(1) of the Act) to establish by clearly demonstrating the validity of the grounds for declining the contract proposal.

§ 900.164 What rights do Indian tribes, tribal organizations, and the government have during the appeal process?

Both the Indian tribe or tribal organization and the government agency have the same rights during the appeal process. These rights include the right to:

(a) Be represented by legal counsel;

(b) Have the parties provide witnesses who have knowledge of the relevant issues, including specific witnesses with that knowledge, who are requested by either party;

(c) Cross-examine witnesses;

(d) Introduce oral or documentary evidence, or both;

(e) Require that oral testimony be under oath;

(f) Receive a copy of the transcript of the hearing, and copies of all documentary evidence which is introduced at the hearing;

(g) Compel the presence of witnesses, or the production of documents, or both, by subpoena at hearings or at depositions;

(h) Take depositions, to request the production of documents, to serve interrogatories on other parties, and to request admissions; and

(i) Any other procedural rights under the Administrative Procedure Act, 5 U.S.C. 556.

§ 900.165 What happens after the hearing?

(a) Within 30 days of the end of the formal hearing or any post-hearing briefing schedule established by the ALJ, the ALJ shall send all the parties a recommended decision, by certified mail, return receipt requested. The recommended decision shall contain the ALJ's findings of fact and conclusions of law on all the issues. The recommended decision shall also state that the Indian tribe or tribal organization has the right to object to the recommended decision.

(b) If the appeal involves the Department of Health and Human Services, the recommended decision shall contain the following statement:

Within 30 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Secretary of Health and Human Services under 25 CFR 900.166. An appeal to the Secretary under 25 CFR 900.166 shall be filed at the following address: Department of Health and Human Services, 200 Independence Ave. S.W., Washington, DC, 20201. You shall serve copies of your notice of appeal on the official whose decision is being appealed.

You shall certify to the Secretary that you have served this copy. If neither party files an objection to the recommended decision within 30 days, the recommended decision will become final.

(c) If the appeal involves the Department of the Interior, the recommended decision shall contain the following statement:

Within 30 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Interior Board of Indian Appeals (IBIA) under 25 CFR 900.166. An appeal to the IBIA under 25 CFR 900.166 shall be filed at the following address: Board of Indian Appeals, 801 North Quincy Street, Arlington, VA 22203. You shall serve copies of your notice of appeal on the Secretary of the Interior, and on the official whose decision is being appealed. You shall certify to the IBIA that you have served these copies. If neither party files an objection to the recommended decision within 30 days, the recommended decision will become final.

§ 900.166 Is the recommended decision always final?

No. Any party to the appeal may file precise and specific written objections to the recommended decision, or any other comments, within 30 days of receiving the recommended decision. Objections shall be served on all other parties. The recommended decision shall become final 30 days after the Indian tribe or tribal organization receives the ALJ's recommended decision, unless a written statement of objections is filed with the Secretary of Health and Human Services or the IBIA during the 30-day period. If no party files a written statement of objections within 30 days, the recommended decision shall become final.

§ 900.167 If an Indian tribe or tribal organization objects to the recommended decision, what will the Secretary of Health and Human Services or the IBIA do?

(a) The Secretary of Health and Human Services or the IBIA has 20 days from the date it receives any timely written objections to modify, adopt, or reverse the recommended decision. If the Secretary of Health and Human Services or the IBIA does not modify or reverse the recommended decision during that time, the recommended decision automatically becomes final.

(b) When reviewing the recommended decision, the IBIA or the Secretary may consider and decide all issues properly raised by any party to the appeal, based on the record.

(c) The decision of the Secretary or the IBIA shall:

(1) Be in writing;

(2) Specify the findings of fact or conclusions of law which are modified or reversed;

(3) Give reasons for the decision, based on the record; and

(4) State that the decision is final for the Department.

§ 900.168 Will an appeal hurt the Indian tribe or tribal organization's position in other contract negotiations?

No. A pending appeal will not affect or prevent the negotiation or award of another contract.

§ 900.169 Will the decisions on appeals be available for the public to review?

Yes. The Secretary shall publish all final decisions from the ALJs, the IBIA, and the Secretary of Health and Human Services.

Appeals of Emergency Reassumption of Self-Determination Contracts or Suspensions, Withholding or Delay of Payments Under a Self-Determination Contract

§ 900.170 What happens in the case of emergency reassumption or suspension or withholding or delay of payments?

(a) This subpart applies when the Secretary gives notice to an Indian tribe or tribal organization that the Secretary intends to:

(1) Immediately rescind a contract or grant and reassume a program; or

(2) Suspend, withhold, or delay payment under a contract.

(b) When the Secretary advises an Indian tribe or tribal organization that the Secretary intends to take an action referred to in paragraph (a)(1) of this section, the Secretary shall also notify the Deputy Director of the Office of Hearings and Appeals, Department of the Interior, 801 North Quincy Street, Arlington, VA 22203.

§ 900.171 Will there be a hearing?

Yes. The Deputy Director of the Office of Hearings and Appeals shall appoint an Administrative Law Judge (ALJ) to hold a hearing.

(a) The hearing shall be held within 10 days of the date of the notice referred to in §900.170 unless the Indian tribe or tribal organization agrees to a later date.

(b) If possible, the hearing will be held at the office of the Indian tribe or tribal organization. If the hearing is held more than 50 miles from the office of the Indian tribe or tribal organization, the Secretary shall arrange to pay transportation costs and per diem for incidental expenses. This will allow for adequate representation of the Indian tribe or tribal organization.

§ 900.172 What happens after the hearing?

(a) Within 30 days after the end of the hearing or any post-hearing briefing schedule established by the ALJ, the ALJ shall send all parties a recommended decision by certified mail, return receipt requested. The recommended decision shall contain the ALJ's findings of fact and conclusions of law on all the issues. The recommended decision shall also state that the Indian tribe or tribal organization has the right to object to the recommended decision.

(b) If the appeal involves the Department of Health and Human Services, the recommended decision shall contain the following statement:

Within 15 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Secretary of Health and Human Services under 25 CFR 900.173. An appeal to the Secretary under 25 CFR 900.173 shall be filed at the following address: Department of Health and Human Services, 200 Independence Ave. S.W., Washington, DC 20201. You shall serve copies of your notice of appeal on the official whose decision is being appealed. You shall certify to the Secretary that you have served this copy. If neither party files an objection to the recommended decision within 15 days, the recommended decision will become final.

(c) If the appeal involves the Department of the Interior, the recommended decision shall contain the following statement:

Within 15 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Interior Board of Indian Appeals (IBIA) under 25 CFR 900.173. An appeal to the IBIA under 25 CFR 900.173 shall be filed at the following address: Board of Indian Appeals, 801 North Quincy Street, Arlington, VA 22203.

You shall serve copies of your notice of appeal on the Secretary of the Interior, and on the official whose decision is being appealed. You shall certify to the IBIA that you have served these copies. If neither party files an objection to the recommended decision within 15 days, the recommended decision will become final.

§ 900.173 Is the recommended decision always final?

No. Any party to the appeal may file precise and specific written objections to the recommended decision, or any other comments, within 15 days of receiving the recommended decision. You shall serve a copy of your objections on the other party. The recommended decision will become final 15 days after the Indian tribe or tribal organization receives the ALJ's recommended decision, unless a written statement of objections is filed with the Secretary of Health and Human Services or the IBIA during the 15-day period. If no party files a written statement of objections within 15 days, the recommended decision will become final.

§ 900.174 If an Indian tribe or tribal organization objects to the recommended decision, what will the Secretary of Health and Human Services or the IBIA do?

(a) The Secretary or the IBIA has 15 days from the date he/she receives timely written objections to modify, adopt, or reverse the recommended decision. If the Secretary or the IBIA does not modify or reverse the recommended decision during that time, the recommended decision automatically becomes final.

(b) When reviewing the recommended decision, the IBIA or the Secretary may consider and decide all issues properly raised by any party to the appeal, based on the record.

(c) The decision of the Secretary or of the IBIA shall:

(1) Be in writing;

(2) Specify the findings of fact or conclusions of law which are modified or reversed;

(3) Give reasons for the decision, based on the record; and

(4) State that the decision is final for the Department.

§ 900.175 Will an appeal hurt an Indian tribe or tribal organization's position in other contract negotiations?

No. A pending appeal will not affect or prevent the negotiation or award of another contract.

§ 900.176 Will the decisions on appeals be available for the public to review?

Yes. The Secretary shall publish all final decisions from the ALJs, the IBIA, and the Secretary of Health and Human Services.

Applicability of the Equal Access to Justice Act

§ 900.177 Does the Equal Access to Justice Act (EAJA) apply to appeals under this subpart?

Yes. EAJA claims against DOI or HHS will be heard under 43 CFR 4.601 through 4.628. For HHS, appeals from an EAJA award will be according to 25 CFR 900.165(b).

Subpart M – Federal Tort Claims Act Coverage General Provisions

§ 900.180 What does this subpart cover?

This subpart explains the applicability of the Federal Tort Claims Act (FTCA). This section covers:

(a) Coverage of claims arising out of the performance of medical-related functions under self-determination contracts;

(b) Coverage of claims arising out of the performance of non-medical-related functions under self-determination contracts; and

(c) Procedures for filing claims under FTCA.

§ 900.181 What definitions apply to this subpart?

Indian contractor means:

(1) In California, subcontractors of the California Rural Indian Health Board, Inc. or, subject to approval of the IHS Director after consultation with the DHHS Office of General Counsel, subcontractors of an Indian tribe or tribal organization which are:

(i) Governed by Indians eligible to receive services from the Indian Health Service;

(ii) Which carry out comprehensive IHS service programs within geographically defined service areas; and

(iii) Which are selected and identified through tribal resolution as the local provider of Indian health care services.

(2) Subject to the approval of the IHS Director after consultation with the DHHS Office of General Counsel, Indian tribes and tribal organizations which meet in all respects the requirements of the Indian Self-Determination Act to contract directly with the Federal Government but which choose through tribal resolution to subcontract to carry out IHS service programs within geographically defined service areas with another Indian tribe or tribal organization which contracts directly with IHS.

(3) Any other contractor that qualifies as an “Indian contractor” under the Indian Self-Determination Act.

§ 900.182 What other statutes and regulations apply to FTCA coverage?

A number of other statutes and regulations apply to FTCA coverage, including the Federal Tort Claims Act (28 U.S.C. 1346(b), 2401, 2671–2680) and related Department of Justice regulations in 28 CFR part 14.

§ 900.183 Do Indian tribes and tribal organizations need to be aware of areas which FTCA does not cover?

Yes. There are claims against self-determination contractors which are not covered by FTCA, claims which may not be pursued under FTCA, and remedies that are excluded by FTCA. General guidance is provided below as to these matters but is not intended as a definitive description of coverage, which is subject to review by the Department of Justice and the courts on a case-by-case basis.

(a) *What claims are expressly barred by FTCA and therefore may not be made against the United States, an Indian tribe or tribal organization?* Any claim under 28 U.S.C. 2680, including claims arising out of assault, battery, false

imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights, unless otherwise authorized by 28 U.S.C. 2680(h).

(b) *What claims may not be pursued under FTCA?*

(1) Except as provided in §900.181(a)(1) and §900.189, claims against subcontractors arising out of the performance of subcontracts with a self-determination contractor;

(2) Claims for on-the-job injuries which are covered by workmen's compensation;

(3) Claims for breach of contract rather than tort claims; or

(4) Claims resulting from activities performed by an employee which are outside the scope of employment.

(c) *What remedies are expressly excluded by FTCA and therefore are barred?*

(1) Punitive damages, unless otherwise authorized by 28 U.S.C. 2674; and

(2) Other remedies not permitted under applicable state law.

§ 900.184 Is there a deadline for filing FTCA claims?

Yes. Claims shall be filed within 2 years of the date of accrual. (28 U.S.C. 2401).

§ 900.185 How long does the Federal government have to process an FTCA claim after the claim is received by the Federal agency, before a lawsuit may be filed?

Six months.

§ 900.186 Is it necessary for a self-determination contract to include any clauses about Federal Tort Claims Act coverage?

No, it is optional. At the request of Indian tribes and tribal organizations, self-determination contracts shall include the following clauses to clarify the scope of FTCA coverage:

(a) The following clause may be used for all contracts:

For purposes of Federal Tort Claims Act coverage, the contractor and its employees (including individuals performing personal services contracts with the contractor to provide health care services) are deemed to be employees of the Federal government while performing work under this contract. This status is not changed by the source of the funds used by the contractor to pay the employee's salary and benefits unless the employee receives additional compensation for performing covered services from anyone other than the contractor.

(b) The following clause is for IHS contracts only:

Under this contract, the contractor's employee may be required as a condition of employment to provide health services to non-IHS beneficiaries in order to meet contractual obligations. These services may be provided in either contractor or non-contractor facilities. The employee's status for Federal Tort Claims Act purposes is not affected.

§ 900.187 Does FTCA apply to a self-determination contract if FTCA is not referenced in the contract?

Yes.

§ 900.188 To what extent shall the contractor cooperate with the Federal government in connection with tort claims arising out of the contractor's performance?

(a) The contractor shall designate an individual to serve as tort claims liaison with the Federal government.

(b) As part of the notification required by 28 U.S.C. 2679(c), the contractor shall notify the Secretary immediately in writing of any tort claim (including any proceeding before an administrative agency or court) filed against the contractor or any of its employees that relates to performance of a self-determination contract or subcontract.

(c) The contractor, through its designated tort claims liaison, shall assist the appropriate Federal agency in preparing a comprehensive, accurate, and unbiased report of the incident so that the claim may be properly evaluated. This report should be completed within 60 days of notification of the filing of the tort claim. The report should be complete in every significant detail and include as appropriate:

(1) The date, time and exact place of the accident or incident;

(2) A concise and complete statement of the circumstances of the accident or incident;

(3) The names and addresses of tribal and/or Federal employees involved as participants or witnesses;

(4) The names and addresses of all other eyewitnesses;

(5) An accurate description of all government and other privately-owned property involved and the nature and amount of damage, if any;

(6) A statement as to whether any person involved was cited for violating a Federal, State or tribal law, ordinance, or regulation;

(7) The contractor's determination as to whether any of its employees (including Federal employees assigned to the contractor) involved in the incident giving rise to the tort claim were acting within the scope of their employment in carrying out the contract at the time the incident occurred;

(8) Copies of all relevant documentation, including available police reports, statements of witnesses, newspaper accounts, weather reports, plats and photographs of the site or damaged property, such as may be necessary or useful for purposes of claim determination by the Federal agency; and

(9) Insurance coverage information, copies of medical bills, and relevant employment records.

(d) The contractor shall cooperate with and provide assistance to the U.S. Department of Justice attorneys assigned to defend the tort claim, including, but not limited to, case preparation, discovery, and trial.

(e) If requested by the Secretary, the contractor shall make an assignment and subrogation of all the contractor's rights and claims (except those against the Federal government) arising out of a tort claim against the contractor.

(f) If requested by the Secretary, the contractor shall authorize representatives of the Secretary to settle or defend any claim and to represent the contractor in or take charge of any action. If the Federal government undertakes the settlement or defense of any claim or action the contractor shall provide all reasonable additional assistance in reaching a settlement or asserting a defense.

§ 900.189 Does this coverage extend to subcontractors of self-determination contracts?

No. Subcontractors or subgrantees providing services to a Public Law 93–638 contractor or grantee are generally not covered. The only exceptions are Indian contractors such as those under subcontract with the California Rural Indian Health Board to carry out IHS programs in geographically defined service areas in California and personal services contracts under §900.193 (for §900.183(b)(1)) or §900.183(b) (for §900.190).

Medical-Related Claims

§ 900.190 Is FTCA the exclusive remedy for a tort claim for personal injury or death resulting from the performance of a self-determination contract?

Yes, except as explained in §900.183(b). No claim may be filed against a self-determination contractor or employee for personal injury or death arising from the performance of medical, surgical, dental, or related functions by the contractor in carrying out self-determination contracts under the Act. Related functions include services such as those provided by nurses, laboratory and x-ray technicians, emergency medical technicians and other health care providers including psychologists and social workers. All such claims shall be filed against the United States and are subject to the limitations and restrictions of the FTCA.

§ 900.191 Are employees of self-determination contractors providing health services under the self-determination contract protected by FTCA?

Yes. For the purpose of Federal Tort Claims Act coverage, an Indian tribe or tribal organization and its employees performing medical-related functions under a self-determination contract are deemed a part of the Public Health Service if the employees are acting within the scope of their employment in carrying out the contract.

§ 900.192 What employees are covered by FTCA for medical-related claims?

(a) Permanent employees;

(b) Temporary employees;

(c) Persons providing services without compensation in carrying out a contract;

(d) Persons required because of their employment by a self-determination contractor to serve non-IHS beneficiaries (even if the services are provided in facilities not owned by the contractor); and

(e) Federal employees assigned to the contract.

§ 900.193 Does FTCA coverage extend to individuals who provide health care services under a personal services contract providing services in a facility that is owned, operated, or constructed under the jurisdiction of the IHS?

Yes. The coverage extends to individual personal services contractors providing health services in such a facility, including a facility owned by an Indian tribe or tribal organization but operated under a self-determination contract with IHS.

§ 900.194 Does FTCA coverage extend to services provided under a staff privileges agreement with a non-IHS facility where the agreement requires a health care practitioner to provide reciprocal services to the general population?

Yes. Those services are covered, as long as the contractor's health care practitioners do not receive additional compensation from a third party for the performance of these services and they are acting within the scope of their employment under a self-determination contract. Reciprocal services include:

(a) Cross-covering other medical personnel who temporarily cannot attend their patients;

(b) Assisting other personnel with surgeries or other medical procedures;

(c) Assisting with unstable patients or at deliveries; or

(d) Assisting in any patient care situation where additional assistance by health care personnel is needed.

§ 900.195 Does FTCA coverage extend to the contractor's health care practitioners providing services to private patients on a fee-for-services basis when such personnel (not the self-determination contractor) receive the fee?

No.

§ 900.196 Do covered services include the conduct of clinical studies and investigations and the provision of emergency services, including the operation of emergency motor vehicles?

Yes, if the services are provided in carrying out a self-determination contract. (An emergency motor vehicle is a vehicle, whether government, contractor, or employee-owned, used to transport passengers for medical services.)

§ 900.197 Does FTCA cover employees of the contractor who are paid by the contractor from funds other than those provided through the self-determination contract?

Yes, as long as the services out of which the claim arose were performed in carrying out the self-determination contract.

§ 900.198 Are Federal employees assigned to a self-determination contractor under the Intergovernmental Personnel Act or detailed under section 214 of the Public Health Service Act covered to the same extent that they would be if working directly for a Federal agency?

Yes.

§ 900.199 Does FTCA coverage extend to health care practitioners to whom staff privileges have been extended in contractor health care facilities operated under a self-determination contract on the condition that such practitioner provide health services to IHS beneficiaries covered by FTCA?

Yes, health care practitioners with staff privileges in a facility operated by a contractor are covered when they perform services to IHS beneficiaries. Such personnel are not covered when providing services to non-IHS beneficiaries.

§ 900.200 May persons who are not Indians or Alaska Natives assert claims under FTCA?

Yes. Non-Indian individuals served under the contract whether or not on a fee-for-service basis, may assert claims under this subpart.

Procedure for Filing Medical-Related Claims

§ 900.201 How should claims arising out of the performance of medical-related functions be filed?

Claims should be filed on Standard Form 95 (Claim for Damage, Injury or Death) or by submitting comparable written information (including a definite amount of monetary damage claimed) with the Chief, PHS Claims Branch, Room 18–20, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857, or at such other address as shall have been provided to the contractor in writing.

§ 900.202 What should a self-determination contractor or a contractor's employee do on receiving such a claim?

They should immediately forward the claim to the PHS Claims Branch at the address indicated in §900.201 and notify the contractor's tort claims liaison.

§ 900.203 If the contractor or contractor's employee receives a summons and/or a complaint alleging a tort covered by FTCA, what should the contractor do?

As part of the notification required by 28 U.S.C. 2679(c), the contractor should immediately inform the Chief, Litigation Branch, Business and Administrative Law Division, Office of General Counsel, Department of Health and Human Services, 330 Independence Avenue SW., Room 5362, Washington, DC 20201, and the contractor's tort claims liaison, and forward the following materials:

(a) Four copies of the claimant's medical records of treatment, inpatient and outpatient, and any related correspondence, as well as reports of consultants;

(b) A narrative summary of the care and treatment involved;

(c) The names and addresses of all personnel who were involved in the care and treatment of the claimant;

(d) Any comments or opinions that the employees who treated the claimant believe to be pertinent to the allegations contained in the claim; and

(e) Other materials identified in §900.188(c).

Non-Medical Related Claims

§ 900.204 Is FTCA the exclusive remedy for a non-medical related tort claim arising out of the performance of a self-determination contract?

Yes. Except as explained in §900.183(b), no claim may be filed against a self-determination contractor or employee based upon performance of non-medical-related functions under a self-determination contract. Claims of this type must be filed against the United States under FTCA.

§ 900.205 To what non-medical-related claims against self-determination contractors does FTCA apply?

It applies to:

(a) All tort claims arising from the performance of self-determination contracts under the authority of the Act on or after October 1, 1989; and

(b) Any tort claims first filed on or after October 24, 1989, regardless of when the incident which is the basis of the claim occurred.

§ 900.206 What employees are covered by FTCA for non-medical-related claims?

(a) Permanent employees;

(b) Temporary employees;

(c) Persons providing services without compensation in carrying out a contract;

(d) Persons required because of their employment by a self-determination contractor to serve non-IHS beneficiaries (even if the services are provided in facilities not owned by the contractor); and

(e) Federal employees assigned to the contract.

§ 900.207 How are non-medical related tort claims and lawsuits filed for IHS?

Non-medical-related tort claims and lawsuits arising out of the performance of self-determination contracts with the Indian Health Service should be filed in the manner described in §900.201 (for both §900.207 and §900.208).

§ 900.208 How are non-medical related tort claims and lawsuits filed for DOI?

Non-medical-related claims arising out of the performance of self-determination contracts with the Secretary of the Interior should be filed in the manner described in §900.201 with the Assistant Solicitor, Procurement and Patents, Office of the Solicitor, Department of the Interior, Room 6511, 1849 C Street NW., Washington, DC 20240.

§ 900.209 What should a self-determination contractor or contractor's employee do on receiving a non-medical related tort claim?

(a) If the contract is with DHHS, they should immediately forward the claim to the PHS Claims Branch at the address indicated in §900.201 and notify the contractor's tort claims liaison.

(b) If the contract is with DOI, they should immediately notify the Assistant Solicitor, Procurement and Patents, Office of the Solicitor, Department of the Interior, Room 6511, 1849 C Street N.W., Washington, DC 20240.

§ 900.210 If the contractor or contractor's employee receives a summons and/or complaint alleging a non-medical related tort covered by FTCA, what should an Indian tribe or tribal organization do?

(a) If the contract is with the DHHS, they should immediately inform the Chief, Litigation Branch, Business and Administrative Law Division, Office of General Counsel, Department of Health and Human Services, 330 Independence Avenue S.W., Room 5362, Washington, DC 20201 and the contractor's tort claims liaison.

(b) If the contract is with the Department of the Interior, they should immediately notify the Assistant Solicitor, Procurement and Patents, Office of the Solicitor, Department of the Interior, Room 6511, 1849 C Street N.W., Washington, DC 20240, and the contractor's tort claims liaison.

Subpart N – Post-Award Contract Disputes

§ 900.215 What does this subpart cover?

(a) This subpart covers:

(1) All HHS and DOI self-determination contracts, including construction contracts; and

(2) All disputes regarding an awarding official's decision relating to a self-determination contract.

(b) This subpart does not cover the decisions of an awarding official that are covered under subpart L.

§ 900.216 What other statutes and regulations apply to contract disputes?

(a) The Contract Disputes Act of 1978 (CDA), Public Law 95–563 (41 U.S.C. 601 as amended);

(b) If the matter is submitted to the CBCA, 48 CFR part 6101; and

(c) The Equal Access to Justice Act (EAJA), 5 U.S.C. 504 and 28 U.S.C. 2412, and regulations at 48 CFR 6101.30, 6101.31 (CBCA), 43 CFR 4.602, 4.604 through 4.628 (DOI), and 45 CFR 13.4 through 13.7 (HHS).

§ 900.217 Is filing a claim under the CDA our only option for resolving post-award contract disputes?

No. The Federal government attempts to resolve all contract disputes by agreement at the awarding official's level. These are alternatives to filing a claim under the CDA:

(a) Before issuing a decision on a claim, the awarding official should consider using informal discussions between the parties, assisted by individuals who have not substantially participated in the matter, to aid in resolving differences.

(b) In addition to filing a CDA claim, or instead of filing a CDA claim, the parties may choose to use an alternative dispute resolution mechanism, pursuant to the provisions of the Administrative Dispute Resolution Act, Public Law 101–552, as amended, 5 U.S.C. 581 et seq., or the options listed in section 108(1)(b)(12) of the Indian Self-Determination Act, as applicable.

§ 900.218 What is a claim under the CDA?

(a) A claim is a written demand by one of the contracting parties, asking for one or more of the following:

(1) Payment of a specific sum of money under the contract;

(2) Adjustment or interpretation of contract terms; or

(3) Any other claim relating to the contract.

(b) However, an undisputed voucher, invoice, or other routing request for payment is not a claim under the CDA. A voucher, invoice, or routing request for payment may be converted into a CDA claim if:

(1) It is disputed as to liability or amount; or

(2) It is not acted upon in a reasonable time and written notice of the claim is given to the awarding official by the senior official designated in the contract.

§ 900.219 How does an Indian tribe, tribal organization, or Federal agency submit a claim?

(a) An Indian tribe or tribal organization shall submit its claim in writing to the awarding official. The awarding official shall document the contract file with evidence of the date the claim was received.

(b) A Federal agency shall submit its claim in writing to the contractor's senior official, as designated in the contract.

§ 900.220 Does it make a difference whether the claim is large or small?

Yes. The Contract Disputes Act requires that an Indian tribe or tribal organization making a claim for more than $100,000 shall certify that:

(a) The claim is made in good faith,

(b) Supporting documents or data are accurate and complete to the best of the Indian tribe or tribal organization's knowledge and belief;

(c) The amount claimed accurately reflects the amount believed to be owed by the Federal government; and

(d) The person making the certification is authorized to do so on behalf of the Indian tribe or tribal organization.

§ 900.221 What happens next?

(a) If the parties do not agree on a settlement, the awarding official will issue a written decision on the claim.

(b) The awarding official shall always give a copy of the decision to the Indian tribe or tribal organization by certified mail, return receipt requested, or by any other method which provides a receipt.

§ 900.222 What goes into a decision?

A decision shall:

(a) Describe the claim or dispute;

(b) Refer to the relevant terms of the contract;

(c) Set out the factual areas of agreement and disagreement;

(d) Set out the actual decision, based on the facts, and outline the reasoning which supports the decision; and

(e) Contain the following language:

This is a final decision. You may appeal this decision to the Civilian Board of Contract Appeals (CBCA), 1800 F Street NW, Washington, DC 20245. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the CBCA and provide a copy to the individual from whose decision the appeal is taken. The notice must indicate that an appeal is intended, and refer to the decision and contract number. Instead of appealing to the CBCA, you may bring an action in the U.S. Court of Federal Claims or in the United States District Court within 12 months of the date you receive this notice.

§ 900.223 When does an Indian tribe or tribal organization get the decision?

(a) If the claim is for more than $100,000, the awarding official shall issue the decision within 60 days of the day he or she receives the claim. If the awarding official cannot issue a decision that quickly, he or she shall tell you when the decision will be issued.

(b) If the claim is for $100,000 or less, and you want a decision within 60 days, you shall advise the awarding official in writing that you want a decision within that period. If you advise the awarding official in writing that you do want a decision within 60 days, the awarding official shall issue the decision within 60 days of the day he or she receives your written notice.

(c) If your claim is for $100,000 or less and you do not advise the awarding official that you want a decision within 60 days, or if your claim exceeds $100,000 and the awarding official has notified you of the time within which a decision will be issued, the awarding official shall issue a decision within a reasonable time. What is “reasonable” depends upon the size and complexity of your claim, and upon the adequacy of the information you have given to the awarding official in support of your claim.

§ 900.224 What happens if the decision does not come within that time?

If the awarding official does not issue a decision within the time required under §900.223, the Indian tribe or tribal organization may treat the delay as though the awarding official has denied the claim, and proceed according to §900.222(e),

§ 900.225 Does an Indian tribe or tribal organization get paid immediately if the awarding official decides in its favor?

Yes. Once the awarding official decides that money should be paid under the contract, the amount due, minus any portion already paid, should be paid as promptly as possible, without waiting for either party to file an appeal. Any payment which is made under this subsection will not affect any other rights either party might have. In addition, it will not create a binding legal precedent as to any future payments.

§ 900.226 What rules govern appeals of cost disallowances?

In any appeal involving a disallowance of costs, the Board of Contract Appeals will give due consideration to the factual circumstances giving rise to the disallowed costs, and shall seek to determine a fair result without rigid adherence to strict accounting principles. The determination of allowability shall assure fair compensation for the work or service performed, using cost and accounting data as guides, but not rigid measures, for ascertaining fair compensation.

§ 900.227 Can the awarding official change the decision after it has been made?

(a) The decision of the awarding official is final and conclusive, and not subject to review by any forum, tribunal or government agency, unless an appeal or suit is timely commenced as authorized by the Contract Disputes Act. Once the decision has been made, the awarding official may not change it, except by agreement of the parties, or under the following limited circumstances:

(1) If evidence is discovered which could not have been discovered through due diligence before the awarding official issued the decision;

(2) If the awarding official learns that there has been fraud, misrepresentation, or other misconduct by a party;

(3) If the decision is beyond the scope of the awarding official's authority;

(4) If the claim has been satisfied, released or discharged; or

(5) For any other reason justifying relief from the decision.

(b) Nothing in this subpart shall be interpreted to discourage settlement discussions or prevent settlement of the dispute at any time.

(c) If a decision is withdrawn and a new decision is issued that is not acceptable to the contractor, the contractor may proceed with the appeal based on the new decision. If no new decision is issued, the contractor may proceed under §900.224.

(d) If an appeal or suit is filed, the awarding official may modify or withdraw his or her final decision.

§ 900.228 Is an Indian tribe or tribal organization entitled to interest if it wins its claim?

Yes. If an Indian tribe or tribal organization wins the claim, it will be entitled to interest on the amount of the award. The interest will be calculated from the date the awarding official receives the claim until the day it is paid. The interest rate will be the rate which the Secretary of the Treasury sets for the Renegotiation Board under the Renegotiation Act of 1951, Public Law 92–41, 26 U.S.C. 1212 and 26 U.S.C. 7447.

§ 900.229 What role will the awarding official play during an appeal?

(a) The awarding official shall provide any data, documentation, information or support required by the IBCA for use in deciding a pending appeal.

(b) Within 30 days of receiving an appeal or learning that an appeal has been filed, the awarding official shall assemble a file which contains all the documents which are pertinent to the appeal, including:

(1) The decision and findings of fact from which the appeal is taken;

(2) The contract, including specifications and pertinent modifications, plans and drawings;

(3) All correspondence between the parties which relates to the appeal, including the letter or letters of claims in response to which the decision was issued;

(4) Transcripts of any testimony taken during the course of the proceedings, and affidavits or statements of any witnesses on the matter in dispute, which were made before the filing of the notice of appeal with the IBCA; and

(5) Any additional information which may be relevant.

§ 900.230 What is the effect of a pending appeal?

(a) Indian tribes and tribal organizations shall continue performance of a contract during the appeal of any claims to the same extent they would had there been no dispute.

(b) A pending dispute will not affect or bar the negotiation or award of any subsequent contract or negotiation between the parties.

Subpart O – Conflicts of Interest

§ 900.231 What is an organizational conflict of interest?

An organizational conflict of interest arises when there is a direct conflict between the financial interests of the contracting Indian tribe or tribal organization and:

(a) The financial interests of beneficial owners of Indian trust resources;

(b) The financial interests of the United States relating to trust resources, trust acquisitions, or lands conveyed or to be conveyed pursuant to the Alaska Native Claims Settlement Act 43 U.S.C. 1601 *et seq.*; or

(c) An express statutory obligation of the United States to third parties. This section only applies if the conflict was not addressed when the contract was first negotiated. This section only applies where the financial interests of the Indian tribe or tribal organization are significant enough to impair the Indian tribe or tribal organization's objectivity in carrying out the contract, or a portion of the contract.

§ 900.232 What must an Indian tribe or tribal organization do if an organizational conflict of interest arises under a contract?

This section only applies if the conflict was not addressed when the contract was first negotiated. When an Indian tribe or tribal organization becomes aware of an organizational conflict of interest, the Indian tribe or tribal organization must immediately disclose the conflict to the Secretary.

§ 900.233 When must an Indian tribe or tribal organization regulate its employees or subcontractors to avoid a personal conflict of interest?

An Indian tribe or tribal organization must maintain written standards of conduct to govern officers, employees, and agents (including subcontractors) engaged in functions related to the management of trust assets.

§ 900.234 What types of personal conflicts of interest involving tribal officers, employees or subcontractors would have to be regulated by an Indian tribe?

The Indian tribe or tribal organization would need a tribally-approved mechanism to ensure that no officer, employee, or agent (including a subcontractor) of the Indian tribe or tribal organization reviews a trust transaction in which that person has a financial or employment interest that conflicts with that of the trust beneficiary, whether the tribe or an allottee. Interests arising from membership in, or employment by, an Indian tribe or rights to share in a tribal claim need not be regulated.

§ 900.235 What personal conflicts of interest must the standards of conduct regulate?

The standards must prohibit an officer, employee, or agent (including a subcontractor) from participating in the review, analysis, or inspection of trust transactions involving an entity in which such persons have a direct financial interest or an employment relationship. It must also prohibit such officers, employees, or agents from accepting any gratuity, favor, or anything of more than nominal value, from a party (other than the Indian tribe) with an interest in the trust transactions under review. Such standards must also provide for sanctions or remedies for violation of the standards.

§ 900.236 May an Indian tribe elect to negotiate contract provisions on conflict of interest to take the place of this regulation?

Yes. An Indian tribe and the Secretary may agree to contract provisions, concerning either personal or organizational conflicts, that address the issues specific to the program and activities contracted in a manner that provides equivalent protection against conflicts of interest to these regulations. Agreed-upon contract provisions shall be followed, rather than the related provisions of this regulation. For example, the Indian tribe and the Secretary may agree that using the Indian tribe's own written code of ethics satisfies the objectives of the personal conflicts provisions of this regulation, in whole or in part.

Subpart P – Retrocession and Reassumption Procedures

§ 900.240 What does retrocession mean?

A retrocession means the return to the Secretary of a contracted program, in whole or in part, for any reason, before the expiration of the term of the contract.

§ 900.241 Who may retrocede a contract, in whole or in part?

An Indian tribe or tribal organization authorized by an Indian tribe may retrocede a contract.

§ 900.242 What is the effective date of retrocession?

The retrocession is effective on the date which is the earliest date among:

(a) One year from the date of the Indian tribe or tribal organization's request;

(b) The date the contract expires; or

(c) A mutually agreed-upon date.

§ 900.243 What effect will an Indian tribe or tribal organization's retrocession have on its rights to contract?

An Indian tribe or tribal organization's retrocession shall not negatively affect:

(a) Any other contract to which it is a party;

(b) Any other contracts it may request; and

(c) Any future request by the Indian tribe or tribal organization to contract for the same program.

§ 900.244 Will an Indian tribe or tribal organization's retrocession adversely affect funding available for the retroceded program?

No. The Secretary shall provide not less than the same level of funding that would have been available if there had been no retrocession.

§ 900.245 What obligation does the Indian tribe or tribal organization have with respect to returning property that was used in the operation of the retroceded program?

On the effective date of any retrocession, the Indian tribe or tribal organization shall, at the request of the Secretary, deliver to the Secretary all requested property and equipment provided under the contract which have a per item current fair market value, less the cost of improvements borne by the Indian tribe or tribal organization, in excess of $5,000 at the time of the retrocession.

§ 900.246 What does reassumption mean?

Reassumption means rescission, in whole or in part, of a contract and assuming or resuming control or operation of the contracted program by the Secretary without consent of the Indian tribe or tribal organization. There are two types of reassumption: emergency and non-emergency.

§ 900.247 Under what circumstances is a reassumption considered an emergency instead of non-emergency reassumption?

(a) A reassumption is considered an emergency reassumption if an Indian tribe or tribal organization fails to fulfill the requirements of the contract and this failure poses:

(1) An immediate threat of imminent harm to the safety of any person; or

(2) Imminent substantial and irreparable harm to trust funds, trust lands, or interest in such lands.

(b) A reassumption is considered a non-emergency reassumption if there has been:

(1) A violation of the rights or endangerment of the health, safety, or welfare of any person; or

(2) Gross negligence or mismanagement in the handling or use of:

(i) Contract funds;

(ii) Trust funds;

(iii) Trust lands; or

(iv) Interests in trust lands under the contract.

§ 900.248 In a non-emergency reassumption, what is the Secretary required to do?

The Secretary must:

(a) Notify the Indian tribes or tribal organizations served by the contract and the contractor in writing by certified mail of the details of the deficiencies in contract performance;

(b) Request specified corrective action to be taken within a reasonable period of time, which in no case may be less than 45 days; and

(c) Offer and provide, if requested, the necessary technical assistance and advice to assist the contractor to overcome the deficiencies in contract performance. The Secretary may also make a grant for the purpose of obtaining such technical assistance as provided in section 103 of the Act.

§ 900.249 What happens if the contractor fails to take corrective action to remedy the contract deficiencies identified in the notice?

The Secretary shall provide a second written notice by certified mail to the Indian tribes or tribal organizations served by the contract and the contractor that the contract will be rescinded, in whole or in part.

§ 900.250 What shall the second written notice include?

The second written notice shall include:

(a) The intended effective date of the reassumption;

(b) The details and facts supporting the intended reassumption; and

(c) Instructions that explain the Indian tribe or tribal organization's right to a formal hearing within 30 days of receipt of the notice.

§ 900.251 What is the earliest date on which the contract will be rescinded in a non-emergency reassumption?

The contract will not be rescinded by the Secretary before the issuance of a final decision in any administrative hearing or appeal.

§ 900.252 In an emergency reassumption, what is the Secretary required to do?

(a) Immediately rescind, in whole or in part, the contract;

(b) Assume control or operation of all or part of the program; and

(c) Give written notice to the contractor and the Indian tribes or tribal organizations served.

§ 900.253 What shall the written notice include?

The written notice shall include the following:

(a) A detailed statement of the findings which support the Secretary's determination;

(b) A statement explaining the contractor's right to a hearing on the record under §900.171 within 10 days of the emergency reassumption or such later date as the contractor may approve;

(c) An explanation that the contractor may be reimbursed for actual and reasonable “wind up costs” incurred after the effective date of the rescission; and

(d) A request for the return of property, if any.

§ 900.254 May the contractor be reimbursed for actual and reasonable “wind up costs” incurred after the effective date of rescission?

Yes.

§ 900.255 What obligation does the Indian tribe or tribal organization have with respect to returning property that was used in the operation of the rescinded contract?

On the effective date of any rescission, the Indian tribe or tribal organization shall, at the request of the Secretary, deliver to the Secretary all property and equipment provided under the contract which has a per item current fair market value,

less the cost of improvements borne by the Indian tribe or tribal organization, in excess of $5,000 at the time of the retrocession.

§ 900.256 Will a reassumption adversely affect funding available for the reassumed program?

No. The Secretary shall provide at least the same level of funding that would have been provided if there had been no reassumption.

C. Delegation

DEPARTMENT OF HEALTH AND HUMAN SERVICES Public Health Service

Indian Health Service
Rockville MD 20857

March 14, 1996

Program #15

TO: Director of Headquarters Operations

FROM: Director

SUBJECT: Delegation of Authority for the Indian Self- Determination and Education Assistance Act, Public Law 93-638, As Amended

Authority Delegated and To Whom

1. Pursuant to the authority delegated to the Director, Indian Health Service (IHS), by the Acting Assistant Secretary for Health, dated June 30, 1993, and as continued in the reorganization order designating the IHS as an Operating Division reporting directly to the Secretary of Health and Human Services, signed by the Secretary on October 31, 1995, and published in the Federal Register (60 FR 56605) on November 9, 1995, I hereby delegate to the Director of Headquarters Operations, for application IHS-wide, all of the authorities of the Indian Self-Determination and Education Assistance Act, Public Law (P.L.)93-638, as amended.

Redelegations and Restrictions

2. The above authorities may be redelegated.

3. This authority does not include the authority to promulgate regulations under Section 107 of P.L. 93-638, as amended, and the authority to submit reports to Congress, establish advisory committees or national commissions, and appoint members to such committees or commissions.

Prior Delegation

4. This delegation supersedes the delegation of authority contained in the Indian Health Manual, Part 1, Chapter 5, Delegations of Authority, Subject: Indian Self-Determination and Education Assistance Act, Title I, Exhibit 1-5.15, dated November 23, 1988. Previous redelegations of authority made to officials within IHS may continue in effect to the extent that they are consistent with this delegation and until they are superseded or canceled by appropriate authority.

Effective Date

5. This delegation is effective upon date of signature. In addition, I hereby affirm and ratify any actions taken by the Director of Headquarters Operation or his/her subordinates which, in effect, involved the exercise of the authorities delegated herein prior to the effective date of this delegation.

/Michael Trujillo/
Michael H. Trujillo, M.D., M.P.H
Assistant Surgeon General

As defined by 25 CFR 900.6 an awarding official "means any person who by appointment or delegation in accordance with applicable regulations has the authority to enter into and administer contracts on behalf of the United States of America and make determinations and findings with respect thereto." This authority generally rests with warranted contracting officers as authorized by FAR 1.6 and HHSAR 301.603 unless otherwise delegated (see Alaska Delegation below).

DEPARTMENT OF HEALTH AND HUMAN SERVICES Public Health Service

Indian Health Service
Rockville MD 20857

March 14, 1996

Program #16

TO: Director Alaska Area

FROM: Acting Director of Headquarters Operations

SUBJECT: Delegation of Authority for the Indian Self- Determination and Education Assistance Act, Public Law 93-638, As Amended

Authority Delegated and To Whom

1. Pursuant to the authority delegated to the Director of Headquarters Operations by the Director, Indian Health Service (IHS) on March 14, 1996, I hereby delegate to the Director, Alaska Area IHS, for application within the Alaska Area, all of the authorities of the Indian Self-Determination and Education Assistance Act, Public Law (P.L.) 93-638, as amended, including:

a. The authority to award contracts, and subsequent modifications to contracts, pursuant to Title I of P.L. 93-638, as amended.

b. The authority to issue Annual Funding Agreements (AFA) for Compacts awarded pursuant to Title III of P.L. 93-638, as amended.

c. The authority to sign amendments to Compacts awarded pursuant to Title III of P.L. 93-638, as amended.

Redelegations and Restrictions

2. Contracts awarded pursuant to Title I of P.L. 93-638, as amended, may only be awarded and administered by a Contracting Officer appointed in accordance with the Federal and Department acquisition regulations.

3. The Director retains the authority to sign all initial Compact and initial AFA documents for awards made pursuant to Title III of P.L. 93-638, as amended.

4. Annual Funding Agreements (AFA) for Compacts awarded pursuant to Title III, Section 303, of P.L. 93-638, as amended, may only be executed by issuance of a Notice of Grant Award that is signed by a duly appointed Compacts Officer. In the absence of an appointed Compacts Officer, AFAs negotiated by the Alaska Area

must be submitted to the Chief Grants Management Officer, Office of Administration and Management, for clearance processing and signature by the Director.

5. This authority does not include the authority to promulgate regulations under Section 107 of the Act, and the authority to submit reports to Congress, establish advisory committees or national commissions, and appoint members to such committees or commissions.

Prior Delegation

6. This delegation supersedes the delegation of authority to the Director, Alaska Area contained in the Indian Health Manual, Part 1, Chapter 5, Delegations of Authority, Subject: Indian Self-Determination and Education Assistance Act, Title I, Exhibit 1-5.1J, dated November 23, 1988. Previous redelegations of authority made to officials within the Alaska Area IHS may continue in effect to the extent that they are consistent with this delegation and until they are superseded or canceled by appropriate authority.

Effective Date

7. This delegation is effective upon date of signature. In addition, I hereby affirm and ratify any actions taken by the Director, Alaska Area, which, in effect, involved the exercise of the authorities delegated herein prior to the effective date of this delegation.

/Luana L. Reyes/
Luana Reyes

D. Title I – Forms Appendix

Note: These checklists and suggested formats are presented in the order they would be used throughout the pre-award process. Not all formats or forms will be needed for any particular award.

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As soon as the funds are identified for planning, design or construction, the Area must notify the Tribe (25 CFR 900.120).

Sample Informational Meeting Agenda 6

This type of meeting may take place at the request of the Tribe if they need additional information on prior to determining whether or not they wish to assume a project under a Title I contract (25 CFR 900.122).

Features of an Architecture/Engineering (A/E) Design Contract 7

The purpose of this information is to inform the Tribe of the steps the Government would take if the Tribe decides it does not want to assume the project. It is for use in an informational meeting that would take place if the Tribe needs additional information prior to deciding whether or not to contract for design activities. This information is not binding upon the Tribe, it is provided strictly as technical assistance.

Features of a Construction Contract 8

The purpose of this information is to inform the Tribe of the steps the Government would take if the Tribe decides it does not want to assume the project. It is for use in an informational meeting that would take place if the Tribe needs additional information prior to deciding whether or not to contract for construction activities. This information is not binding upon the Tribe, it is provided strictly as technical assistance.

Typical Acquisition Milestones 10

The purpose of this information is to inform the Tribe of the steps the Government would take if the Tribe decides it does not want to assume the project. It is for use in an informational meeting that would take place if the Tribe needs additional information prior to deciding whether or not to contract for design or construction activities. This information is not binding upon the Tribe, it is provided strictly as technical assistance.

Sample Letter of Intent for Reference by Tribes 11

Sample Letter of Intent Acknowledgement 12

Completed by the Area within 30 days after receipt of the letter of intent.

Checklist – PL 93-638 Contract Actions 13

The purpose of this form is to guide the team through the 638 award process, identifying which forms are recommended for use throughout this phase. This document is initially completed by the Project Officer, and sent to the Contracting Office with the documents identified on the form, as applicable.

Sample Agenda Internal Planning Meeting 14
This is an internal meeting that takes place prior to meeting with the Tribe.
Sample Preproposal Scoping Meeting Objectives 15
Sample Letter for Preproposal Meeting 16
Sample Preproposal Conference Agenda 17
Sample Communications Protocol 18
Proposal Review Checklist 19
Upon receipt of the Tribe's proposal, this checklist can be used to ensure that the proposal is complete and meets all requirements identified in the regulation.
Contract File Index 21
Sample Contract 27
Sample Schedule 42
Sample Budget 43
Sample Notification to Designated Official (DO) for Technical Matters 44
Sample Sources of Supply Letter 46
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Sample Tribal Quarterly Progress Report – A/E Services 50
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Includes sample form and reporting elements for negotiation.
Federal Financial Report, SF (Standard Form) 425 52
Monthly Monitoring Report Format 53
For use by the Government's technical representative in tracking reports submitted by the Tribe or Tribal organization.
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Contract Closeout Checklist 58
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Project Leadership Team

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Indian Health Service
Rockville MD 20857

NOV - 8, 1993.

TO: Area Directors

Directors
Offices of Engineering Services

FROM: Acting Associate Director
Office of Environmental Health and Engineering

SUBJECT: Project Coordination for Indian Health Service Facilities Under Design or Construction

Lack of coordination among Indian Health Service (IHS) staffs has caused delays in opening some newly constructed hospitals and health centers. Such delays deny the affected service populations access to improved health care. Also, they are expensive because old and new facilities must be operated simultaneously. Closer attention by all of us would ensure that IHS does not experience indefensible facility opening delays.

Therefore, for the future, we believe that an approach used successfully in several recent projects should be adopted nationwide. Beginning at the design phase of each project a Project Leadership Team (PLT) should be established. The PLTs are effective in coordinating the efforts of those involved in design, construction, and equipping of new IHS facilities. Membership on each PLT should include the Headquarters project engineer/planning officer; the Office of Engineering Services (OES) contracting officer's technical representative (COTR); the Area construction coordinator, contracting officer, and telecommunication/computer officer; the Service Unit Director and facility engineer; and the tribal chairman or representative.

The OES COTR, who will chair the PLT, will be responsible for scheduling monthly telephone conference calls. The conference calls can be structured so that issues which pertain to only a few participants are discussed first. In that way, individuals can leave the conference call after their concerns are addressed.

Changes in usual construction scheduling procedures also may be indicated. In the past, IHS installed telephone and computer systems after the general contractor completed his work. After reviewing recently completed projects, we determined that installing those systems would be less expensive if some work items, especially conduit and wiring installations, were completed by the general contractor. We believe that doing so will provide greater reassurance that completion dates will be met. However, if telephone and computer conduit and wiring are

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Directors, Office of Engineering Services NOV - 8 1993

to be accomplished during the general construction phase it will be especially important that the Area contracting officer and the telecommunications/computer officer, or their representatives, participate in the monthly conference calls.

The conference calls will keep all who are responsible for designing, constructing, and equipping a new facility up-to-date on project developments, especially critical dates. This is important because unless deadlines are met projects cannot be completed on schedule.

If you have suggestions or need additional information regarding this matter, please contact Gary Radtke, P.E., Director, Division of Facilities Planning and Construction. He may be reached by telephone on (301) 443-1850.

James V. Waskiewicz

Sample Notification of Funds Letter

DEPARTMENT OF HEALTH & HUMAN SERVICES Indian Health Service

___ Area Indian Health Service
Address
City, State Zip

Date

CERTIFIED MAIL RETURN RECEIPT #_____

Name, Title
Tribe or Tribal Organization
Address
City, ST Zip

Subject: Project Name – Project Location - Project No.
Notification of Funds Availability

Dear _____:

This letter is to advise the tribe per Section 5(e) of P.L 93-638 and 25 CFR 900.120, published June 24, 1996, that the Indian Health Service (IHS) has allocated funds for the following project:

Project Title:
Project Number:
Location:
Scope:
Amount:

Attached is a copy of the approved PSD/POR/MOA for your information. [if applicable]

Under the regulation cited herein you have the option to accomplish the work under a P.L. 93-638 Subpart J, construction contract. The IHS Project Team is available to meet with you or your representative(s) to provide additional information and technical assistance in preparing a contract proposal for this project.

If the tribe wishes to enter into a contract for this project, please submit a letter of intent signed by a person authorized to act on behalf of the Tribe.

The IHS will proceed to accomplish the project as a "federal acquisition" if we do not receive a written response from you thirty (30) calendar days from the date of receipt of this notification. We will keep you appraised as the project proceeds to solicitation.

Please contact the Project Manager, insert name at (xxx) xxx-xxxx or insert name, Area Facilities Director, at (xxx) xxx-xxxx, if you have any questions or we may be of further assistance.

Sincerely,

_____, Director
Insert Area Indian Health Service

Enclosure (PSD/POR/MOA, if available)

cc

Sample Informational Meeting Agenda

_____Tribe and the Indian Health Service
_____ Project
P.L. 93-638 Construction Contracting Information Meeting Agenda
__*Date*__

1. INTRODUCTION — *IHS Contracting Officer*
   - Purpose of Meeting
   - Introduction of Meeting Participants — *Attendees*
2. PROJECT REVIEW BY ACTIVITY — *IHS Project Manager*
   - _____Design
   - _____
   - _____
   - *POR & PJDQ Approval*
   - *Land Lease*
3. PROJECT FUNDING — *IHS Program Director*
   - Congressional Project Funding Plan
4. PROJECT LEADERSHIP TEAM — *IHS Project Manager*
5. DELIVERY OPTIONS
   - Direct Federal-IHS and P.L. 93-638 Contract – Tribe — *IHS Contracting Officer*
6. FEATURES OF A+E and CONSTRUCTION CONTRACTS — _____
7. ESTIMATED ACQUISITION MILESTONES — _____
   - Design
   - Construction
8. P.L. 93-638, TITLE I, SUBPART J, CONTRACTING — *IHS Contracting Officer*
   - Process for proposal development and contract.
   - Design phase activities.
   - Role of the Tribe.
   - Role of the IHS.
9. DECISION

Features of an Architecture/Engineering (A/E) Design Contract

Activity	Method of Accomplishment	Responsibility
Establish Project Leadership Team (PLT)	Solicit nominations from Area, Service Unit, Tribe, and IHS HQE.	Project Manager (PM)
Source Selection	Determine Set-Aside Qualified Indian-Owned Firms	Contracting Officer (CO)
	Request for Contract • Scope of Work • Estimate • Selection Criteria	Project Manager (PM)
	Designate Selection Board and Chairman of Selection Board	Source Selection Official (SSO)
	Issue Public Notice-Call for qualification statements from A/E's	CO
	Receive qualification statements from A/E's.	CO
	Convene Selection Board	PM & CO
	Select top 3 A/E's	Selection Board/Chair/CO
	Conduct A/E Interviews w/3	Selection Board
	Recommend A/E Selection	Selection Board & CO
	Select/Approve A/E	Source Selection Official
Pre-Award & Award	Develop A/E RFP	CO & PM
	Issue RFP to top A/E Firm	CO
	Proposal development: technical and Price.	Top A/E Firm
	Proposal evaluation.	PM & CO
	Negotiation objective	PM & CO
	Negotiations	PM & CO
	Pre-Award Review	IHS HCA or Legal
	Contract Award	CO
Construction Contract Planning	Acquisition Plan Design-Bid-Build-Direct Federal Construction Management DF P.L. 93-638-Tribe	PM, CO & Area
Design	Pre-Design Meeting	A/E and PLT
	Concept Phase – 3	A/E
	Concept Review Meeting	A/E & PLT
	Select 1 Concept	PLT
	Schematic Submittal	A/E
	Schematic Review	PLT
	Value Engineering (VE)	A/E
	VE Review	PLT
	Design Development (DD)	A/E
	DD Review	PLT
	FCD Review	A/E
	100% Design Submittal	PLT
	Final Construction Documents (FCD)	A/E

Features of a Construction Contract

Activity	Method of Accomplishment	Responsibility
Bidding Phase	Determine Set-Aside; Indian-Owned Firm	Contracting Officer (CO)
	Issue Advance Notice: Fed Biz Ops; Trade Journals; Local Newspapers	CO Issues; Project Manager (PM) drafts announcement
	Develop RFP (Request for Proposal); Source Selection Plan; Bid Evaluation; Instruction to Bidders	CO Lead w/PM involvement
	Determinations: Bonding Requirements; Insurance Requirements; Indian Preference Hiring & Sub-Contracting	CO
	Tribal Employment Rights Office (TERO); Contract Clause; Submittals	
	Final Construction Documents	PM
	Issue the RFP; RFP; 3-Volumnes of Specs; 2-Volumes Drawings	CO
	Tracking Inquiries; Receive Inquiry (200-400 est.); Log receipt; Evaluates and responds or refers to the designer of record (A/E)	CO and PM
	Receives response; Issues Amendment if material; or Issues individual clarification	CO
	Receipt of Proposals/Bid Opening	
	Distribute to Evaluation Team	
	Evaluation/Scoring/Recommendation for Award	PM; Evaluation Board; Evaluation Board Chair; CO Source Selection Official (SSO)
	Determination of Responsibility; Past Performance; Business Clearance	CO
Award	Issue Contract	CO
	Signature	
	Request for Performance and Payment Bonds 10 days	
Notice to Proceed & Pre-Construction	Schedule the Pre-Construction (Pre-Con); CO & PM, Contractor/ including Superintendent/Major Subs/ Business Manager, Tribe TERO, Service Unit (SU) Representative, Area Representative, A/E	CO & PM
	Meeting Record and distribution to participants.	PM drafts, CO signs
	Bonds & Insurance certificate receipt, review for compliance	CO and Legal, if questionable
Construction	Develop Document Control System	CO & PM
	Quality Control Plan	Construction Contractor (CC) submits and PM evaluates, some allow PM approval, some require CO approval.
	Safety Plan	
	Construction Schedule – Contract documents require a network analysis or CPM schedule could be over 2000 work items.	
	Schedule of Values prior to request for first payment (payment plan based on work items)	CC
	Payrolls for all Prime & Subs; Submit weekly; Retain funds for non-compliance and review for compliance.	PM or CO
	Periodic labor interview forms	PM & CO
	Submittal Register	PM

Activity	Method of Accomplishment	Responsibility
Construction continued	Submittal, est. 200-300	CC to PM to A/E to PM to CC
	Shop Drawings, est. 300	
	Request for Information (RFI); Estimate 3000 RFI's	
	Receive; Log; Evaluate; Respond with letter or RFP; Negotiate.	PM, CO
	Issue change order or Document field changes	CO
	Inspection of work – day to day daily log, equipment record, weather, work accomplishments, safety, labor on site; 2 pages installed quantities and materials.	Inspector A/E or direct hire
	Inspection – Periodic Designer of record. Inspects at established benchmarks per Construction Contract Administrator (CCA) contract, e.g. structural, welding, HVAC, electrical, quality work, technical inspection by Architects or discipline specific engineers.	A/E
	Structural inspection-required by code for 3rd party other than the designer of record to perform and certify; IBC (International Building Code) requirement.	CC, A/E, or other Structural
	Testing-usually written into the construction contract.	CC
	PM receives, evaluates for compliance, may refer to A/E	PM
	Inspection/Production Reports	
	PM on site monitoring correspondence – incoming and outgoing assigned number, log, response.	
	Safety-Safety Plan by CC to develop plan; Hire a Monitor for compliance.	
	Monitor and Sanctions	
	Weekly construction meeting; phone or on site.	
	Monthly Project Leadership Team (PLT) meeting/call	
	Monthly Invoices	
	Real property reports	
	Training and operation & maintenance manuals, as-built.	
	Final payment & release of claims.	PM or CO
Commissioning	Division 17 requires the CC to develop a plan and CC to hire an independent entity	CC and PM for monitoring, A/E
Final Inspection Punch List; Final Acceptance	Final inspection for acceptance; Developed from inspection by team after all work complete.	CC, PM, A/E, Inspector PM, CC, CO
Beneficial Occupancy	The point of substantial completion; Earliest date the facility can move in; If done before final acceptance, inspection and approval required.	PM, CO
Warranty Phase	Monitor for defects and malfunction of systems; Conduct warranty inspection PRIOR to expiration; Facility notifies PM of Defects; PM/CO issues letter requiring correction to CC.	PM, CO
Post Occupancy Evaluation	Team that surveys facility to evaluate the effectiveness of the design; Prepares report.	PM, Area, Service Unit
Contract Close-out	Final Contractor Performance Evaluation, financial reconciliation, close-out documents and send files to record center for record retention.	PM, CO

Typical Acquisition Milestones

TYPICAL DESIGN ACQUISITION MILESTONE PLAN
May 2004

ACTIVITY	DURATION
Issue Request for Qualification Statements to A+E Firms – Public Announcement	30 Days
Review Qualification Statements	1 Week
Select Top 3 Highly Qualified A+E's	1 Week
Conduct Interviews w/ Top 3 firms	1 Week
Source Selection Recommendation and Approval	2 Weeks
Issue RFP & A+E Proposal Preparation	30 Days
Evaluation of Proposal	2 Weeks
Negotiations	30 Days
Pre-Award Review	21 Days or less
Award	1 Week

Anticipated total time from public announcement to award = Estimated at 6 months

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TYPICAL CONSTRUCTION ACQUISITION MILESTONE PLAN
Projects over $750,000 Using Sealed Bid Procedures
May 2004

ACTIVITY	DURATION
Issue Public Announcement	15 Days
Solicitation Period	30-60 Days
Evaluation Period	14 Days
Contract Award Preparation	14 Days
Pre-Award Review	21 Days
Award	1 week
Performance and Payment Bonds	10 Days
Notice to proceed	1 week

Anticipated total time from public announcement to notice to proceed = Estimated at 6 months

Sample Letter of Intent for Reference by Tribes

Date

Name, Director
___ Area Indian Health Service
Address
City, State Zip

Dear _____:

This letter shall serve as the ____*insert tribe name*____letter of intent to contract the *insert description of what tribe intends to do e.g. phases of planning, design, and construction and description of project* under a Title I, subpart J, construction contract under the P.L. 93-638, as amended.

The tribe may want to include the following paragraph if they are requesting IHS to contract any phases of the project, if not delete this note and paragraph:
We are requesting the Indian Health Service enter into a direct federal construction contract for _____ with the understanding that federal contract will require the construction contractor to comply with the Tribe Tribal Employment Rights Ordinance (TERO). The contract will also incorporate the standard contract clauses which require Indian Preference in hiring and subcontracting.

The Tribe's point of contact for administrative matters and proposal development is insert name, phone number mailing address and e-mail address. The Tribe's Project Manager or technical point of contact is insert name, phone number and e-mail address.

Sincerely,

Name of Authorized Tribal Signatory
Title of Signer

cc:
IHS OEH&E Program Director

Sample Letter of Intent Acknowledgement

DEPARTMENT OF HEALTH & HUMAN SERVICES Indian Health Service

___ Area Indian Health Service
Address
City, State Zip

Date

Name, Title
Tribe or Tribal Organization
Address
City, ST Zip

Subject: Project Name – Project Location - Project No.
Intent to Contract

Dear _____:

This letter acknowledges receipt of your "letter of intent", dated insert date to contract for insert project name pursuant to Title I of P.L. 93-638, under a "Subpart J" construction contract.

The Indian Health Service designated officials are:

For Contractual Matters
_____ Contracting Officer
Office
Address
City, State Zip
Phone: (xxx) xxx-xxxx
Fax: (xxx) xxx-xxxx
E-mail: xxxxxx

For Technical Matters
_____, Project Officer
Office
Address
City, State Zip
Phone: (xxx) xxx-xxxx
Fax: (xxx) xxx-xxxx
E-mail: xxxxxx

We suggest that a pre-proposal meeting be scheduled for insert date, time and location. The IHS designated official will contact you to schedule this meeting.

We look forward in working with the insert name of tribe or tribal organization in the development of this important project. Please contact the individuals listed above if we may be of further assistance.

Sincerely,

_____, Director
_____ Area Indian Health Service

cc:
Area Facilities Program
Contracting Officer
Project Officer

Checklist – PL 93-638 Contract Actions

P.L. 93-638 Subpart "J" Contract Actions

The Project Officer completes blocks 1, 2, and 10 and forwards to the Contracting Officer. Upon receipt the Contracting Officer will contact the Project Officer to schedule internal IHS meeting and Tribal pre-proposal conferences.

1. Project Identification:

PROJECT NUMBER: AREA:
PROJECT TITLE:
TYPE OF SERVICES: (e.g. Planning, design, construction)
PROJECT OFFICER:
CONTRACTING OFFICER:

2. Attach the following Documentation:

- ☐ Land leases, ROW, Connection agreements, etc.
- ☐ Site Selection Report
- ☐ Area notification of funds to Tribe (25 CFR 900.120)
- ☐ PJD, POR/PSD, or MOA (N*ot required if POR/PSD is part of scope or MOA.)*
- ☐ NEPA Clearance
- ☐ Letter of Intent (25 CFR 900.122) DATE OF RECEIPT: (Resolution required with proposal)
- ☐ Area Director's Acknowledgement Letter
- ☐ Accounting and Appropriation data for project
- ☐ Scope of Work, Specifications, Drawings _____yes _____ none
- ☐ Draft IHS Internal Pre-planning Mtg. Agenda (Attachment #1)
- ☐ Draft Pre-proposal Scoping Objectives (Attachment #2)

3. Internal Planning Meeting *

Identify Area Team Members – Schedule IHS Planning Meeting (Attachment #2-Agenda)
Accomplished Date:

4. Transmit Information to Tribe (within 30 days of receipt of letter of intent)
Responsible team member gather and send documents/information and offer dates/times/locations for pre-proposal scoping session. Accomplished Date: _____

5. Preproposal/Joint Scoping Session Purpose: to provide the IHS and Tribe an opportunity to review 638 construction process, assign team members and discuss authorities, review PSD,/POR, jointly scope the project, review, all plans, specifications, funding, develop timelines, review process, etc.
Accomplished Date: _____

6. Secretarial Revisions to Plans, Designs, Cost Estimates (as identified in Joint Scoping Session)
Accomplished Date, if applicable:_____

7. Negotiation Session(s) Goal: to develop a mutually acceptable proposal
Accomplished Date: _____ Negotiation Memorandum Date:_____

8. ADR. _____ **yes, file documented?** _____ **N/A** Held at the request of the Tribe to resolve areas of disagreement prior to submission of proposal

9. Proposal Submission.

- ☐ Date proposal received: _____.
- ☐ Proposal checklist completed
- ☐ Area staff complete obligation in UFMS prior to sending contract to Tribe for signature (or upon receipt of final proposal if mutual agreement was not reached).

If the Tribe and IHS agree: Proposal is approved & awarded within 30 days.
If agreement is not reached: Proposal is declined within 30 days (see 25 CFR 900.123)

10. Submitted By: _____ **Approved:** _____
Project Officer Area Program Director

Sample Agenda Internal Planning Meeting

Attachment #1 **For IHS Internal Program Use Only**

Agenda: Internal Planning Meeting
Project Title:

1. Review P.L. 93-638, Subpart J, process, procedures for planning, design and construction, as necessary.
2. Designate IHS Project Team Members and their roles and responsibilities:

   Team Member Role & Responsibilities
3. Assign team members for the following activities (Note, these activities may include participants not listed in 2 above)
   a. Negotiation
   b. Proposal Review
   c. Other Program
   d. Design Phase Reviews
4. Define communication protocols (e.g., notification of planned meetings, participation in conference calls, copies of relevant correspondence, etc.)
5. Review Project (As desired by IHS to present to tribe)
   a. Identify contractible functions, PSD/POR/MOA and proposed approach and alternatives to discuss w/tribe.
   b. Identify functions retained by IHS
6. Identify available information to be furnished to the Tribe and who will furnish (must be completed within 30 days of receipt of letter of intent):
   a. Construction drawings
   b. Maps
   c. Engineering reports
   d. Design reports
   e. Plans of requirements (POR/PSD)
   f. Budget Estimates or other cost estimates (only if available)
   g. Environmental assessments or environmental impact statements
   h. Archeological reports
   i. Studies
   j. P.L. 93-638 Information Package
7. Discuss Timelines
8. Discuss Service Unit Interests
9. Discuss known Tribal Interests
10. Discuss Area Director Interests and other Area Program Management Concerns.
11. Develop draft pre-proposal conference agenda and IHS pre-negotiation objectives.
12. Identify tribal participants in preproposal conference
13. Status of land leases, ROWs, connection agreements, etc.
14. NEPA
15. Obtain copy of Tribe's single agency audit to determine compliance with Subpart F

Sample Preproposal Scoping Meeting Objectives

Attachment #2 **For IHS Internal Program Use Only**

IHS Pre-Proposal Scoping Mtg. Objectives
Project Title:

For each area of discussion, provide the objective as well as information that can be used to support the Area's position in negotiations.

1. Scope of Work, packaging, etc.
2. Discuss Role of the IHS (25 CFR 900.131)
3. Discuss Role of the Tribe (25 CFR 900.130)
4. Discuss Funding Sources (IHS & Other), contingency, budget requirements of the tribe based on (25 CFR 900.127) or special appropriation requirements) or desired structuring by IHS.
5. Recommended Contract Type: Fixed Price or Cost Reimbursement (25 CFR 900.116)
6. List applicable health and safety standards: (25 CFR 900.125 (a)(2))
7. List applicable building codes or standards: (25 CFR 900.125 (a)(3))
8. Recommended contract period of performance by major category of work: (25 CFR 900.125 (a)(7))
9. Materials and workmanship: (25 CFR 900.125 (a)(9))
10. List Inspection and testing: (25 CFR 900.125 (a)(10))
11. Discuss NEPA requirements and final approval:
12. Recommended Payment schedule: (25 CFR 900.125 (b)(5) and 25 CFR 900.132)
13. Reporting: Progress, financial, and final (25 CFR 900.130 (c)(7))
14. Reviews (Design 25 CFR 900.131 (b)(5) Shop drawings (25 CFR 900.131 (b)(8)) Master Plan required?
    - Concepts – IHS review only
    - Schematics – IHS review and approval
    - Design Development – IHS review only
    - Final Construction Documents – IHS review and approval
    - On-site monitoring visits (25 CFR 900.131 (b)(9))
    - Fire Sprinkler Systems
15. Disposition of real and personal property:
    (Tribe automatically takes title to all real and personal property unless stated otherwise in their proposal) Discuss real property, personal property and equipment, reporting requirements, land leases, transfer dates, etc. Also discuss impact of joint funding ownership and lease back of facility to IHS where tribe takes title and IHS must lease facility for IHS operated programs. Title and status of land leases, ROW, connection agreements, etc.)
16. Recommended FAR Clauses for Inclusion: (25 CFR 900.115 (b))
17. Project Leadership Team

Sample Letter for Preproposal Meeting

DEPARTMENT OF HEALTH & HUMAN SERVICES Indian Health Service

___ Area Indian Health Service
Address
City, State Zip

Date

Name, Title
Tribe or Tribal Organization
Address
City, ST Zip

Subject: Project Name – Project Location - Project No
Preproposal Conference

Dear _____:

This is to confirm that the preproposal conference is scheduled for insert date and time at insert location.

The intent of this pre-proposal conference is to provide the insert name Tribe with all available information and develop a proposed timetable for developing a mutually agreeable proposal and contract. Attached is a proposed agenda for the meeting.

Please advise whether there is any additional information that the Tribe would like IHS to provide at the pre-proposal conference. I may be reached at insert phone number.

Sincerely,

_____, Contracting Officer
Insert Area Area Indian Health Service

cc:

Sample Preproposal Conference Agenda

_____ Tribe and the Indian Health Service
PRE-PROPOSAL CONFERENCE AGENDA
P.L. 93-638, TITLE I, SUBPART J- CONTRACT
___*Date*___

10. INTRODUCTION
    - Purpose of Meeting — *IHS Contracting Officer*
    - Introduction of Meeting Participants — Attendees

11. PROJECT REVIEW BY ACTIVITY — *IHS Project Manager*
    - _____
    - _____

12. PROJECT FUNDING — *IHS Project Manager*
    - Congressional Project Funding Plan
    - Project Fund Allocation

13. P.L. 93-638, CONSTRUCTION CONTRACTING — *IHS Contracting Officer*
    - Joint Scoping Proposal Development
      -Proposal Requirements
      -Title to Facility

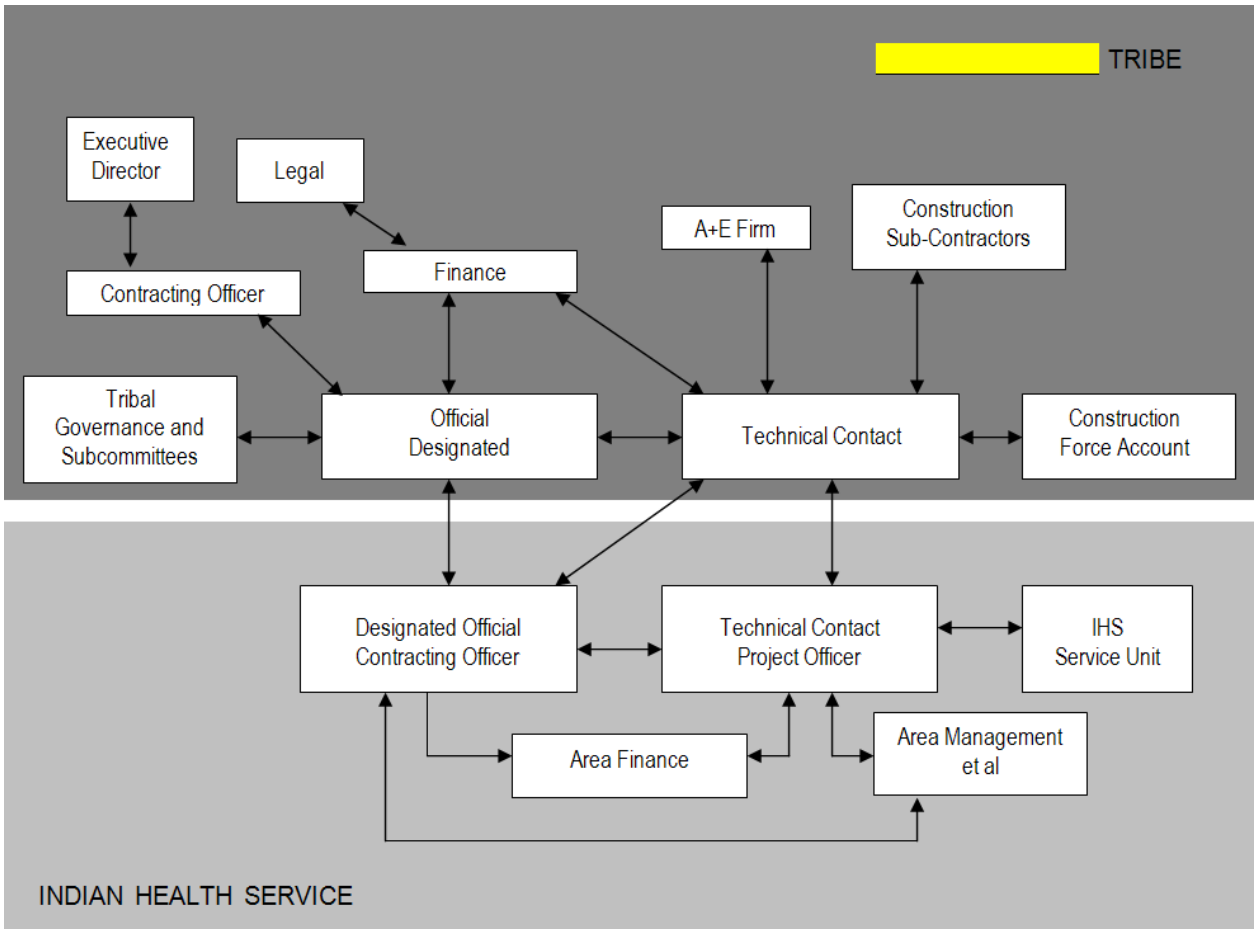
14. NECESSARY TRIBAL COUNCIL DECISIONS — *IHS Contracting Officer*
    - Proceed with P.L. 93-638 contract (yes or no)?
      -If yes, which project activities?
      -If yes, what contract type (fixed price or cost-reimbursement)?
      -If yes, identify tribal personnel (authority to negotiate, manage, etc.).
      -If no, provide written notice.
    - Tribe to take title to facilities?
    - Tribe's ability to meet Subpart F requirements

15. DEVELOP MILESTONE SCHEDULE — *Attendees*
    - *Action Items, assignment, dates*

Sample Communications Protocol

Note: The purpose of this form is to encourage agreement how communications are conducted. The protocol is based on tribal decisions based on their internal structure as well and should be edited based on the specific contract and agreed to in joint scoping meetings. Delete this note when preparing final proposal documents.

Title I, Subpart J - Construction Contract Communication Protocols



Note - this communication protocol is intended only to illustrate the authorities of individuals and protocols for communication of contractual issues arising under the contract.

This chart does not affect other Government-to-Government Communications.

Proposal Review Checklist

P.L. 93-638 Subpart J
Contract Proposal Review Checklist

Contract No.	Area:
Project Title:	IHS Project No.:
EIN Number:	Tribe's Designated Official:
IHS Official (Contractual Matters):	IHS Official (Technical Matters):

☐ 1. Full name, address and telephone of Tribe or Tribal Organization (25 CFR 900.125(a))

☐ 2. Use of licensed and qualified architects (25 CFR 900.125(a)(1)).

☐ 3. Applicable health and safety standards (25 CFR 900.125(a)(2).

☐ 4. Adherence to applicable federal, state, local or tribal building codes and engineering standards (25 CFR 900.125(a)(3)).

☐ 5. Structural integrity (25 CFR 900.125(a)(4)).

☐ 6. Accountability of funds (25 CFR 900.125(a)(5)) and Subpart F.

☐ 7. Adequate competition for subcontracting under tribal or other applicable law (25 CFR 900.125(a)(7).

☐ 8. Commencement, performance, and completion of the contract (25 CFR 900.125(a)(7)).

☐ 9. Adherence to project plans and specifications, including any applicable federal construction guidelines and manuals and the Secretary shall accept tribal proposals for alternatives which are consistent with or exceed federal guidelines or manuals applicable to construction programs (25 CFR 900.125(a)(8)).

☐ 10. The use of proper materials and workmanship (25 CFR 900.125(a)(9)).

☐ 11. Necessary inspection and testing (25 CFR 900.125(a)(10)).

☐ 12. A process for changes, modifications, stop work and termination of the work when warranted (25 CFR 900.125(a)(11)).

☐ 13. Design statement: "Construction documents produced in accordance with the POR and/or scope of work" and the POR/scope of work is attached to proposal (25 CFR 900.125(b)(1)).

☐ 14. Construction statement: "The facility will be built in accordance with the construction documents produced as part of design activities. The project documents, including plans and specifications, are hereby incorporated into this contract through this reference (25 CFR 900.125(b)(2)).

☐ 15. Proposed methods to accommodate the responsibilities of the Tribe provided in 25 CFR 900.130 and minimum staff qualifications proposed by the Tribe (25 CFR 900.125(b)(4)).

☐ 16. Period of Performance for conduct of all activities contracted (project schedule) (25 CFR 900.125(b)(6). Including the following items as applicable:

- Concepts (C)
- C 21-day review by Government
- Schematics (S)
- S 21-day review and approval by Government
- Design Development (DD)
- DD 21-day review by Government
- Final Construction Documents (FCD)
- FCD 21-day review and approval by Government

☐ 17. A contract budget as described in 25 CFR 900.127 (25 CFR 900.125(b)(5)).

☐ 18. A payment schedule as described in 25 CFR 900.132 (25 CFR 900.125(b)(7)).

☐ 19. A statement indicating whether or not the Tribe or Tribal organization has a CMS contract related to this project (25 CFR 900.125(b)(8)).

☐ 20. Current authorizing resolutions from all tribes benefiting from the contract proposal (25 CFR 900.125(b)(9)).

☐ 21. Federal responsibility other than 25 CFR 900.131 requested by the tribe (25 CFR 900.125(b)(10)).

☐ 22. List of assurances (25 CFR 900.125(c)).

☐ 23. List of FAR clauses for incorporation (25 CFR 900.115(b)(1)).

☐ 24. Identification of party responsible for obtaining Clean Water Act permits.

Comments and other matters requiring follow up:

_____

_____

_____

_____

_____

Reviewed by: _____ Date: _____

Contract File Index

TITLE I PL 93-638 SUBPART J CONSTRUCTION CONTRACT FILE

A. Project / Contract Planning		
Tab	✓ File _ Other	DESCRIPTION
1		**Notification of Funds to Tribe** by Area 25 CFR 900.120 **Area Director Acknowledgment Letter**
2		**PJD, POR, PSD, MOA** Program Justification Document, Program of Requirements, Project Summary Document OR MOA and subsequent amendments. 25 CFR 900.113(g)
3		**Letter of Intent** 25 CFR 900.122(a)
4		**Transmittal of Information:** 25 CFR 900.120(a) a. Plans b. Specifications c. Engineering Reports d. Government Cost Estimates e. PL 93-638 T.A. Guide f. Other Information
5		**NEPA**
6		**LAND LEASE AND EASEMENTS**

A PROJECT / CONTRACT A PLANNING

TITLE I PL 93-638 SUBPART J CONSTRUCTION CONTRACT FILE

B. Pre-Contract / Negotiation Phase		
Tab	✓ File _ Other	DESCRIPTION
1		**Tribe's Draft Proposal**(s), if applicable
2		**IHS Proposal Evaluations**, if applicable
3		**Secretarial Revisions to Plans, Designs, Cost Estimates**, if applicable 25 CFR 900.122(b)(3).
4		**Documentation relating to**: Preproposal Conference Technical Assistance 25 CFR 900.122(b)(1) Joint Scoping Sessions 25 CFR 900.122(b)(2) Negotiation Sessions 25 CFR 900.122(b)(4)
5		**Alternative Dispute Resolution Documents**, if applicable

B PRE-CONTRACT B NEGOTIATION PHASE

TITLE I PL 93-638 SUBPART J CONSTRUCTION CONTRACT FILE

C. Final Proposal / Award Phase		
Tab	✓ File or N/A	DESCRIPTION
1		**Declination information**, if applicable Approval for Declination from HQ Proposal Declination Letter 25 CFR 900.123(a) Documentation of TA on Declination 25 CFR 900.123(b)(2)
2		**Evidence** the Contracting Entity meets minimum requirements of 25 CFR Part 900 Subpart F including: Organization Management Systems Financial Management Systems Procurement Management Systems Property Management Systems
3		**Funding Document for Award** / Evidence of UFMS Obligation
4		**Contract and/or Final Approved Proposal,** including: Resolution of Contracting Tribe Resolution of Tribes Benefiting Advance Payment Schedule Other contract attachments
5		**Modifications**

C FINAL PROPOSAL C AWARD PHASE

TITLE I PL 93-638 SUBPART J CONSTRUCTION CONTRACT FILE

D. Post Award		
Tab	✓ File _ Other	DESCRIPTION
1		**Designated Official Appointment Letter**
2		**Reports from Tribe:** **Financial Reports** a. Quarterly Report Tracking Form b. Contract Balance Sheet c. Tribe's Quarterly Financial Reports (SF 425) d. Quarterly Narrative Progress Reports
3		**IHS Designated Official Monitoring Reports**
4		Submittals: a. **NEPA** b. **Planning Documents** c. **Concepts** (IHS Comments) d. **Schematics** (IHS Comment and Approval) e. **Design Development** (IHS Comments) f. **Final Construction Documents** (IHS Comments and Approval) g. Other submittals as negotiated

D POST AWARD D

TITLE I PL 93-638 SUBPART J CONSTRUCTION CONTRACT FILE

E. Correspondence

E CONTRACT E CORRESPONDENCE

TITLE I PL 93-638 SUBPART J CONSTRUCTION CONTRACT FILE

F. Contract Close-Out		
Tab	✓ File _ Other	DESCRIPTION
1		**Final Financial Report** (SF 425)
2		**Single Agency Audit** (Cost-Reimbursement)
3		**Final Contract Financial Reconciliation**: Obligations and Mods less expenditures, Advance Payments less expenditures, and adjustments to payments if necessary
4		**De-Obligation of Funds**, if applicable
5		a. **Project Officer Final Inspection** & Recommendation for Acceptance (if applicable) b. **Final Acceptance and Close-Out** Memorandum to the file, from CO
6		**Warranty**
7		**Disposition of Property** (Final Inventory by Tribe transferred to the Govt.), if applicable
8		**IHS Internal Contract Close-Out Checklist**

F CONTRACT CLOSE-OUT F

Sample Contract

NOTE: THIS IS A SAMPLE – TITLE I CONTRACT/ Proposal which if used, will meet the minimum requirements of Subpart J. Contact DES Contracting Office for most current program specific example. Yellow Shaded Items must be edited in this document as appropriate to the specific project being contracted.

Self-Determination Construction Contract
by and between the

_____*Insert Tribal Name*_____
and the
United States Department of Health and Human Services,
Indian Health Service
Contract Number: _____

(a) Authority and Purpose.-

(1) Authority.- This agreement, denoted a Self-Determination Contract (hereafter "Contract"), is entered into by the Secretary of the Department of Health and Human Services, Indian Health Service (hereafter "Secretary"), for and on behalf of the United States, and the *tribal name*, a federally recognized Indian Tribe (hereafter "Tribe"), pursuant to Title I of the Indian Self-Determination and Education Assistance Act (hereafter "ISDEAA") (25 U.S.C. 450 et seq.) as implemented by 25 C.F.R. Part 900, Subpart J. The applicable construction provisions of Title I of the ISDEAA (25 U.S.C. 450 et seq.) and its implementing regulation at 25 C.F.R Part 900, Subpart J, are incorporated by reference in this Contract. In accordance with 25 C.F.R. 900.115(c) provisions of this construction contract shall be liberally construed in favor of the contracting Tribe.

(2) Purpose. – In accordance with 25 C.F.R. 900.115(a) the self-determination construction contract is a government-to-government agreement that transfers control of the construction project, including administrative functions, to the Tribe to facilitate effective and meaningful by the Tribe in planning, conducting, and administering the construction project, and so that the construction project is responsive to the true needs of the Indian community.

This construction contract includes: _____*describe major phases*_____as defined in the Tribe's attached proposal.

(b) Terms, Provisions, and Conditions.-

(1) Funding. -

Select One of the following and delete the remaining:

Use for cost-re-imbursement contract for new facility construction where the Tribe is taking IHS administrative shares and the project is phased funded over more than one year's worth of line item appropriated funds:

The overall fair and reasonable price and not to exceed amount for the project including IHS administrative shares pursuant to 25 U.S.C. 450j(m)(4)(C) and 25 C.F.R. 900.127 is $_____. Of this amount $_____ will be obligated under the contract as funds for the project are appropriated and $_____ is contingency retained by the Secretary. Funds in the amount of $_____are currently available and will be obligated under the contract per the following accounting and appropriation data. (This does not include Phase I contingency retained in the amount of $_____.) The Secretary's obligation beyond the funds currently available is contingent upon the availability of appropriated funds by Congress specifically for the _____.

or

Use this funding paragraph for fully funded by IHS for cost reimbursement contracts
The overall fair and reasonable price and not to exceed amount for the project including IHS administrative shares pursuant to 25 U.S.C. 450j(m)(4)(C) and 25 C.F.R. 900.127 is

$_____The total dollar amount available for performance and completion of all work under this contract is _____, of which $_____is obligated under this contract and $_____ in contingency is retained by the Government. 900.127(e)(8)

or

Use this funding paragraph for fully funded by IHS for Fixed Price contracts
The overall fair and reasonable price and not to exceed amount for the project including IHS administrative shares pursuant to 25 U.S.C. 450j(m)(4)(C) and 25 C.F.R. 900.127 is $_____.

CONTRACT

or

Use for Fixed Price jointly funded by IHS and Tribe:

The total tribal and IHS cost of the project including planning, design, equipment, and construction is $_____. Of the total project funding, the Indian Health Service contract award amount under this contract is $_____. The _____ Indian _Tribe_____ will fund $_____ of the project. The Tribe is responsible for successful completion of the work, utilizing the funds provided, as described in this contract including the contract documents, exhibits, and attachments (See also Part 120 of the contract proposal). *(Note, the Tribe does not have to deposit the funds with the IHS. By signing the contract, the Tribe is bound to fund the amount above. The Tribe or recipients share of outlays are recorded on the financial report in block 10c. Delete this note on final document).*

Delete or insert for tribally operated facilities where staffing packages are not funded by IHS:

The _____ Indian Tribe acknowledges that the Indian Health Service will not provide additional funding for staffing and/or programs to operate the Tribe's P.L. 93-638 health services contract/compact with the IHS beyond the current level of funding identified in the Tribe's P.L. 93-638 health services contract/compact. The _____Tribe continues to be eligible for any future program increases as provided by law.

IHS Accounting and Appropriation Data:

_____

_____

Tribe name Tax I.D. Number:_____
Tribe name DUNS Number:_____

The following savings provision, applies to cost re-imbursement only -Delete if contract is fixed price.

(2) Savings.-In accordance with 25 U.S.C. 450e-2, beginning in fiscal year 1998 and thereafter, where the actual costs of construction projects under self determination contracts, compacts, or grants, pursuant to Public Laws 93-638, 103-413, or 100-297, are less than the estimated costs thereof, use of the resulting excess funds shall be determined by the appropriate Secretary after consultation with Tribe(s).

(3) Payment. – Payments will be made according to the advance payment schedule negotiated between the parties in attachment ____. In accordance with 25 C.F.R. 900.132**(**d**),** upon award of the contract, the Secretary shall transfer the amount of the first allocation to the Indian Tribe within 21 days after the date of contract award. The second allocation shall be made not later than 7 days before the end of the first allocation period. Pursuant to 25 C.F.R. 900.132(e) Not later than 7 days before the end of each subsequent allocation period after the second allocation, the Secretary shall transfer to the Indian Tribe or tribal organization the amount for the next allocation period, unless the Tribe is delinquent in submission of allocation period progress reports and financial reports or the Secretary takes action to suspend or terminate the contract in accordance with 25 C.F.R. 900.131(b)(11), 900131(b)(12) or 900.131(b)(13).

Subsequent modifications awarded under this contract will be paid in accordance with the terms of each specific modification.

(4) Type of Agreement.- This is a cost-reimbursable *or* fixed price ISDEAA Construction Contract.

(**6) Conflicting Terms-Order of Precedence.-** Any inconsistency in this contract or between this contract and the regulation shall be resolved by giving precedence in the following order: (a) The appropriation; (b) Public Law 93-638, as amended (ISDEAA); (c) the regulation; (d) this contract including subsequent modifications; (e) contract documents, exhibits, and attachments (other than the contract proposal); and (f) the contract proposal.

(7) Property.- No property will be transferred to the Tribe for the administration of this project.

Title to Equipment/Personal property acquired for the purpose of managing the overall project shall vest with the Tribe or Government? *If title will vest with the Government, negotiate as a closeout requirement inclusion of the information in the "Documentation of Equipment Transfer" letter. This letter provide the Government with the information necessary to allow the equipment to be included in the IHS inventories.*

Select an appropriate real property statement:

The Federal Government will own the facilities constructed under the project. Title to real property including fixed equipment and capital improvements within the site boundaries shall vest in the Federal Government. The Tribe will comply with the IHS OEH&E Technical Handbook, Part IV, Chapter 30-2 Guidelines for Real Property Asset Accountability

CONTRACT

(http://www.oehe.ihs.gov/hb/pdf/03002.pdf). In summary, the Tribe must provide IHS all information needed to record the facility on the real property inventory reports, as outlined in this chapter. The Tribe shall complete the form included as Exhibit V, copy attached, as part of the contract closeout.

or

Title to real property and capital improvements within the site boundaries shall vest in the Federal Government. This does not negate the Tribe's right to assume title should the Tribe elect to do so under Title I or V of P.L. 93-638, as amended, to assume operation and ownership of the assets of the IHS.

or

The United States will at no time during the construction, or after completion of the project, have any interest in, or title to any real or personal property acquired by *tribe name* as a part of this contract.

If the Tribe takes title and the IHS operates the facility – Discuss responsibility for required lease to be completed prior to acceptance and occupancy by IHS.

For Tribal Built on tribal Land, Government owned and IHS operated facilities discuss lease requirements which must occur prior to construction.

NOTE: Reference Appendix VI of this guide for additional information and forms for real and personal property reporting.

(8) Disputes. - Disputes shall be governed by 25 C.F.R Part 900 subpart J, L or N, as applicable

(9) IHS Designated Officials. The Indian Health Service's official to serve as a representative on matters of notices, proposed amendments to the contract, submission of reports, and other purposes of a contractual nature is: _____*name*_____, Contracting Officer, *insert address*_____, Telephone _____, Fax_____, e-mail: _____. For technical matters including submittal review and approval and on-site monitoring visits, the Government's project officer is: _____*name*_____, *address*_____, Telephone _____, FAX _____, and e-mail: _____.

(10) FAR Clauses. The Indian Health Service and Tribe mutually agree to the applicable FAR clauses listed in Attachment C.

(11) Attachments to Contract and Proposal.

(A) Authorizing Resolution - *insert name* Tribe Resolution No._____.
(B) List of FAR Clauses
(C) Electronic Funds Transfer Form
(D) Identify Final Construction Documents
(E) Program of Requirements/PSD/MOA
(F) Contract Budget and Phased Funding Plan
(G) Advance Payment Schedule Based on Phased Funding Plan
(H) Contract Schedule
(I) A/E Design Guide
(J) Real Property Reporting Requirement
(K) Personal Property Reporting Requirement

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(11) Contract Signatures.-

TRIBE NAME

BY: _____
Name of Authorized Tribal Signatory
Title of Authorized Tribal Signatory

UNITED STATES OF AMERICA
DEPARTMENT OF HEALTH AND HUMAN SERVICES
INDIAN HEALTH SERVICE

PROPOSAL APPROVAL

BY: _____
Name of Area Director
Director, Area Name

CONTRACT AWARD

BY: _____
Name of Contracting Officer
Contracting Officer
Contracting Officer Location

Date of Contract Award:_____

Tribe Name-CONSTRUCTION CONTRACT PROPOSAL

25 CFR 900.125

Part A- PROGRAM STANDARDS

Full name, address, and telephone number of Tribe: (25 CFR 900.125(a))

The Tribe's designated official for contractual purposes:
_____(Name)_____
Same Address as above
Telephone:
E-mail:

The Tribe's designated official for technical purposes:
_____(Name)
Same address as above.
Telephone:
E-mail:

(1) **Licensed and qualified Architects** 25 CFR 900.125 (a)(1)

The Tribe will subcontract with or provide the services of licensed and qualified architects, engineers, and other consultants as needed to manage, inspect, and accomplish the construction contract work.

Any modifications to the attached final construction drawings and specifications shall be stamped by a licensed engineer or licensed architect.

(2) **Applicable Health and Safety Standards** 25 CFR 900.125(a)(2)

The Occupational Safety and Health Act will apply to this contract. The Tribe is solely responsible for monitoring the work to ensure compliance.

(3) **Adherence to applicable Federal, State, local, or tribal building codes and engineering standards** 25 CFR 900.125(a)(3)

The Tribe agrees that all construction activities performed under this Contract will be completed in conformity with the applicable subsections, parts, provisions, or subdivisions of the codes and standards in effect at the time the contract is signed as listed herein.

OEHE Programs should list per type of construction project contemplated.

For Facility construction project which require design per the IHS A/E design guide, list consisent with section III. General Design Requirement.

(4) **Structural Integrity** 25CFR 900.125(a)(4)

The Tribe agrees to have structural calculations and any required design effort to be performed by or under the direction of a licensed structural engineer. The licensed structural engineer shall stamp all drawings and specifications requiring structural design.

(5) **Accountability of Funds** 25 CFR 900.125(a)(5)

In accordance with 25 CFR 900.130(c)(2), The Tribe shall administer and dispense funds provided through the contract in accordance with Subpart F, 25 CFR 900.42 through 900.45 and implement a property management system in accordance with subpart F**,** 25 CFR 900.51 through 900.60.

Note, the following applies to Cost-Reimbursement contracts only, delete if contract is fixed price:

The Tribe will provide an annual single organization-wide audit as prescribed by the Single Audit Act of 1984, 31 USC. Section 7501 et seq., and will adhere to generally accepted accounting principles. The annual single audit is to be sent to:

The Single Audit Clearinghouse
1201 E. 10th St.
Jeffersonville, IN 47132

National External Audit Review Center
Lucas Place, Room 514
323 W. 8th St.
Kansas City, MO 64105

The Tribe may use funds under this contract to pay for allocable, allowable, and reasonable project costs within the limitation of costs. OMB Circular A-87 applies to this contract.

The Tribe agrees to submit quarterly financial reports as described in the attached contract proposal.

(6) **Competition** 25 CFR 900.125(a)(6) and 25 CFR 900.48

The Tribe will provide adequate competition for subcontracting under Tribal or other applicable law. All "major procurement transactions" shall be conducted providing for full and open competition to the extent necessary to ensure efficient expenditure of contract funds. Tribal policy shall govern what is considered a "major procurement transaction".

Indian preference and tribal preference shall be applied as provided in 25 USC §450e (b)(c).

7. **Adherence to Project Plans and Specifications.** 25 CFR 900.125(a)(8)

The Tribe will adhere to the project final construction documents.

8. **The Use of Proper Materials and Workmanship** 25 CFR 900.125(a)(9)

The Tribe will use new materials and perform work in accordance with applicable codes as specified in the final construction documents.

9. **Inspections and Testing** 25 CFR 900.125(a)(10)

The Tribe will ensure all required testing is performed as required by the Final Construction Documents and reviewed by the A/E for the project. The Tribe will assure that a qualified construction inspector performs the day-to-day inspection of work in progress for compliance with the final construction documents.

10. **Process for Changes, Modifications, Stop Work, and Termination of Work**
25 CFR 900.125(a)(11)

Changes and Modifications:
Select which version for the final contract and delete the one not used
Changes – option 1 very general and consistent with900.130(c)(5)
Changes that require an increase to the negotiated contract budget or an increase in the negotiated performance period or are a significant departure from the final construction documents included as part of this contract will be submitted to the IHS designated official for contractual matters for approval prior to the work being performed.

A change request will list the following: Justification for the change; description of the change; citation of contract section, specification and drawing section affected by the change; estimated cost of the change; additional time required as a result of the change, and signature of the person authorized to enter into change agreements for the Tribe.

In the event of stop work or termination of work, notices or other documents shall be submitted to the Tribe's designated official for contractual purposes.

Or Changes Option 2 below is more specific and requires editing to meet the practical terms of the project mutually agreeable to both parties:

Changes that require an increase to the negotiated contract budget, an increase in the negotiated performance period, changes in the approved plans and specifications, or are a significant departure from the scope or objective of the project described in or included as part of this contract shall require approval by IHS prior to the work being performed.

Change Process – The Tribes agree to notify the IHS of changes in the negotiated total contract budget, increase in the negotiated performance period or schedule, changes in the approved final construction documents, or significant department from the scope of PSD.

Changes in the PSD/POR/MOA require an amendment to the PSD/POR/MOA and approval by IHS, but will not require a contract modification unless there is a performance period, budget, or scope of work change.

During design phase activities, due to the strict 21day Government review and response requirements, the Tribes agrees to provide updated schedules as the activities change in Attachment ___. Schedule changes do not require a modification to the contract unless the total performance time in any phase changes by ___%.

Final Construction Document changes during construction will be submitted to and approved by the IHS technical representative. A contract modification will not be required unless there is an increase to the overall contract amount or total performance period.

The Tribes is not required to submit budget revisions when there are changes within budget line items and the total contract amount does not change.

Changes that require a formal modification to the contract include changes within 15% of any phase of the performance period, established contract amount (including contingency) *delete the including contingency if a fixed price contract* and/or additional projects are made available for contracting under P.L. 93-638, Subpart J, construction contracting. The change request will list the following: a description of the change, why the change is needed, estimated cost of the change, additional time required as a result of the change, and signature of the person authorized to enter into change agreements for the Tribes. The change request will be submitted to the IHS Contracting Officer for review and approval prior to the work actually being performed.

PART B - Construction Contract Proposal

Activities to be performed:
The ___*tribe name*_____proposes to accomplish __*by what means? Subcontracting, force account or combination>*_____ the planning, design and construction of the _____
What and where?_____.
Sample facilities statement of work for facilities construction:

Phase I, Planning Services

Phase I activities shall include providing a PJDQ/POR/PSD for the proposed project. The PJDQ/POR/PSD will be approved by the Indian Health Service prior to proceeding with any other phase of work under this contract.

Describe planning document requirements here: e.g.
The Project Summary Document will at a minimum include: Background about the project; project scope and description; alternatives considered; project justification; deficiencies to be addressed, if any; program impacts; workload for existing and planned space; site selection; detailed estimated project costs for design and construction, contract delivery schedules; funding sources; and plans to meet any other programmatic needs. The PSD will also include net and gross sizes of space and include the IHS supportable space evaluation for IHS maintenance and improvement funds, furnishings, equipment, and other information and design criteria on which to base the construction project documents.

The Tribe will evaluate all land and lease issues affecting the proposed project and ensure all requirements are properly met in accordance with tribal, local or other federal regulations prior to commencing design and construction; and conduct pre-design site investigations. The Tribe will provide all information necessary for a NEPA determination by the IHS.

Phase II, Design Services

1. Concepts
2. Schematic
3. Design Development
4. Final Construction Documents

The IHS Architect/Engineer (A/E) Guide dated _____ will be used to measure acceptable levels of performance for phase II design. The design guide will be incorporated into the *tribe name* A/E subcontracts.

Construction documents produced as a part of the contract will be produced in accordance with the _____ developed by the *tribe name* and approved by IHS under phase I of this project.

As a part of the design activities, the *tribe name* will secure all permits, right-of-ways, and obtain, subject to Part 130 D, all environmental and historic preservation clearances necessary for the IHS to make a NEPA determination prior to submission of the final construction documents for approval.

The Tribe agrees to work with *who* to develop an acquisition plan, which will include the planning and purchase of computers, telephones, cultural artwork, fixed and moveable medical equipment, and furniture to be purchased by the Tribe under this contract.

The Tribe will evaluate all utility, land and lease issues affecting the proposed project and ensure all requirements are properly met in accordance with tribal, local or other federal regulations prior to commencing design and construction; and conduct pre-design site investigations.

Use this if force account is not contemplated or a combination of subcontracting and force account is used.
Upon approval of the construction documents, the Tribe will provide bidding services and award a contract for construction.

Phase III - Construction Services
The facility will be constructed in accordance with the approved construction documents and PSD/POR. Construction services including the provision of all management supervision, inspection and quality control, labor, materials, equipment, and services necessary to complete the work in accordance with the construction documents prepared as part of the design phase.

1. Design Statement 25 CFR 900.125(b) (1)

If design clarifications or modifications to the final construction contract are required, the Tribe agrees that revisions to the construction documents produced as a part of the contract will be produced in accordance with the Program of Requirements and/or Scope of Work attached hereto.

2. Construction Statement 25 CFR 900.125(b) (2)

The facility will be built in accordance with the construction documents produced as a part of design activities. The project documents, including the plans and specifications, are hereby incorporated into this contract through this reference.

3. Proposed Methods to Accommodate the Responsibilities of the Secretary provided in 25 CFR 900.131. 25 CFR 900.125(b)(3)

In accordance with 25 CFR 900.115(a), the Secretary's role in the conduct of a contracted construction project is limited to the Secretary's responsibilities set out in 25 CFR 900.131.

a.) In carrying out the responsibilities of this section, and specifically in carrying out review, comment and approval functions under this section, the Secretary shall provide for full tribal participation in the decision making process and shall honor tribal preferences and recommendations to the greatest extent feasible. This includes promptly notifying the Tribe of any concerns or issues in writing that may lead to disapproval, meeting with the Tribe to discuss these concerns and issues and to share relevant information and documents, and making a good faith effort to resolve all issues and concerns of the Tribe. The time allowed for government review, comment, and approval shall be no more than 21-days per review unless a different time period is negotiated. The 21-day time period may be extended if the Tribe agrees to the extension in writing. Disagreements over the government's decisions in carrying out these responsibilities shall be handled under Subpart N of the regulation governing contract disputes under the Contract Disputes Act. (25 CFR 900.131(b)(1))

b.) National Environmental Policy Act (NEPA). All NEPA approvals have been completed and approved by the IHS certifying official. If extraordinary or exceptional circumstances involving the NEPA and related environmental considerations are encountered in the project, or if there is any change in the project, which could change the project environmental determination, the Tribe agrees to stop construction in the area of discovery and to notify the appropriate authority and the IHS Designated Official for Contractual matters. (25 CFR 900.131(b)(2))

c.) Where construction phase activities require design changes to final construction documents, IHS shall have the authority to review and approve final construction documents for general compliance with the contract requirements. The Tribe agrees to consult with the IHS designated official on all design changes prior to submission of the change to the IHS designated official for contractual matters.

d.) If the contracted project involves design activities, the Secretary reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, for Federal government purposes: The copyright in any work developed under a contract or subcontract; and any rights of copyright to which an Indian tribe or tribal organization or a tribal subcontractor purchases ownership through this contract. (25 CFR 900 (b)(5))

e.) Identify results of negotiation for review and comment on shop drawings for the contract. (25 CFR 900.131(b)(8))

f.) The IHS may conduct monthly on-site monitoring visits. *Or alternatively may negotiate* milestone visits. (25 CFR 900.131(b)(9))

g.) The Secretary retains the right to conduct final project inspections jointly with the Tribe and to accept the building or facility. If the Secretary identifies problems during final inspections, the information shall be provided to the Tribe and shall be limited to items that are materially noncompliant. (25 CFR 900(b)(10))

If use and possession is proposed by the tribal organization operating the facility prior to final acceptance of the by the Government, the tribe agrees that use and possession will not occur until substantial completion has been established and the Secretary has been provided an opportunity to jointly perform an inspection for substantial completion with the Tribe.

h.) Suspension of Work. The Secretary can require the Tribe to suspend work under a contract in accordance with this paragraph. The Secretary may suspend work under a contract for no more than 30 days unless the Tribe has failed to correct the reason(s) for the suspension or unless the cause of the suspension cannot be resolved through either the efforts of the Secretary or the Tribe. (25 CFR 900.131(11))

i. The following are reasons the Secretary may suspend work under a self-determination contract for construction:

(A) Differing site conditions encountered upon commencement of construction activities that impact health or safety concerns or shall require an increase in the negotiated project budget;

(B) The IHS discovers materially non-compliant work;

(C) Funds allocated for the project that is the subject of this contract are rescinded by Congressional action;

(D) Other Congressional actions occur that materially affect the subject matter of the contract.

ii. If the Secretary wishes to suspend the work, the Secretary shall first provide written notice and an opportunity for the Tribe to correct the problem. The Secretary may direct the Tribe to suspend temporarily work under a contract only after providing a minimum of 5 working days advance written notice to the Tribe describing the nature of the performance deficiencies or imminent safety, health or environmental issues which are the cause for suspending the work.

iii. The Tribe shall be compensated for reasonable costs, including but not limited to overhead costs, incurred due to any suspension of work that occurred through no fault of the Tribe.

iv. Disputes arising as a result of a suspension of the work by the Secretary shall be subject to the Contract Disputes Act or any other alternative dispute resolution mechanism as negotiated between and agreed to by the parties and contained in the contract.

i.) The Secretary can terminate for cause in the event non-compliant work is not corrected through the suspension process specified in 25 CFR 900.131(b)(11).

j.) Termination for Convenience. The Secretary retains authority to terminate the project for convenience for the following reasons: (25 CFR 900.131(b)(13))

i. Termination for convenience is requested by the Tribe;

ii. Termination for convenience is requested by the Secretary and agreed to by the Tribe.

iii. Funds allocated for the project that is the subject of the contract are rescinded by Congressional action.

iv. Other Congressional actions take place that affect the subject matter of the contract.

v. If the Secretary terminates a self-determination contract for convenience, the Tribe shall provide the Tribe 21 days advance written notice of intent to terminate a contract for convenience; or

vi. The Tribe shall be compensated for reasonable costs incurred due to termination of the contract.

4. Proposed Methods to Accommodate the Responsibilities of Tribe provided in 900.130 unless otherwise addressed in Part A of the Tribes proposal and minimum staff qualifications proposed by the Tribe. 25 CFR 900.125(b)(4).

The Tribe proposes the following methods to accommodate the responsibilities of the Tribe as described in 25 CFR 900.130:

a.) The Tribe will subcontract with or provide its own forces to conduct construction activities in accordance with the project construction documents. The Tribe plans to provide construction management and administration services, on-site surveying, materials testing and inspection, full time on-site observation by an Architect's Representative, and periodic A/E observation services in support of the _____ Project. The Tribe intends to provide these services through subcontracts with _____. (25 CFR 900.130 (a) and (c)(3))

b.) The Tribe shall direct the activities of project architects, engineer, construction contractors, and other project consultants, facilitate the flow of information between the Tribe and its subcontractors, resolve disputes between itself and its subcontractors to monitor the work produced by its subcontractors to assure compliance with the POR and/or plans and specifications. (25 CFR 900.130 (b)(3) and (c)(4)).

c.) The Tribe shall manage or provide for the management of day-to-day activities of the contract including the issuance of construction change orders to subcontractors except that, unless the Secretary agrees: (25 CFR 900.130 (c)(5))

i. The Tribe may not issue a change order to a construction subcontractor that will cause the Tribe to exceed the performance period in its self-determination co exceed its self determination contract budget;

ii. The Tribe may not issue a change order to a construction subcontractor that will cause the Tribe to e the performance period in its self determination budget; or

iii. The Tribe may not issue a construction subcontractor a change order that is a significant departure from the scope or objective of the project.

d.) The Tribe shall direct the work of its subcontractors so that work produced is provided in accordance with the contract budget and performance period as negotiated between and agreed to by the parties. (25 CFR 900.130 (b)(4) and (c)(6))

e.) The Tribe shall provide the Secretary with an opportunity to review and provide written comments on the project plans and specifications only at the concept phase, the schematic phase (or preliminary design), the design development phase, and the final construction document phase and approve the project plans and specifications for general compliance with contract requirements only at the schematic phase (or the preliminary design) and the final construction documents phase or as otherwise negotiated. (25 CFR 900.130(b)(5))

f.) The Tribe shall provide the Secretary with the plans and specifications after their final review so, if needed, the Secretary may obtain an independent government cost estimate in accordance with 900.131(b)(4) for the construction of the project. (25 CFR 900.130(b)(6)

g.) Reports. The Tribe agrees to submit quarterly financial reports on an SF-425 and progress reports within forty-five (45) calendar days following the end of each quarter based on the Tribes financial fiscal year. (25 CFR 900.130 (b)(8) and (c)(7))

Financial reports will report funds expended during the period and total funds expended for the project. The tribe will provide an initial schedule of values and updates as they may occur.

Progress reports will include a narrative of the work accomplished, the percent of work completed, major subcontracts, modifications implemented during the report period, and A/E service deliverables. An initial construction schedule will be provided for each phase contracted and updated as schedule changes occur.

h.) Job Site or Project Office Records. The tribe will maintain an on the job-site or project office, and make available to the Secretary during monitoring visits: contracts, major subcontracts, modifications, construction documents, change orders, shop drawings, equipment cut sheets, inspection reports, testing reports, and current redline drawings. (25 CFR 900.130 (c)(8))

i.) Contract Closeout. Upon completion of the project, the tribe will provide to the Secretary a reproducible copy of the record plans and a contract closeout report. The closeout report will include a final narrative report, final expenditure report and release of claims form. The reproducible copy of the record drawings will include an electronic cop of all as-built drawing files. The Tribe will retain project records and design documents for a minimum of 3 years following completion of the contract. (25 CFR 900.130 (b)(7) and (d)).

j.) Warranty. The Tribe shall provide a one-year warranty secured form its construction subcontractors commencing with the date of final acceptance or the date the Government takes possession, whichever is earlier. If the facility is Government owned include: All construction warranty problems and latent defects will be communicated by [identify responsible party, eg., facility manager] to the Tribe's Project Manager and to the IHS Designated Official for Technical Matters. The Tribe is responsible for resolution of all construction warranty and latent defects. [the following sentence applies only when the facility is IHS-owned and operated] The Tribe will ensure that all manufacturer and supplier extended warranties (separate from and in addition to the one-year construction warranty) are issued in the name of IHS. The IHS will be responsible for working with manufacturers (e.g., roof, windows, boiler, etc.) for those defects.

k.) Acceptance. Acceptance will be used universally to include the terms "beneficial occupancy" and "substantial completion". IHS will accept the facility when it can be used for its intended purpose and no life safety issues exist that would prohibit use of the facility. It is the goal of IHS to coordinate with the Tribe acceptance of the facility from the subcontractor and IHS to accept the facility from the Tribe concurrently.

l.) Sufficient Funding: For cost-reimbursable projects, the tribe shall not be obligated to continue performance that requires an expenditure of more funds than were awarded under the contract. If the Tribe has reason to believe that the total amount required for performance of the contract will be greater than the amount of funds awarded, it shall provide notice to the government within 10 days of discovery. If the government does not increase the amount of funds awarded under the contract, the Tribe may suspend performance of the contract until sufficient additional funds are awarded. (25 CFR 900.130 (e))

5. **Budget** 25 CFR 900.125(b)(5)

Attachment ____.

6. **Period of Performance** 25 CFR 900.125(b)(6)

Attachment _____, stipulates major contract activities and milestones that are expressed in calendar days.

7. **Payment Schedule** 25 CFR 900.125(b)(7)

Attachment ___

8. **Construction Management Services (CMS) Contract Statement** 25 CFR 900.125(b)(8)

The *insert name of tribe* has no CMS contract related to this project.

9. **Tribal Resolution** 25 CFR 900.125(b)(9)

Attachment A.

10. **Additional Responsibilities of the Secretary 25 CFR 900.125(b)(10).**

Insert as negotiated

Who is responsible for securing permits? e.g., stormwater permits that are issued under the Clean Water Act that is a law applicable to all parties, including Tribes. Violators may be subject to fines or imprisonment.

PART C – ASSURANCES

As provided in the Indian Self-Determination and Education Assistance Act and regulation promulgated under Title I there under, 25 CFR 900.125(c), the Tribe provides the following assurances:

(1) If the Tribe elects not to take title (pursuant to subpart I) to Federal property used in carrying out the contract, ``The Tribe will not dispose of, modify the use of, or change the terms of the real property title, or other interest in the site and facilities without permission and instructions from the awarding agency. The Indian tribe or tribal organization will record the Federal interest in the title of real property in accordance with awarding agency directives and will include a covenant in the title of real property acquired in whole or in part with Federal assistance funds to assure nondiscrimination during the useful life of the project"; and

(2) ``The Tribe will comply with the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4801 et seq.)" which prohibits the use of lead based paint in construction or rehabilitation of residential structures;

(3) ``The Tribe will comply, or has already complied, with the requirements of Titles II and III of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Pub. L. 91-646)," which provides for fair and equitable treatment of persons displaced or whose property is acquired as a result of Federal participation in purchases; and

(4) ``Except for work performed by tribal or tribal organization employees, the Tribe will comply, as applicable, with the provisions of the Davis-Bacon Act (40 U.S.C. 276c and 18 U.S.C. 874)," for Federally assisted construction sub agreements;

(5) ``The Tribe will comply with the flood insurance purchase requirements of section 102(a) of the Flood Disaster Protection Act of 1973 (Pub. L. 93-234)," which requires recipients in a special flood hazard area to participate in the program and to purchase flood insurance if the total cost of insurable construction and acquisition is $10,000 or more;

(6) ``The Tribe will comply with all applicable Federal environmental laws, regulations, and Executive Orders;"

(7) ``The Tribe will comply with the Wild and Scenic Rivers Act of 1968 (16 U.S.C. 1271 et seq.) related to protecting the components or potential components of the national wild and scenic rivers system;"

(8) ``The Tribe will assist the awarding agency in assuring compliance with section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470), EO 11593 (identification and preservation of historic properties), and the Archaeological and Historic Preservation Act of 1974 (16 U.S.C. 469a-1 et seq.)."

Part D - IDENTIFICATION OF FEDERAL LAWS, EXECUTIVE ORDERS, OR REGULATIONS APPLICABLE TO THE CONTRACT. 25 CFR 900.125 (d)

(A) Tribe Name, Resolution No. _____, Dated _____

(B) Tribe Name, Resolution No. _____, Dated _____

ATTACHMENT B **FAR CLAUSES**

The Tribe agrees to include the following Federal Acquisition Regulation (FAR) clauses, or their equivalent, as applicable in all subcontracts awarded under this contract. These clauses are intended to provide the tribe the subcontract clauses specific to construction contracting that are necessary to ensure that the contract may be carried out in a satisfactory manner, or in the case of Davis Bacon Act, as required by law.

52.209-6 Protecting the Government's Interest when Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment
52.211-10 Commencement, Prosecution, and Completion of Work
52.211-12 Liquidated Damages – Construction (If determined appropriate by the tribe)
52.211-13 Time Extensions
52.211-18 Variation in Estimated Quantity
52.222-6 Davis Bacon Act (Applies only to other than the tribe or a tribal organization.)
52.222-7 Withholding of Funds (Applies only to other than the tribe or a tribal organization.)
52.222-8 Payrolls and Basic Records (Applies only to other than the tribe or a tribal organization.)
52.222-9 Apprentices and Trainees (Applies only to other than the tribe or a tribal organization.)
52.222-10 Compliance with Copeland Act Requirements (Applies only to other than the tribe or a tribal organization.)
52.222-11 Subcontracts (Labor Standards) (Applies only to other than the tribe or a tribal organization.)
52.222-12 Contract Termination-Debarment (Applies to other than the tribe or a tribal organization.)
52.222-13 Compliance with Davis-Bacon and Related Act Regulations (Applies only to other than the tribe or a tribal organization.)
52.222-14 Disputes Concerning Labor Standards (Applies only to other than the tribe or a tribal organization.)
52.222-15 Certification of Eligibility (Applies only to other than the tribe or a tribal organization.)
52.228-1 Bid Guarantee
52.228-5 Insurance-Work on a Government Installation
52.228-12 Prospective Subcontractor Requests for Bond
52.228-13 Alternative Payment Protections (for subcontracts under $100,000)
52.228-14 Irrevocable Letter of Credit
52.228-15 Performance and Payment Bonds—Construction (for subcontracts over $100,000)
52.229-3 Federal, State, and Local Taxes
52.232-5 Payments under Fixed-Price Construction Contracts
52.233-1 Disputes
52.236-2 Differing Site Conditions
52.236-3 Site Investigation and Conditions Affecting the Work
52.236-5 Material and Workmanship
52.236-6 Superintendence by the Contractor
52.236-7 Permits and Responsibilities
52.236-8 Other contracts
52.236-9 Protection of Existing Vegetation, Structures, Equipment, Utilities, and Improvements
52.236-10 Operation and Storage Areas
52.236-11 Use and Possession Prior to Completion
52.236-12 Cleaning Up
52.236-13 Accident Prevention
52.236-14 Availability and Use of Utility Services
52.236-15 Schedules for Construction Contracts
52.236-16 Quantity Surveys.
52.236-17 Layout of Work.
52.236-21 Specifications and Drawings for Construction.
52.242-13 Bankruptcy
52.242-14 Suspension of Work
52.243-4 Changes
52.246-12 Inspection of Construction
52.246-21 Warranty of Construction
52.249-2 Termination for Convenience of the Government (Fixed-Price)-Alternate I
52.249-10 Default (Fixed-Price Construction)

The Tribe agrees to secure performance and payment bonds for all subcontracts consistent with the requirements of FAR 28.102.

A/E Subcontract Design Clauses
52.244-4 Subcontractors and Outside Associates and Consultants (Architect-Engineer Services)
52.232-10 Payments under Fixed-Price Architect-Engineer Contracts
52.236-22 Design within Funding Limitations
52.236-23 Responsibility of the Architect-Engineer Contractor
52.236-24 Work Oversight in Architect-Engineer Contracts
52.236-25 Requirement for Registration of Designers

Final page of the Sample Contract

Sample Schedule

Contract No.: Attachment XX

Note: Only Major Contract Milestones are required

(Insert Project Description)

Step	Activity	Days to Complete
1	Contract Award IHS and Tribe	1
2	A/E Contract	30
3	Conceptual Design	45
4	Review Conceptual Design	21
5	Schematic Design	60
6	Review & Approve Schematic Design	21
7	Design Development	90
8	Review Design Development	21
9	Construction Documents 100%	120
10	Review 100% Construction Documents	21
11	Construction	450
12	Final Inspection/Punchlist Construction Complete	30
13	Contract Closeout & Warranty	360

Sample Budget

	Project Budget		
	Project Title		
	Date:		Total Budget
1	Salaries		
	1 Project Manager - XX months @ $XXX/month (XX mo. for warranty)		0
	1 Administrative Clerk - XX months @ $XXXX/month (XX time)		0
	1 Procurement Specialist (Equipment) XX mos @ $XX/mo.		0
	Total Salaries		0
2	Fringe Benefits @ XX% of Salaries		0
3	Indirect Costs @ XXX% of (What Base?)		0
4	Total Salaries, Fringe, and Indirect Costs		0
5	Travel - XX months @ $XXX/month		0
6	Training		0
7	Phone/Fax - XX months @ $XXX/month		0
8	Equipment, Supplies, and Materials		0
9	Office Rental (Including Setup and Utilities)		0
10	Reproduction - XXX copies monthly @ .XX/copy for XX months		0
11	Subtotal		0
12	Technical Consultant Cost		0
	XX months @ XX hours/month @ $XX/hour	0	
	Travel - XX trips @ $XXXX/trip	0	
	Misc. cost for printing, postage, etc.	0	
13	Pre-Contract Cost		0
14	Legal		0
15	Total Administrative and Management Costs		0
16	Design Phase		0
	A/E Design	0	
	Equipment	0	
	CM Part A Fee	0	
17	Construction Contract (Includes Special Equipment)		0
18	A/E CCA/CO (Includes Warranty Phase)		0
19	Project Contingency Awarded		0
	Contingency Retained By IHS if CR Contract		0
20	Equipment Acquisition		0
21	Cultural Arts		0
	Total Project Budget		**$0**

	Project Funding and Award		
	Funding Sources-List		
	Project 106(a) Amount		0
	Program 106(a) Amount:		
			0
			0
			0
			0
			0
	Total Project Funding		**$0**
	Contingency Award Calculation as per 900.127(e)(8)		
	Total Activities Contracted (excluding Contingency)		0
	Contingency Calculation (3% of Activities Contracted)	3%	0
	--or--		
	Total Contingency Budgeted		0
	Contingency Calculation (50% of Contingency Budgeted)	50%	0
	Total Contingency Awarded (Greater of 2)		0
	Maximum Total Contingency Retained		0
	Contract Award Calculation		
	Total Project Funding		0
	Total Contingency Retained		0
	Total Contract Award		**$0**

Sample Notification to Designated Official (DO) for Technical Matters

DEPARTMENT OF HEALTH & HUMAN SERVICES

Memorandum

Date XXXX

From Contracting Officer, XXXXXXXXXXXX - XXXXXX

Subject XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

Contract No. XXXXXXXXXXXX – **Notification of Appointment to Designated Official for Technical Matters**

To XXXXXXXXXXXXXXX

XXXXXXXXXXXX, you are hereby notified that you are identified as the Designated Official for Technical Matters for the subject contract.

Enclosed is a copy of the subject contract for your file.

This is a P.L. 93-638, Title I, "Subpart J" construction contract. Accordingly, the Federal Acquisition Regulation (FAR) and Health and Human Services Acquisition Regulation (HHSAR) do not apply, except to the extent the clauses are included in the contract as part of the negotiation process. Your responsibilities and authorities as the Designated Official for technical matters under the subject contract are limited to the following:

1. Technical Assistance as negotiated in the contract. The Tribe did not request any technical assistance from IHS on this contract. However, this does not preclude them from making a written request during the course of performance.

2. Submittal Reviews and Approvals. The IHS will review, provide comments, and approve submittals as follows:

   a. PSD - Review and Approval
   b. NEPA - Review and Approval
   c. Concepts - Review and Comment
   d. Schematics - Review and Approval
   e. Design Development - Review and Comment
   f. Final Construction Contract - Review and Approval

   You are responsible for receipt of submittals, coordination of review with Area and Service Unit staff, screening and consolidating review comments and providing comments as well as required approvals to the Tribe. While performing this function you must instruct Area, Service Unit Personnel, or other IHS technical consultants that they may not communicate any information on reviews directly to the Tribe. In addition, when notifying reviewers of the due date for their comments consider the amount of time required for consolidation and finalization of the Government's response to ensure the 21-day deadline established by the contract is met. Note, in negotiations we agreed to incorporate a provision in the contract that IHS would make a concerted effort to minimize the review times for design submittals ahead of the 21-day time period.

   In accordance with the contract, you must promptly notify the Tribe of any concerns or issues in writing that may lead to disapproval, meet with the Tribe to discuss these

concerns and issues and share relevant information and documents, and make a good faith effort to resolve all issues and concerns of the Tribe.

3. NEPA – You are responsible for receiving the NEPA information from the Tribe and for obtaining approvals from the IHS NEPA Certifying Official within prescribed NEPA timeframes.

4. You are required to immediately notify the Contracting Officer of changes as described in 25 CFR 130(c)(5) or discussions that contemplate changes.

5. The contract specifies that the IHS may make monthly on-site monitoring visits. If IHS makes a monthly on site visit, the visit must be documented in the form of a trip report for the contract record, with a copy to the Contracting Officer and the Tribe. As part of the site visit, a review of progress made should be compared to the contract schedule.

6. If monthly on-site monitoring visits are not made, monthly conference calls must be conducted to monitor progress. The Project Officer must submit monthly contract status reports to the Contracting Officer documenting progress made, schedule updates, concerns, and potential changes.

7. You are responsible for initiating advance payments as authorized by the contract. Note that the authorization must be sent to the Contracting Officer with sufficient time to allow for review, approval, and transmission to Finance so timely payments can be made. The Tribe should be notified immediately if there are any outstanding issues that would preclude timely authorization of payment, including lack of quarterly reports, or work not progressing to allow for completion within the contract schedule.

8. You are responsible for obtaining final reports to close out the contract.

Please acknowledge acceptance by signing below in the space provided. Please return a copy of your acknowledgment to me and keep a copy for your reference. Please keep in mind that your appointment as the Designated Official for Technical Matters encompasses only the responsibilities and authorities as outlined above.

Contracting Officer Name

Acknowledged

Signature Designated Official for Technical Matters date

Acknowledged

Signature Supervisor of Designated Official date

Sample Sources of Supply Letter

DEPARTMENT OF HEALTH & HUMAN SERVICES Indian Health Service

___ Area Indian Health Service
Address
City, State Zip

Date

Name/Title
Organization
Address
City, ST Zip

Reference: Authorization to Use Federal Supply Schedules

This letter shall serve as authorization for the Tribe or Tribal Organization to utilize all Federal sources of supplies and services required by your organization in the performance of the Indian Self-Determination Act Compact between the Department of Health and Human Services, Indian Health Service and the Tribe or Tribal Organization.

The authority to utilize all Federal sources of supplies and services, including the selection and removal of excess Federal property from DRMO, is provided in your contract and authorized by Section 105(k) (25 U.S.C. § 450j) of Public Law 93-638, the Indian Self-Determination and Education and Assistance Act, as amended, and further implemented by Part 51 of the Federal Acquisition Regulation.

The Tribe or Tribal Organization shall be responsible for the prompt payment of all supplies and services obtained through this authorization.

Should any Federal Supply Schedule Contractor refuse to honor an order placed by the Tribe or Tribal Organization, the undersigned should be notified immediately.

Should there be any questions concerning this authorization, please call me at (xxx) xxx-xxxx.

Sincerely,

Name
Contracting Officer

Note: Similar letters may be issued to authorize Tribes to access Government Travel rates or GSA fleet vehicles at the request of the Tribe.

Sample Schedule of Amounts for Contract Payment

Name and Address of Contractor		Contract Number/Project Title & Location			
Item	Description	Quantity	Unit of Measure	Unit Cost	Total Value
				TOTAL CONTRACT PRICE	$ -

Contractor

submitted by:

_____

(signature/title/date)

Tribe or Tribal Organization

approved:

_____ _____

Title - Authorized Official Date

Sample instructions for completing the schedule of amounts to include in the solicitation document:

The contractor shall prepare a schedule of the estimated values of each principal category of the work which when added together equal the total contract price. The following detail is required:

The principle categories of work shall be broken into line items of sufficient detail to allow meaningful measurement of the work on a monthly basis as determined by ___. Units of measure appropriate to the type of work shall be used. "Lump sum" pricing of line items shall be avoided except when payment for that line item is requested based on 100% completion of that line item or where there is no other practical unit of measure.

The cost of preparatory work (e.g., shop drawings or submittals), field and home office overhead, profit, insurance, taxes, warranties, as-built drawings, etc., shall be pro-rated into items of physical work and not listed as separate line items.

Cost of performance and payment bonds may be listed as a single line item and not pro-rated. Also, cost of mobilization and demobilization relating to transportation or installation costs associated with such items as site trailers, heavy equipment, temporary batch plants, temporary on-site manufacturing and assembly facilities, temporary on-site quarters facilities, temporary sanitation facilities, temporary utility connections, and/or temporary secured storage facilities may be listed as line items and not pro-rated. If mobilization is listed separately, a line item for demobilization must be included and shall be at least 20 percent of the mobilization cost. A detailed listing of the items included and the individual cost for each item shall be provided in support of proposed amounts for mobilization and demobilization.

Material stored on site may be included in earned progress if the contractor furnishes satisfactory evidence that it has acquired title to such material and that the material will be used in performance of the contract.

Sample Contract Modification

SAMPLE FORMAT
P.L. 93-638-CONSTRUCTION MODIFICATION

Tribe Name
Contract Number _____
Modification Number _____ (_)
Page 1 of 2

The parties agree:

The purpose of this contract modification is to:
_____
_____

1. The contract is changed as follows:

   Cite applicable contract section effected, describe how it changes. E.g. add, delete, supercede; number applicable attachment and refer to here.
   _____

2. Part ____, _____Performance Period is changed to:
   _____
   _____

3. Section __ of the contract, Attachment ____ of the contract, and Part ___ are changed in increase funds available pursuant to the attached _____ Budget and Funding Source documents.

   The total Indian Health Service Funds through Modification ___ is $_____ of which $_____shall be obligated as follows:

   List Amount, Accounting and Appropriation Data

   Advance Payments shall be made as follows: *List agreed amount and dates.*

   The total contract amount is hereby increased/decreased by _____, from $_____ to $_____, by reason of this modification.

Tribe Name
Contract Number _____
Modification Number _____ (_)
Page 2 of 2

FOR THE TRIBE:

Approved by: _____ _____
Date Name
Title

FOR THE INDIAN HEALTH SERVICE:

Recommended by: _____ _____
Date Name
Title, _____ Area Indian Health Service

Approved by: _____ _____
Date Name
Contracting Officer
_____ Area Indian Health Service

Sample Tribal Quarterly Progress Report – A/E Services

Project Title:	Date:
Tribe:	Contract No:
Contract Start Date:	Contract Completion Date:
Project Title:	Report Period: _____ through _____.

Narrative Report of Current Actions & Updates	
Narrative of Work completed this period including (but not limited to): description of contracts, major subcontracts and modifications implemented during the report period and deliverables (25 CFR 900.130(b)(8)	
Percent of work completed:	
Actions requiring attention:	
Funding Issues:	

Attachment A: Updated Performance Schedule (if changes have occurred during reporting period)
Attachment B: Financial Status Report – SF 425
Attachment C: Updated Payment Schedule (if changes have occurred during reporting period)

Signature: _____ Date _____
Name -Tribal Designated Official

Sample Tribal Quarterly Progress Report – Construction

Project Title:	**Date:**
Tribe:	Contract No:
Contract Start Date:	Contract Completion Date:
Project Title:	Report Period: _____ through _____.
Narrative Report of Current Actions & Updates	
Narrative of Work Completed this Period.	
Percent of work completed.	
Actions requiring attention:	
Funding Issues:	

Attachment A: Updated Schedule (if changes have occurred during reporting period)
Attachment B: Financial Status Report – SF 425
Attachment C: Updated Schedule of Values (if changes have occurred during reporting period)

Signature: _____ Date _____
Name -Tribal Designated Official

Information that may be negotiated as part of the quarterly reporting requirements:

Quarterly Report

1. Cover Sheet – Project Name, 638 Agreement Number, Tribe Name
2. Table of Contents
3. Project Status Report Narrative:
    a. Time / % Complete: Days worked/contract % complete; $billed/contract % complete
    b. Progress for the quarter
        i. By division
        ii. Coordination issues
        iii. PM issues
        iv. Potential impacts (positive and negative) to schedule
4. Note any potential modifications or substantive changes to design or program requiring Government review, i.e., varying from the Program of Requirements or the 638 agreement.
5. Note any issues pending requiring Government input.
6. Provide a current Project Milestone Schedule.
7. Photographs showing an overview of progress for quarter, if project is under construction.

Federal Financial Report, SF (Standard Form) 425

A fillable copy of this form may be obtained online by completing an Internet search for "SF 425".

FEDERAL FINANCIAL REPORT

(Follow form instructions)

1. Federal Agency and Organizational Element to Which Report is Submitted	2. Federal Grant or Other Identifying Number Assigned by Federal Agency (To report multiple grants, use FFR Attachment)		Page 1	of pages
3. Recipient Organization (Name and complete address including Zip code)				
4a. DUNS Number	4b. EIN	5. Recipient Account Number or Identifying Number (To report multiple grants, use FFR Attachment)	6. Report Type ○ Quarterly ○ Semi-Annual ○ Annual ○ Final	7. Basis of Accounting ○ Cash ○ Accrual
8. Project/Grant Period From: (Month, Day, Year)	To: (Month, Day, Year)		9. Reporting Period End Date (Month, Day, Year)	

10. Transactions	Cumulative
(Use lines a-c for single or multiple grant reporting)	
Federal Cash (To report multiple grants, also use FFR Attachment):	
a. Cash Receipts	
b. Cash Disbursements	
c. Cash on Hand (line a minus b)	
(Use lines d-o for single grant reporting)	
Federal Expenditures and Unobligated Balance:	
d. Total Federal funds authorized	
e. Federal share of expenditures	
f. Federal share of unliquidated obligations	
g. Total Federal share (sum of lines e and f)	
h. Unobligated balance of Federal funds (line d minus g)	
Recipient Share:	
i. Total recipient share required	
j. Recipient share of expenditures	
k. Remaining recipient share to be provided (line i minus j)	
Program Income:	
l. Total Federal program income earned	
m. Program income expended in accordance with the deduction alternative	
n. Program income expended in accordance with the addition alternative	
o. Unexpended program income (line l minus line m or line n)	

	a. Type	b. Rate	c. Period From	Period To	d. Base	e. Amount Charged	f. Federal Share
11. Indirect Expense							
				g. Totals:			

12. *Remarks: Attach any explanations deemed necessary or information required by Federal sponsoring agency in compliance with governing legislation:*

13. Certification: By signing this report, I certify that it is true, complete, and accurate to the best of my knowledge. I am aware that any false, fictitious, or fraudulent information may subject me to criminal, civil, or administrative penalities. (U.S. Code, Title 18, Section 1001)

a. Typed or Printed Name and Title of Authorized Certifying Official	c. Telephone (Area code, number and extension)
	d. Email address
b. Signature of Authorized Certifying Official	e. Date Report Submitted (Month, Day, Year)
	14. Agency use only:

Standard Form 425
OMB Approval Number: 0348-0061
Expiration Date: 10/31/2011

Paperwork Burden Statement
According to the Paperwork Reduction Act, as amended, no persons are required to respond to a collection of information unless it displays a valid OMB Control Number. The valid OMB control number for this information collection is 0348-0061. Public reporting burden for this collection of information is estimated to average 1.5 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0060), Washington, DC 20503.

Monthly Monitoring Report Format

Indian Health Service
For Internal Program Use Only

MONTHLY PROGRESS REPORT

Project Title**:**	Date:
Project:	**Contract No:**
Contract Start Date:	Contract Completion Date:
Contractor:	Tribe's Technical Contact:
Narrative Report of Current Actions & Updates	
Design/Const. Update:	
Pending Actions:	
Funding:	

Signature: _____ Date _____
Designated Official for Technical Purposes

Quarterly Report Tracking Form

Title I, P.L. 93-638, Subpart J Contract Quarterly Report Tracking Form

Tribe: _____ Contract No.: _____

Award date: _____

Insert date report received for each quarter during performance.

Fiscal Year	Quarterly Financial Reports				Quarterly Narrative Reports			
	1st	2nd	3rd	4th	1st	2nd	3rd	4th

Sample Notice of Material Non-Compliance

DEPARTMENT OF HEALTH & HUMAN SERVICES Indian Health Service

Division of Engineering Services
M/S RX-24, Rm. 710
2201 Sixth Avenue
Seattle, WA 98121-2500
Phone: 206/615-2455
Fax: 206/615-2466

Date

Name
Title
Tribe
Address
City, State, Zip

SUBJECT: *Project Title*
Contract Number
NOTICE OF MATERIAL NON-COMPLIANCE AND SUSPENSION OF WORK

Dear Chairman _____:

This is to inform you that the _____Tribe is in material non-compliance with the terms of the subject contract as described herein:

1. *Failure to submit timely quarterly financial and progress reports;*
2. *Failure to submit National Environmental Protection Agency (NEPA) and historical preservation documents;*
3. *Failure to progress, provide updated schedules or request a change to the contract; and*
4. *Material incomplete 65% construction design document submittal.*

Financial and Progress Reports

Reference contract section (25 CFR 900.130(b)(8)) Reporting, prescribes the requirements for quarterly financial, SF 425, and progress reports. The reports shall contain a narrative of the work accomplished, including but not limited to descriptions of the contract progress, major contracts, and modifications implemented during the reporting period, and total funds expended for the project. The Tribes shall also provide copies for the information of the government: an initial schedule of values and updates as they may occur, an initial construction schedule and updates as they occur, and the initial work and payment schedule as they may occur.

The only financial report, SF 425, received by IHS is for the quarter(s) ending ___*list*_____;

Progress reports received by IHS are for the quarters ending _____*list*_____.

National Environmental Policy Act

Reference contract section, in part, prescribes that the Tribe will secure and obtain, subject to Part 130 D, all environmental and historic preservation clearances necessary for the IHS to make a NEPA determination prior to submission of the final construction documents for approval.

Reference contract section, in part, prescribes that the Tribe will provide all necessary information and documentation, to the Designated IHS Project Officer, for the IHS to make a NEPA determination.

The IHS Project Officer has provided a checklist and questionnaire to the Tribe on _____ different occasions: *List Dates*. Completion of the checklist and questionnaire would have met the requirements by the Tribe for IHS to make a determination concerning NEPA and Section 106 of the National Historic Preservation Act of 1966, P.L. 89-665. IHS has not received any information or documentation from the Tribe to make this determination.

Contract Schedule

Attachment D, contract deliverables and performance schedule are significantly behind schedule.

Chairman _____ - Page 2

Part 130 E prescribes in part that a formal modification to the contract is required when there are schedule changes within _____ of any phase of the performance period.

The project is approximately _____ days behind the *date* revised project schedule and more than _____ behind the original contract schedule.

In recent consultation with the Tribe, the Tribe has proposed to further delay construction of the project for approximately _____ beyond the current schedule. IHS has requested schedule updates with no response from the Tribe. The last IHS effort to obtain an updated schedule was by letter to *Tribe* dated _____, which requested an updated schedule to be submitted by _____. As of this date, IHS has not received an updated schedule.

Design Submittals

The 65% construction design document submittal was scheduled to be complete on ____. A 65% construction design document submittal was received by IHS on _____ and was determined materially incomplete and rejected by letter dated _____.

This letter serves to provide *Tribe* with the advance written notice of impending action to suspend work for material non-compliance of the subject contract pursuant to 25 CFR Part 900.131 (b)(11)(ii) and to provide the *Tribe* the opportunity to correct the problem.

To avoid suspension of the contract, the *Tribe* must provide the following by *date*:

1. A revised schedule and plan for the Project per reference contract section of the contract. It is likely that a contract modification will be required. reference contract section of the contract, a request for change order must be also submitted listing the following: a description of the change, why the change order is needed, estimated cost of the change order and increase to the tribal share of funds that will be used to support the cost or a statement that there are no associated costs of the extension, additional time required as a result of the change and signature of the person authorized to enter into the change order agreements by the Tribes.
2. A detailed action plan which will lead to completion by the Tribe of necessary information and documentation for IHS to make the final NEPA determination. This plan needs to include the information required by reference contract section, of the contract to ensure compliance with Section 106 of the National Historic Preservation Act of 1966, P.L. 89-665, Executive Order 11593, and the Archaeological and Historic Preservation Act of 1974. The action plan must identify: tasks to be performed, responsible individuals for completing the task, and a delivery date for completing the task.
3. A plan for submission of all delinquent quarterly financial and progress reports.

   Assign specific responsibility for submission of these reports to an individual and describe what controls will be implemented to ensure timely submission in the future.
4. Provide a plan and schedule for complete submission of the 65% construction design document submittal.

Failure to provide complete and accurate information may result in suspension of work per 25 CFR Part 900.131 (b)(11).

Technical assistance may be requested by contacting _____, IHS Designated Official for Technical Matters by telephone at ( ) ___-____.

If there are any questions regarding this letter or other contractual concerns, please contact me by telephone at (___) ___-_____.

Sincerely,

Name
Contracting Officer

cc:
IHS Technical Official for Technical Matters; IHS Program Director; IHS Area; Tribe's Designated Officials under the Contract

Sample Memo Project Officer Recommendation to Close Contract

DEPARTMENT OF HEALTH & HUMAN SERVICES

Memorandum

Date: Date

To: Contracting Officer, ___ Branch

From: Project Officer, ___ Branch

Subject: Project Name – Project Location - Project No. (PIN) – Contract No.
Recommendation for Contract Closeout

The ____ Tribe has satisfactorily completed all work required by the subject contract, including submission of all reports. All payments have been made, and there are no outstanding issues, claims or disputes under this contract.

Address status of remaining contingency funds, e.g., attach request to deobligate or statement that contingency funds were used in furtherance of the project.

Address status of real and personal property, e.g., transfer agreement, quitclaim deed, personal property information, etc. - OR state: The Government is not taking title to any property under this contract.

Identify warranty dates and date Tribe and Government accepted work.

It is recommended that this contract be administratively closed.

Name

Contract Closeout Checklist

638 Contract Closeout
Insert Name Tribe of Indians
Contract insert number

CONTRACT CLOSEOUT CHECKLIST		
	✓ Complete Status/Responsible Party	DESCRIPTION
1.		Final Financial Report (SF 425) Including Full Report of Tribal Funds Expended and IHS Funds Expended if jointly funded
2.		Final Contract Financial Reconciliation: Verify obligations and advance payments in UFMS match expenditures and contract amount.
3.		De-obligation of IHS Funds (If applicable) by Mod No. ___
4.		Warranty Period Established
5.		Disposition of Property a. Personal Property b. Real Property
6.		a. Project Officer Final Inspection & Recommendation for Final Acceptance and/or Contract Closeout. b. Contracting Officer Final Acceptance and/or Closeout Letter.

All contract actions are complete and included in the official file. The contract is considered closed and the file may be sent to the Federal record center.

_____ _____
Date Program Office - Signature

Approved:

_____ _____
Date Contracting Officer

Sample Letter to Tribe Contract Closeout

DEPARTMENT OF HEALTH & HUMAN SERVICES Indian Health Service

___ Area Indian Health Service
Address
City, State Zip

Date

Name, Title
Tribe or Tribal Organization
Address
City, ST Zip

Subject: Project Name – Project Location - Project No.
Contract Closeout

Dear _____:

This letter is to advise you that the Tribe has satisfactorily completed all work required by the subject contract, including submission of all reports, and this contract is administratively closed.

Sincerely,

_____, Contracting Officer
_____ Area Indian Health Service

cc:
Project Officer

APPENDIX III

TITLE V

APPENDIX III – TITLE V

A. Title V, Process for Subpart N Project Agreements

1. Secretarial Notification to Tribe (42 CFR 137.320 &137.322)

A. Before developing a new project resource allocation methodology and application process the Secretary must consult with all Indian Tribes.

B. Before spending any funds for planning, design, construction, or renovation projects, whether subject to competitive application and ranking process or not.

C. Within 30 days after the Secretary's allocation of funds for the planning phase, design phase, or construction phase activities for a specific project.

2. Project Assumption Process (42 CFR 137.325)

A. Tribe submits notice requesting a pre-negotiation process per 105(m)(3) of the Act, or

B. Submits a proposed Construction Project Agreement - Final or Draft.

C. A combination of notice and proposal.

3. Pre-Negotiation Phase per step in 105(m)(3). (42 CFR 137.325(a) and (b))

A. Technical assistance.

B. Joint scoping session between Tribe and IHS.

C. Secretarial revision of plans, designs, or cost estimates in response to Tribal concerns.

D. Negotiation session for development of a mutually agreeable proposal.

E. Alternative dispute resolution for unresolved areas of disagreement.

F. Submission of final proposal by tribe.

4. Final Proposal – Approval

A. 30 Days after receipt by Secretary or as otherwise agreed to in writing by Tribe, or reject. (42 CFR 137.330)

B. If the Secretary fails to notify the tribe of decision to approve or reject within 30 days, the proposal will be deemed approved. (42 CFR 137.334)

C. Basis for rejection (42 CFR 137.332)

i. The amount of funds proposed in the final construction project proposal exceeds the applicable funding level for the construction project.

ii. The final construction proposal doesn't meet the minimum content requirements.

iii. The final proposal on its face clearly demonstrates that the construction project cannot be completed as proposed.

iv. Proposals for inherently Federal function that cannot legally be delegated.

5. Post Proposal Approval and Role of the Secretary

A. Advance Payments: Within 10 days of award.

B. Reviews: One review and approval.

i. Planning documents

ii. Design documents as negotiated.

C. Reports: Semi-Annual

i. Progress

ii. Financial

D. Schedules: Updates only where substantial deviation.

E. Payments: Based on negotiated advance payment schedule if performance exceeds 1 year.

F. Certified Payrolls if Davis Bacon applies: Tribe retains payroll records and do not submit to the Government.

G. Personal Property Inventories where equipment funds are a part of compact: Tribe does not have to submit inventories unless they have requested the Government to take title to the equipment as specified in the compact.

H. IHS Monitoring: Semi-Annual, unless otherwise stipulated in the project agreement and only to "view the progress".

I. Amendments or Modifications: Only when the tribe request additional projects be added to the existing project agreement or there is a

J. Final Inspections: None, unless negotiated in the project agreement if IHS owns and operates.

K. Close-out: Not addressed in law or regulations. Close-Out of Project Agreement should be negotiated into the Project Agreement. Recommended minimum:

i. Final Expenditure Report

ii. Final personal property inventory only where Secretary takes title

iii. Financial reconciliation on cost-reimbursement contract; e.g. Determination of savings on contingency retained by IHS which may need obligation into the Project Agreement as savings for additional services.

B. Title V Regulations; 42 CFR Part 36, et al. Tribal Self-Governance Amendments of 2000, Final Rule

Code of Federal Record (CFR) Title 42: Public Health Part 137 – Tribal Self-Governance

Subpart A – General Provisions

§ 137.1 Authority, purpose and scope.

(a) Authority. These regulations are prepared, issued and maintained with the active participation and representation of Indian Tribes, Tribal organizations and inter-Tribal consortia pursuant to the guidance of the negotiated rulemaking procedures required by section 517 of the Act [25 U.S.C. 458aaa–16].

(b) Purpose. These regulations codify rules for self-governance compacts, funding agreements, and construction project agreements between the Department of Health and Human Services (DHHS) and Self-Governance Tribes to implement sections 2, 3, and 4 of Pub. L. 106–260.

(c) Scope. These regulations are binding on the Secretary and on Indian Tribes carrying out programs, services, functions, and activities (or portions thereof) (PSFAs) under Title V except as otherwise specifically authorized by a waiver under section 512(b) of the Act [25 U.S.C. 458aaa–11(b)].

(d) Information collection. The information collection requirements have been submitted to the Office of Management and Budget (OMB) and are pending OMB approval.

§ 137.2 Congressional policy.

(a) According to section 2 of Pub. L. 106–260, Congress has declared that:

(1) The Tribal right of self-government flows from the inherent sovereignty of Indian Tribes and nations;

(2) The United States recognizes a special government-to-government relationship with Indian Tribes, including the right of the Indian Tribes to self-governance, as reflected in the Constitution, treaties, Federal statutes, and the course of dealings of the United States with Indian Tribes;

(3) Although progress has been made, the Federal bureaucracy, with its centralized rules and regulations, has eroded Tribal Self-Governance and dominates Tribal affairs.

(4) The Tribal Self-Governance Demonstration Project, established under title III of the Indian Self-Determination Act (ISDA) [25 U.S.C. 450f note] was designed to improve and perpetuate the government-to-government relationship between Indian Tribes and the United States and to strengthen Tribal control over Federal funding and program management;

(5) Although the Federal Government has made considerable strides in improving Indian health care, it has failed to fully meet its trust responsibilities and to satisfy its obligations to the Indian Tribes under treaties and other laws; and

(6) Congress has reviewed the results of the Tribal Self-Governance Demonstration Project and finds that transferring full control and funding to Tribal governments, upon Tribal request, over decision making for Federal PSFAs:

(i) Is an appropriate and effective means of implementing the Federal policy of government-to-government relations with Indian Tribes; and

(ii) Strengthens the Federal policy of Indian self-determination.

(b) According to section 3 of Pub. L. 106–260, Congress has declared its policy to:

(1) Permanently establish and implement Tribal Self-Governance within the DHHS;

(2) Call for full cooperation from the DHHS and its constituent agencies in the implementation of Tribal Self-Governance to—

(i) Enable the United States to maintain and improve its unique and continuing relationship with, and responsibility to, Indian Tribes;

(ii) Permit each Indian Tribe to choose the extent of its participation in self-governance in accordance with the provisions of the ISDA relating to the provision of Federal services to Indian Tribes;

(iii) Ensure the continuation of the trust responsibility of the United States to Indian Tribes and Indians;

(iv) Affirm and enable the United States to fulfill its obligations to the Indian Tribes under treaties and other laws;

(v) Strengthen the government-to-government relationship between the United States and Indian Tribes through direct and meaningful consultation with all Tribes;

(vi) Permit an orderly transition from Federal domination of programs and services to provide Indian Tribes with meaningful authority, control, funding, and discretion to plan, conduct, redesign, and administer PSFAs that meet the needs of the individual Tribal communities;

(vii) Provide for a measurable parallel reduction in the Federal bureaucracy as programs, services, functions, and activities (or portion thereof) are assumed by Indian Tribes;

(viii) Encourage the Secretary to identify all PSFAs of the DHHS that may be managed by an Indian Tribe under this Act and to assist Indian Tribes in assuming responsibility for such PSFAs; and

(ix) Provide Indian Tribes with the earliest opportunity to administer PSFAs from throughout the Department.

(c) According to section 512(a) of the Act [25 U.S.C. 458aaa–11(a)], Congress has declared, except as otherwise provided by law, the Secretary shall interpret all Federal laws, Executive Orders, and regulations in a manner that will facilitate:

(1) The inclusion of PSFAs and funds associated therewith, in the agreements entered into under this section;

(2) The implementation of compacts and funding agreements entered into under this title; and

(3) The achievement of Tribal health goals and objectives.

(d) According to section 512(f) of the Act [25 U.S.C. 458aaa–11(f)], Congress has declared that each provision of Title V and each provision of a compact or funding agreement shall be liberally construed for the benefit of the Indian Tribe participating in and any ambiguity shall be resolved in favor of the Indian Tribe.

(e) According to section 515(b) of the Act [25 U.S.C. 458aaa–14(b)], Congress has declared that nothing in the Act shall be construed to diminish in any way the trust responsibility of the United States to Indian Tribes and individual Indians that exists under treaties, Executive orders, or other laws and court decisions.

(f) According to section 507(g) of the Act [25 U.S.C. 458aaa–6(g)], Congress has declared that the Secretary is prohibited from waiving, modifying, or diminishing in any way the trust responsibility of the United States with respect to Indian Tribes and individual Indians that exists under treaties, Executive orders, other laws, or court decisions.

(g) According to section 515(c) of the Act [25 U.S.C. 458aaa–14(c)], Congress has declared that the Indian Health Service (IHS) under this Act shall neither bill nor charge those Indians who may have the economic means to pay for services, nor require any Tribe to do so. Nothing in this section shall impair the right of the IHS or an Indian Tribe to seek recovery from third parties section 206 of the Indian Health Care Improvement Act [25 U.S.C. 1621e], under section 1 of the Federal Medical Care Recovery Act [42 U.S.C. 2651], and any other applicable Federal, State or Tribal law.

(h) According to section 507(e) of the Act [25 U.S.C. 458aaa–6(e)], Congress has declared that in the negotiation of compacts and funding agreements the Secretary shall at all times negotiate in good faith to maximize implementation of the self-governance policy. The Secretary shall carry out Title V in a manner that

maximizes the policy of Tribal Self-Governance, and in a manner consistent with the purposes specified in section 3 of the Act.

§ 137.3 Effect on existing Tribal rights.

Nothing in this part shall be construed as:

(a) Affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by Indian Tribes;

(b) Terminating, waiving, modifying, or reducing the trust responsibility of the United States to the Indian Tribe(s) or individual Indians. The Secretary must act in good faith in upholding this trust responsibility;

(c) Mandating an Indian Tribe to apply for a compact(s) or grant(s) as described in the Act; or

(d) Impeding awards by other Departments and agencies of the United States to Indian Tribes to administer Indian programs under any other applicable law.

§ 137.4 May Title V be construed to limit or reduce in any way the funding for any program, project, or activity serving an Indian Tribe under this or other applicable Federal law?

No, if an Indian Tribe alleges that a compact or funding agreement violates section 515(a) of the Act [25 U.S.C. 458aaa–14(a)], the Indian Tribe may apply the provisions of section 110 of the Act [25 U.S.C. 450m–1].

§ 137.5 Effect of these regulations on Federal program guidelines, manual, or policy directives.

Unless expressly agreed to by the Self-Governance Tribe in the compact or funding agreement, the Self-Governance Tribe shall not be subject to any agency circular, policy, manual, guidance, or rule adopted by the IHS, except for the eligibility provisions of section 105(g) of the Act [25 U.S.C. 450j(g)] and regulations promulgated under section 517 of the Act [25 U.S.C. 458aaa–16(e)].

§ 137.6 Secretarial policy.

In carrying out Tribal self-governance under Title V, the Secretary recognizes the right of Tribes to self-government and supports Tribal sovereignty and self-determination. The Secretary recognizes a unique legal relationship with Tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. The Secretary supports the self-determination choices of each Tribe and will continue to work with all Tribes on a government-to-government basis to address issues concerning Tribal self-determination.

Subpart B – Definitions

§ 137.10 Definitions.

Unless otherwise provided in this part:

Act means sections 1 through 9 and Titles I and V of the Indian Self-Determination and Education Assistance Act of 1975, Public Law 93–638, as amended.

Appeal means a request by an Indian Tribe for an administrative review of an adverse decision by the Secretary.

Compact means a legally binding and mutually enforceable written agreement, including such terms as the parties intend shall control year after year, that affirms the government-to-government relationship between a Self-Governance Tribe and the United States.

Congressionally earmarked competitive grants as used in section 505(b)(1) of the Act [25 U.S.C. 458aaa–4(b)(1)] means statutorily mandated grants as defined in this section and used in subpart H of this part.

Contract means a self-determination contract as defined in section 4(j) of the Act [25 U.S.C. 450b].

Days means calendar days; except where the last day of any time period specified in these regulations falls on a Saturday, Sunday, or a Federal holiday, the period shall carry over to the next business day unless otherwise prohibited by law.

Department means the Department of Health and Human Services.

Director means the Director of the Indian Health Service.

Funding agreement means a legally binding and mutually enforceable written agreement that identifies the PSFAs that the Self-Governance Tribe will carry out, the funds being transferred from the Service Unit, Area, and Headquarter's levels in support of those PSFAs and such other terms as are required, or may be agreed upon, pursuant to Title V.

Gross mismanagement means a significant, clear, and convincing violation of a compact, funding agreement, or regulatory or statutory requirements applicable to Federal funds transferred to an Indian Tribe by a compact or funding agreement that results in a significant reduction of funds available for the PSFAs assumed by a Self-Governance Tribe.

IHS means Indian Health Service.

IHS discretionary grant means a grant established by IHS pursuant to the IHS' discretionary authority without any specific statutory directive.

Indian means a person who is a member of an Indian Tribe.

Indian Tribe means any Indian Tribe, band, nation, or other organized group, or community, including pueblos, rancherias, colonies, and any Alaska Native Village, or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians; provided that in any case in which an Indian Tribe has authorized another Indian Tribe, an inter-Tribal consortium, or a Tribal organization to plan for or carry out programs, services, functions, or activities (or portions thereof) on its behalf under Title V, the authorized Indian Tribe, inter-Tribal consortium or Tribal organization shall have the rights and responsibilities of the authorizing Indian Tribe (except as otherwise provided in the authorizing resolution or in this part). In such event, the term “Indian Tribe” as used in this part includes such other authorized Indian Tribe, inter-Tribal consortium, or Tribal organization.

Indirect costs shall have the same meaning as it has in 25 CFR 900.6 as applied to compacts, funding agreements and construction project agreements entered into under this part.

Inherent Federal functions means those Federal functions which cannot legally be delegated to Indian Tribes.

Inter-Tribal consortium means a coalition of two or more separate Indian Tribes that join together for the purpose of participating in self-governance, including Tribal organizations.

OMB means the Office of Management and Budget.

PSFA means programs, services, functions, and activities (or portions thereof).

Real property means any interest in land together with the improvements, structures, and fixtures and appurtenances thereto.

Reassumption means rescission, in whole or part, of a funding agreement and assuming or resuming control or operation of the PSFAs by the Secretary without consent of the Self-Governance Tribe.

Retained Tribal share means those funds that are available as a Tribal share but which the Self-Governance Tribe elects to leave with the IHS to administer.

Retrocession means the voluntary return to the Secretary of a self-governance program, service, function or activity (or portion thereof) for any reason, before or on the expiration of the term of the funding agreement.

Secretary means the Secretary of Health and Human Services (and his or her respective designees.)

Self-Governance means the program of self-governance established under section 502 of the Act [25 U.S.C. 458aaa–1].

Self-Governance Tribe means an Indian Tribe participating in the program of self-governance pursuant to section 503(a) of the Act [25 U.S.C. 458aaa–2(a)] or selected and participating in self-governance pursuant to section 503(b) of the Act [25 U.S.C. 458aaa–2(b)].

Statutorily mandated grant as used in this section and subpart F of this part means a grant specifically designated in a statute for a defined purpose.

Title I means sections 1 through 9 and Title I of the Indian Self-Determination and Education Assistance Act of 1975, Pub. L. 93–638, as amended.

Title V means Title V of the Indian Self-Determination and Education Assistance Act of 1975, Pub. L. 93–638, as amended.

Tribal organization means the recognized governing body of any Indian Tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities; provided, that in any case where a contract or compact is entered into, or a grant is made, to an organization to perform services benefitting more than one Indian Tribe, the approval of each such Indian Tribe shall be a prerequisite to the entering into or making of such contract, compact, or grant.

Tribal Self-Governance Advisory Committee means the Committee established by the Director of IHS that consists of Tribal representatives from each of the IHS Areas participating in Self-Governance, and that provides advocacy and policy guidance for implementation of Tribal Self-Governance within IHS.

Tribal share means an Indian Tribe's portion of all funds and resources that support secretarial PSFAs that are not required by the Secretary for the performance of inherent Federal functions.

Subpart C – Selection of Indian Tribes for Participation in Self-Governance

§ 137.15 Who may participate in Tribal Self-Governance?

Those Self-Governance Tribes described in 503(a) of the Act [25 U.S.C. 458aaa–2(a)] participating in the Title III Tribal Self-Governance Demonstration Project and up to 50 additional Indian Tribes per year that meet the criteria in §137.18 may participate in self-governance.

§ 137.16 What if more than 50 Indian Tribes apply to participate in self-governance?

The first Indian Tribes who apply and are determined to be eligible shall have the option to participate in self-governance. Any Indian Tribe denied participation due to the limitation in number of Indian Tribes that may take part is entitled to participate in the next fiscal year, provided the Indian Tribe continues to meet the financial stability and financial management capacity requirements.

§ 137.17 May more than one Indian Tribe participate in the same compact and/or funding agreement?

Yes, Indian Tribes may either:

(a) Each sign the same compact and/or funding agreement, provided that each one meets the criteria to participate in self-governance and accepts legal responsibility for all financial and administrative decisions made under the compact or funding agreement, or

(b) Authorize another Indian Tribe to participate in self-governance on their behalf.

§ 137.18 What criteria must an Indian Tribe satisfy to be eligible to participate in self-governance?

To be eligible to participate in self-governance, an Indian Tribe must have:

(a) Successfully completed the planning phase described in §137.20;

(b) Requested participation in self-governance by resolution or other official action by the governing body of each Indian Tribe to be served; and

(c) Demonstrated, for three fiscal years, financial stability and financial management capability.

Planning Phase

§ 137.20 What is required during the planning phase?

The planning phase must be conducted to the satisfaction of the Indian Tribe and must include:

(a) legal and budgetary research; and

(b) internal Tribal government planning and organizational preparation relating to the administration of health programs.

§ 137.21 How does an Indian Tribe demonstrate financial stability and financial management capacity?

The Indian Tribe provides evidence that, for the three years prior to participation in self-governance, the Indian Tribe has had no uncorrected significant and material audit exceptions in the required annual audit of the Indian Tribe's self-determination contracts or self-governance funding agreements with any Federal agency.

§ 137.22 May the Secretary consider uncorrected significant and material audit exceptions identified regarding centralized financial and administrative functions?

Yes, if the Indian Tribe chooses to centralize its self-determination or self-governance financial and administrative functions with non-self-determination or non-self-governance financial and administrative functions, such as personnel, payroll, property management, etc., the Secretary may consider uncorrected significant and material audit exceptions related to the integrity of a cross-cutting centralized function in determining the Indian Tribe's eligibility for participation in the self-governance program.

§ 137.23 For purposes of determining eligibility for participation in self-governance, may the Secretary consider any other information regarding the Indian Tribe's financial stability and financial management capacity?

No, meeting the criteria set forth in §§137.21 and 137.22, shall be conclusive evidence of the required stability and capability to participate in self-governance.

§ 137.24 Are there grants available to assist the Indian Tribe to meet the requirements to participate in self-governance?

Yes, any Indian Tribe may apply, as provided in §137.25, for a grant to assist it to:

(a) Plan to participate in self-governance; and

(b) Negotiate the terms of the compact and funding agreement between the Indian Tribe and Secretary.

§ 137.25 Are planning and negotiation grants available?

Subject to the availability of funds, IHS will annually publish a notice of the number of planning and negotiation grants available, an explanation of the application process for such grants, and the criteria for award. Questions may be directed to the Office of Tribal Self-Governance.

§ 137.26 Must an Indian Tribe receive a planning or negotiation grant to be eligible to participate in self-governance?

No, an Indian Tribe may use other resources to meet the planning requirement and to negotiate.

Subpart D – Self-Governance compact

§ 137.30 What is a self-governance compact?

A self-governance compact is a legally binding and mutually enforceable written agreement that affirms the government-to-government relationship between a Self-Governance Tribe and the United States.

§ 137.31 What is included in a compact?

A compact shall include general terms setting forth the government-to-government relationship consistent with the Federal Government's trust responsibility and statutory and treaty obligations to Indian Tribes and such other terms as the parties intend to control from year to year.

§ 137.32 Is a compact required to participate in self-governance?

Yes, Tribes must have a compact in order to participate in self-governance.

§ 137.33 May an Indian Tribe negotiate a funding agreement at the same time it is negotiating a compact?

Yes, at an Indian Tribe's option, a funding agreement may be negotiated prior to or at the same time as the negotiation of a compact.

§ 137.34 May a funding agreement be executed without negotiating a compact?

No, a compact is a separate document from a funding agreement, and the compact must be executed before or at the same time as a funding agreement.

§ 137.35 What is the term of a self-governance compact?

Upon approval and execution of a self-governance compact, the compact remains in effect for so long as permitted by Federal law or until terminated by mutual written agreement or retrocession or reassumption of all PSFAs.

Subpart E—Funding Agreements

§ 137.40 What is a funding agreement?

A funding agreement is a legally binding and mutually enforceable written agreement that identifies the PSFAs that the Self-Governance Tribe will carry out, the funds being transferred from service unit, area and headquarters levels in support of those PSFAs and such other terms as are required or may be agreed upon pursuant to Title V.

§ 137.41 What PSFAs must be included in a funding agreement?

At the Self-Governance Tribe's option, all PSFAs identified in and in accordance with section 505(b) of the Act must be included in a funding agreement, subject to section 507(c) of the Act [25 U.S.C. 458aaa–6(c)].

§ 137.42 What Tribal shares may be included in a funding agreement?

All Tribal shares identified in sections 505(b)(1) [25 U.S.C. 458aaa–4(b)(1)] and 508(c) of the Act [25 U.S.C. 458aaa–7(c)] may be included in a funding agreement, including Tribal shares of IHS discretionary grants.

§ 137.43 May a Tribe negotiate and leave funds with IHS for retained services?

Yes, at the discretion of the Self-Governance Tribe, Tribal shares may be left, in whole or in part, with IHS for certain PSFAs. These shares are referred to as a “retained Tribal shares.”

Terms in a Funding Agreement

§ 137.45 What terms must be included in a funding agreement?

A funding agreement must include terms required under section 505(d) of the Act [25 U.S.C. 458aaa–4(d)] and provisions regarding mandatory reporting and reassumption pursuant to section 507(a) of the Act [25 U.S.C. 458aaa–6(a)], unless those provisions have been included in a compact.

§ 137.46 May additional terms be included in a funding agreement?

Yes, at the Self-Governance Tribe's option, additional terms may be included as set forth in sections 506 [25 U.S.C. 458aaa–5] and 516(b) of the Act [25 U.S.C. 458aaa–15(b)]. In addition, any other terms to which the Self-Governance Tribe and the Secretary agree may be included.

§ 137.47 Do any provisions of Title I apply to compacts, funding agreements, and construction project agreements negotiated under Title V of the Act?

(a) Yes, the provisions of Title I listed in section 516(a) of the Act [25 U.S.C. 458aaa–15(a)] and section 314 of Pub. L. 101–512, as amended, [25 U.S.C. 450f note] mandatorily apply to a compact, funding agreement and construction project agreement to the extent they are not in conflict with Title V. In addition, at the option of a Self-Governance Tribe, under section 516(b) of the Act [25 U.S.C. 458aaa–15(b)] any provisions of Title I may be included in the compact or funding agreement.

(b) The provisions of Title I referenced in section 516(a) of the Act [25 U.S.C. 458aaa–15(a)] are sections 5 [25 U.S.C. 450c], 6 [25 U.S.C. 450d], 7 [25 U.S.C. 450e], 102(c) and (d) [25 U.S.C. 450f(c) and (d)], 104 [25 U.S.C. 450i], 105(k) and (l) [25 U.S.C. 450j(k) and (l)], 106(a) through (k) [25 U.S.C. 450j–1(a) through (k)], and 111 [25 U.S.C. 450n] of the Act.

§ 137.48 What is the effect of incorporating a Title I provision into a compact or funding agreement?

The incorporated Title I provision shall have the same force and effect as if it were set out in full in Title V.

§ 137.49 What if a Self-Governance Tribe requests such incorporation at the negotiation stage of a compact or funding agreement?

In that event, such incorporation shall be deemed effective immediately and shall control the negotiation and resulting compact and funding agreement.

Term of a Funding Agreement

§ 137.55 What is the term of a funding agreement?

A funding agreement shall have the term mutually agreed to by the parties. Absent notification from an Indian Tribe that it is withdrawing or retroceding the operation of one or more PSFAs identified in the funding agreement, the funding agreement shall remain in full force and effect until a subsequent funding agreement is executed.

§ 137.56 Does a funding agreement remain in effect after the end of its term?

Yes, the provisions of a funding agreement, including all recurring increases received and continuing eligibility for other increases, remain in full force and effect until a subsequent funding agreement is executed. Upon execution of a subsequent funding agreement, the provisions of such a funding agreement are retroactive to the end of the term of the preceding funding agreement.

§ 137.57 How is a funding agreement amended during the effective period of the funding agreement?

A funding agreement may be amended by the parties as provided for in the funding agreement, Title V, or this part.

Subpart F – Statutorily Mandated Grants

§ 137.60 May a statutorily mandated grant be added to a funding agreement?

Yes, in accordance with section 505(b)(2) of the Act [25 U.S.C. 458aaa–4(b)(2)], a statutorily mandated grant may be added to the funding agreement after award.

§ 137.65 May a Self-Governance Tribe receive statutorily mandated grant funding in an annual lump sum advance payment?

Yes, grant funds shall be added to the funding agreement as an annual lump sum advance payment after the grant is awarded.

§ 137.66 May a Self-Governance Tribe keep interest earned on statutorily mandated grant funds?

Yes, a Self-Governance Tribe may keep Interest Earned on Statutorily Mandated Grant Funds.

§ 137.67 How may a Self-Governance Tribe use interest earned on statutorily mandated grant funds?

Interest earned on such funds must be used to enhance the grant program including allowable administrative costs.

§ 137.68 May funds from a statutorily mandated grant added to a funding agreement be reallocated?

No, unless it is permitted under the statute authorizing the grant or under the terms and conditions of the grant award, funds from a statutorily mandated grant may not be reallocated.

§ 137.69 May a statutorily mandated grant program added to a funding agreement be redesigned?

No, unless it is permitted under the statute authorizing the grant or under the terms and conditions of the grant award, a program added to a funding agreement under a statutorily mandated grant may not be redesigned.

§ 137.70 Are the reporting requirements different for a statutorily mandated grant program added to a funding agreement?

Yes, the reporting requirements for a statutorily mandated grant program added to a funding agreement are subject to the terms and conditions of the grant award.

§ 137.71 May the Secretary and the Self-Governance Tribe develop separate programmatic reporting requirements for statutorily mandated grants?

Yes, the Secretary and the Self-Governance Tribe may develop separate programmatic reporting requirements for statutorily mandated grants.

§ 137.72 Are Self-Governance Tribes and their employees carrying out statutorily mandated grant programs added to a funding agreement covered by the Federal Tort Claims Act (FTCA)?

Yes, Self-Governance Tribes and their employees carrying out statutorily mandated grant programs are added to a funding agreement covered by the FTCA. Regulations governing coverage under the FTCA are published at 25 CFR Part 900, Subpart M.

§ 137.73 What provisions of Title V apply to statutorily mandated grants added to the funding agreement?

None of the provisions of Title V apply.

Subpart G – Funding

General

§ 137.75 What funds must the Secretary transfer to a Self-Governance Tribe in a funding agreement?

Subject to the terms of any compact or funding agreement, the Secretary must transfer to a Tribe all funds provided for in the funding agreement, pursuant to section 508(c) of the Act [25 U.S.C. 458aaa–7(c)] and §137.80. The Secretary shall provide funding for periods covered by joint resolution adopted by Congress making continuing appropriations, to the extent permitted by such resolutions.

§ 137.76 When must the Secretary transfer to a Self-Governance Tribe funds identified in a funding agreement?

When a funding agreement requires an annual transfer of funding to be made at the beginning of a fiscal year, or requires semiannual or other periodic transfers of funding to be made commencing at the beginning of a fiscal year, the first such transfer shall be made not later than 10 days after the apportionment of such funds by the OMB to the Department, unless the funding agreement provides otherwise.

§ 137.77 When must the Secretary transfer funds that were not paid as part of the initial lump sum payment?

The Secretary must transfer any funds that were not paid in the initial lump sum payment within 10 days after distribution methodologies and other decisions regarding payment of those funds have been made by the IHS.

§ 137.78 May a Self-Governance Tribe negotiate a funding agreement for a term longer or shorter than one year?

Yes, upon Tribal request, the Secretary must negotiate a funding agreement for a term longer or shorter than a year. All references in these regulations to funding agreements shall also include funding agreements for a term longer or shorter than one year.

§ 137.79 What funds must the Secretary include in a funding agreement?

The Secretary must include funds in a funding agreement in an amount equal to the amount that the Self-Governance Tribe would have been entitled to receive in a contract under Title I, including amounts for direct program costs specified under section 106(a)(1) of the Act and amounts for contract support costs specified under section 106(a) (2), (3), (5), and (6) of the Act [25 U.S.C. 450j–1(a)(2), (3), (5) and (6)]. In addition, the Secretary shall include any funds that are specifically or functionally related to the provision by the Secretary of services and benefits to the Self-Governance Tribe or its members, all without regard to the organizational level within the Department where such functions are carried out.

Prohibitions

§ 137.85 Is the Secretary prohibited from failing or refusing to transfer funds that are due to a Self-Governance Tribe under Title V?

Yes, sections 508(d)(1)(A) and (B) of the Act [25 U.S.C. 458aaa–7(d)(1)(A) and (B)] expressly prohibit the Secretary from:

(a) Failing or refusing to transfer to a Self-Governance Tribe its full share of any central, headquarters, regional, area, or service unit office or other funds due under Title V, except as required by Federal law, and

(b) From withholding portions of such funds for transfer over a period of years.

§ 137.86 Is the Secretary prohibited from reducing the amount of funds required under Title V to make funding available for self-governance monitoring or administration by the Secretary?

Yes, the Secretary is prohibited from reducing the amount of funds required under Title V to make funding available for self-governance monitoring or administration.

§ 137.87 May the Secretary reduce the amount of funds due under Title V in subsequent years?

No, in accordance with section 508(d)(1)(C)(ii) of the Act [25 U.S.C. 458aaa–7(d)(1)(C)(ii)], the Secretary is prohibited from reducing the amount of funds required under Title V in subsequent years, except pursuant to:

(a) A reduction in appropriations from the previous fiscal year for the program or function to be included in a compact or funding agreement;

(b) A Congressional directive in legislation or accompanying report;

(c) A Tribal authorization;

(d) A change in the amount of pass-through funds subject to the terms of the funding agreement; or

(e) Completion of a project, activity, or program for which such funds were provided.

§ 137.88 May the Secretary reduce the amount of funds required under Title V to pay for Federal functions, including Federal pay costs, Federal employee retirement benefits, automated data processing, technical assistance, and monitoring of activities under the Act?

No, the Secretary may not reduce the amount of funds required under Title V to pay for Federal functions, including Federal pay costs, Federal employee retirement benefits, automated data processing, technical assistance, and monitoring of activities under the Act.

§ 137.89 May the Secretary reduce the amount of funds required under Title V to pay for costs of Federal personnel displaced by contracts under Title I or Self-Governance under Title V?

No, the Secretary may not reduce the amount of funds required under Title V to pay for costs of Federal personnel displaced by contracts under Title I or Self-Governance under Title V.

§ 137.90 May the Secretary increase the funds required under the funding agreement?

Yes, the Secretary may increase the funds required under the funding agreement. However, the Self-Governance Tribe and the Secretary must agree to any transfer of funds to the Self-Governance Tribe unless otherwise provided for in the funding agreement.

Acquisition of Goods and Services From the IHS

§ 137.95 May a Self-Governance Tribe purchase goods and services from the IHS on a reimbursable basis?

Yes, a Self-Governance Tribe may choose to purchase from the IHS any goods and services transferred by the IHS to a Self-Governance Tribe in a compact or funding agreement. The IHS shall provide any such goods and services to the Self-Governance Tribe, on a reimbursable basis, including payment in advance with subsequent adjustment.

Prompt Payment Act

§ 137.96 Does the Prompt Payment Act apply to funds transferred to a Self-Governance Tribe in a compact or funding agreement?

Yes, the Prompt Payment Act, 39 U.S.C. section 3901 *et seq.*, applies to the transfer of all funds due under a compact or funding agreement authorized pursuant to Title V. See also §137.76 through 137.78 and 137.341(f).

Interest or Other Income on Transfers

§ 137.100 May a Self-Governance Tribe retain and spend interest earned on any funds paid under a compact or funding agreement?

Yes, pursuant to section 508(h) of the Act [25 U.S.C. 458aaa–7(h)], a Self-Governance Tribe may retain and spend interest earned on any funds paid under a compact or funding agreement.

§ 137.101 What standard applies to a Self-Governance Tribe's management of funds paid under a compact or funding agreement?

A Self-Governance Tribe is under a duty to invest and manage the funds as a prudent investor would, in light of the purpose, terms, distribution requirements, and provisions in the compact or funding agreement and Title V. This duty requires the exercise of reasonable care, skill, and caution, and is to be applied to investments not in isolation but in the context of the investment portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable to the Self-Governance Tribe. In making and implementing investment decisions, the Self-Governance Tribe has a duty to diversify the investments unless, under the circumstances, it is prudent not to do so. In addition, the Self-Governance Tribe must:

(a) Conform to fundamental fiduciary duties of loyalty and impartiality;

(b) Act with prudence in deciding whether and how to delegate authority and in the selection and supervision of agents; and

(c) Incur only costs that are reasonable in amount and appropriate to the investment responsibilities of the Self-Governance Tribe.

Carryover of Funds

§ 137.105 May a Self-Governance Tribe carryover from one year to the next any funds that remain at the end of the funding agreement?

Yes, pursuant to section 508(i) of the Act, a Self-Governance Tribe may carryover from one year to the next any funds that remain at the end of the funding agreement.

Program Income

§ 137.110 May a Self-Governance Tribe retain and expend any program income earned pursuant to a compact and funding agreement?

All Medicare, Medicaid, or other program income earned by a Self-Governance Tribe shall be treated as supplemental funding to that negotiated in the funding agreement. The Self-Governance Tribe may retain all such income and expend such funds in the current year or in future years except to the extent that the Indian Health Care Improvement Act (25 U.S.C. 1601 *et seq.*) provides otherwise for Medicare and Medicaid receipts. Such funds shall not result in any offset or reduction in the amount of funds the Self-Governance Tribe is authorized to receive under its funding agreement in the year the program income is received or for any subsequent fiscal year.

Limitation of Costs

§ 137.115 Is a Self-Governance Tribe obligated to continue performance under a compact or funding agreement if the Secretary does not transfer sufficient funds?

No, if a Self-Governance Tribe believes that the total amount of funds provided for a specific PSFA in a compact or funding agreement is insufficient, the Self-Governance Tribe must provide reasonable written notice of such insufficiency to the Secretary. If the Secretary does not increase the amount of funds transferred under the funding agreement in a quantity sufficient for the Self-Governance Tribe to complete the PSFA, as jointly determined by the Self-Governance Tribe and the Secretary, the Self-Governance Tribe may suspend performance of the PSFA until such time as additional funds are transferred.

Stable Base Budget

§ 137.120 May a Self-Governance Tribe's funding agreement provide for a stable base budget?

Yes, at the option of a Self-Governance Tribe, a funding agreement may provide for a stable base budget, specifying the recurring funds to be transferred to a Self-Governance Tribe for a period specified in the funding agreement.

§ 137.121 What funds may be included in a stable base budget amount?

The stable base budget amount may include, at the option of the Self-Governance Tribe,

(a) Recurring funds available under section 106(a) of the Act [25 U.S.C. 450j–1] ;

(b) Recurring Tribal shares; and

(c) Any recurring funds for new or expanded PSFAs not previously assumed by the Self-Governance Tribe.

§ 137.122 May a Self-Governance Tribe with a stable base budget receive other funding under its funding agreement?

Yes, the funding agreement may include non-recurring funds, other recurring funds, and other funds the Self-Governance Tribe is entitled to include in a funding agreement that are not included in the stable base budget amount.

§ 137.123 Once stable base funding is negotiated, do funding amounts change from year to year?

Stable base funding amounts are subject to adjustment:

(a) Annually only to reflect changes in Congressional appropriations by sub-sub activity excluding earmarks;

(b) By mutual agreement of the Self-Governance Tribe and the Secretary; or

(c) As a result of full or partial retrocession or reassumption.

§ 137.124 Does the effective period of a stable base budget have to be the same as the term of the funding agreement?

No, the Self-Governance Tribe may provide in its funding agreement that the effective period of the stable base budget will be either longer or shorter than the term of the funding agreement.

Subpart H – Final Offer

§ 137.130 What is covered by this subpart?

This subpart explains the final offer process provided by the statute for resolving, within a specific timeframe, disputes that may develop in negotiation of compacts, funding agreements, or amendments thereof.

§ 137.131 When should a final offer be submitted?

A final offer should be submitted when the Secretary and an Indian Tribe are unable to agree, in whole or in part, on the terms of a compact or funding agreement (including funding levels).

§ 137.132 How does the Indian Tribe submit a final offer?

(a) A written final offer should be submitted:

(1) During negotiations to the agency lead negotiator *or*

(2) Thereafter to the Director.

(b) The document should be separate from the compact, funding agreement, or amendment and clearly identified as a “Final Offer.”

§ 137.133 What does a final offer contain?

A final offer contains a description of the disagreement between the Secretary and the Indian Tribe and the Indian Tribe's final proposal to resolve the disagreement.

§ 137.134 When does the 45 day review period begin?

The 45 day review period begins from the date the IHS receives the final offer. Proof of receipt may include a date stamp, or postal return receipt, or hand delivery.

§ 137.135 May the Secretary request and obtain an extension of time of the 45 day review period?

Yes, the Secretary may request an extension of time before the expiration of the 45 day review period. The Indian Tribe may either grant or deny the Secretary's request for an extension. To be effective, any grant of extension of time must be in writing and be signed by the person authorized by the Indian Tribe to grant the extension before the expiration of the 45 day review period.

§ 137.136 What happens if the agency takes no action within the 45 day review period (or any extensions thereof)?

The final offer is accepted automatically by operation of law.

§ 137.137 If the 45 day review period or extension thereto, has expired, and the Tribes offer is deemed accepted by operation of law, are there any exceptions to this rule?

No, there are no exceptions to this rule if the 45 day review period or extension thereto, has expired, and the Tribe's offer is deemed accepted by operation of law.

§ 137.138 Once the Indian Tribe's final offer has been accepted or deemed accepted by operation of law, what is the next step?

After the Indian Tribe's final offer is accepted or deemed accepted, the terms of the Indian Tribe's final offer and any funds included therein, shall be added to the funding agreement or compact within 10 days of the acceptance or the deemed acceptance.

Rejection of Final Offers

§ 137.140 On what basis may the Secretary reject an Indian Tribe's final offer?

The Secretary may reject an Indian Tribe's final offer for one of the following reasons:

(a) the amount of funds proposed in the final offer exceeds the applicable funding level to which the Indian Tribe is entitled under the Act;

(b) the PSFA that is the subject of the final offer is an inherent Federal function that cannot legally be delegated to an Indian Tribe;

(c) the Indian Tribe cannot carry out the PSFA in a manner that would not result in significant danger or risk to the public health; or

(d) the Indian Tribe is not eligible to participate in self-governance under section 503 of the Act [25 U.S.C. 458aaa–2].

§ 137.141 How does the Secretary reject a final offer?

The Secretary must reject a final offer by providing written notice to the Indian Tribe based on the criteria in §137.140 not more than 45 days after receipt of a final offer, or within a longer time period as agreed by the Self-Governance Tribe consistent with this subpart.

§ 137.142 What is a “significant danger” or “risk” to the public health?

A significant danger or risk is determined on a case-by-case basis in accordance with section 507(c) of the Act [25 U.S.C. 458aaa–6(c)].

§ 137.143 How is the funding level to which the Indian Tribe is entitled determined?

The Secretary must provide funds under a funding agreement in an amount equal to the amount that the Indian Tribe would have been entitled to receive under self-determination contracts under this Act, including amounts for direct program costs specified under section 106(a)(1) of the Act [25 U.S.C. 450j–1(a)(1)] and amounts for contract support costs specified under section 106(a) (2), (3), (5), and (6) of the Act [25 U.S.C. 450j–1(a)(2), (3), (5) and (6)], including any funds that are specifically or functionally related to the provision by the Secretary of services and benefits to the Indian Tribe or its members, all without regard to the organizational level within the Department where such functions are carried out.

§ 137.144 Is technical assistance available to an Indian Tribe to avoid rejection of a final offer?

Yes, upon receiving a final offer, the Secretary must offer any necessary technical assistance, and must share all relevant information with the Indian Tribe in order to avoid rejection of a final offer.

§ 137.145 If the Secretary rejects a final offer, is the Secretary required to provide the Indian Tribe with technical assistance?

Yes, the Secretary must offer and, if requested by the Indian Tribe, provide additional technical assistance to overcome the stated grounds for rejection.

§ 137.146 If the Secretary rejects all or part of a final offer, is the Indian Tribe entitled to an appeal?

Yes, the Indian Tribe is entitled to appeal the decision of the Secretary, with an agency hearing on the record, and the right to engage in full discovery relevant to any issue raised in the matter. The procedures for appeals are found in subpart P of this part. Alternatively, at its option, the Indian Tribe has the right to sue pursuant to section 110 of the Act [25 U.S.C. 450m–1] in Federal district court to challenge the Secretary's decision.

§ 137.147 Do those portions of the compact, funding agreement, or amendment not in dispute go into effect?

Yes, subject to section 507(c)(1)(D) of the Act [25 U.S.C. 458aaa–6(c)(1)(D)].

§ 137.148 Does appealing the decision of the Secretary prevent entering into the compact, funding agreement, or amendment?

No, appealing the decision of the Secretary does not prevent entering into the compact, funding agreement, or amendment.

Burden of Proof

§ 137.150 What is the burden of proof in an appeal from rejection of a final offer?

With respect to any appeal, hearing or civil action, the Secretary shall have the burden of demonstrating by clear and convincing evidence the validity of the grounds for rejecting the final offer.

Decision Maker

§ 137.155 What constitutes a final agency action?

A final agency action shall consist of a written decision from the Department to the Indian Tribe either:

(a) By an official of the Department who holds a position at a higher organizational level within the Department than the level of the departmental agency in which the decision that is the subject of the appeal was made; or

(b) By an administrative judge.

Subpart I – Operational Provisions

Conflicts of Interest

§ 137.160 Are Self-Governance Tribes required to address potential conflicts of interest?

Yes, self-Governance Tribes participating in self-governance under Title V must ensure that internal measures are in place to address conflicts of interest in the administration of self-governance PSFAs.

Audits and Cost Principles

§ 137.165 Are Self-Governance Tribes required to undertake annual audits?

Yes, under the provisions of section 506(c) of the Act [25 U.S.C. 458aaa–5(c)], Self-Governance Tribes must undertake annual audits pursuant to the Single Audit Act, 31 U.S.C. 7501 *et seq.*

§ 137.166 Are there exceptions to the annual audit requirements?

Yes, the exceptions are described in 31 U.S.C. 7502 of the Single Audit Act.

§ 137.167 What cost principles must a Self-Governance Tribe follow when participating in self-governance under Title V?

A Self-Governance Tribe must apply the cost principles of the applicable OMB circular, except as modified by:

(a) Section 106 (k) of the Act [25 U.S.C. 450j–1],

(b) Other provisions of law, or

(c) Any exemptions to applicable OMB circulars subsequently granted by the OMB.

§ 137.168 May the Secretary require audit or accounting standards other than those specified in §137.167?

No, no other audit or accounting standards shall be required by the Secretary.

§ 137.169 How much time does the Federal Government have to make a claim against a Self-Governance Tribe relating to any disallowance of costs, based on an audit conducted under §137.165?

Any right of action or other remedy (other than those relating to a criminal offense) relating to any disallowance of costs is barred unless the Secretary provides notice of such a disallowance within 365 days from receiving any required annual agency single audit report or, for any period covered by law or regulation in force prior to enactment of the Single Agency Audit Act of 1984, any other required final audit report.

§ 137.170 When does the 365 day period commence?

For the purpose of determining the 365 day period, an audit report is deemed received on the date of actual receipt by the Secretary, at the address specified in §137.172, if, within 60 days after receiving the audit report, the Secretary does not give notice of a determination by the Secretary to reject the single-agency audit report as insufficient due to non-compliance with chapter 75 of title 31, United States Code or noncompliance with any other applicable law.

§ 137.171 Where do Self-Governance Tribes send their audit reports?

(a) For fiscal years ending on or before June 30, 1996, the audit report must be sent to: National External Audit Review Center, Lucas Place Room 514, 323 W. 8th St., Kansas City, MO 64105.

(b) For fiscal years, beginning after June 30, 1996, the audit report must be sent to: Single Audit Clearinghouse, 1201 E. 10th St., Jeffersonville, IN 47132.

§ 137.172 Should the audit report be sent anywhere else to ensure receipt by the Secretary?

Yes, the Self-Governance Tribe should also send the audit report to: National External Audit Review Center, Lucas Place Room 514, 323 W. 8th St., Kansas City, MO 64105.

§ 137.173 Does a Self-Governance Tribe have a right of appeal from a disallowance?

Yes, the notice must set forth the right of appeal and hearing to the Interior Board of Contract Appeals, pursuant to section 110 of the Act [25 U.S.C. 450m–1].

Records

§ 137.175 Is a Self-Governance Tribe required to maintain a recordkeeping system?

Yes. Tribes are required to maintain records and provide Federal agency access to those records as provided in §137.177.

§ 137.176 Are Tribal records subject to the Freedom of Information Act and Federal Privacy Act?

No, except to the extent that a Self-Governance Tribe specifies otherwise in its compact or funding agreement, the records of the Self-Governance Tribe shall not be considered Federal records for purposes of chapter 5 of title 5, United States Code.

§ 137.177 Is the Self-Governance Tribe required to make its records available to the Secretary?

Yes, after 30 days advance written notice from the Secretary, the Self-Governance Tribe must provide the Secretary with reasonable access to such records to enable the Department to meet its minimum legal recordkeeping system requirements under sections 3101 through 3106 of title 44 United States Code.

§ 137.178 May Self-Governance Tribes store patient records at the Federal Records Centers?

Yes, at the option of a Self-Governance Tribe, patient records may be stored at Federal Records Centers to the same extent and in the same manner as other Department patient records in accordance with section 105(o) of the Act [25 U.S.C. 450j(o)].

§ 137.179 May a Self-Governance Tribe make agreements with the Federal Records Centers regarding disclosure and release of the patient records stored pursuant to §137.178?

Yes, a Self-Governance Tribe may make agreements with the Federal Records Centers regarding disclosure and release of the patient records stored pursuant to §137.178.

§ 137.180 Are there other laws that govern access to patient records?

Yes, a Tribe must consider the potential application of Tribal, Federal and state law and regulations that may apply to requests for access to Tribal patient records, such as the provisions 42 CFR 2.1–2.67 pertaining to records regarding drug and/or alcohol treatment.

Redesign

§ 137.185 May a Self-Governance Tribe redesign or consolidate the PSFAs that are included in a funding agreement and reallocate or redirect funds for such PSFAs?

Yes, a Self-Governance Tribe may redesign or consolidate PSFAs included in a funding agreement and reallocate or redirect funds for such PSFAs in any manner which the Self-Governance Tribe deems to be in the best interest of the health and welfare of the Indian community being served, only if the redesign or consolidation does not have the effect of denying eligibility for services to population groups otherwise eligible to be served under applicable Federal law.

Non-Duplication

§ 137.190 Is a Self-Governance Tribe that receives funds under Title V also entitled to contract under section 102 of the Act [25 U.S.C. 450(f)] for such funds?

For the period for which, and to the extent to which, funding is provided under the compact or funding agreement, the Self-Governance Tribe is not entitled to contract with the Secretary for the same funds or PSFA under section 102 of the Act [25 U.S.C. 450f]. Such Self-Governance Tribe is eligible for new programs on the same basis as other Indian Tribes.

Health Status Reports

§ 137.200 Are there reporting requirements for Self-Governance Tribes under Title V?

Yes, compacts or funding agreements negotiated between the Secretary and a Self-Governance Tribe must include a provision that requires the Self-Governance Tribe to report on health status and services delivery. These reports may only impose minimal burdens on the Self-Governance Tribes.

§ 137.201 What are the purposes of the Tribal reporting requirements?

Tribal reports enable the Secretary to prepare reports required under Title V and to develop the budget request. The reporting requirements are not intended as a quality assessment or monitoring tool, although such provision may be included at the option of the Self-Governance Tribe. Under no circumstances will the reporting requirement include any confidential, proprietary or commercial information. For example, while staffing levels may be a part of a report, pay levels for the staff are considered confidential between the Self-Governance Tribe and the employee.

§ 137.202 What types of information will Self-Governance Tribes be expected to include in the reports?

Reports will be derived from existing minimal data elements currently collected by Self-Governance Tribes, and may include patient demographic and workload data. Not less than 60 days prior to the start of negotiations or a mutually agreed upon timeframe, the IHS will propose a list of recommended minimal data elements, along with justification for their inclusion, to be used as a basis for negotiating these requirements into the Self-Governance Tribe's compact or funding agreement.

§ 137.203 May a Self-Governance Tribe participate in a voluntary national uniform data collection effort with the IHS?

Yes, in order to advance Indian health advocacy efforts, each Self-Governance Tribe will be encouraged to participate, at its option, in national IHS data reporting activities such as Government Performance Results Act, epidemiologic and surveillance reporting.

§ 137.204 How will this voluntary national uniform data set be developed?

IHS will work with representatives of Self-Governance Tribes, in coordination with the Tribal Self Governance Advisory Committee (TSGAC), to develop a mutually-defined annual voluntary uniform subset of data that is consistent with Congressional intent, minimizes reporting burdens, and responds to the needs of the Self-Governance Tribe.

§ 137.205 Will this voluntary uniform data set reporting activity be required of all Self-Governance Tribes entering into a compact with the IHS under Title V?

No, to the extent that specific resources are available or have not otherwise been provided to Self-Governance Tribes for this purpose, and if the Self-Governance Tribes choose to participate, the IHS will provide resources, hardware, software, and technical assistance to the Self-Governance Tribes to facilitate data gathering to ensure data consistency and integrity under this voluntary effort.

§ 137.206 Why does the IHS need this information?

This information will be used to comply with sections 513 [25 U.S.C. 458aaa–12] and 514 [25 U.S.C. 458aaa–13] of the Act as well as to assist IHS in advocating for the Indian health system, budget formulation, and other reporting required by statute, development of partnerships with other organizations that benefit the health status of Indian Tribes, and sharing of best practices.

§ 137.207 Will funding be provided to the Self-Governance Tribe to compensate for the costs of reporting?

Yes, reporting requirements are subject to the Secretary providing specific funds for this purpose in the funding agreement.

Savings

§ 137.210 What happens if self-governance activities under Title V reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings?

To the extent that PSFAs carried out by Self-Governance Tribes under Title V reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings that have not otherwise been included in the amount of Tribal shares and other funds determined under section 508(c) of the Act [25 U.S.C. 458aaa–7(c)], the Secretary must make such savings available to the Self-Governance Tribes, for the provision of additional services to program beneficiaries in a manner equitable to directly served, contracted, and compacted programs.

§ 137.211 How does a Self-Governance Tribe learn whether self-governance activities have resulted in savings as described in §137.210.

The annual report prepared pursuant to section 514(b)(2) [25 U.S.C. 458aaa–13(b)(2)] of the Act must specifically identify any such savings.

Access to Government Furnished Property

§ 137.215 How does a Self-Governance Tribe obtain title to real and personal property furnished by the Federal Government for use in the performance of a compact, funding agreement, construction project agreement, or grant agreement pursuant to section 512(c) of the Act [25 U.S.C. 458aaa–11(c)]?

(a) For government-furnished real and personal property made available to a Self-Governance Tribe, the Self-Governance Tribe must take title to all real or personal property unless the Self-Governance Tribe requests that the United States retain the title.

(b) For government-furnished personal property made available to a Self-Governance Tribe:

(1) The Secretary, in consultation with each Self-Governance Tribe, must develop a list of the property used in a compact, funding agreement, or construction project agreement.

(2) The Self-Governance Tribe must indicate any items on the list to which the Self-Governance Tribe wants the Secretary to retain title.

(3) The Secretary must provide the Self-Governance Tribe with any documentation needed to transfer title to the remaining listed property to the Self-Governance Tribe.

(c) For government-furnished real property made available to a Self-Governance Tribe:

(1) The Secretary, in consultation with the Self-Governance Tribe, must develop a list of the property furnished for use in a compact, funding agreement, or construction project agreement.

(2) The Secretary must inspect any real property on the list to determine the presence of any hazardous substance activity, as defined in 41 CFR 101–47.202–2(b)(10).

(3) The Self-Governance Tribe must indicate on the list to the Secretary any items of real property to which the Self-Governance Tribe wants the Secretary to retain title and those items of property to which the Self-Governance Tribe wishes to obtain title. The Secretary must take such steps as necessary to transfer title to the Self-Governance Tribe those items of real property which the Self-Governance Tribe wishes to acquire.

Matching and Cost Participation Requirements

§ 137.217 May funds provided under compacts, funding agreements, or grants made pursuant to Title V be treated as non-Federal funds for purposes of meeting matching or cost participation requirements under any other Federal or non-Federal program?

Yes, funds provided under compacts, funding agreements, or grants made pursuant to Title V may be treated as non-Federal funds for purposes of meeting matching or cost participation requirements under any other Federal or non-Federal program.

Federal Tort Claims Act (FTCA)

§ 137.220 Do section 314 of Public Law 101–512 [25 U.S.C. 450f note] and section 102(d) of the Act [25 U.S.C. 450f(d)] (regarding, in part, FTCA coverage) apply to compacts, funding agreements and construction project agreements?

Yes, regulations governing FTCA coverage are set out at 25 CFR Part 900, Subpart M.

Subpart J – Regulation Waiver

§ 137.225 What regulations may be waived under Title V?

A Self-Governance Tribe may request a waiver of regulation(s) promulgated under section 517 of the Act [25 U.S.C. 458aaa–16] or under the authorities specified in section 505(b) of the Act [25 U.S.C. 458aaa–4(b)] for a compact or funding agreement entered into with the IHS under Title V.

§ 137.226 How does a Self-Governance Tribe request a waiver?

A Self-Governance Tribe may request a waiver by submitting a written request to the Secretary identifying the applicable Federal regulation(s) sought to be waived and the basis for the request.

§ 137.227 How much time does the Secretary have to act on a waiver request?

The Secretary must either approve or deny the requested waiver in writing within 90 days after receipt by the Secretary.

§ 137.228 Upon what basis may the waiver request be denied?

A denial may be made only upon a specific finding by the Secretary that identified language in the regulation may not be waived because such waiver is prohibited by Federal law.

§ 137.229 What happens if the Secretary neither approves or denies a waiver request within the time specified in §137.227?

The waiver request is deemed approved.

§ 137.230 Is the Secretary's decision on a waiver request final for the Department?

Yes, the Secretary's decision on a waiver request is final for the Department.

§ 137.231 May a Self-Governance Tribe appeal the Secretary's decision to deny its request for a waiver of a regulation promulgated under section 517 of the Act [25 U.S.C. 458aaa–16]?

The decision may not be appealed under these regulations but may be appealed by the Self-Governance Tribe in Federal Court under applicable law.

Subpart K – Withdrawal

§ 137.235 May an Indian Tribe withdraw from a participating inter-Tribal consortium or Tribal organization?

Yes, an Indian Tribe may fully or partially withdraw from a participating inter-Tribal consortium or Tribal organization its share of any PSFAs included in a compact or funding agreement.

§ 137.236 When does a withdrawal become effective?

A withdrawal becomes effective within the time frame specified in the resolution that authorizes withdrawal from the participating Tribal organization or inter-Tribal consortium. In the absence of a specific time frame set forth in the resolution, such withdrawal becomes effective on

(a) The earlier of 1 year after the date of submission of such request, or the date on which the funding agreement expires; or

(b) Such date as may be mutually agreed upon by the Secretary, the withdrawing Indian Tribe, and the participating Tribal organization or inter-Tribal consortium that has signed the compact or funding agreement on behalf of the withdrawing Indian Tribe, inter-Tribal consortium, or Tribal organization.

§ 137.237 How are funds redistributed when an Indian Tribe fully or partially withdraws from a compact or funding agreement and elects to enter a contract or compact?

When an Indian Tribe eligible to enter into a contract under Title I or a compact or funding agreement under Title V fully or partially withdraws from a participating inter-Tribal consortium or Tribal organization, and has proposed to enter into a contract or compact and funding agreement covering the withdrawn funds:

(a) The withdrawing Indian Tribe is entitled to its Tribal share of funds supporting those PSFAs that the Indian Tribe will be carrying out under its own contract or compact and funding agreement (calculated on the same basis as the funds were initially allocated in the funding agreement of the inter-Tribal consortium or Tribal organization); and

(b) the funds referred to in paragraph (a) of this section must be transferred from the funding agreement of the inter-Tribal consortium or Tribal organization, on the condition that the provisions of sections 102 [25 U.S.C. 450f] and 105(i) of the Act [25 U.S.C. 450j], as appropriate, apply to the withdrawing Indian Tribe.

§ 137.238 How are funds distributed when an Indian Tribe fully or partially withdraws from a compact or funding agreement administered by an inter-Tribal consortium or Tribal organization serving more than one Indian Tribe and the withdrawing Indian Tribe elects not to enter a contract or compact?

All funds not obligated by the inter-Tribal consortium or Tribal organization associated with the withdrawing Indian Tribe's returned PSFAs, less close out costs, shall be returned by the inter-Tribal consortium or Tribal organization to the IHS for operation of the PSFAs included in the withdrawal.

§ 137.239 If the withdrawing Indian Tribe elects to operate PSFAs carried out under a compact or funding agreement under Title V through a contract under Title I, is the resulting contract considered a mature contract under section 4(h) of the Act [25 U.S.C. 450b(h)]?

Yes, if the withdrawing Indian Tribe elects to operate PSFAs carried out under a compact or funding agreement under Title V through a contract under Title I, the resulting contract is considered a mature contract under section 4(h) of the Act [25 U.S.C. 450b(h)] at the option of the Indian Tribe.

Subpart L – Retrocession

§ 137.245 What is retrocession?

Retrocession means the return by a Self-Governance Tribe to the Secretary of PSFAs, that are included in a compact or funding agreement, for any reason, before the expiration of the term of the compact or funding agreement.

§ 137.246 How does a Self-Governance Tribe retrocede a PSFA?

The Self-Governance Tribe submits a written notice to the Director of its intent to retrocede. The notice must specifically identify those PSFAs being retroceded. The notice may also include a proposed effective date of the retrocession.

§ 137.247 What is the effective date of a retrocession?

Unless the request for retrocession is rescinded, the retrocession becomes effective within the timeframe specified by the parties in the compact or funding agreement. In the absence of a specification, the retrocession becomes effective on:

(a) The earlier of 1 year after:

(1) The date of submission of the request, or

(2) The date on which the funding agreement expires; or

(b) Whatever date is mutually agreed upon by the Secretary and the retroceding Self-Governance Tribe.

§ 137.248 What effect will a retrocession have on a retroceding Self-Governance Tribe's rights to contract or compact under the Act?

A retrocession request shall not negatively affect:

(a) Any other contract or compact to which the retroceding Self-Governance Tribe is a party;

(b) Any other contracts or compacts the retroceding Self-Governance Tribe may request; and

(c) Any future request by such Self-Governance Tribe or an Indian Tribe to compact or contract for the same program.

§ 137.249 Will retrocession adversely affect funding available for the retroceded program?

No, the Secretary shall provide no less than the same level of funding that would have been available if there had been no retrocession.

§ 137.250 How are funds distributed when a Self-Governance Tribe fully or partially retrocedes from its compact or funding agreement?

Any funds not obligated by the Self-Governance Tribe and associated with the Self-Governance Tribe's returned PSFAs, less close out costs, must be returned by the Self-Governance Tribe to IHS for operation of the PSFA's associated with the compact or funding agreement from which the Self-Governance Tribe retroceded in whole or in part.

§ 137.251. What obligation does the retroceding Self-Governance Tribe have with respect to returning property that was provided by the Secretary under the compact or funding agreement and that was used in the operation of the retroceded program?

On the effective date of any retrocession, the retroceding Self-Governance Tribe, shall, at the option of the Secretary, deliver to the Secretary all requested property and equipment provided by the Secretary under the

compact or funding agreement, to the extent used to carry out the retroceded PSFAs, which at the time of retrocession has a per item current fair market value, less the cost of improvements borne by the Self-Governance Tribe in excess of $5,000 at the time of the retrocession.

Subpart M – Reassumption

§ 137.255 What does reassumption mean?

Reassumption means rescission by the Secretary without consent of the Self-Governance Tribe of PSFAs and associated funding in a compact or funding agreement and resuming responsibility to provide such PSFAs.

§ 137.256 Under what circumstances may the Secretary reassume a program, service, function, or activity (or portion thereof)?

(a) Subject to the steps in §137.257, the Secretary may reassume a program, service, function, or activity (or portion thereof) and associated funding if the Secretary makes a specific finding relative to that PSFA of :

(1) Imminent endangerment of the public health caused by an act or omission of the Self-Governance Tribe, and the imminent endangerment arises out of a failure to carry out the compact or funding agreement; or

(2) Gross mismanagement with respect to funds transferred to the Self-Governance Tribe by a compact or funding agreement, as determined by the Secretary, in consultation with the Inspector General, as appropriate.

(b) Immediate reassumption may occur under additional requirements set forth in §137.261.

§ 137.257 What steps must the Secretary take prior to reassumption becoming effective?

Except as provided in §137.261 for immediate reassumption, prior to a reassumption becoming effective, the Secretary must:

(a) Notify the Self-Governance Tribe in writing by certified mail of the details of findings required under §137.256(a)(1) and (2);

(b) Request specified corrective action within a reasonable period of time, which in no case may be less than 45 days;

(c) Offer and provide, if requested, the necessary technical assistance and advice to assist the Self-Governance Tribe to overcome the conditions that led to the findings described under (a); and

(d) Provide the Self-Governance Tribe with a hearing on the record as provided under Subpart P of this part.

§ 137.258 Does the Self-Governance Tribe have a right to a hearing prior to a non-immediate reassumption becoming effective?

Yes, at the Self-Governance Tribe's request, the Secretary must provide a hearing on the record prior to or in lieu of the corrective action period identified in §137.257(b).

§ 137.259 What happens if the Secretary determines that the Self-Governance Tribe has not corrected the conditions that the Secretary identified in the notice?

(a) The Secretary shall provide a second written notice by certified mail to the Self-Governance Tribe served by the compact or funding agreement that the compact or funding agreement will be rescinded, in whole or in part.

(b) The second notice shall include:

(1) The intended effective date of the reassumption;

(2) The details and facts supporting the intended reassumption; and

(3) Instructions that explain the Indian Tribe's right to a formal hearing within 30 days of receipt of the notice.

§ 137.260 What is the earliest date on which a reassumption can be effective?

Except as provided in §137.261, no PSFA may be reassumed by the Secretary until 30 days after the final resolution of the hearing and any subsequent appeals to provide the Self-Governance Tribe with an opportunity to take corrective action in response to any adverse final ruling.

§ 137.261 Does the Secretary have the authority to immediately reassume a PSFA?

Yes, the Secretary may immediately reassume operation of a program, service, function, or activity (or portion thereof) and associated funding upon providing to the Self-Governance Tribe written notice in which the Secretary makes a finding:

(a) of imminent substantial and irreparable endangerment of the public health caused by an act or omission of the Indian Tribe; and

(b) the endangerment arises out of a failure to carry out the compact or funding agreement.

§ 137.262 If the Secretary reassumes a PSFA immediately, when must the Secretary provide the Self-Governance Tribe with a hearing?

If the Secretary immediately reassumes a PSFA, the Secretary must provide the Self-Governance Tribe with a hearing under Subpart P of this part not later than 10 days after such reassumption, unless the Self-Governance Tribe and the Secretary agree to an extension.

§ 137.263 May the Secretary provide a grant to a Self-Governance Tribe for technical assistance to overcome conditions identified under §137.257?

Yes, the Secretary may make a grant for the purpose of obtaining technical assistance as provided in section 103 of the Act [25 U.S.C. 458aaa-h].

§ 137.264 To what extent may the Secretary require the Self-Governance Tribe to return property that was provided by the Secretary under the compact or funding agreement and used in the operation of the reassumed program?

On the effective date of any reassumption, the Self-Governance Tribe, shall, at the option of the Secretary and only to the extent requested by the Secretary, deliver to the Secretary property and equipment provided by the Secretary under the compact or funding agreement, to the extent the property was used to directly carry out the reassumed program, service, function, or activity (or portion thereof), provided that at the time of reassumption the property has a per item current fair market value, less the cost of improvements borne by the Self-Governance Tribe, in excess of $5,000 at the time of the reassumption.

§ 137.265 May a Tribe be reimbursed for actual and reasonable close out costs incurred after the effective date of reassumption?

Yes, a Tribe may be reimbursed for actual and reasonable close out costs incurred after the effective date of reassumption.

Subpart N – Construction

Purpose and Scope

§ 137.270 What is covered by this subpart?

This subpart covers IHS construction projects carried out under section 509 of the Act [25 U.S.C. 458aaa-8].

§ 137.271 Why is there a separate subpart in these regulations for construction project agreements?

Construction projects are separately defined in Title V and are subject to a separate proposal and review process. Provisions of a construction project agreement and this subpart shall be liberally construed in favor of the Self-Governance Tribe.

§ 137.272 What other alternatives are available for Self-Governance Tribes to perform construction projects?

Self-Governance Tribes also have the option of performing IHS construction projects under a variety of other legal authorities, including but not limited to Title I of the Act, the Indian Health Care Improvement Act, Public Law 94–437, and Public Law 86–121. This subpart does not cover projects constructed pursuant to agreements entered into under these authorities.

§ 137.273 What are IHS construction PSFAs?

IHS construction PSFAs are a combination of construction projects as defined in §137.280 and construction programs.

§ 137.274 Does this subpart cover construction programs?

No, except as provided in §137.275, this subpart does not cover construction programs such as the:

(a) Maintenance and Improvement Program;

(b) Construction program functions; and,

(c) Planning services and construction management services.

§ 137.275 May Self-Governance Tribes include IHS construction programs in a construction project agreement or in a funding agreement?

Yes, Self-Governance Tribes may choose to assume construction programs in a construction project agreement, in a funding agreement, or in a combination of the two. These programs may include the following:

(a) Maintenance and improvement program;

(b) Construction program functions; and

(c) Planning services and construction management services.

Construction Definitions

§ 137.280 Construction Definitions.

ALJ means administrative law judge.

APA means Administrative Procedures Act, 5 U.S.C. 701–706.

Budget means a statement of the funds required to complete the scope of work in a construction project agreement. For cost reimbursement agreements, budgets may be stated using broad categories such as planning, design, construction, project administration, and contingency. For fixed price agreements, budgets may be stated as lump sums, unit cost pricing, or a combination thereof.

Categorical exclusion means a category of actions that do not individually or cumulatively have a significant effect on the human environment and that have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

CEQ means Council on Environmental Quality in the Office of the President.

Construction management services (CMS) means activities limited to administrative support services; coordination; and monitoring oversight of the planning, design, and construction process. CMS activities typically include:

(1) Coordination and information exchange between the Self-Governance Tribe and the Federal Government;

(2) Preparation of a Self-Governance Tribe's project agreement; and

(3) A Self-Governance Tribe's subcontract scope of work identification and subcontract preparation, and competitive selection of construction contract subcontractors.

Construction phase is the phase of a construction project agreement during which the project is constructed, and includes labor, materials, equipment and services necessary to complete the work, in accordance with the construction project agreement.

Construction project means:

(1) An organized noncontinuous undertaking to complete a specific set of predetermined objectives for the planning, environmental determination, design, construction, repair, improvement, or expansion of buildings or facilities described in a project agreement, and

(2) Does not include construction program administration and activities described in sections 4(m)(1) through (3) of the Act [25 U.S.C. 4b(m)(1) through (3)], that may otherwise be included in a funding agreement under section 505 of the Act [25 U.S.C. 458aaa–4].

Construction project agreement means a negotiated agreement between the Secretary and a Self-Governance Tribe, that at a minimum:

(1) Establishes project phase start and completion dates;

(2) Defines a specific scope of work and standards by which it will be accomplished;

(3) Identifies the responsibilities of the Self-Governance Tribe and the Secretary;

(4) Addresses environmental considerations;

(5) Identifies the owner and operations and maintenance entity of the proposed work;

(6) Provides a budget;

(7) Provides a payment process; and

(8) Establishes the duration of the agreement based on the time necessary to complete the specified scope of work, which may be 1 or more years.

Design phase is the phase of a construction project agreement during which project plans, specifications, and other documents are prepared that are used to build the project. Site investigation, final site selection activities and environmental review and determination activities are completed in this phase if not conducted as a part of the planning phase.

Maintenance and improvement program:

(1) As used in this subpart means the program that provides funds for eligible facilities for the purpose of:

(i) Performing routine maintenance;

(ii) Achieving compliance with accreditation standards;

(iii) Improving and renovating facilities;

(iv) Ensuring that Indian health care facilities meet existing building codes and standards; and

(v) Ensuring compliance with public law building requirements.

(2) The maintenance and improvement program is comprised of routine maintenance and repair funding and project funding. Typical maintenance and improvement projects have historically been funded out of regional or national project pools and may include, but are not limited to, total replacement of a heating or cooling system, remodel of a medical laboratory, removal of lead based paint, abatement of asbestos and abatement of underground fuel storage tanks. Maintenance and repair program funding provided under a funding agreement is not covered under this subpart.

NEPA means the National Environmental Policy Act of 1969 [42 U.S.C. 4321 *et seq.*].

NHPA means the National Historic Preservation Act [16 U.S.C. 470 *et seq.*].

Planning phase is the phase of a construction project agreement during which planning services are provided.

Planning services may include performing a needs assessment, completing and/or verifying master plans, developing justification documents, conducting pre-design site investigations, developing budget cost estimates, conducting feasibility studies as needed, conducting environmental review activities and justifying the need for the project.

SHPO means State Historic Preservation Officer.

Scope of work or specific scope of work means a brief written description of the work to be accomplished under the construction project agreement, sufficient to confirm that the project is consistent with the purpose for which the Secretary has allocated funds.

THPO means Tribal Historic Preservation Officer.

NEPA Process

§ 137.285 Are Self-Governance Tribes required to accept Federal environmental responsibilities to enter into a construction project agreement?

Yes, under section 509 of the Act [25 U.S.C. 458aaa–8], Self-Governance Tribes must assume all Federal responsibilities under the NEPA of 1969 [42 U.S.C. 4321 *et seq.*] and the National Historic Preservation Act [16 U.S.C. 470 *et seq.*] and related provisions of law that would apply if the Secretary were to undertake a construction project, but only those responsibilities directly related to the completion of the construction project being assumed.

§ 137.286 Do Self-Governance Tribes become Federal agencies when they assume these Federal environmental responsibilities?

No, while Self-Governance Tribes are required to assume Federal environmental responsibilities for projects in place of the Secretary, Self-Governance Tribes do not thereby become Federal agencies. However, because Self-Governance Tribes are assuming the responsibilities of the Secretary for the purposes of performing these Federal environmental responsibilities, Self-Governance Tribes will be considered the equivalent of Federal agencies for certain purposes as set forth in this subpart.

§ 137.287 What is the National Environmental Policy Act (NEPA)?

The NEPA is a procedural law that requires Federal agencies to follow established environmental review procedures, which include reviewing and documenting the environmental impact of their actions. NEPA establishes a comprehensive policy for protection and enhancement of the environment by the Federal Government; creates the Council on Environmental Quality in the Office of the President; and directs Federal agencies to carry out the policies and procedures of the Act. CEQ regulations (40 CFR 1500–1508) establish three levels of environmental review: categorical exclusions, environmental assessments, and environmental impact statements.

§ 137.288 What is the National Historic Preservation Act (NHPA)?

The NHPA requires Federal agencies to take into account the effects of their undertakings, such as construction projects, on properties covered by the NHPA, such as historic properties, properties eligible for listing on the National Register of Historic Places, or properties that an Indian Tribe regards as having religious and/or cultural importance. Section 106 of the NHPA [16 U.S.C. 470f] requires Federal agencies to afford the Advisory Council on Historic Preservation, acting through the SHPO or the THPO, a reasonable opportunity to comment on such undertakings.

§ 137.289 What is a Federal undertaking under NHPA?

The Advisory Council on Historic Preservation has defined a Federal undertaking in 36 CFR 800.16(y) as a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; those requiring a Federal permit, license or approval; and those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

§ 137.290 What additional provisions of law are related to NEPA and NHPA?

(a) Depending upon the nature and the location of the construction project, environmental laws related to NEPA and NHPA may include:

(1) Archaeological and Historical Data Preservation Act [16 U.S.C. 469];

(2) Archeological Resources Protection Act [16 U.S.C. 470aa];

(3) Clean Air Act [42 U.S.C. 7401];

(4) Clean Water Act [33 U.S.C. 1251];

(5) Coastal Barrier Improvement Act [42 U.S.C. 4028 and 16 U.S.C. Sec. 3501];

(6) Coastal Barrier Resources Act [16 U.S.C. 3501];

(7) Coastal Zone Management Act [16 U.S.C. 1451];

(8) Comprehensive Environmental Response, Compensation, and Liability Act [42 U.S.C. 9601];

(9) Endangered Species Act [16 U.S.C. 1531 *et seq.*];

(10) Farmland Protection Policy Act [7 U.S.C. 4201 *et seq.*];

(11) Marine Protection, Research, and Sanctuaries Act [33 U.S.C. 1401–1445; 16 U.S.C. 1431–1447F; 33 U.S.C. 2801–2805];

(12) National Historic Preservation Act [16 U.S.C. 470 *et seq.*];

(13) National Trails System Act [16 U.S.C. 1241];

(14) Native American Graves Protection and Repatriation Act [25 U.S.C. 3001];

(15) Noise Control Act [42 U.S.C.4901];

(16) Resource Conservation and Recovery Act [42 U.S.C. 6901];

(17) Safe Drinking Water Act [42 U.S.C. 300F];

(18) Toxic Substance Control Act [15 U.S.C. 2601];

(19) Wild and Scenic Rivers Act [16 U.S.C. 1271]; and

(20) Wilderness Act [16 U.S.C. 1131].

(b) This section provides a list of environmental laws for informational purposes only and does not create any legal rights or remedies, or imply private rights of action.

§ 137.291 May Self-Governance Tribes carry out construction projects without assuming these Federal environmental responsibilities?

Yes, but not under section 509 of the Act [25 U.S.C. 458aaa–8]. Self-Governance Tribes may otherwise elect to perform construction projects, or phases of construction projects, under other legal authorities (see §137.272).

§ 137.292 How do Self-Governance Tribes assume environmental responsibilities for construction projects under section 509 of the Act [25 U.S.C. 458aaa–8]?

Self-Governance Tribes assume environmental responsibilities by:

(a) Adopting a resolution or taking an equivalent Tribal action which:

(1) Designates a certifying officer to represent the Self-Governance Tribe and to assume the status of a responsible Federal official under NEPA, NHPA, and related provisions of law; and

(2) Accepts the jurisdiction of the Federal court, as provided in §137.310 and §137.311 for purposes of enforcement of the Federal environmental responsibilities assumed by the Self-Governance Tribe; and

(b) Entering into a construction project agreement under section 509 of the Act [25 U.S.C. 458aaa–8].

§ 137.293 Are Self-Governance Tribes required to adopt a separate resolution or take equivalent Tribal action to assume environmental responsibilities for each construction project agreement?

No, the Self-Governance Tribe may adopt a single resolution or take equivalent Tribal action to assume environmental responsibilities for a single project, multiple projects, a class of projects, or all projects performed under section 509 of the Act [25 U.S.C. 458aaa–8].

§ 137.294 What is the typical IHS environmental review process for construction projects?

(a) Most IHS construction projects normally do not have a significant impact on the environment, and therefore do not require environmental impact statements (EIS). Under current IHS procedures, an environmental review is performed on all construction projects. During the IHS environmental review process, the following activities may occur:

(1) Consult with appropriate Tribal, Federal, state, and local officials and interested parties on potential environmental effects;

(2) Document assessment of potential environmental effects; (IHS has developed a form to facilitate this process.)

(3) Perform necessary environmental surveys and inventories;

(4) Consult with the Advisory Council on Historic Preservation, acting through the SHPO or THPO, to ensure compliance with the NHPA;

(5) Determine if extraordinary or exceptional circumstances exist that would prevent the project from meeting the criteria for categorical exclusion from further environmental review under NEPA, or if an environmental assessment is required;

(6) Obtain environmental permits and approvals; and

(7) Identify methods to avoid or mitigate potential adverse effects;

(b) This section is for informational purposes only and does not create any legal rights or remedies, or imply private rights of action.

§ 137.295 May Self-Governance Tribes elect to develop their own environmental review process?

Yes, Self-Governance Tribes may develop their own environmental review process or adopt the procedures of the IHS or the procedures of another Federal agency.

§ 137.296 How does a Self-Governance Tribe comply with NEPA and NHPA?

Self-Governance Tribes comply with NEPA and the NHPA by adopting and following:

(a) their own environmental review procedures;

(b) the procedures of the IHS; and/or

(c) the procedures of another Federal agency.

§ 137.297 If the environmental review procedures of a Federal agency are adopted by a Self-Governance Tribe, is the Self-Governance Tribe responsible for ensuring the agency's policies and procedures meet the requirements of NEPA, NHPA, and related environmental laws?

No, the Federal agency is responsible for ensuring its own policies and procedures meet the requirements of NEPA, NHPA, and related environmental laws, not the Self-Governance Tribe.

§ 137.298 Are Self-Governance Tribes required to comply with Executive Orders to fulfill their environmental responsibilities under section 509 of the Act [25 U.S.C. 458aaa–8]?

No, but Self-Governance Tribes may at their option, choose to voluntarily comply with Executive Orders. For facilities where ownership will vest with the Federal Government upon completion of the construction, Tribes and the Secretary may agree to include the goals and objectives of Executive Orders in the codes and standards of the construction project agreement.

§ 137.299 Are Federal funds available to cover the cost of Self-Governance Tribes carrying out environmental responsibilities?

Yes, funds are available:

(a) for project-specific environmental costs through the construction project agreement; and

(b) for environmental review program costs through a funding agreement and/or a construction project agreement.

§ 137.300 Since Federal environmental responsibilities are new responsibilities, which may be assumed by Tribes under section 509 of the Act [25 U.S.C. 458aaa–8], are there additional funds available to Self-Governance Tribes to carry out these formerly inherently Federal responsibilities?

Yes, the Secretary must transfer not less than the amount of funds that the Secretary would have otherwise used to carry out the Federal environmental responsibilities assumed by the Self-Governance Tribe.

§ 137.301 How are project and program environmental review costs identified?

(a) The Self-Governance Tribe and the Secretary should work together during the initial stages of project development to identify program and project related costs associated with carrying out environmental responsibilities for proposed projects. The goal in this process is to identify the costs associated with all foreseeable environmental review activities.

(b) If unforeseen environmental review and compliance costs are identified during the performance of the construction project, the Self-Governance Tribe or, at the request of the Self-Governance Tribe, the Self-Governance Tribe and the Secretary (with or without amendment as required by §137.363) may do one or more of the following:

(1) Mitigate adverse environmental effects;

(2) Alter the project scope of work; and/or

(3) Add additional program and/or project funding, including seeking supplemental appropriations.

§ 137.302 Are Federal funds available to cover start-up costs associated with initial Tribal assumption of environmental responsibilities?

(a) Yes, start-up costs are available as provided in section 508(c) of the Act [25 U.S.C. 458aaa–7(c)]. During the initial year that these responsibilities are assumed, the amount required to be paid under section 106(a)(2) of the Act [25 U.S.C. 450j–1(a)(2)] must include startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis pursuant to the agreement necessary:

(1) To plan, prepare for, and assume operation of the environmental responsibilities; and

(2) To ensure compliance with the terms of the agreement and prudent management.

(b) Costs incurred before the initial year that the agreement is in effect may not be included in the amount required to be paid under section 106(a)(2) of the Act [25 U.S.C. 450j–1(a)(2)] if the Secretary does not receive a written notification of the nature and extent of the costs prior to the date on which such costs are incurred.

§ 137.303 Are Federal or other funds available for training associated with Tribal assumption of environmental responsibilities?

Yes, Self-Governance Tribes may use construction program and project funds for training and program development. Training and program development funds may also be available from other Federal agencies, such as the Environmental Protection Agency and the National Park Service, state and local governments, and private organizations.

§ 137.304 May Self-Governance Tribes buy back environmental services from the IHS?

Yes, Self-Governance Tribes may "buy back" project related services in their construction project agreement, including design and construction engineering, and environmental compliance services from the IHS in accordance with Section 508(f) of the Act [25 U.S.C. 458aaa–7(f)] and §137.95, subject to the availability of the IHS's capacity to conduct the work.

§ 137.305 May Self-Governance Tribes act as lead, cooperating, or joint lead agencies for environmental review purposes?

Yes, Self-Governance Tribes assuming Federal environmental responsibilities for construction projects under section 509 of the Act [25 U.S.C. 458aaa–8] are entitled to receive equal consideration, on the same basis as any Federal agency, for lead, cooperating, and joint lead agency status. For informational purposes, the terms "lead," "cooperating," and "joint lead agency" are defined in the CEQ regulations at 40 CFR 1508.16, 1508.5, and 1501.5 respectively.

§ 137.306 How are Self-Governance Tribes recognized as having lead, cooperating, or joint lead agency status?

Self-Governance Tribes may be recognized as having lead, cooperating, or joint lead agency status through funding or other agreements with other agencies. To the extent that resources are available, the Secretary will encourage and facilitate Federal, state, and local agencies to enter into agreements designating Tribes as lead, cooperating, or joint lead agencies for environmental review purposes.

§ 137.307 What Federal environmental responsibilities remain with the Secretary when a Self-Governance Tribe assumes Federal environmental responsibilities for construction projects under section 509 of the Act [25 U.S.C. 458aaa–8]?

(a) All environmental responsibilities for Federal actions not directly related to construction projects assumed by Tribes under section 509 of the Act [25 U.S.C. 458aaa–8] remain with the Secretary. Federal agencies, including the IHS, retain responsibility for ensuring their environmental review procedures meet the requirements of NEPA, NHPA and related provisions of law, as called for in §137.297.

(b) The Secretary will provide information updating and changing IHS agency environmental review policy and procedures to all Self-Governance Tribes implementing a construction project agreement, and to other Indian Tribes upon request. If a Self-Governance Tribe participating under section 509 of the Act [25 U.S.C. 458aaa–8] does not wish to receive this information, it must notify the Secretary in writing. As resources permit, at the request of the Self-Governance Tribe, the Secretary will provide technical assistance to the Self-governance tribe to assist the Self-governance Tribe in carrying out Federal environmental responsibilities.

§ 137.308 Does the Secretary have any enforcement authority for Federal environmental responsibilities assumed by Tribes under section 509 of the Act [25 U.S.C. 458aaa–8]?

No, the Secretary does not have any enforcement authority for Federal environmental responsibilities assumed by Tribes under section 509 of the Act [25 U.S.C. 458aaa–8].

§ 137.309 How are NEPA and NHPA obligations typically enforced?

NEPA and NHPA obligations are typically enforced by interested parties who may file lawsuits against Federal agencies alleging that the agencies have not complied with their legal obligations under NEPA and NHPA. These lawsuits may only be filed in Federal court under the provisions of the APA, 5 U.S.C. 701–706. Under the APA, a Federal judge reviews the Federal agency's actions based upon an administrative record prepared by the Federal agency. The judge gives appropriate deference to the agency's decisions and does not substitute the court's views for those of the agency. Jury trials and civil discovery are not permitted in APA

proceedings. If a Federal agency has failed to comply with NEPA or NHPA, the judge may grant declaratory or injunctive relief to the interested party. No money damages or fines are permitted in APA proceedings.

§ 137.310 Are Self-Governance Tribes required to grant a limited waiver of their sovereign immunity to assume Federal environmental responsibilities under section 509 of the Act [25 U.S.C. 458aaa–8]?

Yes, but only as provided in this section. Unless Self-Governance Tribes consent to the jurisdiction of a court, Self-Governance Tribes are immune from civil lawsuits. Self-Governance Tribes electing to assume Federal environmental responsibilities under section 509 of the Act [25 U.S.C. 458aaa–8] must provide a limited waiver of sovereign immunity solely for the purpose of enforcing a Tribal certifying officer's environmental responsibilities, as set forth in this subpart. Self-Governance Tribes are not required to waive any other immunity.

§ 137.311 Are Self-Governance Tribes entitled to determine the nature and scope of the limited immunity waiver required under section 509(a)(2) of the Act [25 U.S.C. 458aaa–8(a)(2)]?

(a) Yes, Section 509(a)(2) of the Act [25 U.S.C. 458aaa–8(a)(2)] only requires that the waiver permit a civil enforcement action to be brought against the Tribal certifying officer in his or her official capacity in Federal district court for declaratory and injunctive relief in a procedure that is substantially equivalent to an APA enforcement action against a Federal agency. Self-Governance Tribes are not required to subject themselves to suit in their own name, to submit to trial by jury or civil discovery, or to waive immunity for money damages, attorneys fees, or fines.

(b) Self-Governance Tribes may base the grant of a limited waiver under this subpart on the understanding that:

(1) Judicial review of the Tribal certifying official's actions are based upon the administrative record prepared by the Tribal official in the course of performing the Federal environmental responsibilities; and

(2) Actions and decisions of the Tribal certifying officer will be granted deference on a similar basis as Federal officials performing similar functions.

§ 137.312 Who is the proper defendant in a civil enforcement action under section 509(a)(2) of the Act [25 U.S.C. 458aaa–8(a)(2)]?

Only the designated Tribal certifying officer acting in his or her official capacity may be sued. Self-Governance Tribes and other Tribal officials are not proper defendants in lawsuits brought under section 509(a)(2) of the Act [25 U.S.C. 458aaa–8(a)(2)].

Notification (Prioritization Process, Planning, Development and Construction)

§ 137.320 Is the Secretary required to consult with affected Indian Tribes concerning construction projects and programs?

Yes, before developing a new project resource allocation methodology and application process the Secretary must consult with all Indian Tribes. In addition, before spending any funds for planning, design, construction, or renovation projects, whether subject to a competitive application and ranking process or not, the Secretary must consult with any Indian Tribe that would be significantly affected by the expenditure to determine and honor Tribal preferences whenever practicable concerning the size, location, type, and other characteristics of the project.

§ 137.321 How do Indian Tribes and the Secretary identify and request funds for needed construction projects?

In addition to the requirements contained in section 513 of the Act [25 U.S.C. 458aaa–12], Indian Tribes and the Secretary are encouraged to jointly identify health facility and sanitation needs at the earliest possible date for IHS budget formulation. In developing budget justifications for specific projects to be proposed to Congress, the Secretary shall follow the preferences of the affected Indian Tribe(s) to the greatest extent feasible concerning the size, location, type, and other characteristics of the project.

§ 137.322 Is the Secretary required to notify an Indian Tribe that funds are available for a construction project or a phase of a project?

(a) Yes, within 30 days after the Secretary's allocation of funds for planning phase, design phase, or construction phase activities for a specific project, the Secretary shall notify, by registered mail with return receipt in order to document mailing, the Indian Tribe(s) to be benefitted by the availability of the funds for each phase of a project. The Secretarial notice of fund allocation shall offer technical assistance in the preparation of a construction project proposal.

(b) The Secretary shall, within 30 days after receiving a request from an Indian Tribe, furnish the Indian Tribe with all information available to the Secretary about the project including, but not limited to: construction drawings, maps, engineering reports, design reports, plans of requirements, cost estimates, environmental assessments, or environmental impact reports and archeological reports.

(c) An Indian Tribe is not required to request this information prior to either submitting a notification of intent or a construction project proposal.

(d) The Secretary shall have a continuing responsibility to furnish information to the Indian Tribes.

Project Assumption Process

§ 137.325 What does a Self-Governance Tribe do if it wants to perform a construction project under section 509 of the Act [25 U.S.C. 458aaa–8]?

(a) A Self-Governance Tribe may start the process of developing a construction project agreement by:

(1) Notifying the Secretary in writing that the Self-Governance Tribe wishes to enter into a pre-agreement negotiation phase as set forth in section 105(m)(3) of the Act [25 U.S.C. 450j(m)(3)]; or

(2) Submitting a proposed construction project agreement. This proposed agreement may be the final proposal, or it may be a draft for consideration and negotiation, or

(3) A combination of the actions described in paragraphs (a)(1) and (2) of this section.

(b) Upon receiving a Self-Governance Tribe's request to enter into a pre-negotiation phase the Secretary shall take the steps outlined in section 105(m)(3) of the Act [25 U.S.C. 450j(m)(3)].

§ 137.326 What must a Tribal proposal for a construction project agreement contain?

A construction project proposal must contain all of the required elements of a construction project agreement as defined in §137.280. In addition to these minimum requirements, Self-Governance Tribes may propose additional items.

§ 137.327 May multiple projects be included in a single construction project agreement?

Yes, a Self-Governance Tribe may include multiple projects in a single construction project agreement proposal or may add additional approved projects by amendment(s) to an existing construction project agreement.

§ 137.328 Must a construction project proposal incorporate provisions of Federal construction guidelines and manuals?

(a) No, the Self-Governance Tribe and the Secretary must agree upon and specify appropriate building codes and architectural and engineering standards (including health and safety) which must be in conformity with nationally recognized standards for comparable projects.

(b) The Secretary may provide, or the Self-Governance Tribe may request, Federal construction guidelines and manuals for consideration by the Self-Governance Tribe in the preparation of its construction project proposal. If Tribal construction codes and standards (including national, regional, State, or Tribal building codes or construction industry standards) are consistent with or exceed otherwise applicable nationally recognized standards, the Secretary must accept the Tribally proposed standards.

§ 137.329 What environmental considerations must be included in the construction project agreement?

The construction project agreement must include:

(a) Identification of the Tribal certifying officer for environmental review purposes,

(b) Reference to the Tribal resolution or equivalent Tribal action appointing the Tribal certifying officer and accepting the jurisdiction of the Federal court for enforcement purposes as provided in §§137.310 and 137.311.

(c) Identification of the environmental review procedures adopted by the Self-Governance Tribe, and

(d) An assurance that no action will be taken on the construction phase of the project that would have an adverse environmental impact or limit the choice of reasonable alternatives prior to making an environmental determination in accordance with the Self-Governance Tribe's adopted procedures.

§ 137.330 What happens if the Self-Governance Tribe and the Secretary cannot develop a mutually agreeable construction project agreement?

The Self-Governance Tribe may submit a final construction project proposal to the Secretary. No later than 30 days after the Secretary receives the final construction project proposal, or within a longer time agreed to by the Self-Governance Tribe in writing, the Secretary shall review and make a determination to approve or reject the construction project proposal in whole or in part.

§ 137.331 May the Secretary reject a final construction project proposal based on a determination of Tribal capacity or capability?

No, the Secretary may not reject a final construction project proposal based on a determination of Tribal capacity or capability.

§ 137.332 On what basis may the Secretary reject a final construction project proposal?

(a) The only basis for rejection of project activities in a final construction project proposal are:

(1) The amount of funds proposed in the final construction project proposal exceeds the applicable funding level for the construction project as determined under sections 508(c) [25 U.S.C. 458aaa–7(c)] and 106 of the Act [25 U.S.C. 450j–1].

(2) The final construction project proposal does not meet the minimum content requirements for construction project agreements set forth in section 501(a)(2) of the Act [25 U.S.C. 458aaa(a)(2)]; and

(3) The final construction project proposal on its face clearly demonstrates that the construction project cannot be completed as proposed.

(b) For construction programs proposed to be included in a construction project agreement, the Secretary may also reject that portion of the proposal that proposes to assume an inherently Federal function that cannot legally be delegated to the Self-Governance Tribe.

§ 137.333 What procedures must the Secretary follow if the Secretary rejects a final construction project proposal, in whole or in part?

Whenever the Secretary rejects a final construction project proposal in whole or in part, the Secretary must:

(a) Send the Self-Governance Tribe a timely written notice of rejection that shall set forth specific finding(s) that clearly demonstrates, or that is supported by controlling legal authority supporting the rejection;

(b) Within 20 days, provide all documents relied on in making the rejection decision to the Self-Governance Tribe;

(c) Provide assistance to the Self-Governance Tribe to overcome any objections stated in the written notice of rejection;

(d) Provide the Self-Governance Tribe with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter and the opportunity for appeal of the decision to reject the final construction contract proposal, under the regulations set forth in subpart P of this part, except that the Self-Governance Tribe may, in lieu of filing an appeal, initiate an action in Federal district court and proceed directly under sections 511 [25 U.S.C. 458aaa–10] and 110(a) of the Act [25 U.S.C. 450m–1(a)]. With respect to any hearing or appeal or civil action conducted pursuant to this section, the Secretary shall have the burden of demonstrating by clear and convincing evidence the validity of the grounds for rejecting the final construction project proposal (or portion thereof); and

(e) Provide the Self-Governance Tribe with the option of entering into the severable portions of a final proposed construction project agreement (including a lesser funding amount) that the Secretary did not reject, subject to any additional alterations necessary to conform the construction project agreement to the severed provisions. Exercising this option does not affect the Self-Governance Tribe's right to appeal the portion of the final construction project proposal that was rejected by the Secretary.

§ 137.334 What happens if the Secretary fails to notify the Self-Governance Tribe of a decision to approve or reject a final construction project proposal within the time period allowed?

If the Secretary fails to notify the Self-Governance Tribe of the decision to approve or reject within 30 days (or a longer period if agreed to by the Self-Governance Tribe in writing), then the proposal will be deemed approved by the Secretary.

§ 137.335 What costs may be included in the budget for a construction agreement?

(a) A Self-Governance Tribe may include costs allowed by applicable OMB Circulars, and costs allowed under sections 508(c) [25 U.S.C. 458aaa–7(c)], 106 [25 U.S.C. 450j–1] and 105 (m) of the Act [25 U.S.C. 450j(m)]. The costs incurred will vary depending on which phase of the construction process the Self-Governance Tribe is conducting and type of construction project agreement that will be used.

(b) Regardless of whether a construction project agreement is fixed price or cost-reimbursement, budgets may include costs or fees associated with the following:

(1) Construction project proposal preparation;

(2) Conducting community meetings to develop project documents;

(3) Architects, engineers, and other consultants to prepare project planning documents, to develop project plans and specifications, and to assist in oversight of the design during construction;

(4) Real property lease or acquisition;

(5) Development of project surveys including topographical surveys, site boundary descriptions, geotechnical surveys, archeological surveys, and NEPA compliance;

(6) Project management, superintendence, safety and inspection;

(7) Travel, including local travel incurred as a direct result of conducting the construction project agreement and remote travel in conjunction with the project;

(8) Consultants, such as demographic consultants, planning consultants, attorneys, accountants, and personnel who provide services, to include construction management services;

(9) Project site development;

(10) Project construction cost;

(11) General, administrative overhead, and indirect costs;

(12) Securing and installing moveable equipment, telecommunications and data processing equipment, furnishings, including works of art, and special purpose equipment when part of a construction contract;

(13) Other costs directly related to performing the construction project agreement;

(14) Project Contingency:

(i) A cost-reimbursement project agreement budgets contingency as a broad category. Project contingency remaining at the end of the project is considered savings.

(ii) Fixed-price agreements budget project contingency in the lump sum price or unit price.

(c) In the case of a fixed-price project agreement, a reasonable profit determined by taking into consideration the relevant risks and local market conditions.

§ 137.336 What is the difference between fixed-price and cost-reimbursement agreements?

(a) Cost-reimbursement agreements generally have one or more of the following characteristics:

(1) Risk is shared between IHS and the Self-Governance Tribe;

(2) Self-Governance Tribes are not required to perform beyond the amount of funds provided under the agreement;

(3) Self-Governance Tribes establish budgets based upon the actual costs of the project and are not allowed to include profit;

(4) Budgets are stated using broad categories, such as planning, design, construction project administration, and contingency;

(5) The agreement funding amount is stated as a "not to exceed" amount;

(6) Self-Governance Tribes provide notice to the IHS if they expect to exceed the amount of the agreement and require more funds;

(7) Excess funds remaining at the end of the project are considered savings; and

(8) Actual costs are subject to applicable OMB circulars and cost principles.

(b) Fixed Price agreements generally have one or more of the following characteristics:

(1) Self-Governance Tribes assume the risk for performance;

(2) Self-Governance Tribes are entitled to make a reasonable profit;

(3) Budgets may be stated as lump sums, unit cost pricing, or a combination thereof;

(4) For unit cost pricing, savings may occur if actual quantity is less than estimated; and,

(5) Excess funds remaining at the end of a lump sum fixed price project are considered profit, unless, at the option of the Self-Governance Tribe, such amounts are reclassified in whole or in part as savings.

§ 137.337 What funding must the Secretary provide in a construction project agreement?

The Secretary must provide funding for a construction project agreement in accordance with sections 106 [25 U.S.C. 450j–1] and 508(c) of the Act [25 U.S.C. 458aaa–7(c)].

§ 137.338 Must funds from other sources be incorporated into a construction project agreement?

Yes, at the request of the Self-Governance Tribe, the Secretary must include funds from other agencies as permitted by law, whether on an ongoing or a one-time basis.

§ 137.339 May a Self-Governance Tribe use project funds for matching or cost participation requirements under other Federal and non-Federal programs?

Yes, notwithstanding any other provision of law, all funds provided under a construction project agreement may be treated as non-Federal funds for purposes of meeting matching or cost participation requirements under any other Federal or non-Federal program.

§ 137.340 May a Self-Governance Tribe contribute funding to a project?

Yes, the Self-Governance Tribe and the Secretary may jointly fund projects. The construction project agreement should identify the Secretarial amount and any Tribal contribution amount that is being incorporated into the construction project agreement. The Self-Governance Tribe does not have to deposit its contribution with the Secretary.

§ 137.341 How will a Self-Governance Tribe receive payment under a construction project agreement?

(a) For all construction project agreements, advance payments shall be made annually or semiannually, at the Self-Governance Tribe's option. The initial payment shall include all contingency funding for the project or phase of the project to the extent that there are funds appropriated for that purpose.

(b) The amount of subsequent payments is based on the mutually agreeable project schedule reflecting:

(1) Work to be accomplished within the advance payment period,

(2) Work already accomplished, and

(3) Total prior payments for each annual or semiannual advance payment period.

(c) For lump sum, fixed price agreements, at the request of the Self-Governance Tribe, payments shall be based on an advance payment period measured as follows:

(1) One year; or

(2) Project Phase(e.g., planning, , design, construction.) If project phase is chosen as the payment period, the full amount of funds necessary to perform the work for that phase of the construction project agreement is payable in the initial advance payment. For multi-phase projects, the planning and design phases must be completed prior to the transfer of funds for the associated construction phase. The completion of the planning and design phases will include at least one opportunity for Secretarial approval in accordance with §137.360.

(d) For the purposes of payment, Sanitation Facilities Construction Projects authorized pursuant to Pub. L. 86–121, are considered to be a single construction phase and are payable in a single lump sum advance payment in accordance with paragraph (c)(2) of this section.

(e) For all other construction project agreements, the amount of advance payments shall include the funds necessary to perform the work identified in the advance payment period of one year.

(f) Any agreement to advance funds under paragraphs (b), (c) or (d) of this section is subject to the availability of appropriations.

(g) (1) Initial advance payments are due within 10 days of the effective date of the construction project agreement; and

(2) subsequent payments are due:

(i) Within 10 days of apportionment for annual payments or

(ii) Within 10 days of the start date of the project phase for phase payments.

§ 137.342 What happens to funds remaining at the conclusion of a cost reimbursement construction project?

All funds, including contingency funds, remaining at the conclusion of the project are considered savings and may be used by the Self-Governance Tribe to provide additional services for the purpose for which the funds were originally appropriated. No further approval or justifying documentation is required before the expenditure of the remaining funds.

§ 137.343 What happens to funds remaining at the conclusion of a fixed price construction project?

(a) For lump sum fixed price construction project agreements, all funds remaining at the conclusion of the project are considered profits and belong to the Self-Governance Tribe.

(b) For fixed price construction project agreements with unit price components, all funds remaining that are associated with overestimated unit price quantities are savings and may be used by the Self-Governance Tribe in accordance with section 137.342. All other funds remaining at the conclusion of the project are considered profit and belong to the Self-Governance Tribe.

(c) At the option of the Self-Governance Tribe, funds otherwise identified in paragraphs (a) and (b) as "profit" may be reclassified, in whole or in part, as savings and to that extent may be used by the Self-Governance Tribe in accordance with section 137.142.

§ 137.344 May a Self-Governance Tribe reallocate funds among construction project agreements?

Yes, a Self-Governance Tribe may reallocate funds among construction project agreements to the extent not prohibited by applicable appropriation law(s).

Roles of Self-Governance Tribe in Establishing and Implementing Construction Project Agreements

§ 137.350 Is a Self-Governance Tribe responsible for completing a construction project in accordance with the negotiated construction project agreement?

Yes, a Self-Governance Tribe assumes responsibility for completing a construction project, including day-to-day on-site management and administration of the project, in accordance with the negotiated construction project agreement. However, Self-Governance Tribes are not required to perform beyond the amount of funds provided. For example, a Self-Governance Tribe may encounter unforeseen circumstances during the term of a construction project agreement. If this occurs, options available to the Self-Governance Tribe include, but are not limited to:

(a) Reallocating existing funding;

(b) Reducing/revising the scope of work that does not require an amendment because it does not result in a significant change;

(c) Utilizing savings from other projects;

(d) Requesting additional funds or appropriations;

(e) Utilizing interest earnings;

(f) Seeking funds from other sources; and/or

(g) Redesigning or re-scoping that does result in a significant change by amendment as provided in §§137.363 and 137.364.

§ 137.351 Is a Self-Governance Tribe required to submit construction project progress and financial reports for construction project agreements?

Yes, a Self-Governance Tribe must provide the Secretary with construction project progress and financial reports semiannually or, at the option of the Self-Governance Tribe, on a more frequent basis. Self-Governance Tribes are only required to submit the reports, as negotiated in the Construction Project Agreement, after funds have been transferred to the Self-Governance Tribe for a construction project. Construction project progress reports and financial reports are only required for active construction projects.

§ 137.352 What is contained in a construction project progress report?

Construction project progress reports contain information about accomplishments during the reporting period and issues and concerns of the Self-Governance Tribe, if any.

§ 137.353 What is contained in a construction project financial report?

Construction project financial reports contain information regarding the amount of funds expended during the reporting period, and financial concerns of the Self-Governance Tribe, if any.

Roles of the Secretary in Establishing and Implementing Construction Project Agreements

§ 137.360 Does the Secretary approve project planning and design documents prepared by the Self-Governance Tribe?

The Secretary shall have at least one opportunity to approve project planning and design documents prepared by the Self-Governance Tribe in advance of construction if the Self-Governance Tribe is required to submit planning or design documents as a part of the scope of work under a construction project agreement.

§ 137.361 Does the Secretary have any other opportunities to approve planning or design documents prepared by the Self-Governance Tribe?

Yes, but only if there is an amendment to the construction project agreement that results in a significant change in the original scope of work.

§ 137.362 May construction project agreements be amended?

Yes, the Self-Governance Tribe, at its discretion, may request the Secretary to amend a construction project agreement to include additional projects. In addition, amendments are required if there is a significant change from the original scope of work or if funds are added by the Secretary. The Self-Governance Tribe may make immaterial changes to the performance period and make budget adjustments within available funding without an amendment to the construction project agreement.

§ 137.363 What is the procedure for the Secretary's review and approval of amendments?

(a) The Secretary shall promptly notify the Self-Governance Tribe in writing of any concerns or issues that may lead to disapproval. The Secretary shall share relevant information and documents, and make a good faith effort to resolve all issues and concerns of the Self-Governance Tribe. If, after consultation with the Self-Governance Tribe, the Secretary intends to disapprove the proposed amendment, then the Secretary shall follow the procedures set forth in §137.330 through 137.334.

(b) The time allowed for Secretarial review, comment, and approval of amendments is 30 days, or within a longer time if agreed to by the Self-Governance Tribe in writing. Absence of a written response by the Secretary within 30 days shall be deemed approved.

(c) The timeframe set forth in paragraph (b) of this section is intended to be the maximum time and may be reduced based on urgency and need, by agreement of the parties. If the Self-Governance Tribe requests reduced timeframes for action due to unusual or special conditions (such as limited construction periods), the Secretary shall make a good faith effort to accommodate the requested timeframes.

§ 137.364 What constitutes a significant change in the original scope of work?

A significant change in the original scope of work is:

(a) A change that would result in a cost that exceeds the total of the project funds available and the Self-Governance Tribe's contingency funds; or

(b) A material departure from the original scope of work, including substantial departure from timelines negotiated in the construction project agreement.

§ 137.365 What is the procedure for the Secretary's review and approval of project planning and design documents submitted by the Self-Governance Tribe?

(a) The Secretary shall review and approve planning documents to ensure compliance with planning standards identified in the construction project agreement. The Secretary shall review and approve design documents for general compliance with requirements of the construction project agreement.

(b) The Secretary shall promptly notify the Self-Governance Tribe in writing of any concerns or issues that may lead to disapproval. The Secretary shall share relevant information and documents, and make a good faith effort to resolve all issues and concerns of the Self-Governance Tribe. If, after consultation with the Self-

Governance Tribe, the Secretary intends to disapprove the documents, then the Secretary shall follow the procedures set forth in §137.333.

(c) The time allowed for Secretarial review, comment, and approval of planning and design documents is 21 days, unless otherwise agreed to by the Self-Governance Tribe in writing. Absence of a written response by the Secretary within 21 days shall be deemed approved.

§ 137.366 May the Secretary conduct onsite project oversight visits?

Yes, the Secretary may conduct onsite project oversight visits semiannually or on an alternate schedule negotiated in the construction project agreement. The Secretary must provide the Self-Governance Tribe with reasonable advance written notice to assist the Self-Governance Tribe in coordinating the visit. The purpose of the visit is review the progress under the construction project agreement. At the request of the Self-Governance Tribe, the Secretary must provide the Self-Governance Tribe a written site visit report.

§ 137.367 May the Secretary issue a stop work order under a construction project agreement?

No, the Secretary has no role in the day-to-day management of a construction project.

§ 137.368 Is the Secretary responsible for oversight and compliance of health and safety codes during construction projects being performed by a Self-Governance Tribe under section 509 of the Act [25 U.S.C. 488aaa–8]?

No, the Secretary is not responsible for oversight and compliance of health and safety codes during construction projects being performed by a Self-Governance Tribe under section 509 of the Act [25 U.S.C. 488aaa–8].

Other

§ 137.370 Do all provisions of this part apply to construction project agreements under this subpart?

Yes, to the extent the provisions are not inconsistent with the provisions in this subpart. Provisions that do not apply include: programmatic reports and data requirements; reassumption; compact and funding agreement review, approval, and final offer process; and compact and funding agreement contents.

§ 137.371 Who takes title to real property purchased with funds provided under a construction project agreement?

The Self-Governance Tribe takes title to the real property unless the Self-Governance Tribe requests that the Secretary take title to the property.

§ 137.372 Does the Secretary have a role in the fee-to-trust process when real property is purchased with construction project agreement funds?

No, the Secretary does not have a role in the fee-to-trust process except to provide technical assistance if requested by the Self-Governance Tribe.

§ 137.373 Do Federal real property laws, regulations and procedures that apply to the Secretary also apply to Self-Governance Tribes that purchase real property with funds provided under a construction project agreement?

No, unless the Self-Governance Tribe has requested the Secretary to take fee title to the property.

§ 137.374 Does the Secretary have a role in reviewing or monitoring a Self-Governance Tribe's actions in acquiring or leasing real property with funds provided under a construction project agreement?

No, unless the Self-Governance Tribe has requested the Secretary take fee title to the property. The Self-Governance Tribe is responsible for acquiring all real property needed to perform a construction project under a construction project agreement, not the Secretary. The Secretary shall not withhold funds or refuse to enter into a construction project agreement because of a disagreement between the Self-Governance Tribe and the Secretary over the Self-Governance Tribe's decisions to purchase or lease real property.

§ 137.375 Are Tribally-owned facilities constructed under section 509 of the Act [25 U.S.C. 458aaa–8] eligible for replacement, maintenance, and improvement funds on the same basis as if title to such property were vested in the United States?

Yes, Tribally-owned facilities constructed under section 509 of the Act [25 U.S.C. 458aaa–8] are eligible for replacement, maintenance, and improvement funds on the same basis as if title to such property were vested in the United States.

§ 137.376 Are design and construction projects performed by Self-Governance Tribes under section 509 of the Act [25 U.S.C. 458aaa–8] subject to Federal metric requirements?

No, however, the Self-Governance Tribe and the Secretary may negotiate the use of Federal metric requirements in the construction project agreement when the Self-Governance Tribe will design and/or construct an IHS facility that the Secretary will own and operate.

§ 137.377 Do Federal procurement laws and regulations apply to construction project agreements performed under section 509 of the Act [25 U.S.C. 458aaa–8]?

No, unless otherwise agreed to by the Tribe, no provision of the Office of Federal Procurement Policy Act, the Federal Acquisition Regulations issued pursuant thereto, or any other law or regulation pertaining to Federal procurement (including Executive Orders) shall apply to any construction project conducted under section 509 of the Act [25 U.S.C. 458aaa–8]. The Secretary and the Self-Governance Tribe may negotiate to apply specific provisions of the Office of Federal Procurement and Policy Act and Federal Acquisition Regulations to a construction project agreement or funding agreement. Absent a negotiated agreement, such provisions and regulatory requirements do not apply.

§ 137.378 Do the Federal Davis-Bacon Act and wage rates apply to construction projects performed by Self-Governance Tribes using their own funds or other non-Federal funds?

No, the Federal Davis-Bacon Act and wage rates do not apply to construction projects performed by Self-Governance Tribes using their own funds or other non-Federal funds.

§ 137.379 Do Davis-Bacon wage rates apply to construction projects performed by Self-Governance Tribes using Federal funds?

Davis-Bacon Act wage rates only apply to laborers and mechanics employed by the contractors and subcontractors (excluding Indian Tribes, inter-Tribal consortia, and Tribal organizations) retained by Self-Governance Tribes to perform construction. The Davis-Bacon Act and wage rates do not apply when Self-Governance Tribes perform work with their own employees.

Subpart O – Secretarial Responsibilities

Budget Request

§ 137.401 What role does Tribal consultation play in the IHS annual budget request process?

The IHS will consult with Tribes on budget issues consistent with Administration policy on Tribal consultation.

Reports

§ 137.405 Is the Secretary required to report to Congress on administration of Title V and the funding requirements presently funded or unfunded?

Yes, no later than January 1 of each year after the date of enactment of the Tribal Self-Governance Amendments of 2000, the Secretary shall submit to the Committee on Indian Affairs of the Senate and the Committee on Resources of the House of Representatives a written report regarding the administration of Title V. The report shall include a detailed analysis of the funding requirements presently funded or unfunded for each Indian Tribe or Tribal organization, either directly by the Secretary, under self-determination contracts under Title I, or under compacts and funding agreements authorized under Title V.

§ 137.406 In compiling reports pursuant to this section, may the Secretary impose any reporting requirements on Self-Governance Tribes, not otherwise provided in Title V?

No, in compiling reports pursuant to this section, the Secretary may not impose any reporting requirements on Self-Governance Tribes, not otherwise provided in Title V.

§ 137.407 What guidelines will be used by the Secretary to compile information required for the report?

The report shall be compiled from information contained in funding agreements, annual audit reports, and data of the Secretary regarding the disposition of Federal funds. The report must identify:

(a) The relative costs and benefits of self-governance, including savings;

(b) With particularity, all funds that are specifically or functionally related to the provision by the Secretary of services and benefits to Self-Governance Tribes and their members;

(c) The funds transferred to each Self-Governance Tribe and the corresponding reduction in the Federal bureaucracy;

(d) The funding formula for individual Tribal shares of all headquarters' funds, together with the comments of affected Self-Governance Tribes, developed under §137.405 of this subpart; and

(e) Amounts expended in the preceding fiscal year to carry out inherent Federal functions, including an identification of those functions by type and location.

Subpart P – Appeals

§ 137.410 For the purposes of section 110 of the Act [25 U.S.C. 450m–1] does the term contract include compacts, funding agreements, and construction project agreements entered into under Title V?

Yes, for the purposes of section 110 of the Act [25 U.S.C. 450m–1] the term “contract” includes compacts, funding agreements, and construction project agreements entered into under Title V.

Post-Award Disputes

§ 137.412 Do the regulations at 25 CFR Part 900, Subpart N apply to compacts, funding agreements, and construction project agreements entered into under Title V?

Yes, the regulations at 25 CFR Part 900, Subpart N apply to compacts, funding agreements, and construction project agreements entered into under Title V.

Pre-Award Disputes

§ 137.415 What decisions may an Indian Tribe appeal under §137.415 through 137.436?

An Indian Tribe may appeal:

(a) A decision to reject a final offer, or a portion thereof, under section 507(b) of the Act [25 U.S.C. 458aaa–6(b)];

(b) A decision to reject a proposed amendment to a compact or funding agreement, or a portion thereof, under section 507(b) of the Act [25 U.S.C. 458aaa–6(b)];

(c) A decision to rescind and reassume a compact or funding agreement, in whole or in part, under section 507(a)(2) of the Act [25 U.S.C. 458aaa–6(a)(2)], except for immediate reassumptions under section 507(a)(2)(C) of the Act [25 U.S.C. 458aaa–6(a)(2)(C)];

(d) A decision to reject a final construction project proposal, or a portion thereof, under section 509(b) of the Act [25 U.S.C. 458aaa–8(b)] and subpart N of this part; and

(e) For construction project agreements carried out under section 509 of the Act [25 U.S.C. 458aaa–8], a decision to reject project planning documents, design documents, or proposed amendments submitted by a Self-Governance Tribe under section 509(f) of the Act [25 U.S.C. 458aaa–8(f)] and subpart N of this part.

§ 137.416 Do §§137.415 through 137.436 apply to any other disputes?

No, §§137.415 through 137.436 only apply to decisions listed in §137.415. Specifically, §§137.415 through 137.436 do not apply to any other dispute, including, but not limited to:

(a) Disputes arising under the terms of a compact, funding agreement, or construction project agreement that has been awarded;

(b) Disputes arising from immediate reassumptions under section 507(a)(2)(C) of the Act [25 U.S.C. 458aaa–6(a)(2)(C)] and §137.261 and 137.262, which are covered under §137.440 through 137.445.

(c) Other post-award contract disputes, which are covered under §137.412.

(d) Denials under the Freedom of Information Act, 5 U.S.C. 552, which may be appealed under 45 CFR part 5.

(e) Decisions relating to the award of grants under section 503(e) of the Act [25 U.S.C. 458aaa–2(e)], which may be appealed under 45 CFR part 5.

§ 137.417 What procedures apply to Interior Board of Indian Appeals (IBIA) proceedings?

The IBIA may use the procedures set forth in 43 CFR 4.22–4.27 as a guide.

§ 137.418 How does an Indian Tribe know where and when to file its appeal from decisions made by IHS?

Every decision in any of the areas listed in §137.415 must contain information which shall tell the Indian Tribe where and when to file the Indian Tribe's appeal. Each decision shall include the following statement:

Within 30 days of the receipt of this decision, you may request an informal conference under 42 CFR 137.421, or appeal this decision under 42 CFR 137.425 to the Interior Board of Indian Appeals (IBIA). Should you decide to appeal this decision, you may request a hearing on the record. An appeal to the IBIA under 42 CFR 137.425 shall be filed with the IBIA by certified mail or by hand delivery at the following address: Board of Indian Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203. You shall serve copies of your Notice of Appeal on the Secretary and on the official whose decision is being appealed. You shall certify to the IBIA that you have served these copies.

§ 137.419 What authority does the IBIA have under §§137.415 through 137.436?

The IBIA has the authority:

(a) to conduct a hearing on the record;

(b) to permit the parties to engage in full discovery relevant to any issue raised in the matter;

(c) to issue a recommended decision; *and*

(d) to take such action as necessary to insure rights specified in §137.430.

§ 137.420 Does an Indian Tribe have any options besides an appeal?

Yes, the Indian Tribe may request an informal conference. An informal conference is a way to resolve issues as quickly as possible, without the need for a formal hearing. Or, the Indian Tribe may, in lieu of filing an administrative appeal under this subpart or upon completion of an informal conference, file an action in Federal court pursuant to section 110 of the Act [25 U.S.C. 450m–1].

§ 137.421 How does an Indian Tribe request an informal conference?

The Indian Tribe must file its request for an informal conference with the office of the person whose decision it is appealing, within 30 days of the day it receives the decision. The Indian Tribe may either hand-deliver the request for an informal conference to that person's office, or mail it by certified mail, return receipt requested.

If the Indian Tribe mails the request, it will be considered filed on the date the Indian Tribe mailed it by certified mail.

§ 137.422 How is an informal conference held?

(a) The informal conference must be held within 30 days of the date the request was received, unless the Indian Tribe and the authorized representative of the Secretary agree on another date.

(b) If possible, the informal conference will be held at the Indian Tribe's office. If the meeting cannot be held at the Indian Tribe's office and is held more than fifty miles from its office, the Secretary must arrange to pay transportation costs and per diem for incidental expenses to allow for adequate representation of the Indian Tribe.

(c) The informal conference must be conducted by a designated representative of the Secretary.

(d) Only people who are the designated representatives of the Indian Tribe, or authorized by the Secretary are allowed to make presentations at the informal conference. Such designated representatives may include Office of Tribal Self-Governance.

§ 137.423 What happens after the informal conference?

(a) Within 10 days of the informal conference, the person who conducted the informal conference must prepare and mail to the Indian Tribe a written report which summarizes what happened at the informal conference and a recommended decision.

(b) Every report of an informal conference must contain the following language:

Within 30 days of the receipt of the recommended decision from the informal conference, you may file an appeal of the initial decision of the DHHS agency with the Interior Board of Indian Appeals (IBIA) under 42 CFR 137.425. You may request a hearing on the record. An appeal to the IBIA under 42 CFR 137.425 shall be filed with the IBIA by certified mail or hand delivery at the following address: Board of Indian Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203. You shall serve copies of your Notice of Appeal on the Secretary and on the official whose decision is being appealed. You shall certify to the IBIA that you have served these copies. Alternatively you may file an action in Federal court pursuant to section 110 of the Act. [25 U.S.C. 450m–1].

§ 137.424 Is the recommended decision from the informal conference final for the Secretary?

No. If the Indian Tribe is dissatisfied with the recommended decision from the informal conference, it may still appeal the initial decision within 30 days of receiving the recommended decision and the report of the informal conference. If the Indian Tribe does not file a notice of appeal within 30 days, or before the expiration of the extension it has received under §137.426 , the recommended decision of the informal conference becomes final for the Secretary and may be appealed to Federal court pursuant to section 110 of the Act [25 U.S.C. 450m–1].

§ 137.425 How does an Indian Tribe appeal the initial decision if it does not request an informal conference or if it does not agree with the recommended decision resulting from the informal conference?

(a) If the Indian Tribe decides to appeal, it must file a notice of appeal with the IBIA within 30 days of receiving either the initial decision or the recommended decision from the informal conference.

(b) The Indian Tribe may either hand-deliver the notice of appeal to the IBIA, or mail it by certified mail, return receipt requested. If the Indian Tribe mails the Notice of Appeal, it will be considered filed on the date the Indian Tribe mailed it by certified mail. The Indian Tribe should mail the notice of appeal to: Board of Indian Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203.

(c) The Notice of Appeal must:

(1) Briefly state why the Indian Tribe thinks the initial decision is wrong;

(2) Briefly identify the issues involved in the appeal; and

(3) State whether the Indian Tribe wants a hearing on the record, or whether the Indian Tribe wants to waive its right to a hearing.

(d) The Indian Tribe must serve a copy of the notice of appeal upon the official whose decision it is appealing. The Indian Tribe must certify to the IBIA that it has done so.

(e) The authorized representative of the Secretary will be considered a party to all appeals filed with the IBIA under the Act.

(f) In lieu of filing an administrative appeal an Indian Tribe may proceed directly to Federal court pursuant to section 110 of the Act [25 U.S.C. 450m–1].

§ 137.426 May an Indian Tribe get an extension of time to file a notice of appeal?

Yes, if the Indian Tribe needs additional time, the Indian Tribe may request an extension of time to file its Notice of Appeal with the IBIA within 60 days of receiving either the initial decision or the recommended decision resulting from the informal conference. The request of the Indian Tribe must be in writing, and must give a reason for not filing its notice of appeal within the 30-day time period. If the Indian Tribe has a valid reason for not filing its notice of appeal on time, it may receive an extension.

§ 137.427 What happens after an Indian Tribe files an appeal?

(a) Within 5 days of receiving the Indian Tribe's notice of appeal, the IBIA will decide whether the appeal falls under §137.415. If so, the Indian Tribe is entitled to a hearing.

(b) If the IBIA cannot make that decision based on the information included in the notice of appeal, the IBIA may ask for additional statements from the Indian Tribe, or from the appropriate Federal agency. If the IBIA asks for more statements, it will make its decision within 5 days of receiving those statements.

(c) If the IBIA decides that the Indian Tribe is not entitled to a hearing or if the Indian Tribe has waived its right to a hearing on the record, the IBIA will dismiss the appeal and inform the Indian Tribe that it is not entitled to a hearing or has waived its right to a hearing.

§ 137.428 How is a hearing arranged?

(a) If a hearing is to be held, the IBIA will refer the Indian Tribe's case to the Hearings Division of the Office of Hearings and Appeals of the U.S. Department of the Interior. The case will then be assigned to an Administrative Law Judge (ALJ), appointed under 5 U.S.C. 3105.

(b) Within 15 days of the date of the referral, the ALJ will hold a pre-hearing conference, by telephone or in person, to decide whether an evidentiary hearing is necessary, or whether it is possible to decide the appeal based on the written record. At the pre-hearing conference the ALJ will provide for:

(1) A briefing and discovery schedule;

(2) A schedule for the exchange of information, including, but not limited to witness and exhibit lists, if an evidentiary hearing is to be held;

(3) The simplification or clarification of issues;

(4) The limitation of the number of expert witnesses, or avoidance of similar cumulative evidence, if an evidentiary hearing is to be held;

(5) The possibility of agreement disposing of all or any of the issues in dispute; and

(6) Such other matters as may aid in the disposition of the appeal.

(c) The ALJ shall order a written record to be made of any conference results that are not reflected in a transcript.

§ 137.429 What happens when a hearing is necessary?

(a) The ALJ must hold a hearing within 90 days of the date of the order referring the appeal to the ALJ, unless the parties agree to have the hearing on a later date.

(b) At least 30 days before the hearing, the Secretary must file and serve the Indian Tribe with a response to the notice of appeal.

(c) If the hearing is held more than 50 miles from the Indian Tribe's office, the Secretary must arrange to pay transportation costs and per diem for incidental expenses to allow for adequate representation of the Indian Tribe.

(d) The hearing shall be conducted in accordance with the Administrative Procedure Act, 5 U.S.C. 556.

§ 137.430 What is the Secretary's burden of proof for appeals covered by §137.415?

As required by section 518 of the Act [25 U.S.C. 458aaa–17], the Secretary must demonstrate by clear and convincing evidence the validity of the grounds for the decision made and that the decision is fully consistent with provisions and policies of the Act.

§ 137.431 What rights do Indian Tribes and the Secretary have during the appeal process?

Both the Indian Tribe and the Secretary have the same rights during the appeal process. These rights include the right to:

(a) Be represented by legal counsel;

(b) Have the parties provide witnesses who have knowledge of the relevant issues, including specific witnesses with that knowledge, who are requested by either party;

(c) Cross-examine witnesses;

(d) Introduce oral or documentary evidence, or both;

(e) Require that oral testimony be under oath;

(f) Receive a copy of the transcript of the hearing, and copies of all documentary evidence which is introduced at the hearing;

(g) Compel the presence of witnesses, or the production of documents, or both, by subpoena at hearings or at depositions;

(h) Take depositions, to request the production of documents, to serve interrogatories on other parties, and to request admissions; and

(i) Any other procedural rights under the Administrative Procedure Act, 5 U.S.C. 556.

§ 137.432 What happens after the hearing?

(a) Within 30 days of the end of the formal hearing or any post-hearing briefing schedule established by the ALJ, the ALJ shall send all the parties a recommended decision, by certified mail, return receipt requested. The recommended decision must contain the ALJ's findings of fact and conclusions of law on all the issues. The recommended decision shall also state that the Indian Tribe has the right to object to the recommended decision.

(b) The recommended decision shall contain the following statement:

Within 30 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Secretary under 42 CFR 137.43. An appeal to the Secretary under 42 CFR 137.43 shall be filed at the following address: Department of Health and Human Services, 200 Independence Ave. S.W., Washington, DC, 20201. You shall serve copies of your notice of appeal on the official whose decision is being appealed. You shall certify to the Secretary that you have served this copy. If neither party files an objection to the recommended decision within 30 days, the recommended decision will become final.

§ 137.433 Is the recommended decision always final?

No, any party to the appeal may file precise and specific written objections to the recommended decision, or any other comments, within 30 days of receiving the recommended decision. Objections must be served on all other parties. The recommended decision shall become final for the Secretary 30 days after the Indian Tribe receives the ALJs recommended decision, unless a written statement of objections is filed with the Secretary during the 30-day period. If no party files a written statement of objections within 30 days, the recommended decision shall become final for the Secretary.

§ 137.434 If an Indian Tribe objects to the recommended decision, what will the Secretary do?

(a) The Secretary has 45 days from the date it receives the final authorized submission in the appeal to modify, adopt, or reverse the recommended decision. The Secretary also may remand the case to the IBIA for further proceedings. If the Secretary does not modify or reverse the recommended decision or remand the case to the IBIA during that time, the recommended decision automatically becomes final.

(b) When reviewing the recommended decision, the Secretary may consider and decide all issues properly raised by any party to the appeal, based on the record.

(c) The decision of the Secretary must:

(1) Be in writing;

(2) Specify the findings of fact or conclusions of law that are modified or reversed;

(3) Give reasons for the decision, based on the record; and

(4) State that the decision is final for the Department.

§ 137.435 Will an appeal adversely affect the Indian Tribe's rights in other compact, funding negotiations, or construction project agreement?

No, a pending appeal will not adversely affect or prevent the negotiation or award of another compact, funding agreement, or construction project agreement.

§ 137.436 Will the decisions on appeal be available for the public to review?

Yes, all final decisions must be published for the Department under this subpart. Decisions can be found on the Department's website.

Appeals of an Immediate Reassumption of a Self-Governance Program

§ 137.440 What happens in the case of an immediate reassumption under section 507(a)(2)(C) of the Act [25 U.S.C. 458aaa–6(a)(2)(C)]?

(a) The Secretary may, upon written notification to the Self-Governance Tribe, immediately reassume operation of a program, service, function, or activity (or portion thereof) if:

(1) The Secretary makes a finding of imminent substantial and irreparable endangerment of the public health caused by an act or omission of the Self-Governance Tribe; and

(2) The endangerment arises out of a failure to carry out the compact or funding agreement.

(b) When the Secretary advises a Self-Governance Tribe that the Secretary intends to take an action referred to in paragraph (a) of this section, the Secretary must also notify the Deputy Director of the Office of Hearings and Appeals, Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203.

§ 137.441 Will there be a hearing?

Yes, unless the Self-Governance Tribe waives its right to a hearing in writing. The Deputy Director of the Office of Hearings and Appeals must appoint an Administrative Law Judge to hold a hearing,

(a) The hearing must be held within 10 days of the date of the notice referred to in §137.440 unless the Self-Governance Tribe agrees to a later date.

(b) If possible, the hearing will be held at the office of the Self-Governance Tribe. If the hearing is held more than 50 miles from the office of the Self-Governance Tribe, the Secretary must arrange to pay transportation costs and per diem for incidental expenses. This will allow for adequate representation of the Self-Governance Tribe.

§ 137.442 What happens after the hearing?

(a) Within 30 days after the end of the hearing or any post-hearing briefing schedule established by the ALJ, the ALJ must send all parties a recommended decision by certified mail, return receipt requested. The recommended decision shall contain the ALJs findings of fact and conclusions of law on all the issues. The recommended decision must also state that the Self-Governance Tribe has the right to object to the recommended decision.

(b) The recommended decision must contain the following statement:

Within 15 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Secretary under §137.443. An appeal to the Secretary under 25 CFR 900.165(b) shall be filed at the following address: Department of Health and Human Services, 200 Independence Ave. SW., Washington, DC 20201. You shall serve copies of your notice of appeal on the official whose decision is being appealed. You shall certify to the Secretary that you have served this copy. If neither party files an objection to the recommended decision within 15 days, the recommended decision will become final.

§ 137.443 Is the recommended decision always final?

No, any party to the appeal may file precise and specific written objections to the recommended decision, or any other comments, within 15 days of receiving the recommended decision. The objecting party must serve a copy of its objections on the other party. The recommended decision will become final 15 days after the Self-Governance Tribe receives the ALJs recommended decision, unless a written statement of objections is filed with the Secretary during the 15-day period. If no party files a written statement of objections within 15 days, the recommended decision will become final.

§ 137.444 If a Self-Governance Tribe objects to the recommended decision, what action will the Secretary take?

(a) The Secretary has 15 days from the date the Secretary receives timely written objections to modify, adopt, or reverse the recommended decision. If the Secretary does not modify or reverse the recommended decision during that time, the recommended decision automatically becomes final.

(b) When reviewing the recommended decision, the Secretary may consider and decide all issues properly raised by any party to the appeal, based on the record.

(c) The decision of the Secretary must:

(1) Be in writing;

(2) Specify the findings of fact or conclusions of law that are modified or reversed;

(3) Give reasons for the decision, based on the record; and

(4) State that the decision is final for the Secretary.

§ 137.445 Will an immediate reassumption appeal adversely affect the Self-Governance Tribe's rights in other self-governance negotiations?

No, a pending appeal will not adversely affect or prevent the negotiation or award of another compact, funding agreement, or construction project agreement.

Equal Access to Justice Act Fees

§ 137.450 Does the Equal Access to Justice Act (EAJA) apply to appeals under this subpart?

Yes, EAJA claims against the Department will be heard pursuant to 25 CFR 900.177.

C. Delegation

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Indian Health Service
Rockville MD 20852

SEP 3 2009

TO: Addressees Administrative #48

FROM: Director

SUBJECT: Delegation of Authority, Administrative # 48, "Indian Self-Determination and Education Assistance Act, Public Law 93-638, as Amended, Title V Construction Project Agreements"

AUTHORITY DELEGATED

Pursuant to the authorities delegated to the Director, Indian Health Service (IHS), by the Assistant Secretary for Health on July 17, 1996, and as specified in the Reorganization Order of January 4, 1988, (52 *Federal Register* 47053), which elevated the IHS to a Public Health Service Agency, I hereby delegate to the officials listed below, for application throughout the IHS, the authority to approve Title V Construction Project Agreements and/or modifications to those agreements under the Indian Self-Determination and Education Assistance Act (ISDEAA), Public Law 93-638, as amended.

TO WHOM DELEGATED

Deputy Director for Management Operations
Director, Office of Environmental Health and Engineering
Area Directors

AUTHORITY TO REDELEGATE

These authorities may not be redelegated.

RESTRICTIONS AND LIMITATIONS

The IHS Director retains the authority to approve all initial compacts and initial financial agreements awarded under Title V of the ISDEAA, as amended.

SUPERSESSION

None.

Page 2 - Addressees

EFFECTIVE DATE

This DOA is effective on date of signature.

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

D. Title V – Forms Appendix

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Sample Letter Area Notice to Tribe of Fund Availability

DEPARTMENT OF HEALTH & HUMAN SERVICES Indian Health Service

___ Area Indian Health Service
Address
City, State Zip

Date

CERTIFIED MAIL RETURN RECEIPT #_____

Name, Title
Tribe or Tribal Organization
Address
City, ST Zip

Subject: Project Name – Project Location - Project No.
Notification of Funds Availability

Dear _____:

This letter is to advise the tribe per Section 5(e) of P.L 93-638 and 25 CFR 900.120, published June 24, 1996, that the Indian Health Service (IHS) has allocated funds for the following project:
Project Title:
Project Number:
Location:
Scope:
Amount:

Attached is a copy of the approved PSD/POR/MOA for your information. [If applicable]

Under the regulations cited herein you have the option to accomplish the work under a 42 CFR Part 137 Subpart N, construction contract. The Indian Health Service Project Team is available to meet with you or your representative(s) to provide additional information related to this project.

If the tribe wishes to enter into a contract for this project, please submit a letter of intent signed by a person authorized to act on behalf of the Tribe.

The IHS will proceed to accomplish the project as a "federal acquisition" if we do not receive a written response from you thirty (30) calendar days from the date of receipt of this notification. We will keep you appraised as the project proceeds to solicitation.

Please contact the Project Manager, insert name at (xxx) xxx-xxxx or insert name, Area Facilities Director, at (xxx) xxx-xxxx, if you have any questions or we may be of further assistance.

Sincerely,

_____, Director
_____ Area Indian Health Service

Enclosure (PSD/POR/MOA, if available)
cc:

Sample Letter of Intent

For use by Tribes

Date

Name, Director
_____ *Area Indian Health Service*
Address
City, State Zip

Dear _____*:*

This letter shall serve as the ____*insert tribe name*____letter of intent to enter into a P.L. 93-638, Title V, Construction Project Agreement for *insert description of what tribe intends to do e.g. phases of planning, design, and construction and description of project*.

The tribe may want to include the following paragraph if they are requesting IHS to manage and contract any phases of the project, if not delete this note and paragraph:
We are requesting the Indian Health Service (IHS) to contract for the _____construction under a direct federal contract with the understanding that federal contract will incorporate a requirement for the construction contractor to comply with the Tribe Tribal Employment Rights Ordinance (TERO) and will incorporate the standard federal contract clauses which require Indian Preference in hiring and subcontracting.

The tribe is requesting IHS to enter into a pre-agreement negotiation phase as set forth in section 105(m)(3) of the Act (25 U.S.C. 450j(m)(3).

The Tribe's point of contact for proposal development is insert name, phone number and e-mail address.

Sincerely,

Name of Authorized Tribal Signatory
Title of Signer

cc:
IHS Area OEH&E Program Director

Sample Letter of Intent Acknowledgement

DEPARTMENT OF HEALTH & HUMAN SERVICES Indian Health Service

___ Area Indian Health Service
Address
City, State Zip

Date

Name, Title
Tribe or Tribal Organization
Address
City, ST Zip

Subject: Project Name – Project Location - Project No.
Intent to Contract

Dear _____:

This letter acknowledges receipt of your "letter of intent", dated insert date to contract for insert project name pursuant to Title V of P.L. 93-638.

The Indian Health Service designated official is:

Name
Area
Address
City, State Zip
Phone:
Fax:
E-mail:

The IHS suggests that a pre-proposal meeting be scheduled for insert date, time and location. insert designated official name will contact you to schedule this meeting.

We look forward in working with the insert name of tribe or tribal organization in the development of this important project. Please contact the individuals listed above if we may be of further assistance.

Sincerely,

_____, Director
_____ Area Indian Health Service

cc:

IHS Internal Approval Checklist

IHS INTERNAL APPROVAL CHECKLIST
T-V, P.L. 93-638 Construction Project Agreements

1. Project Identification:
PROJECT NUMBER: _____
AREA: _____
PROJECT TITLE: _____
TYPE OF SERVICES: _____ (e.g. planning, design, construction)
IHS Designated Official: _____
Tribes Designated Official: _____

2. Actions Completed:

- ☐ Area notification of funds to Tribe
- ☐ Notice of Intent by Tribe (not required if tribe submits initial proposal in lieu)
- ☐ Area Director's Acknowledgement Letter
- ☐ All available information transmitted to the tribe within 30 days
- ☐ PJD, POR/PSD, or MOA (N*ot required if POR/PSD is part of project scope or MOA)*
- ☐ Accounting and appropriation data (evidence of UFMS obligation)
- ☐ Scope of Work, Specifications, Drawings _____yes _____ part of scope
- ☐ Applicable Land, Lease, or other issues as applicable complete
- ☐ Final Project Agreement proposal meets requirements of 42 CFR 137.332, review checklist attached.

Proposal Approval:

- ☐ Date proposal received: _____
- ☐ Proposal Approval (w/in 30 Days): _____
- ☐ Advance Payment(s) authorized 10 days from Award: _____

_____ _____
IHS Technical Designated Official **Area Program Director**

Sample Letter for Preproposal Meeting (including proposed agenda)

DEPARTMENT OF HEALTH & HUMAN SERVICES Indian Health Service

___ Area Indian Health Service
Address
City, State Zip

Date

Name, Title
Tribe or Tribal Organization
Address
City, ST Zip

Subject: Project Name – Project Location - Project No.
Preproposal Conference

Dear _____:

This is to confirm that the preproposal conference is scheduled for insert date and time at insert location.

The intent of this pre-proposal conference is to provide the tribe with all available information and develop a proposed timetable for developing a mutually agreeable proposal and contract.

We propose the following agenda:

1. Introductions
2. P.L. 93-638 Options: Title I, Construction Contract or Title V Project Agreements.
3. Review of Program of Requirements (POR) or *PSD or MOA*, NEPA requirements, and all other available project information.
4. Project Funding and Administrative Shares
5. Review of Design documents
6. Develop Time Table for development of mutually agreeable proposal/Contract

Please advise whether there is any additional information that the tribe would like to have presented to them by IHS at the pre-proposal conference. I may be reached by telephone at insert phone number.

Sincerely,

Name, Title
_____ Area Indian Health Service

cc:

Minimal Proposal Checklist

P.L. 93-638, Title V - Minimum Proposal Requirements

(42 CFR 137.326, 280)

- ☐ **Project phase start and completion dates.** (42 CFR 137.280)
- ☐ **Specific scope of work defined.** (42 CFR 137.280)
- ☐ **Defined standards.** (42 CFR 137.280)
- ☐ **Identifies responsibilities of the Tribe.** (42 CFR 137.280)
- ☐ **Identifies responsibilities of the Secretary/IHS.** (42 CFR 137.280)
- ☐ **Addresses environmental considerations.** (42 CFR 137.280, 292, 310, and 329)
- ☐ **Resolution, attached or referenced.** (42 CFR 137.292, 293, and 329)
  - **Designates Certifying Officer** (42 CFR 137.292(a)(1), and 42 CFR 137.329)
  - **Accept Jurisdiction of Federal Court and limited waiver of sovereign immunity** (42 CFR 137.310 & 311)
  - **Identification of the environmental review procedures adopted by Tribe.** (42 CFR 137.329)
  - **Assurance that no construction with environmental impact.** (42 CFR 137.329)
- ☐ **Identifies owner, and operations and maintenance entity of proposed work.** (42 CFR 137.280)
- ☐ **Budget.** (42 CFR 137.280,335)
- ☐ **Statement of Fixed Price or Cost Reimbursement.** (42 CFR 137.336)
- ☐ **Payment process.** (42 CFR 137.280, 341)
- ☐ **Duration of the agreement.** (42 CFR 137.280)
- ☐ **Other items requested by the Tribe.** (42 CFR 137.326)

Project Agreement File Index

Title V, PL 93-638 CONSTRUCTION PROJECT AGREEMENT FILE INDEX

A. **Pre-Proposal**		
Tab	**In File** _ Other (Note File Location)	DESCRIPTION
1		**Area Notification of Funds** to Tribe (105)(M)/ 42 CFR 137.325
2		**PJD, POR, PSD, MOA** Program Justification Document, Program of Requirements, Project Summary Document OR MOA.
3		**Tribal Notices** If Applicable. (42 CFR 137. 325 and 137.322 (b))
4		**Area Director Acknowledgment Letter**
5		**Transmittal of Information by Secretary** (42 CFR 137.322(b)) ___ a. Plans ___ b. Specifications ___ c. Engineering Reports ___ d. Gov't Cost Estimates ___ e. Engineering Reports ___ f. P.L. 93-638, T.A. Guide ___ g. Other Information
6		**Pre proposal Conference** if applicable

A PRE-PROPOSAL A

Title V, PL 93-638 CONSTRUCTION PROJECT AGREEMENT FILE INDEX

B. **PRE-NEGOTIATION PHASE** (42 CFR 137.325)		
Tab	✓ File _ Other	DESCRIPTION
1		**Technical Assistance, Joint Scoping Sessions Negotiations** (42 CFR 137.325(b))
2		**Tribe's Draft Proposal**(s)
3		**IHS Proposal Evaluations**
4		**Secretarial Revisions to Plans, Designs, Cost Estimates**, if applicable.

B PRE- NEGOTIATION PHASE B

Title V, PL 93-638 CONSTRUCTION PROJECT AGREEMENT FILE INDEX

C. **FINAL PROPOSAL DOCUMENTS**		
Tab	✓ File or N/A	**DESCRIPTION**
1		**Approved Final Proposal & Attachments** (42 CFR 137.326, 280) **Secretary Fund Certifications**
2		**Tribal Resolution** of Tribes Benefiting from Project
3		**Proposal Approval Documents**
4		**Alternative Dispute Resolution Documents**, if applicable.
5		**Failure to Agree Documents**, if applicable.
6		**Amendments to Project Agreements** **Secretary Fund Certifications**

C FINAL PROPOSAL DOCUMENTS C

Title V, PL 93-638 CONSTRUCTION PROJECT AGREEMENT FILE INDEX

D. **POST APPROVAL DOCUMENTS**		
Tab	✓ File _ Other	DESCRIPTION
1		**Advance Payment Schedules** **Advance Payment Authorizations** **Electronic Funds Transfer Form**
2		**Tribe Semi-Annual Expenditure Reports**
3		**Tribe Semi-Annual Progress Reports**
4		**Secretary Monitoring Reports**
5		**Personal Property Inventories**, if applicable.
6		**Submittals** or other Reports

D POST APPROVAL D DOCUMENTS

Title V, PL 93-638 CONSTRUCTION PROJECT AGREEMENT FILE INDEX

E. **CORRESPONDENCE**		
Tab	✓ File _ Other	DESCRIPTION

E CORRESPONDENCE E

Sample Project Agreement

PROJECT TITLE
PROJECT TITLE (CONTINUED)
Project Location

P.L. 93-638, Title V
Construction Project Agreement
Between the
Tribe and Indian Health Service
Tribal Identification No: _____
IHS Identification No. _____

TITLE V CONSTRUCTION PROJECT AGREEMENT

Project Title

To complete this project, the Tribe and the ____ Area Indian Health Service (__AIHS) mutually agree to the terms and conditions contained in this Agreement.

FOR THE TRIBE:

RECOMMENDED BY: _____ _____
Date Name
Title
Tribal Program Name

APPROVED BY: _____ _____
Date Name
Title

FOR THE _____ AREA INDIAN HEALTH SERVICE:

RECOMMENDED BY: _____ _____
Date Name
Director, OEH&E

APPROVED BY: _____ _____
Date Name
Director

TITLE V CONSTRUCTION PROJECT AGREEMENT
Project Title

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B. INTRODUCTION

C. TRIBE PROJECT RESPONSIBILITITES

D. ____ AIHS CONSTRUCTION PROJECT REVIEW

E. STANDARDS USED FOR ACCOMPLISHING PROJECTS

F. ENVIRONMENTAL CONSIDERATIONS

G. SCOPE OF PROJECT

H. ADMINISTRATCION OF FUNDS

I. DURATION OF AGREEMENT AND PROJECT SCHEDULE

J. OWNERSHIP AND OPERATIONS & MAINENANCE (O&M) INFORMATION

K. TRIBE AND SECRETARY DESIGNATED OFFICIALS

APPENDIX

DATE OF DOCUMENT: [Insert date]

A. AUTHORITY

The Secretary of United States Department of Health and Human Services, through its delegated representatives and the [Tribe or Tribal Organization] , through its authorized representatives, enter into this Title V Construction Project Agreement (TVA) for [insert purpose], pursuant to Title V of the Indian Self-Determination and Education Assistance Act (ISDEAA) (25 U.S.C. 450f et seq. and 458aaa et seq.), and the Self-Governance federal regulations at Title 42, Code of Federal Regulations, Part 136, Subpart N (42 C.F.R. Part 137).

B. INTRODUCTION

Throughout this TVA, the participating entities are referred to as follows:

[Edit as necessary]
Division of Environmental Health and Engineering = DEHE
Indian Health Service = IHS
[___]Area Indian Health Service = _AIHS

[Name of Tribe] Resolution number [insert no.], certified [insert date], authorizes [name of Tribe] to enter into this TVA for the projects or projects described in this TVA. This Resolution number [insert no.] is attached at appendix [insert appendix no.] to this TVA.

C. [TRIBE] PROJECT RESPONSIBILITIES

The [Tribe] will assume responsibility for completing this TVA, including day-to-day on-site project management and administration, according to this negotiated TVA (42 C.F.R. 137.350). However, the [Tribe] is not required to perform duties beyond the amount of funded activities. In the event unforeseen project circumstances require significant changes to either the original scope of work or funding, alternatives are available including but not limited to the following (42 CFR §§ 137.350-137.353):

- Reallocating existing funding;
- Reducing/revising the scope of work that does not require and amendment because it does not result in a significant change;
- Use savings from other projects;
- Requesting additional funds or appropriations;
- Utilizing interest earnings;
- Seeking funds from other sources; and/or
- Redesigning or re-scoping that does result in a significant change by amendment as provided in 42 C.F.R.§§137.363 and 137.364.

[Tribe] agrees to provide the necessary documentation to satisfy the IHS capitalization reporting. For federally owned and operated facilities [Tribe] agrees to provide all required furniture, fixture, and equipment (FF&E) information needed by IHS to capture FF&E inventory into it records. [*Use this sentence only if IHS is taking title to the facility-it may be expanded to be specific on what is required.*]

[Tribe] shall provide the _AIHS with construction progress and financial reports for all active project(s) [negotiate monthly, quarterly, semi-annually..etc]. Progress reports will contain information about accomplishments achieved during the reporting period and issues or concerns. Financial reports will contain information about funding expenditures during the reporting period and financial issues or concerns which might impede completion of the project (42 C.F.R. §§ 137.351 and 137.353). Reports shall be provided to the [_]AIHS no later than date of month, quarter, year…etc].
(IMPORTANT NOTE: IHS and Tribes may negotiate and agree use contract phrases from Title I. (25 C.F.R. §§ 900.112))

The final closeout report shall be the Federal Real Property Closeout Report, when applicable and a [*negotiated*] Closeout Report when not applicable.

a) A Federal Real Property Closeout Report shall be completed for projects which exceed $100,000.
b) A Closeout Report shall be completed for all other projects.

The applicable report should be provided within 120 days after receipt of release of claims and final payment. [*Recommend inserting the following*] A template for the reports is included in Appendix [_] and Appendix [_] of this Agreement.

D. [_]AIHS CONSTRUCTION PROJECT REVIEW

The [_]AIHS shall have at least one opportunity to approve any project planning and design document produced by the scope of work of this Agreement (42 CFR §137.360). [*Negotiate and list planning and design document(s) that will be reviewed by IHS. Recommend negotiation to include incorporation of the most current version of the IHS A/E Design Guide to establish mutually agreed upon planning and design submittal criteria by which IHS will conduct its review and/or approval(s)*]

The [_]AIHS may conduct onsite project visits semiannually; however, it must provide reasonable advance written notice to the [Tribe] to assist in coordinating the visit. The purpose of the visit is to review the progress under the TVA. At the request of the [Tribe], the [_]AIHS will provide the [Tribe] with a written site visit report (42 CFR §137.366).

E. STANDARDS USED FOR ACCOMPLISHING PROJECTS

The project will be developed in collaboration with the community wherein construction will occur. The design will conform to applicable federal and state statutes, and construction approvals or operating permits will be obtained as necessary to ensure compliance of the completed project. Projects shall be reviewed by experienced staff for compliance and quality assurance during development and shall be designed and/or overseen by an architect/engineer licensed in the State of [insert state in which project is to be completed.]

(Discuss IHS A+E design guide for new facility construction) (Negotiate including applicable FAR clauses which may benefit Tribe)

The administration of the project, including the disposition of funds remaining following the scope of work completion, shall be in accordance with Title V of the ISDEAA, 42 C.F.R. Part 137, Subpart N, [Negotiate and list any other operating guidelines.

F. ENVIRONMENTAL CONSIDERATIONS

In accordance with Section 509 of the ISDEAA (25 U.S.C. § 458aaa-8) and [Tribal] Resolution [insert number], dated [insert date], the [Tribe] assumes all Federal responsibilities under the National Environmental Policy Act (NEPA), the National Historic Preservation Act (NHPA), and related provisions of law that would apply if the Secretary of the Department of Health and Human Services were to undertake the construction project (42 C.F.R. §137.285). Furthermore, [insert title of tribal person delegated authority] shall appoint a [Tribe] Environmental Certification Officer to represent the [Tribe] and assume the status of a responsible Federal official. 42 C.F.R. §§137.292(a)(1) and 137.329(a).

The [Tribe] Resolution number [insert number]acknowledges the jurisdiction of the federal district court for purposes of civil enforcement actions brought against the [Tribe's] environmental certification officer in his or her official capacity for declaratory and injunctive relief that is substantially equivalent to an Administrative Procedures Act enforcement action against a federal agency. 42 C.F.R. §§137.292(a)(2) and 137.329(b).

No action will be taken on the construction phase of the project that would have an adverse environmental impact or limit the choice of reasonable alternatives prior to making an

environmental determination in accordance with the [Tribe's] adopted procedures. (42 CFR §137.329(d))

The Memorandum to The Record from the Tribe, dated insert date, appoints the [insert title] as the [Tribe] Environmental Certification Officer. The letter further states that [Tribe] has adopted the IHS environmental review procedures. This memorandum is attached as Appendix [insert number] to this Agreement.

(Suggest including in Appendix the Tribal Resolution, and/or memo to the record or resolution designating Tribal Environmental Certification Officer)

G. SCOPE OF PROJECT

[Insert a brief but descriptive narrative of the proposed scope and associated unit amounts. Include only those subcategory items provided by funding source allocations (i.e., HPS, WSDS) Delete subcategories that are not relevant. "Scope of work" is defined at 42 C.F.R. §137.280 as "a brief written description of the work to be accomplished under the TVA sufficient to confirm that the project is consistent with the purpose for which IHS has allocated funds.]

H. ADMINISTRATION OF FUNDS

H.1. Payment Process [edit to include only one project option]

For SFC Projects:

For payment purposes, this project is considered to be a single phase and is payable in a single, lump sum advance payment due to the Tribe within ten (10) days of the effective date of this Agreement. (42 CFR §137.341 (d))

For all other projects:

The amount of advance payments shall include the funds necessary to perform the work identified in the advance payment period of one year. [List agreed schedule] (42 CFR §137.341 (d), citing §137.341(c)(2))

H.2. Project Funding

This project is a [insert either lump sum fixed price or cost reimbursement] agreement funded as follows:

Contributor	Fiscal Year	Description	Amount
IHS_____	_____	_____	$_____
IHS_____	_____	_____	$_____
[Other]_____	_____	_____	$_____
TOTAL PROJECT FUNDING			$_____

[*Use this paragraph only as applicable where no staffing package is being provided for facility construction.*]
The [Tribe] acknowledges that the IHS will not provide additional funding for staffing and/or programs, services, functions, and activities (PSFAs) to operate the [Tribe's] Self-Governance health services compact with the IHS beyond the current level of funding identified in the Tribe's Self Governance Funding Agreement. The [Tribe] continues to be eligible for any future PSFA increases through its Funding Agreement as may be provided by law.

I. DURATION OF AGREEMENT AND PROJECT SCHEDULE

This Agreement becomes effective upon signature by all parties and receipt of an allotment of funds confirming availability of project funding. The TVA ends one year following completion of the construction or upon completion of final closeout report(s) or as otherwise agreed to by the parties.

Project design activities are anticipated to begin [insert month/year]. Project construction completion is projected for [insert month/year].

J. OWNERSHIP AND OPERATIONS & MAINTENANCE (O&M) INFORMATION

The [_____] will assume ownership of the facilities constructed and FF&E provided under this agreement upon acceptance of the facility.

The [_____] is responsible for all operation and maintenance of facilities constructed and FF&E provided under this project.

K. [TRIBE] AND SECRETARY DESIGNATED OFFICIALS

The [Tribe's] designated official for this TVA is:

[Insert name
Title
Organization
Address
Phone and fax numbers
e-mail address]

The Secretary's designated official for this TVA is:

Administrative	Technical
[Insert name	[Insert name
Title	Title
Organization	Organization
Address	Address
Phone and fax numbers	Phone and fax numbers
e-mail address]	e-mail address]

The IHS designated official for administration of the TVA is delegated the authority to sign project agreement amendments on behalf of the Indian health Service including the modifications to add phased project activities subject to the availability of funds certified for the project and terms of this TVA.

All amendments/modifications will be made in writing and separately agreed to between the [___] and IHS.

APPENDICES

Appendix No. 1: [Tribe] Resolution [insert no.], certified [insert date]
Appendix No. 2: Memorandum to The Record, from [Tribe], dated [insert date]
Appendix No. 3 – [X]: List other items as mentioned in contract, e.g.,
Project Data System Sheet if SFC
PJD, POR, PSD or PJDQ if facilities

Sample Letter Sources of Supply

DEPARTMENT OF HEALTH & HUMAN SERVICES Indian Health Service

___ Area Indian Health Service
Address
City, State Zip

Date

Name/Title
Organization
Address
City, ST Zip

Reference: Authorization to Use Federal Supply Schedules

This letter shall serve as authorization for the Tribe or Tribal Organization to utilize all Federal sources of supplies and services required by your organization in the performance of the Indian Self-Determination Act Compact between the Department of Health and Human Services, Indian Health Service and the Tribe or Tribal Organization.

The authority to utilize all Federal sources of supplies and services, including the selection and removal of excess Federal property from DRMO, is provided in the insert Tribe name Compact and is authorized by Section 105(k) (25 U.S.C. § 450j) of Public Law 93-638, the Indian Self-Determination and Education and Assistance Act, as amended, and further implemented by Part 51 of the Federal Acquisition Regulation.

The Tribe or Tribal Organization shall be responsible for the prompt payment of all supplies and services obtained through this authorization.

Should any Federal Supply Schedule Contractor refuse to honor an order placed by the Tribe or Tribal Organization, the undersigned should be notified immediately.

Should there be any questions concerning this authorization, please call me at (xxx) xxx-xxxx.

Sincerely,

Name
Contracting Officer

Federal Financial Report, SF (Standard Form) 425

A fillable copy of this form may be obtained online by completing an Internet search for "SF 425".

FEDERAL FINANCIAL REPORT

(Follow form instructions)

1. Federal Agency and Organizational Element to Which Report is Submitted	2. Federal Grant or Other Identifying Number Assigned by Federal Agency (To report multiple grants, use FFR Attachment)		Page 1	of pages
3. Recipient Organization (Name and complete address including Zip code)				
4a. DUNS Number	4b. EIN	5. Recipient Account Number or Identifying Number (To report multiple grants, use FFR Attachment)	6. Report Type ○ Quarterly ○ Semi-Annual ○ Annual ○ Final	7. Basis of Accounting ○ Cash ○ Accrual
8. Project/Grant Period From: (Month, Day, Year)	To: (Month, Day, Year)		9. Reporting Period End Date (Month, Day, Year)	

10. Transactions	Cumulative
(Use lines a-c for single or multiple grant reporting)	
Federal Cash (To report multiple grants, also use FFR Attachment):	
a. Cash Receipts	
b. Cash Disbursements	
c. Cash on Hand (line a minus b)	
(Use lines d-o for single grant reporting)	
Federal Expenditures and Unobligated Balance:	
d. Total Federal funds authorized	
e. Federal share of expenditures	
f. Federal share of unliquidated obligations	
g. Total Federal share (sum of lines e and f)	
h. Unobligated balance of Federal funds (line d minus g)	
Recipient Share:	
i. Total recipient share required	
j. Recipient share of expenditures	
k. Remaining recipient share to be provided (line i minus j)	
Program Income:	
l. Total Federal program income earned	
m. Program income expended in accordance with the deduction alternative	
n. Program income expended in accordance with the addition alternative	
o. Unexpended program income (line l minus line m or line n)	

	a. Type	b. Rate	c. Period From	Period To	d. Base	e. Amount Charged	f. Federal Share
11. Indirect Expense							
				g. Totals:			

12. *Remarks: Attach any explanations deemed necessary or information required by Federal sponsoring agency in compliance with governing legislation:*

13. Certification: By signing this report, I certify that it is true, complete, and accurate to the best of my knowledge. I am aware that any false, fictitious, or fraudulent information may subject me to criminal, civil, or administrative penalities. (U.S. Code, Title 18, Section 1001)

a. Typed or Printed Name and Title of Authorized Certifying Official	c. Telephone (Area code, number and extension)
	d. Email address
b. Signature of Authorized Certifying Official	e. Date Report Submitted (Month, Day, Year)
	14. Agency use only:

Standard Form 425
OMB Approval Number: 0348-0061
Expiration Date: 10/31/2011

Paperwork Burden Statement
According to the Paperwork Reduction Act, as amended, no persons are required to respond to a collection of information unless it displays a valid OMB Control Number. The valid OMB control number for this information collection is 0348-0061. Public reporting burden for this collection of information is estimated to average 1.5 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0060), Washington, DC 20503.

APPENDIX IV
FAR

Federal Acquisition Regulation Clauses

APPENDIX IV – FEDERAL ACQUISITION REGULATION (FAR) CLAUSES

For incorporation into agreements and subcontracts between the Tribe and other entities performing work on a contract.

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Federal Acquisition Regulation (FAR) Clauses – Construction

52.209-6 Protecting the Government's Interest When Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment

(a) *Definition.* "Commercially available off-the-shelf (COTS)" item, as used in this clause—

(1) Means any item of supply (including construction material) that is—

(i) A commercial item (as defined in paragraph (1) of the definition in FAR 2.101);

(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products.

(b) The Government suspends or debars Contractors to protect the Government's interests. Other than a subcontract for a commercially available off-the-shelf item, the Contractor shall not enter into any subcontract, in excess of $30,000 with a Contractor that is debarred, suspended, or proposed for debarment by any executive agency unless there is a compelling reason to do so.

(c) The Contractor shall require each proposed subcontractor whose subcontract will exceed $30,000, other than a subcontractor providing a commercially available off-the-shelf item, to disclose to the Contractor, in writing, whether as of the time of award of the subcontract, the subcontractor, or its principals, is or is not debarred, suspended, or proposed for debarment by the Federal Government.

(d) A corporate officer or a designee of the Contractor shall notify the Contracting Officer, in writing, before entering into a subcontract with a party (other than a subcontractor providing a commercially available off-the-shelf item) that is debarred, suspended, or proposed for debarment (see FAR 9.404 for information on the Excluded Parties List System). The notice must include the following:

(1) The name of the subcontractor.

(2) The Contractor's knowledge of the reasons for the subcontractor being in the Excluded Parties List System.

(3) The compelling reason(s) for doing business with the subcontractor notwithstanding its inclusion in the Excluded Parties List System.

(4) The systems and procedures the Contractor has established to ensure that it is fully protecting the Government's interests when dealing with such subcontractor in view of the specific basis for the party's debarment, suspension, or proposed debarment.

(e) *Subcontracts.* Unless this is a contract for the acquisition of commercial items, the Contractor shall include the requirements of this clause, including this paragraph (e) (appropriately modified for the identification of the parties), in each subcontract that—

(1) Exceeds $30,000 in value; and

(2) Is not a subcontract for commercially available off-the-shelf items.

Purpose: Prohibits prime contractors from entering into subcontracts with entities that have been suspended or debarred from doing business with the Government (exceptions may be allowed if requested). This protects the owner's interest by helping to assure the subcontractors are responsible organizations likely to successfully complete the required work.

52.211-10 Commencement, Prosecution, and Completion of Work

The Contractor shall be required to (a) commence work under this contract within _____ [*Contracting Officer insert number*] calendar days after the date the Contractor receives the notice to proceed, (b) prosecute the work diligently, and (c) complete the entire work ready for use not later than _____.* The time stated for completion shall include final cleanup of the premises.

*The Contracting Officer shall specify either a number of days after the date the contractor receives the notice to proceed, or a calendar date.

Alternate I (Apr 1984). If the completion date is expressed as a specific calendar date, computed on the basis of the contractor receiving the notice to proceed by a certain day, add the following paragraph to the basic clause:

The completion date is based on the assumption that the successful offeror will receive the notice to proceed by _____ [*Contracting Officer insert date*]. The completion date will be extended by the number of calendar days after the above date that the Contractor receives the notice to proceed, except to the extent that the delay in issuance of the notice to proceed results from the failure of the Contractor to execute the contract and give the required performance and payment bonds within the time specified in the offer.

Purpose: Clearly establishes a timeframe for start and completion of all work required under a contract. Inclusion of this clause helps to avoid future misunderstandings.

52.211-12 Liquidated Damages—Construction

(a) If the Contractor fails to complete the work within the time specified in the contract, the Contractor shall pay liquidated damages to the Government in the amount of _____ [*Contracting Officer insert amount*] for each calendar day of delay until the work is completed or accepted.

(b) If the Government terminates the Contractor's right to proceed, liquidated damages will continue to accrue until the work is completed. These liquidated damages are in addition to excess costs of repurchase under the Termination clause.

Purpose: Liquidated damages are an agreed or stipulated substitute for actual damages. If there is a delay, the owner need only prove that the delay is the contractor's fault. Without liquidated dames, the owner would also have to prove the nature and amount of actual damages, which is exceedingly difficult to do.

52.211-13 Time Extensions

Time extensions for contract changes will depend upon the extent, if any, by which the changes cause delay in the completion of the various elements of construction. The change order granting the time extension may provide that the contract completion date will be extended only for those specific elements related to the changed work and that the remaining contract completion dates for all other portions of the work will not be altered. The change order also may provide an equitable readjustment of liquidated damages under the new completion schedule.

Purpose: Used with liquidated damages clause. Establishes understanding regarding when and what elements will be considered in extending the amount of time for completion. If the contract work is phased or otherwise specifies different completion dates for various parts of the work, this clause is necessary to augment the owner's authority provided under the changes clause to adjust the delivery schedule and liquidated damages.

52.211-18 Variation in Estimated Quantity

If the quantity of a unit-priced item in this contract is an estimated quantity and the actual quantity of the unit-priced item varies more than 15 percent above or below the estimated quantity, an equitable adjustment in the contract price shall be made upon demand of either party. The equitable adjustment shall be

based upon any increase or decrease in costs due solely to the variation above 115 percent or below 85 percent of the estimated quantity. If the quantity variation is such as to cause an increase in the time necessary for completion, the Contractor may request, in writing, an extension of time, to be received by the Contracting Officer within 10 days from the beginning of the delay, or within such further period as may be granted by the Contracting Officer before the date of final settlement of the contract. Upon the receipt of a written request for an extension, the Contracting Officer shall ascertain the facts and make an adjustment for extending the completion date as, in the judgment of the Contracting Officer, is justified.

This clause allows the contractor to accurately price fixed unit-price elements under a contract. The risk associated with quantity changes is allocated between the parties. The owner avoids paying a large contingency due to unlimited unknown quantities.

52.222-6 Davis-Bacon Act

As prescribed in 22.407(a), insert the following clause:

(a) Definition.—"Site of the work"—

(1) Means—

(i) *The primary site of the work.* The physical place or places where the construction called for in the contract will remain when work on it is completed; and

(ii) *The secondary site of the work, if any.* Any other site where a significant portion of the building or work is constructed, provided that such site is—

(A) Located in the United States; and

(B) Established specifically for the performance of the contract or project;

(2) Except as provided in paragraph (3) of this definition, includes any fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, tool yards, etc., provided—

(i) They are dedicated exclusively, or nearly so, to performance of the contract or project; and

(ii) They are adjacent or virtually adjacent to the "primary site of the work" as defined in paragraph (a)(1)(i), or the "secondary site of the work" as defined in paragraph (a)(1)(ii) of this definition;

(3) Does not include permanent home offices, branch plant establishments, fabrication plants, or tool yards of a Contractor or subcontractor whose locations and continuance in operation are determined wholly without regard to a particular Federal contract or project. In addition, fabrication plants, batch plants, borrow pits, job headquarters, yards, etc., of a commercial or material supplier which are established by a supplier of materials for the project before opening of bids and not on the Project site, are not included in the "site of the work." Such permanent, previously established facilities are not a part of the "site of the work" even if the operations for a period of time may be dedicated exclusively or nearly so, to the performance of a contract.

(b)(1) All laborers and mechanics employed or working upon the site of the work will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR part 3)), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, or as may be incorporated for a secondary site of the work, regardless of any contractual relationship which may be alleged to exist between the Contractor and such laborers and mechanics. Any wage determination incorporated for a secondary site of the work shall be effective from the first day on which work under the contract was performed at that site and shall be incorporated without any adjustment in contract price or estimated cost. Laborers employed by the construction Contractor or construction subcontractor that are transporting portions of the building or work between the secondary site of the work and the primary site of the work shall be paid in accordance with the wage determination applicable to the primary site of the work.

(2) Contributions made or costs reasonably anticipated for bona fide fringe benefits under section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of paragraph (e) of this clause; also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs which cover the particular weekly period, are deemed to be constructively made or incurred during such period.

(3) Such laborers and mechanics shall be paid not less than the appropriate wage rate and fringe benefits in the wage determination for the classification of work actually performed, without regard to skill, except as provided in the clause entitled Apprentices and Trainees. Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein; provided that the employer's payroll records accurately set forth the time spent in each classification in which work is performed.

(4) The wage determination (including any additional classifications and wage rates conformed under paragraph (c) of this clause) and the Davis-Bacon poster (WH-1321) shall be posted at all times by the Contractor and its subcontractors at the primary site of the work and the secondary site of the work, if any, in a prominent and accessible place where it can be easily seen by the workers.

(c)(1) The Contracting Officer shall require that any class of laborers or mechanics which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. The Contracting Officer shall approve an additional classification and wage rate and fringe benefits therefor only when all the following criteria have been met:

(i) The work to be performed by the classification requested is not performed by a classification in the wage determination.

(ii) The classification is utilized in the area by the construction industry.

(iii) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

(2) If the Contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the Contracting Officer agree on the classification and wage rate (including the amount designated for fringe benefits, where appropriate), a report of the action taken shall be sent by the Contracting Officer to the Administrator of the:

Wage and Hour Division
Employment Standards Administration
U.S. Department of Labor
Washington, DC 20210

The Administrator or an authorized representative will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the Contracting Officer or will notify the Contracting Officer within the 30-day period that additional time is necessary.

(3) In the event the Contractor, the laborers or mechanics to be employed in the classification, or their representatives, and the Contracting Officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the Contracting Officer shall refer the questions, including the views of all interested parties and the recommendation of the Contracting Officer, to the Administrator of the Wage and Hour Division for determination. The Administrator, or an authorized representative, will issue a determination within 30 days of receipt and so advise the Contracting Officer or will notify the Contracting Officer within the 30-day period that additional time is necessary.

(4) The wage rate (including fringe benefits, where appropriate) determined pursuant to paragraphs (c)(2) and (c)(3) of this clause shall be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

(d) Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the Contractor shall either pay the benefit as stated in the wage determination or shall pay another bona fide fringe benefit or an hourly cash equivalent thereof.

(e) If the Contractor does not make payments to a trustee or other third person, the Contractor may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program; provided, That the Secretary of Labor has found, upon the written request of the Contractor, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the Contractor to set aside in a separate account assets for the meeting of obligations under the plan or program.

Purpose: Provides an administrative procedure to comply with legal requirements.

52.222-7 Withholding of Funds

The Contracting Officer shall, upon his or her own action or upon written request of an authorized representative of the Department of Labor, withhold or cause to be withheld from the Contractor under this contract or any other Federal contract with the same Prime Contractor, or any other federally assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same Prime Contractor, so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers, employed by the Contractor or any subcontractor the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper, employed or working on the site of the work, all or part of the wages required by the contract, the Contracting Officer may, after written notice to the Contractor, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

Purpose: Allows the owner to withhold contract payments when the contractor fails to comply with the governing wage determination.

52.222-8 Payrolls and Basic Records

(a) Payrolls and basic records relating thereto shall be maintained by the Contractor during the course of the work and preserved for a period of 3 years thereafter for all laborers and mechanics working at the site of the work. Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made, and actual wages paid. Whenever the Secretary of Labor has found, under paragraph (d) of the clause entitled Davis-Bacon Act, that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in section 1(b)(2)(B) of the Davis-Bacon Act, the Contractor shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits. Contractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs.

(b)(1) The Contractor shall submit weekly for each week in which any contract work is performed a copy of all payrolls to the Contracting Officer. The payrolls submitted shall set out accurately and completely all of the information required to be maintained under paragraph (a) of this clause, except that full social security numbers and home addresses shall not be included on weekly transmittals. Instead the payrolls shall only need to include an individually identifying number for each employee (*e.g.*, the last four digits of the employee's social security number). The required weekly payroll information may be submitted in any form desired. Optional Form WH-347 is available for this purpose and may be obtained from the U.S. Department of Labor Wage and Hour Division website at http://www.dol.gov/whd/forms/wh347.pdf . The Prime Contractor is

responsible for the submission of copies of payrolls by all subcontractors. Contractors and subcontractors shall maintain the full social security number and current address of each covered worker, and shall provide them upon request to the Contracting Officer, the Contractor, or the Wage and Hour Division of the Department of Labor for purposes of an investigation or audit of compliance with prevailing wage requirements. It is not a violation of this section for a Prime Contractor to require a subcontractor to provide addresses and social security numbers to the Prime Contractor for its own records, without weekly submission to the Contracting Officer.

(2) Each payroll submitted shall be accompanied by a "Statement of Compliance," signed by the Contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract and shall certify—

(i) That the payroll for the payroll period contains the information required to be maintained under paragraph (a) of this clause and that such information is correct and complete;

(ii) That each laborer or mechanic (including each helper, apprentice, and trainee) employed on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in the Regulations, 29 CFR Part 3; and

(iii) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the contract.

(3) The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH-347 shall satisfy the requirement for submission of the "Statement of Compliance" required by paragraph (b)(2) of this clause.

(4) The falsification of any of the certifications in this clause may subject the Contractor or subcontractor to civil or criminal prosecution under Section 1001 of Title 18 and Section 3729 of Title 31 of the United States Code.

(c) The Contractor or subcontractor shall make the records required under paragraph (a) of this clause available for inspection, copying, or transcription by the Contracting Officer or authorized representatives of the Contracting Officer or the Department of Labor. The Contractor or subcontractor shall permit the Contracting Officer or representatives of the Contracting Officer or the Department of Labor to interview employees during working hours on the job. If the Contractor or subcontractor fails to submit required records or to make them available, the Contracting Officer may, after written notice to the Contractor, take such action as may be necessary to cause the suspension of any further payment. Furthermore, failure to submit the required records upon request or to make such records available may be grounds for debarment action pursuant to 29 CFR 5.12.

Purpose: Establishes the requirements for record submission and retention as required by statute. This clause ensures that the owner has covered all requirements with the contractor.

52.222-9 Apprentices and Trainees

(a) Apprentices.

(1) An apprentice will be permitted to work at less than the predetermined rate for the work performed when employed—

(i) Pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship Training, Employer, and Labor Services (OATELS) or with a State Apprenticeship Agency recognized by the OATELS; or

(ii) In the first 90 days of probationary employment as an apprentice in such an apprenticeship program, even though not individually registered in the program, if certified by the OATELS or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice.

(2) The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio permitted to the Contractor as to the entire work force under the registered program.

(3) Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated in paragraph (a)(1) of this clause, shall be paid not less than the applicable wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed.

(4) Where a Contractor is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in the Contractor's or subcontractor's registered program shall be observed. Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination.

(5) Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator determines that a different practice prevails for the applicable apprentice classification, fringes shall be paid in accordance with that determination.

(6) In the event OATELS, or a State Apprenticeship Agency recognized by OATELS, withdraws approval of an apprenticeship program, the Contractor will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(b) Trainees.

(1) Except as provided in 29 CFR 5.16, trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship Training, Employer, and Labor Services (OATELS). The ratio of trainees to journeymen on the job site shall not be greater than permitted under the plan approved by OATELS.

(2) Every trainee must be paid at not less than the rate specified in the approved program for the trainee's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed in the wage determination unless the Administrator of the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeyman wage rate in the wage determination which provides for less than full fringe benefits for apprentices. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the OATELS shall be paid not less than the applicable wage rate in the wage determination for the classification of work actually performed. In addition, any trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate in the wage determination for the work actually performed.

(3) In the event OATELS withdraws approval of a training program, the Contractor will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(c) *Equal employment opportunity*. The utilization of apprentices, trainees, and journeymen under this clause shall be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and 29 CFR Part 30.

Establishes the rules under which a contractor may pay less than the prevailing wage. This clause provides an administrative procedure to ensure compliance with legal requirements.

52.222-10 Compliance with Copeland Act Requirements

The Contractor shall comply with the requirements of 29 CFR Part 3, which are hereby incorporated by reference in this contract.

Details obligation of contractors and subcontractors relative to the weekly submission of statements regarding the wages paid on work covered thereby; sets forth the circumstances and procedures governing the making of payroll deductions from the wages of those employed on such work; and delineates the methods of payment permissible on such work.

52.222-11 Subcontracts (Labor Standards)

(a) *Definition.* "Construction, alteration or repair," as used in this clause, means all types of work done by laborers and mechanics employed by the construction Contractor or construction subcontractor on a particular building or work at the site thereof, including without limitation—

(1) Altering, remodeling, installation (if appropriate) on the site of the work of items fabricated off-site;

(2) Painting and decorating;

(3) Manufacturing or furnishing of materials, articles, supplies, or equipment on the site of the building or work;

(4) Transportation of materials and supplies between the site of the work within the meaning of paragraphs (a)(1)(i) and (ii) of the "site of the work" as defined in the FAR clause at 52.222-6, Davis-Bacon Act of this contract, and a facility which is dedicated to the construction of the building or work and is deemed part of the site of the work within the meaning of paragraph (2) of the "site of work" definition; and

(5) Transportation of portions of the building or work between a secondary site where a significant portion of the building or work is constructed, which is part of the "site of the work" definition in paragraph (a)(1)(ii) of the FAR clause at 52.222-6, Davis-Bacon Act, and the physical place or places where the building or work will remain (paragraph (a)(1)(i) of the FAR clause at 52.222-6, in the "site of the work" definition).

(b) The Contractor shall insert in any subcontracts for construction, alterations and repairs within the United States the clauses entitled—

(1) Davis-Bacon Act;

(2) Contract Work Hours and Safety Standards Act—Overtime Compensation (if the clause is included in this contract);

(3) Apprentices and Trainees;

(4) Payrolls and Basic Records;

(5) Compliance with Copeland Act Requirements;

(6) Withholding of Funds;

(7) Subcontracts (Labor Standards);

(8) Contract Termination—Debarment;

(9) Disputes Concerning Labor Standards;

(10) Compliance with Davis-Bacon and Related Act Regulations; and

(11) Certification of Eligibility.

(c) The prime Contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor performing construction within the United States with all the contract clauses cited in paragraph (b).

(d)(1) Within 14 days after award of the contract, the Contractor shall deliver to the Contracting Officer a completed Standard Form (SF) 1413, Statement and Acknowledgment, for each subcontract for construction within the United States, including the subcontractor's signed and dated acknowledgment that the clauses set forth in paragraph (b) of this clause have been included in the subcontract.

(2) Within 14 days after the award of any subsequently awarded subcontract the Contractor shall deliver to the Contracting Officer an updated completed SF 1413 for such additional subcontract.

(e) The Contractor shall insert the substance of this clause, including this paragraph (e) in all subcontracts for construction within the United States.

Purpose: Requires contractors to include these clauses in subcontracts, again, allowing the owner to enforce labor statues.

Also establishes the requirement for identification of subcontractors.

52.222-12 Contract Termination—Debarment

A breach of the contract clauses entitled Davis-Bacon Act, Contract Work Hours and Safety Standards Act—Overtime Compensation, Apprentices and Trainees, Payrolls and Basic Records, Compliance with Copeland Act Requirements, Subcontracts (Labor Standards), Compliance with Davis-Bacon and Related Act Regulations, or Certification of Eligibility may be grounds for termination of the contract, and for debarment as a Contractor and subcontractor as provided in 29 CFR 5.12.

Purpose: Allows the owner to terminate a contract if the contractor does not comply with labor statutes; avoids an argument over whether failure to comply with the labor clauses is a material breach that justifies a default termination.

52.222-13 Compliance with Davis-Bacon and Related Act Regulations

All rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 CFR parts 1, 3, and 5 are hereby incorporated by reference in this contract.

Purpose: This clause ensures that the owner has covered all labor statute requirements with the contractor.

52.222-14 Disputes Concerning Labor Standards

The United States Department of Labor has set forth in 29 CFR parts 5, 6, and 7 procedures for resolving disputes concerning labor standards requirements. Such disputes shall be resolved in accordance with those procedures and not the Disputes clause of this contract. Disputes within the meaning of this clause include disputes between the Contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

Purpose: Establishes the procedures for resolving labor disputes to minimize use of administrative or legal resources.

52.222-15 Certification of Eligibility

(a) By entering into this contract, the Contractor certifies that neither it (nor he or she) nor any person or firm who has an interest in the Contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

(b) No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government contract by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

(c) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

Purpose: Ensures that the contractor has not violated labor statutes in the past and will not subcontract with firms who have violated labor statutes in the past.

52.228-1 Bid Guarantee

(a) Failure to furnish a bid guarantee in the proper form and amount, by the time set for opening of bids, may be cause for rejection of the bid.

(b) The bidder shall furnish a bid guarantee in the form of a firm commitment, *e.g.*, bid bond supported by good and sufficient surety or sureties acceptable to the Government, postal money order, certified check, cashier's check, irrevocable letter of credit, or, under Treasury Department regulations, certain bonds or notes of the United States. The Contracting Officer will return bid guarantees, other than bid bonds—

(1) To unsuccessful bidders as soon as practicable after the opening of bids; and

(2) To the successful bidder upon execution of contractual documents and bonds (including any necessary coinsurance or reinsurance agreements), as required by the bid as accepted.

(c) The amount of the bid guarantee shall be _____ percent of the bid price or $_____, whichever is less.

(d) If the successful bidder, upon acceptance of its bid by the Government within the period specified for acceptance, fails to execute all contractual documents or furnish executed bond(s) within 10 days after receipt of the forms by the bidder, the Contracting Officer may terminate the contract for default.

(e) In the event the contract is terminated for default, the bidder is liable for any cost of acquiring the work that exceeds the amount of its bid, and the bid guarantee is available to offset the difference.

Purpose: Protects the owner by requiring bidders to submit a bid guarantee. This allows the owner to collect the difference between the low bidder and the second low in the even the low bidder refuses to honor its bid.

52.228-5 Insurance—Work on a Government Installation

(a) The Contractor shall, at its own expense, provide and maintain during the entire performance of this contract, at least the kinds and minimum amounts of insurance required in the Schedule or elsewhere in the contract.

(b) Before commencing work under this contract, the Contractor shall notify the Contracting Officer in writing that the required insurance has been obtained. The policies evidencing required insurance shall contain an endorsement to the effect that any cancellation or any material change adversely affecting the Government's interest shall not be effective—

(1) For such period as the laws of the State in which this contract is to be performed prescribe; or

(2) Until 30 days after the insurer or the Contractor gives written notice to the Contracting Officer, whichever period is longer.

(c) The Contractor shall insert the substance of this clause, including this paragraph (c), in subcontracts under this contract that require work on a Government installation and shall require subcontractors to provide and maintain the insurance required in the Schedule or elsewhere in the contract. The Contractor shall maintain a

copy of all subcontractors' proofs of required insurance, and shall make copies available to the Contracting Officer upon request.

Purpose: Protects the owner's interests by requiring the contractor and all subcontractors to maintain insurance. Government policy is to require certain types of insurance (worker's comp, general liability, and automobile) in a fixed price contract on the Government's property. It reduces exposure in a situation where the Government is joined to claim by a third party against the contractor on the basis that the event happened on Government property.

52.228-12 Prospective Subcontractor Requests for Bonds

In accordance with Section 806(a)(3) of Pub. L. 102-190, as amended by Sections 2091 and 8105 of Pub. L. 103-355, upon the request of a prospective subcontractor or supplier offering to furnish labor or material for the performance of this contract for which a payment bond has been furnished to the Government pursuant to the Miller Act, the Contractor shall promptly provide a copy of such payment bond to the requester.

Purpose: Allows the owner to require the contractor to provide copies of bonds to subs. (The owner otherwise has no privity-helps protect the interest of subs increasing their willingness to work on the project.)

52.228-13 Alternative Payment Protections

(a) The Contractor shall submit one of the following payment protections:

_____

_____

_____

(b) The amount of the payment protection shall be 100 percent of the contract price.

(c) The submission of the payment protection is required within _____ days of contract award.

(d) The payment protection shall provide protection for the full contract performance period plus a one-year period.

(e) Except for escrow agreements and payment bonds, which provide their own protection procedures, the Contracting Officer is authorized to access funds under the payment protection when it has been alleged in writing by a supplier of labor or material that a nonpayment has occurred, and to withhold such funds pending resolution by administrative or judicial proceedings or mutual agreement of the parties.

(f) When a tripartite escrow agreement is used, the Contractor shall utilize only suppliers of labor and material that signed the escrow agreement.

Purpose: For smaller projects the owner may want to offer alternatives to Miller Act Bonds. By accepting alternative forms of payment protection, the owner may generate interest for more contractors.

52.228-14 Irrevocable Letter of Credit

(a) "Irrevocable letter of credit" (ILC), as used in this clause, means a written commitment by a federally insured financial institution to pay all or part of a stated amount of money, until the expiration date of the letter, upon presentation by the Government (the beneficiary) of a written demand therefor. Neither the financial institution nor the offeror/Contractor can revoke or condition the letter of credit.

(b) If the offeror intends to use an ILC in lieu of a bid bond, or to secure other types of bonds such as performance and payment bonds, the letter of credit and letter of confirmation formats in paragraphs (e) and (f) of this clause shall be used.

(c) The letter of credit shall be irrevocable, shall require presentation of no document other than a written demand and the ILC (including confirming letter, if any), shall be issued/confirmed by an acceptable federally insured financial institution as provided in paragraph (d) of this clause, and—

(1) If used as a bid guarantee, the ILC shall expire no earlier than 60 days after the close of the bid acceptance period;

(2) If used as an alternative to corporate or individual sureties as security for a performance or payment bond, the offeror/Contractor may submit an ILC with an initial expiration date estimated to cover the entire period for which financial security is required or may submit an ILC with an initial expiration date that is a minimum period of one year from the date of issuance. The ILC shall provide that, unless the issuer provides the beneficiary written notice of non-renewal at least 60 days in advance of the current expiration date, the ILC is automatically extended without amendment for one year from the expiration date, or any future expiration date, until the period of required coverage is completed and the Contracting Officer provides the financial institution with a written statement waiving the right to payment. The period of required coverage shall be:

(i) For contracts subject to the Miller Act, the later of—

(A) One year following the expected date of final payment;

(B) For performance bonds only, until completion of any warranty period; or

(C) For payment bonds only, until resolution of all claims filed against the payment bond during the one-year period following final payment.

(ii) For contracts not subject to the Miller Act, the later of—

(A) 90 days following final payment; or

(B) For performance bonds only, until completion of any warranty period.

(d) Only federally insured financial institutions rated investment grade or higher shall issue or confirm the ILC. The offeror/Contractor shall provide the Contracting Officer a credit rating that indicates the financial institution has the required rating(s) as of the date of issuance of the ILC. Unless the financial institution issuing the ILC had letter of credit business of at least $25 million in the past year, ILCs over $5 million must be confirmed by another acceptable financial institution that had letter of credit business of at least $25 million in the past year.

(e) The following format shall be used by the issuing financial institution to create an ILC:

_____

[*Issuing Financial Institution's Letterhead or Name and Address*]

Issue Date _____

Irrevocable Letter of Credit No. _____

Account party's name _____

Account party's address _____

For Solicitation No. _____ (*for reference only*)

To: [*U.S. Government agency*]

[*U.S. Government agency's address*]

1. We hereby establish this irrevocable and transferable Letter of Credit in your favor for one or more drawings up to United States $_____. This Letter of Credit is payable at [*issuing financial institution's and, if any, confirming financial institution's*] office at [*issuing financial institution's address and, if any, confirming financial institution's address*] and expires with our close of business on _____, or any automatically extended expiration date.

2. We hereby undertake to honor your or the transferee's sight draft(s) drawn on the issuing or, if any, the confirming financial institution, for all or any part of this credit if presented with this Letter of Credit and confirmation, if any, at the office specified in paragraph 1 of this Letter of Credit on or before the expiration date or any automatically extended expiration date.

3. [*This paragraph is omitted if used as a bid guarantee, and subsequent paragraphs are renumbered.*] It is a condition of this Letter of Credit that it is deemed to be automatically extended without amendment for one year from the expiration date hereof, or any future expiration date, unless at least 60 days prior to any expiration date, we notify you or the transferee by registered mail, or other receipted means of delivery, that we elect not to consider this Letter of Credit renewed for any such additional period. At the time we notify you, we also agree to notify the account party (and confirming financial institution, if any) by the same means of delivery.

4. This Letter of Credit is transferable. Transfers and assignments of proceeds are to be effected without charge to either the beneficiary or the transferee/assignee of proceeds. Such transfer or assignment shall be only at the written direction of the Government (the beneficiary) in a form satisfactory to the issuing financial institution and the confirming financial institution, if any.

5. This Letter of Credit is subject to the Uniform Customs and Practice (UCP) for Documentary Credits, 1993 Revision, International Chamber of Commerce Publication No. 500, and to the extent not inconsistent therewith, to the laws of _____ [*state of confirming financial institution, if any, otherwise state of issuing financial institution*].

6. If this credit expires during an interruption of business of this financial institution as described in Article 17 of the UCP, the financial institution specifically agrees to effect payment if this credit is drawn against within 30 days after the resumption of our business.

Sincerely,

_____

[*Issuing financial institution*]

(f) The following format shall be used by the financial institution to confirm an ILC:

_____

[*Confirming Financial Institution's Letterhead or Name and Address*]

(Date) _____

Our Letter of Credit Advice Number _____

Beneficiary: _____ [*U.S. Government agency*]

Issuing Financial Institution: _____

Issuing Financial Institution's LC No.: _____

Gentlemen:

1. We hereby confirm the above indicated Letter of Credit, the original of which is attached, issued by _____ [*name of issuing financial institution*] for drawings of up to United States dollars _____/U.S. $_____ and expiring with our close of business on _____ [*the expiration date*], or any automatically extended expiration date.

2. Draft(s) drawn under the Letter of Credit and this Confirmation are payable at our office located at _____.

3. We hereby undertake to honor sight draft(s) drawn under and presented with the Letter of Credit and this Confirmation at our offices as specified herein.

4. [*This paragraph is omitted if used as a bid guarantee, and subsequent paragraphs are renumbered.*] It is a condition of this confirmation that it be deemed automatically extended without amendment for one year from the expiration date hereof, or any automatically extended expiration date, unless:

(a) At least 60 days prior to any such expiration date, we shall notify the Contracting Officer, or the transferee and the issuing financial institution, by registered mail or other receipted means of delivery, that we elect not to consider this confirmation extended for any such additional period; or

(b) The issuing financial institution shall have exercised its right to notify you or the transferee, the account party, and ourselves, of its election not to extend the expiration date of the Letter of Credit.

5. This confirmation is subject to the Uniform Customs and Practice (UCP) for Documentary Credits, 1993 Revision, International Chamber of Commerce Publication No. 500, and to the extent not inconsistent therewith, to the laws of _____ [*state of confirming financial institution*].

6. If this confirmation expires during an interruption of business of this financial institution as described in Article 17 of the UCP, we specifically agree to effect payment if this credit is drawn against within 30 days after the resumption of our business.

Sincerely,

_____
[*Confirming financial institution*]

(g) The following format shall be used by the Contracting Officer for a sight draft to draw on the Letter of Credit:

SIGHT DRAFT

_____
[*City, State*]

(Date) _____
[*Name and address of financial institution*]

Pay to the order of _____ [*Beneficiary Agency*] _____ the sum of United States $_____. This draft is drawn under Irrevocable Letter of Credit No. _____.

_____
[*Beneficiary Agency*]

_____
[*By*]

Purpose: Sets for the requirements for an irrevocable letter of credit to help ensure that the interests of the owner are protected when this instrument is used as a form of payment protection (in lieu of a payment bond).

52.228-15 Performance and Payment Bonds—Construction

(a) *Definitions.* As used in this clause—

"Original contract price" means the award price of the contract; or, for requirements contracts, the price payable for the estimated total quantity; or, for indefinite-quantity contracts, the price payable for the specified minimum quantity. Original contract price does not include the price of any options, except those options exercised at the time of contract award.

(b) *Amount of required bonds*. Unless the resulting contract price is $150,000 or less, the successful offeror shall furnish performance and payment bonds to the Contracting Officer as follows:

(1) *Performance bonds (*Standard Form 25*)*. The penal amount of performance bonds at the time of contract award shall be 100 percent of the original contract price.

(2) *Payment Bonds (*Standard Form 25A*)*. The penal amount of payment bonds at the time of contract award shall be 100 percent of the original contract price.

(3) Additional bond protection.

(i) The Government may require additional performance and payment bond protection if the contract price is increased. The increase in protection generally will equal 100 percent of the increase in contract price.

(ii) The Government may secure the additional protection by directing the Contractor to increase the penal amount of the existing bond or to obtain an additional bond.

(c) *Furnishing executed bonds*. The Contractor shall furnish all executed bonds, including any necessary reinsurance agreements, to the Contracting Officer, within the time period specified in the Bid Guarantee provision of the solicitation, or otherwise specified by the Contracting Officer, but in any event, before starting work.

(d) *Surety or other security for bonds*. The bonds shall be in the form of firm commitment, supported by corporate sureties whose names appear on the list contained in Treasury Department Circular 570, individual sureties, or by other acceptable security such as postal money order, certified check, cashier's check, irrevocable letter of credit, or, in accordance with Treasury Department regulations, certain bonds or notes of the United States. Treasury Circular 570 is published in the *Federal Register* or may be obtained from the:

U.S. Department of the Treasury
Financial Management Service
Surety Bond Branch
3700 East West Highway, Room 6F01
Hyattsville, MD 20782.
Or via the internet at http://www.fms.treas.gov/c570/

(e) *Notice of subcontractor waiver of protection (40 U.S.C. 3133(c))*. Any waiver of the right to sue on the payment bond is void unless it is in writing, signed by the person whose right is waived, and executed after such person has first furnished labor or material for use in the performance of the contract.

Purpose: Requiring the contractor to submit performance and payment bonds protects the owner in the event the contractor either fails to perform or fails to pay its subcontractors or suppliers.

52.229-3 Federal, State, and Local Taxes

(a) As used in this clause—

"After-imposed Federal tax" means any new or increased Federal excise tax or duty, or tax that was exempted or excluded on the contract date but whose exemption was later revoked or reduced during the contract period, on the transactions or property covered by this contract that the Contractor is required to pay or bear as the result of legislative, judicial, or administrative action taking effect after the contract date. It does not include social security tax or other employment taxes.

"After-relieved Federal tax" means any amount of Federal excise tax or duty, except social security or other employment taxes, that would otherwise have been payable on the transactions or property covered by this

contract, but which the Contractor is not required to pay or bear, or for which the Contractor obtains a refund or drawback, as the result of legislative, judicial, or administrative action taking effect after the contract date.

"All applicable Federal, State, and local taxes and duties" means all taxes and duties, in effect on the contract date, that the taxing authority is imposing and collecting on the transactions or property covered by this contract.

"Contract date" means the date set for bid opening or, if this is a negotiated contract or a modification, the effective date of this contract or modification.

"Local taxes" includes taxes imposed by a possession or territory of the United States, Puerto Rico, or the Northern Mariana Islands, if the contract is performed wholly or partly in any of those areas.

(b) The contract price includes all applicable Federal, State, and local taxes and duties.

(c) The contract price shall be increased by the amount of any after-imposed Federal tax, provided the Contractor warrants in writing that no amount for such newly imposed Federal excise tax or duty or rate increase was included in the contract price, as a contingency reserve or otherwise.

(d) The contract price shall be decreased by the amount of any after-relieved Federal tax.

(e) The contract price shall be decreased by the amount of any Federal excise tax or duty, except social security or other employment taxes, that the Contractor is required to pay or bear, or does not obtain a refund of, through the Contractor's fault, negligence, or failure to follow instructions of the Contracting Officer.

(f) No adjustment shall be made in the contract price under this clause unless the amount of the adjustment exceeds $250.

(g) The Contractor shall promptly notify the Contracting Officer of all matters relating to any Federal excise tax or duty that reasonably may be expected to result in either an increase or decrease in the contract price and shall take appropriate action as the Contracting Officer directs.

(h) The Government shall, without liability, furnish evidence appropriate to establish exemption from any Federal, State, or local tax when the Contractor requests such evidence and a reasonable basis exists to sustain the exemption.

Purpose: Because this clause defines taxes and relieves the contractor from the burden of future taxes, relative contingency pricing should be minimal. The owner would also benefit from future tax relief. Neutralizes the effect of the Government's sovereign capacity on its role as a contracting party. Distinguishes Federal taxes from state and local taxes and clarifies that no adjustment is to be made for changes in state and local taxes (since the Federal government has no control over such taxes). A tribe conducting a Self-Determination Act construction contract might consider a similar provision to assure prospective subcontractors that the tribe will not take advantage of its taxing authority to impose additional taxes after subcontract awards. Otherwise, subcontractors might by discouraged from bidding.

52.232-5 Payments under Fixed-Price Construction Contracts

(a) *Payment of price*. The Government shall pay the Contractor the contract price as provided in this contract.

(b) *Progress payments*. The Government shall make progress payments monthly as the work proceeds, or at more frequent intervals as determined by the Contracting Officer, on estimates of work accomplished which meets the standards of quality established under the contract, as approved by the Contracting Officer.

(1) The Contractor's request for progress payments shall include the following substantiation:

(i) An itemization of the amounts requested, related to the various elements of work required by the contract covered by the payment requested.

(ii) A listing of the amount included for work performed by each subcontractor under the contract.

(iii) A listing of the total amount of each subcontract under the contract.

(iv) A listing of the amounts previously paid to each such subcontractor under the contract.

(v) Additional supporting data in a form and detail required by the Contracting Officer.

(2) In the preparation of estimates, the Contracting Officer may authorize material delivered on the site and preparatory work done to be taken into consideration. Material delivered to the Contractor at locations other than the site also may be taken into consideration if—

(i) Consideration is specifically authorized by this contract; and

(ii) The Contractor furnishes satisfactory evidence that it has acquired title to such material and that the material will be used to perform this contract.

(c) *Contractor certification.* Along with each request for progress payments, the Contractor shall furnish the following certification, or payment shall not be made: (However, if the Contractor elects to delete paragraph (c)(4) from the certification, the certification is still acceptable.)

I hereby certify, to the best of my knowledge and belief, that—

(1) The amounts requested are only for performance in accordance with the specifications, terms, and conditions of the contract;

(2) All payments due to subcontractors and suppliers from previous payments received under the contract have been made, and timely payments will be made from the proceeds of the payment covered by this certification, in accordance with subcontract agreements and the requirements of Chapter 39 of Title 31, United States Code;

(3) This request for progress payments does not include any amounts which the prime contractor intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of the subcontract; and

(4) This certification is not to be construed as final acceptance of a subcontractor's performance.

_____

(*Name*)

_____

(*Title*)

_____

(*Date*)

(d) *Refund of unearned amounts*. If the Contractor, after making a certified request for progress payments, discovers that a portion or all of such request constitutes a payment for performance by the Contractor that fails to conform to the specifications, terms, and conditions of this contract (hereinafter referred to as the "unearned amount"), the Contractor shall—

(1) Notify the Contracting Officer of such performance deficiency; and

(2) Be obligated to pay the Government an amount (computed by the Contracting Officer in the manner provided in paragraph (j) of this clause) equal to interest on the unearned amount from the 8th day after the date of receipt of the unearned amount until—

(i) The date the Contractor notifies the Contracting Officer that the performance deficiency has been corrected; or

(ii) The date the Contractor reduces the amount of any subsequent certified request for progress payments by an amount equal to the unearned amount.

(e) *Retainage*. If the Contracting Officer finds that satisfactory progress was achieved during any period for which a progress payment is to be made, the Contracting Officer shall authorize payment to be made in full.

However, if satisfactory progress has not been made, the Contracting Officer may retain a maximum of 10 percent of the amount of the payment until satisfactory progress is achieved. When the work is substantially complete, the Contracting Officer may retain from previously withheld funds and future progress payments that amount the Contracting Officer considers adequate for protection of the Government and shall release to the Contractor all the remaining withheld funds. Also, on completion and acceptance of each separate building, public work, or other division of the contract, for which the price is stated separately in the contract, payment shall be made for the completed work without retention of a percentage.

(f) *Title, liability, and reservation of rights.* All material and work covered by progress payments made shall, at the time of payment, become the sole property of the Government, but this shall not be construed as—

(1) Relieving the Contractor from the sole responsibility for all material and work upon which payments have been made or the restoration of any damaged work; or

(2) Waiving the right of the Government to require the fulfillment of all of the terms of the contract.

(g) *Reimbursement for bond premiums*. In making these progress payments, the Government shall, upon request, reimburse the Contractor for the amount of premiums paid for performance and payment bonds (including coinsurance and reinsurance agreements, when applicable) after the Contractor has furnished evidence of full payment to the surety. The retainage provisions in paragraph (e) of this clause shall not apply to that portion of progress payments attributable to bond premiums.

(h) *Final payment*. The Government shall pay the amount due the Contractor under this contract after—

(1) Completion and acceptance of all work;

(2) Presentation of a properly executed voucher; and

(3) Presentation of release of all claims against the Government arising by virtue of this contract, other than claims, in stated amounts, that the Contractor has specifically excepted from the operation of the release. A release may also be required of the assignee if the Contractor's claim to amounts payable under this contract has been assigned under the Assignment of Claims Act of 1940 (31 U.S.C. 3727 and 41 U.S.C. 15).

(i) *Limitation because of undefinitized work.* Notwithstanding any provision of this contract, progress payments shall not exceed 80 percent on work accomplished on undefinitized contract actions. A "contract action" is any action resulting in a contract, as defined in FAR Subpart 2.1, including contract modifications for additional supplies or services, but not including contract modifications that are within the scope and under the terms of the contract, such as contract modifications issued pursuant to the Changes clause, or funding and other administrative changes.

(j) *Interest computation on unearned amounts*. In accordance with 31 U.S.C. 3903(c)(1), the amount payable under paragraph (d)(2) of this clause shall be—

(1) Computed at the rate of average bond equivalent rates of 91-day Treasury bills auctioned at the most recent auction of such bills prior to the date the Contractor receives the unearned amount; and

(2) Deducted from the next available payment to the Contractor.

Purpose: This clause sets forth the rules for progress and final payments. The owner benefits from 1) having the rules for payment understood by both parties helping to avoid future conflict; 2) the contractor's assurances that subcontractors have been paid; 3) prohibiting advance payments, decreasing the cost of making early payments (lost interest); 4) defines the rules for retainage, decreasing costs due to contingency pricing by contractors; and 5) requiring a clear release of claims prior to final payment.

52.233-1 Disputes

(a) This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613).

(b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved under this clause.

(c) "Claim," as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. However, a written demand or written assertion by the Contractor seeking the payment of money exceeding $100,000 is not a claim under the Act until certified. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Act. The submission may be converted to a claim under the Act, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

(d)(1) A claim by the Contractor shall be made in writing and, unless otherwise stated in this contract, submitted within 6 years after accrual of the claim to the Contracting Officer for a written decision. A claim by the Government against the Contractor shall be subject to a written decision by the Contracting Officer.

(2)(i) The Contractor shall provide the certification specified in paragraph (d)(2)(iii) of this clause when submitting any claim exceeding $100,000.

(ii) The certification requirement does not apply to issues in controversy that have not been submitted as all or part of a claim.

(iii) The certification shall state as follows: "I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the Contractor."

(3) The certification may be executed by any person duly authorized to bind the Contractor with respect to the claim.

(e) For Contractor claims of $100,000 or less, the Contracting Officer must, if requested in writing by the Contractor, render a decision within 60 days of the request. For Contractor-certified claims over $100,000, the Contracting Officer must, within 60 days, decide the claim or notify the Contractor of the date by which the decision will be made.

(f) The Contracting Officer's decision shall be final unless the Contractor appeals or files a suit as provided in the Act.

(g) If the claim by the Contractor is submitted to the Contracting Officer or a claim by the Government is presented to the Contractor, the parties, by mutual consent, may agree to use alternative dispute resolution (ADR). If the Contractor refuses an offer for ADR, the Contractor shall inform the Contracting Officer, in writing, of the Contractor's specific reasons for rejecting the offer.

(h) The Government shall pay interest on the amount found due and unpaid from (1) the date that the Contracting Officer receives the claim (certified, if required); or (2) the date that payment otherwise would be due, if that date is later, until the date of payment. With regard to claims having defective certifications, as defined in FAR 33.201, interest shall be paid from the date that the Contracting Officer initially receives the claim. Simple interest on claims shall be paid at the rate, fixed by the Secretary of the Treasury as provided in the Act, which is applicable to the period during which the Contracting Officer receives the claim and then at the rate applicable for each 6-month period as fixed by the Treasury Secretary during the pendency of the claim.

(i) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.

Purpose: This clause incorporates the Contract Disputes Act. This means the timeframe and requirements for filing a claim are defined, and the contractor is

required to continue performance during a dispute avoiding a complete shutdown while the dispute is resolved.

52.236-2 Differing Site Conditions

(a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of—

(1) Subsurface or latent physical conditions at the site which differ materially from those indicated in this contract; or

(2) Unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.

(b) The Contracting Officer shall investigate the site conditions promptly after receiving the notice. If the conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performing any part of the work under this contract, whether or not changed as a result of the conditions, an equitable adjustment shall be made under this clause and the contract modified in writing accordingly.

(c) No request by the Contractor for an equitable adjustment to the contract under this clause shall be allowed, unless the Contractor has given the written notice required; *provided*, that the time prescribed in paragraph (a) of this clause for giving written notice may be extended by the Contracting Officer.

(d) No request by the Contractor for an equitable adjustment to the contract for differing site conditions shall be allowed if made after final payment under this contract.

Purpose: Establishes the "rules" when unanticipated site conditions are encountered and allocates the risk between the owner and contractor, decreasing the need for contingency pricing in the contractor's bid, lowering the cost for the owner.

52.236-3 Site Investigation and Conditions Affecting the Work

(a) The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost, including but not limited to (1) conditions bearing upon transportation, disposal, handling, and storage of materials; (2) the availability of labor, water, electric power, and roads; (3) uncertainties of weather, river stages, tides, or similar physical conditions at the site; (4) the conformation and conditions of the ground; and (5) the character of equipment and facilities needed preliminary to and during work performance. The Contractor also acknowledges that it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government, as well as from the drawings and specifications made a part of this contract. Any failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the Government.

(b) The Government assumes no responsibility for any conclusions or interpretations made by the Contractor based on the information made available by the Government. Nor does the Government assume responsibility for any understanding reached or representation made concerning conditions which can affect the work by any of its officers or agents before the execution of this contract, unless that understanding or representation is expressly stated in this contract.

Purpose: By requiring the contractor to familiarize itself with the existing conditions, this clause helps protect the owner from differing site condition claims in some circumstances (e.g., when the site conditions were apparent from reasonable inspection). Inclusion of this clause preempts any argument that the contractor was

entitled to rely on the documents even if there's an obvious conflict with an observable condition.

52.236-5 Material and Workmanship

(a) All equipment, material, and articles incorporated into the work covered by this contract shall be new and of the most suitable grade for the purpose intended, unless otherwise specifically provided in this contract. References in the specifications to equipment, material, articles, or patented processes by trade name, make, or catalog number, shall be regarded as establishing a standard of quality and shall not be construed as limiting competition. The Contractor may, at its option, use any equipment, material, article, or process that, in the judgment of the Contracting Officer, is equal to that named in the specifications, unless otherwise specifically provided in this contract.

(b) The Contractor shall obtain the Contracting Officer's approval of the machinery and mechanical and other equipment to be incorporated into the work. When requesting approval, the Contractor shall furnish to the Contracting Officer the name of the manufacturer, the model number, and other information concerning the performance, capacity, nature, and rating of the machinery and mechanical and other equipment. When required by this contract or by the Contracting Officer, the Contractor shall also obtain the Contracting Officer's approval of the material or articles which the Contractor contemplates incorporating into the work. When requesting approval, the Contractor shall provide full information concerning the material or articles. When directed to do so, the Contractor shall submit samples for approval at the Contractor's expense, with all shipping charges prepaid. Machinery, equipment, material, and articles that do not have the required approval shall be installed or used at the risk of subsequent rejection.

(c) All work under this contract shall be performed in a skillful and workmanlike manner. The Contracting Officer may require, in writing, that the Contractor remove from the work any employee the Contracting Officer deems incompetent, careless, or otherwise objectionable.

Purpose: Helps protect the quality of the project by requiring quality materials and workmanship, as approved by the owner. The contractor is also able to propose alternative materials for the approval of the owner. This clause also allows the owner to require the contractor to remove an employee deemed "incompetent, careless, or otherwise objectionable".

52.236-6 Superintendence by the Contractor

At all times during performance of this contract and until the work is completed and accepted, the Contractor shall directly superintend the work or assign and have on the worksite a competent superintendent who is satisfactory to the Contracting Officer and has authority to act for the Contractor.

Purpose: The owner is assured that a competent party is on site throughout performance, helping increase the chances of successful completion.

52.236-7 Permits and Responsibilities

The Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any Federal, State, and municipal laws, codes, and regulations applicable to the performance of the work. The Contractor shall also be responsible for all damages to persons or property that occur as a result of the Contractor's fault or negligence. The Contractor shall also be responsible for all materials delivered and work performed until completion and acceptance of the entire work, except for any completed unit of work which may have been accepted under the contract.

Purpose: Puts the contractor on notice that they are responsible for: adhering to all Federal, State and local laws; personal or property damage; and materials and work until final acceptance, helping to avoid conflict or misunderstanding.

52.236-8 Other Contracts

The Government may undertake or award other contracts for additional work at or near the site of the work under this contract. The Contractor shall fully cooperate with the other contractors and with Government employees and shall carefully adapt scheduling and performing the work under this contract to accommodate the additional work, heeding any direction that may be provided by the Contracting Officer. The Contractor shall not commit or permit any act that will interfere with the performance of work by any other contractor or by Government employees.

Purpose: Advises the contractor that others will be working on site and that neither party should take any action that negatively impacts the other.

52.236-9 Protection of Existing Vegetation, Structures, Equipment, Utilities, and Improvements

(a) The Contractor shall preserve and protect all structures, equipment, and vegetation (such as trees, shrubs, and grass) on or adjacent to the work site, which are not to be removed and which do not unreasonably interfere with the work required under this contract. The Contractor shall only remove trees when specifically authorized to do so, and shall avoid damaging vegetation that will remain in place. If any limbs or branches of trees are broken during contract performance, or by the careless operation of equipment, or by workmen, the Contractor shall trim those limbs or branches with a clean cut and paint the cut with a tree-pruning compound as directed by the Contracting Officer.

(b) The Contractor shall protect from damage all existing improvements and utilities (1) at or near the work site, and (2) on adjacent property of a third party, the locations of which are made known to or should be known by the Contractor. The Contractor shall repair any damage to those facilities, including those that are the property of a third party, resulting from failure to comply with the requirements of this contract or failure to exercise reasonable care in performing the work. If the Contractor fails or refuses to repair the damage promptly, the Contracting Officer may have the necessary work performed and charge the cost to the Contractor.

Purpose: Protects the owner's property by requiring the contractor to leave the owner's property in at least as good a condition as it was when they arrived. If the contractor does not repair or fix any damage they caused, the owner may have a third party complete the work and charge the contractor.

52.236-10 Operations and Storage Areas

(a) The Contractor shall confine all operations (including storage of materials) on Government premises to areas authorized or approved by the Contracting Officer. The Contractor shall hold and save the Government, its officers and agents, free and harmless from liability of any nature occasioned by the Contractor's performance.

(b) Temporary buildings (*e.g.*, storage sheds, shops, offices) and utilities may be erected by the Contractor only with the approval of the Contracting Officer and shall be built with labor and materials furnished by the Contractor without expense to the Government. The temporary buildings and utilities shall remain the property of the Contractor and shall be removed by the Contractor at its expense upon completion of the work. With the written consent of the Contracting Officer, the buildings and utilities may be abandoned and need not be removed.

(c) The Contractor shall, under regulations prescribed by the Contracting Officer, use only established roadways, or use temporary roadways constructed by the Contractor when and as authorized by the Contracting Officer. When materials are transported in prosecuting the work, vehicles shall not be loaded beyond the loading capacity recommended by the manufacturer of the vehicle or prescribed by any Federal, State, or local law or regulation. When it is necessary to cross curbs or sidewalks, the Contractor shall protect them from damage. The Contractor shall repair or pay for the repair of any damaged curbs, sidewalks, or roads.

Purpose: Sets for the expectations regarding the contractor's use of the owner's property during construction, helping to avoid conflict during performance.

52.236-11 Use and Possession Prior to Completion

(a) The Government shall have the right to take possession of or use any completed or partially completed part of the work. Before taking possession of or using any work, the Contracting Officer shall furnish the Contractor a list of items of work remaining to be performed or corrected on those portions of the work that the Government intends to take possession of or use. However, failure of the Contracting Officer to list any item of work shall not relieve the Contractor of responsibility for complying with the terms of the contract. The Government's possession or use shall not be deemed an acceptance of any work under the contract.

(b) While the Government has such possession or use, the Contractor shall be relieved of the responsibility for the loss of or damage to the work resulting from the Government's possession or use, notwithstanding the terms of the clause in this contract entitled "Permits and Responsibilities." If prior possession or use by the Government delays the progress of the work or causes additional expense to the Contractor, an equitable adjustment shall be made in the contract price or the time of completion, and the contract shall be modified in writing accordingly.

Purpose: Allows the owner to start using facilities that are still under construction and clearly delineates the roles and responsibilities associated with the use. Use of this clause establishes the "rules" for taking use and possession helping to avoid conflicts and disagreements.

52.236-12 Cleaning Up

The Contractor shall at all times keep the work area, including storage areas, free from accumulations of waste materials. Before completing the work, the Contractor shall remove from the work and premises any rubbish, tools, scaffolding, equipment, and materials that are not the property of the Government. Upon completing the work, the Contractor shall leave the work area in a clean, neat, and orderly condition satisfactory to the Contracting Officer.

Purpose: Allows the owner to require the contractor to keep the site in an orderly manner and conduct a final clean up.

52.236-13 Accident Prevention

(a) The Contractor shall provide and maintain work environments and procedures which will—

(1) Safeguard the public and Government personnel, property, materials, supplies, and equipment exposed to Contractor operations and activities;

(2) Avoid interruptions of Government operations and delays in project completion dates; and

(3) Control costs in the performance of this contract.

(b) For these purposes on contracts for construction or dismantling, demolition, or removal of improvements, the Contractor shall—

(1) Provide appropriate safety barricades, signs, and signal lights;

(2) Comply with the standards issued by the Secretary of Labor at 29 CFR Part 1926 and 29 CFR Part 1910; and

(3) Ensure that any additional measures the Contracting Officer determines to be reasonably necessary for the purposes are taken.

(c) If this contract is for construction or dismantling, demolition or removal of improvements with any Department of Defense agency or component, the Contractor shall comply with all pertinent provisions of the

latest version of U.S. Army Corps of Engineers Safety and Health Requirements Manual, EM 385-1-1, in effect on the date of the solicitation.

(d) Whenever the Contracting Officer becomes aware of any noncompliance with these requirements or any condition which poses a serious or imminent danger to the health or safety of the public or Government personnel, the Contracting Officer shall notify the Contractor orally, with written confirmation, and request immediate initiation of corrective action. This notice, when delivered to the Contractor or the Contractor's representative at the work site, shall be deemed sufficient notice of the noncompliance and that corrective action is required. After receiving the notice, the Contractor shall immediately take corrective action. If the Contractor fails or refuses to promptly take corrective action, the Contracting Officer may issue an order stopping all or part of the work until satisfactory corrective action has been taken. The Contractor shall not be entitled to any equitable adjustment of the contract price or extension of the performance schedule on any stop work order issued under this clause.

(e) The Contractor shall insert this clause, including this paragraph (e), with appropriate changes in the designation of the parties, in subcontracts.

Alternate I (Nov 1991). If the contract will involve (a) work of a long duration or hazardous nature, or (b) performance on a Government facility that on the advice of technical representatives involves hazardous materials or operations that might endanger the safety of the public and/or Government personnel or property, add the following paragraph (f) to the basic clause:

(f) Before commencing the work, the Contractor shall—

(1) Submit a written proposed plan for implementing this clause. The plan shall include an analysis of the significant hazards to life, limb, and property inherent in contract work performance and a plan for controlling these hazards; and

(2) Meet with representatives of the Contracting Officer to discuss and develop a mutual understanding relative to administration of the overall safety program.

Purpose: Safeguard resources; avoid delays in completion; and control costs – all to the benefit of both parties. The remedies for non-compliance are also identified.

52.236-14 Availability and Use of Utility Services

(a) The Government shall make all reasonably required amounts of utilities available to the Contractor from existing outlets and supplies, as specified in the contract. Unless otherwise provided in the contract, the amount of each utility service consumed shall be charged to or paid for by the Contractor at prevailing rates charged to the Government or, where the utility is produced by the Government, at reasonable rates determined by the Contracting Officer. The Contractor shall carefully conserve any utilities furnished without charge.

(b) The Contractor, at its expense and in a workmanlike manner satisfactory to the Contracting Officer, shall install and maintain all necessary temporary connections and distribution lines, and all meters required to measure the amount of each utility used for the purpose of determining charges. Before final acceptance of the work by the Government, the Contractor shall remove all the temporary connections, distribution lines, meters, and associated paraphernalia.

Purpose: Allows the owner to charge the contractor for the use of utilities and requires the contractor to install and remove all associated meters, distribution lines, etc.

52.236-15 Schedules for Construction Contracts

(a) The Contractor shall, within five days after the work commences on the contract or another period of time determined by the Contracting Officer, prepare and submit to the Contracting Officer for approval three copies of a practicable schedule showing the order in which the Contractor proposes to perform the work, and the dates on which the Contractor contemplates starting and completing the several salient features of the work (including acquiring materials, plant, and equipment). The schedule shall be in the form of a progress chart of

suitable scale to indicate appropriately the percentage of work scheduled for completion by any given date during the period. If the Contractor fails to submit a schedule within the time prescribed, the Contracting Officer may withhold approval of progress payments until the Contractor submits the required schedule.

(b) The Contractor shall enter the actual progress on the chart as directed by the Contracting Officer, and upon doing so shall immediately deliver three copies of the annotated schedule to the Contracting Officer. If, in the opinion of the Contracting Officer, the Contractor falls behind the approved schedule, the Contractor shall take steps necessary to improve its progress, including those that may be required by the Contracting Officer, without additional cost to the Government. In this circumstance, the Contracting Officer may require the Contractor to increase the number of shifts, overtime operations, days of work, and/or the amount of construction plant, and to submit for approval any supplementary schedule or schedules in chart form as the Contracting Officer deems necessary to demonstrate how the approved rate of progress will be regained.

(c) Failure of the Contractor to comply with the requirements of the Contracting Officer under this clause shall be grounds for a determination by the Contracting Officer that the Contractor is not prosecuting the work with sufficient diligence to ensure completion within the time specified in the contract. Upon making this determination, the Contracting Officer may terminate the Contractor's right to proceed with the work, or any separable part of it, in accordance with the default terms of this contract.

Purpose: Establishes the requirement for a construction schedule and updates. Provides the owner with remedies in the event updated schedules not provided or work is behind schedule.

52.236-16 Quantity Surveys

(a) Quantity surveys shall be conducted, and the data derived from these surveys shall be used in computing the quantities of work performed and the actual construction completed and in place.

(b) The Government shall conduct the original and final surveys and make the computations based on them. The Contractor shall conduct the surveys for any periods for which progress payments are requested and shall make the computations based on these surveys. All surveys conducted by the Contractor shall be conducted under the direction of a representative of the Contracting Officer, unless the Contracting Officer waives this requirement in a specific instance.

(c) Promptly upon completing a survey, the Contractor shall furnish the originals of all field notes and all other records relating to the survey or to the layout of the work to the Contracting Officer, who shall use them as necessary to determine the amount of progress payments. The Contractor shall retain copies of all such material furnished to the Contracting Officer.

Alternate I (Apr 1984). If it is determined at a level above that of the Contracting Officer that it is impracticable for Government personnel to perform the original and final surveys, and the Government wishes the Contractor to perform these surveys, substitute the following paragraph (b) for paragraph (b) of the basic clause:

(b) The Contractor shall conduct the original and final surveys and surveys for any periods for which progress payments are requested. All these surveys shall be conducted under the direction of a representative of the Contracting Officer, unless the Contracting Officer waives this requirement in a specific instance. The Government shall make such computations as are necessary to determine the quantities of work performed or finally in place. The Contractor shall make the computations based on the surveys for any periods for which progress payments are requested.

Purpose: (Used with the variation in estimated quantity clause (52.211-18).) Helps ensure disagreement over payments when using fixed unit prices by establishing responsibilities for determining quantity completed or delivered.

52.236-17 Layout of Work

The Contractor shall lay out its work from Government established base lines and bench marks indicated on the drawings, and shall be responsible for all measurements in connection with the layout. The Contractor shall furnish, at its own expense, all stakes, templates, platforms, equipment, tools, materials, and labor required to lay out any part of the work. The Contractor shall be responsible for executing the work to the lines and grades that may be established or indicated by the Contracting Officer. The Contractor shall also be responsible for maintaining and preserving all stakes and other marks established by the Contracting Officer until authorized to remove them. If such marks are destroyed by the Contractor or through its negligence before their removal is authorized, the Contracting Officer may replace them and deduct the expense of the replacement from any amounts due or to become due to the Contractor.

Purpose: Makes the contractor responsible for establishing benchmarks and measurements, except those provided by the owner. Allows the owner to charge the contractor if staking performed by the owner has to be replaced as a result of contractor action or negligence.

52.236-21 Specifications and Drawings for Construction

(a) The Contractor shall keep on the work site a copy of the drawings and specifications and shall at all times give the Contracting Officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In case of discrepancy in the figures, in the drawings, or in the specifications, the matter shall be promptly submitted to the Contracting Officer, who shall promptly make a determination in writing. Any adjustment by the Contractor without such a determination shall be at its own risk and expense. The Contracting Officer shall furnish from time to time such detailed drawings and other information as considered necessary, unless otherwise provided.

(b) Wherever in the specifications or upon the drawings the words “directed,” “required,” “ordered,” “designated,” “prescribed,” or words of like import are used, it shall be understood that the “direction,” “requirement,” “order,” “designation,” or “prescription,” of the Contracting Officer is intended and similarly the words “approved,” “acceptable,” “satisfactory,” or words of like import shall mean “approved by,” or “acceptable to,” or “satisfactory to” the Contracting Officer, unless otherwise expressly stated.

(c) Where “as shown,” “as indicated,” “as detailed,” or words of similar import are used, it shall be understood that the reference is made to the drawings accompanying this contract unless stated otherwise. The word “provided” as used herein shall be understood to mean “provide complete in place,” that is “furnished and installed.”

(d) Shop drawings means drawings, submitted to the Government by the Contractor, subcontractor, or any lower tier subcontractor pursuant to a construction contract, showing in detail (1) the proposed fabrication and assembly of structural elements, and (2) the installation (*i.e.*, fit, and attachment details) of materials or equipment. It includes drawings, diagrams, layouts, schematics, descriptive literature, illustrations, schedules, performance and test data, and similar materials furnished by the contractor to explain in detail specific portions of the work required by the contract. The Government may duplicate, use, and disclose in any manner and for any purpose shop drawings delivered under this contract.

(e) If this contract requires shop drawings, the Contractor shall coordinate all such drawings, and review them for accuracy, completeness, and compliance with contract requirements and shall indicate its approval thereon as evidence of such coordination and review. Shop drawings submitted to the Contracting Officer without evidence of the Contractor’s approval may be returned for resubmission. The Contracting Officer will indicate an approval or disapproval of the shop drawings and if not approved as submitted shall indicate the Government’s reasons therefor. Any work done before such approval shall be at the Contractor’s risk. Approval by the Contracting Officer shall not relieve the Contractor from responsibility for any errors or

omissions in such drawings, nor from responsibility for complying with the requirements of this contract, except with respect to variations described and approved in accordance with (f) of this clause.

(f) If shop drawings show variations from the contract requirements, the Contractor shall describe such variations in writing, separate from the drawings, at the time of submission. If the Contracting Officer approves any such variation, the Contracting Officer shall issue an appropriate contract modification, except that, if the variation is minor or does not involve a change in price or in time of performance, a modification need not be issued.

(g) The Contractor shall submit to the Contracting Officer for approval four copies (unless otherwise indicated) of all shop drawings as called for under the various headings of these specifications. Three sets (unless otherwise indicated) of all shop drawings, will be retained by the Contracting Officer and one set will be returned to the Contractor.

Alternate I (Apr 1984). When record shop drawings are required and reproducible shop drawings are needed, add the following sentences to paragraph (g) of the basic clause:

> Upon completing the work under this contract, the Contractor shall furnish a complete set of all shop drawings as finally approved. These drawings shall show all changes and revisions made up to the time the equipment is completed and accepted.

Alternate II (Apr 1984). When record shop drawings are required and reproducible shop drawings are not needed, the following sentences shall be added to paragraph (g) of the basic clause:

> Upon completing the work under this contract, the Contractor shall furnish _____ [*Contracting Officer complete by inserting desired amount*] sets of prints of all shop drawings as finally approved. These drawings shall show changes and revisions made up to the time the equipment is completed and accepted.

Purpose: Benefits the owner because this clause sets forth procedures to minimize disruption to the project by: establishing the order of precedence when there are discrepancies in the construction documents and describes the obligations of the parties when discrepancies are not resolved by the clause. Defines terms used in the specifications and drawings. The clause also establishes the requirement for shop drawings or reproducible shop drawings.

52.242-13 Bankruptcy

In the event the contractor enters into proceedings relating to bankruptcy, whether voluntary or involuntary, the contractor agrees to furnish, by certified mail or electronic commerce method authorized by the contract, written notification of the bankruptcy to the contracting officer responsible for administering the contract. This notification shall be furnished within five days of the initiation of the proceedings relating to bankruptcy filing. This notification shall include the date on which the bankruptcy petition was filed, the identity of the court in which the bankruptcy petition was filed, and a listing of government contract numbers and contracting offices for all government contracts against which final payment has not been made. This obligation remains in effect until final payment under this contract.

Purpose: The owner is assured of timely notice of a bankruptcy proceeding involving the contractor.

52.242-14 Suspension of Work

(a) The Contracting Officer may order the Contractor, in writing, to suspend, delay, or interrupt all or any part of the work of this contract for the period of time that the Contracting Officer determines appropriate for the convenience of the Government.

(b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted (1) by an act of the Contracting Officer in the administration of this contract, or (2) by the Contracting Officer's failure to act within the time specified in this contract (or within a reasonable time if not

specified), an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by the unreasonable suspension, delay, or interruption, and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor, or for which an equitable adjustment is provided for or excluded under any other term or condition of this contract.

(c) A claim under this clause shall not be allowed—

(1) For any costs incurred more than 20 days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved (but this requirement shall not apply as to a claim resulting from a suspension order); and

(2) Unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of the suspension, delay, or interruption, but not later than the date of final payment under the contract.

Purpose: Gives the owner the right to stop work under the contract, and establishes the contractor's rights and obligations when work is stopped. Without this clause, preventing the contractor from proceeding could be interpreted as a breach of contract and expose the owner to damages.

52.243-4 Changes

(a) The Contracting Officer may, at any time, without notice to the sureties, if any, by written order designated or indicated to be a change order, make changes in the work within the general scope of the contract, including changes—

(1) In the specifications (including drawings and designs);

(2) In the method or manner of performance of the work;

(3) In the Government-furnished property or services; or

(4) Directing acceleration in the performance of the work.

(b) Any other written or oral order (which, as used in this paragraph (b), includes direction, instruction, interpretation, or determination) from the Contracting Officer that causes a change shall be treated as a change order under this clause; Provided, that the Contractor gives the Contracting Officer written notice stating—

(1) The date, circumstances, and source of the order; and

(2) That the Contractor regards the order as a change order.

(c) Except as provided in this clause, no order, statement, or conduct of the Contracting Officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment.

(d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing. However, except for an adjustment based on defective specifications, no adjustment for any change under paragraph (b) of this clause shall be made for any costs incurred more than 20 days before the Contractor gives written notice as required. In the case of defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with the defective specifications.

(e) The Contractor must assert its right to an adjustment under this clause within 30 days after (1) receipt of a written change order under paragraph (a) of this clause or (2) the furnishing of a written notice under paragraph (b) of this clause, by submitting to the Contracting Officer a written statement describing the

general nature and amount of the proposal, unless this period is extended by the Government. The statement of proposal for adjustment may be included in the notice under paragraph (b) of this clause.

(f) No proposal by the Contractor for an equitable adjustment shall be allowed if asserted after final payment under this contract.

Purpose: Allows the owner to unilaterally change the scope of the contract and establishes the procedures to compensate the contractor when the change impacts the time or cost of performance.

52.246-12 Inspection of Construction

(a) *Definition.* "Work" includes, but is not limited to, materials, workmanship, and manufacture and fabrication of components.

(b) The Contractor shall maintain an adequate inspection system and perform such inspections as will ensure that the work performed under the contract conforms to contract requirements. The Contractor shall maintain complete inspection records and make them available to the Government. All work shall be conducted under the general direction of the Contracting Officer and is subject to Government inspection and test at all places and at all reasonable times before acceptance to ensure strict compliance with the terms of the contract.

(c) Government inspections and tests are for the sole benefit of the Government and do not—

(1) Relieve the Contractor of responsibility for providing adequate quality control measures;

(2) Relieve the Contractor of responsibility for damage to or loss of the material before acceptance;

(3) Constitute or imply acceptance; or

(4) Affect the continuing rights of the Government after acceptance of the completed work under paragraph (i) of this section.

(d) The presence or absence of a Government inspector does not relieve the Contractor from any contract requirement, nor is the inspector authorized to change any term or condition of the specification without the Contracting Officer's written authorization.

(e) The Contractor shall promptly furnish, at no increase in contract price, all facilities, labor, and material reasonably needed for performing such safe and convenient inspections and tests as may be required by the Contracting Officer. The Government may charge to the Contractor any additional cost of inspection or test when work is not ready at the time specified by the Contractor for inspection or test, or when prior rejection makes reinspection or retest necessary. The Government shall perform all inspections and tests in a manner that will not unnecessarily delay the work. Special, full size, and performance tests shall be performed as described in the contract.

(f) The Contractor shall, without charge, replace or correct work found by the Government not to conform to contract requirements, unless in the public interest the Government consents to accept the work with an appropriate adjustment in contract price. The Contractor shall promptly segregate and remove rejected material from the premises.

(g) If the Contractor does not promptly replace or correct rejected work, the Government may—

(1) By contract or otherwise, replace or correct the work and charge the cost to the Contractor; or

(2) Terminate for default the Contractor's right to proceed.

(h) If, before acceptance of the entire work, the Government decides to examine already completed work by removing it or tearing it out, the Contractor, on request, shall promptly furnish all necessary facilities, labor, and material. If the work is found to be defective or nonconforming in any material respect due to the fault of the Contractor or its subcontractors, the Contractor shall defray the expenses of the examination and of satisfactory reconstruction. However, if the work is found to meet contract requirements, the Contracting

Officer shall make an equitable adjustment for the additional services involved in the examination and reconstruction, including, if completion of the work was thereby delayed, an extension of time.

(i) Unless otherwise specified in the contract, the Government shall accept, as promptly as practicable after completion and inspection, all work required by the contract or that portion of the work the Contracting Officer determines can be accepted separately. Acceptance shall be final and conclusive except for latent defects, fraud, gross mistakes amounting to fraud, or the Government's rights under any warranty or guarantee.

Purpose: The owner benefits from this clause because it: establishes that the owner inspections are for the benefit of the owner and not quality assurance for the contractor; requires the contractor to make resources available to conduct reasonable inspections; identifies the owner's remedies in the event work does not comply with specifications; identifies how the cost of invasive inspections will be allocated; and allows the owner to charge the contractor when final inspection is requested and the work is not complete.

52.246-21 Warranty of Construction

(a) In addition to any other warranties in this contract, the Contractor warrants, except as provided in paragraph (i) of this clause, that work performed under this contract conforms to the contract requirements and is free of any defect in equipment, material, or design furnished, or workmanship performed by the Contractor or any subcontractor or supplier at any tier.

(b) This warranty shall continue for a period of 1 year from the date of final acceptance of the work. If the Government takes possession of any part of the work before final acceptance, this warranty shall continue for a period of 1 year from the date the Government takes possession.

(c) The Contractor shall remedy at the Contractor's expense any failure to conform, or any defect. In addition, the Contractor shall remedy at the Contractor's expense any damage to Government-owned or controlled real or personal property, when that damage is the result of—

(1) The Contractor's failure to conform to contract requirements; or

(2) Any defect of equipment, material, workmanship, or design furnished.

(d) The Contractor shall restore any work damaged in fulfilling the terms and conditions of this clause. The Contractor's warranty with respect to work repaired or replaced will run for 1 year from the date of repair or replacement.

(e) The Contracting Officer shall notify the Contractor, in writing, within a reasonable time after the discovery of any failure, defect, or damage.

(f) If the Contractor fails to remedy any failure, defect, or damage within a reasonable time after receipt of notice, the Government shall have the right to replace, repair, or otherwise remedy the failure, defect, or damage at the Contractor's expense.

(g) With respect to all warranties, express or implied, from subcontractors, manufacturers, or suppliers for work performed and materials furnished under this contract, the Contractor shall—

(1) Obtain all warranties that would be given in normal commercial practice;

(2) Require all warranties to be executed, in writing, for the benefit of the Government, if directed by the Contracting Officer; and

(3) Enforce all warranties for the benefit of the Government, if directed by the Contracting Officer.

(h) In the event the Contractor's warranty under paragraph (b) of this clause has expired, the Government may bring suit at its expense to enforce a subcontractor's, manufacturer's, or supplier's warranty.

(i) Unless a defect is caused by the negligence of the Contractor or subcontractor or supplier at any tier, the Contractor shall not be liable for the repair of any defects of material or design furnished by the Government nor for the repair of any damage that results from any defect in Government-furnished material or design.

(j) This warranty shall not limit the Government's rights under the Inspection and Acceptance clause of this contract with respect to latent defects, gross mistakes, or fraud.

Alternate I (Apr 1984). If the Government specifies in the contract the use of any equipment by "brand name and model," the contracting officer may add a paragraph substantially the same as the following paragraph (k) to the basic clause:

(k) Defects in design or manufacture of equipment specified by the Government on a "brand name and model" basis, shall not be included in this warranty. In this event, the Contractor shall require any subcontractors, manufacturers, or suppliers thereof to execute their warranties, in writing, directly to the Government.

Purpose: This clause benefits the owner by establishing a warranty period for work completed and identifying the process and remedies when defects are identified. Reduces the owner's risk of missing defects during the acceptance inspection. However, Contractors have to consider the cost of complying with this requirement in their bid price.

52.249-2 Termination for Convenience of the Government (Fixed-Price)

(a) The Government may terminate performance of work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government's interest. The Contracting Officer shall terminate by delivering to the Contractor a Notice of Termination specifying the extent of termination and the effective date.

(b) After receipt of a Notice of Termination, and except as directed by the Contracting Officer, the Contractor shall immediately proceed with the following obligations, regardless of any delay in determining or adjusting any amounts due under this clause:

(1) Stop work as specified in the notice.

(2) Place no further subcontracts or orders (referred to as subcontracts in this clause) for materials, services, or facilities, except as necessary to complete the continued portion of the contract.

(3) Terminate all subcontracts to the extent they relate to the work terminated.

(4) Assign to the Government, as directed by the Contracting Officer, all right, title, and interest of the Contractor under the subcontracts terminated, in which case the Government shall have the right to settle or to pay any termination settlement proposal arising out of those terminations.

(5) With approval or ratification to the extent required by the Contracting Officer, settle all outstanding liabilities and termination settlement proposals arising from the termination of subcontracts; the approval or ratification will be final for purposes of this clause.

(6) As directed by the Contracting Officer, transfer title and deliver to the Government—

(i) The fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced or acquired for the work terminated; and

(ii) The completed or partially completed plans, drawings, information, and other property that, if the contract had been completed, would be required to be furnished to the Government.

(7) Complete performance of the work not terminated.

(8) Take any action that may be necessary, or that the Contracting Officer may direct, for the protection and preservation of the property related to this contract that is in the possession of the Contractor and in which the Government has or may acquire an interest.

(9) Use its best efforts to sell, as directed or authorized by the Contracting Officer, any property of the types referred to in paragraph (b)(6) of this clause; *provided*, however, that the Contractor (i) is not required to extend credit to any purchaser and (ii) may acquire the property under the conditions prescribed by, and at prices approved by, the Contracting Officer. The proceeds of any transfer or disposition will be applied to reduce any payments to be made by the Government under this contract, credited to the price or cost of the work, or paid in any other manner directed by the Contracting Officer.

(c) The Contractor shall submit complete termination inventory schedules no later than 120 days from the effective date of termination, unless extended in writing by the Contracting Officer upon written request of the Contractor within this 120-day period.

(d) After expiration of the plant clearance period as defined in Subpart 49.001 of the Federal Acquisition Regulation, the Contractor may submit to the Contracting Officer a list, certified as to quantity and quality, of termination inventory not previously disposed of, excluding items authorized for disposition by the Contracting Officer. The Contractor may request the Government to remove those items or enter into an agreement for their storage. Within 15 days, the Government will accept title to those items and remove them or enter into a storage agreement. The Contracting Officer may verify the list upon removal of the items, or if stored, within 45 days from submission of the list, and shall correct the list, as necessary, before final settlement.

(e) After termination, the Contractor shall submit a final termination settlement proposal to the Contracting Officer in the form and with the certification prescribed by the Contracting Officer. The Contractor shall submit the proposal promptly, but no later than 1 year from the effective date of termination, unless extended in writing by the Contracting Officer upon written request of the Contractor within this 1-year period. However, if the Contracting Officer determines that the facts justify it, a termination settlement proposal may be received and acted on after 1 year or any extension. If the Contractor fails to submit the proposal within the time allowed, the Contracting Officer may determine, on the basis of information available, the amount, if any, due the Contractor because of the termination and shall pay the amount determined.

(f) Subject to paragraph (e) of this clause, the Contractor and the Contracting Officer may agree upon the whole or any part of the amount to be paid or remaining to be paid because of the termination. The amount may include a reasonable allowance for profit on work done. However, the agreed amount, whether under this paragraph (f) or paragraph (g) of this clause, exclusive of costs shown in paragraph (g)(3) of this clause, may not exceed the total contract price as reduced by (1) the amount of payments previously made and (2) the contract price of work not terminated. The contract shall be modified, and the Contractor paid the agreed amount. Paragraph (g) of this clause shall not limit, restrict, or affect the amount that may be agreed upon to be paid under this paragraph.

(g) If the Contractor and the Contracting Officer fail to agree on the whole amount to be paid because of the termination of work, the Contracting Officer shall pay the Contractor the amounts determined by the Contracting Officer as follows, but without duplication of any amounts agreed on under paragraph (f) of this clause:

(1) The contract price for completed supplies or services accepted by the Government (or sold or acquired under paragraph (b)(9) of this clause) not previously paid for, adjusted for any saving of freight and other charges.

(2) The total of—

(i) The costs incurred in the performance of the work terminated, including initial costs and preparatory expense allocable thereto, but excluding any costs attributable to supplies or services paid or to be paid under paragraph (g)(1) of this clause;

(ii) The cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract if not included in subdivision (g)(2)(i) of this clause; and

(iii) A sum, as profit on subdivision (g)(2)(i) of this clause, determined by the Contracting Officer under 49.202 of the Federal Acquisition Regulation, in effect on the date of this contract, to be fair and reasonable; however, if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, the Contracting Officer shall allow no profit under this subdivision (g)(2)(iii) and shall reduce the settlement to reflect the indicated rate of loss.

(3) The reasonable costs of settlement of the work terminated, including—

(i) Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;

(ii) The termination and settlement of subcontracts (excluding the amounts of such settlements); and

(iii) Storage, transportation, and other costs incurred, reasonably necessary for the preservation, protection, or disposition of the termination inventory.

(h) Except for normal spoilage, and except to the extent that the Government expressly assumed the risk of loss, the Contracting Officer shall exclude from the amounts payable to the Contractor under paragraph (g) of this clause, the fair value, as determined by the Contracting Officer, of property that is destroyed, lost, stolen, or damaged so as to become undeliverable to the Government or to a buyer.

(i) The cost principles and procedures of Part 31 of the Federal Acquisition Regulation, in effect on the date of this contract, shall govern all costs claimed, agreed to, or determined under this clause.

(j) The Contractor shall have the right of appeal, under the Disputes clause, from any determination made by the Contracting Officer under paragraph (e), (g), or (l) of this clause, except that if the Contractor failed to submit the termination settlement proposal or request for equitable adjustment within the time provided in paragraph (e) or (l), respectively, and failed to request a time extension, there is no right of appeal.

(k) In arriving at the amount due the Contractor under this clause, there shall be deducted—

(1) All unliquidated advance or other payments to the Contractor under the terminated portion of this contract;

(2) Any claim which the Government has against the Contractor under this contract; and

(3) The agreed price for, or the proceeds of sale of, materials, supplies, or other things acquired by the Contractor or sold under the provisions of this clause and not recovered by or credited to the Government.

(l) If the termination is partial, the Contractor may file a proposal with the Contracting Officer for an equitable adjustment of the price(s) of the continued portion of the contract. The Contracting Officer shall make any equitable adjustment agreed upon. Any proposal by the Contractor for an equitable adjustment under this clause shall be requested within 90 days from the effective date of termination unless extended in writing by the Contracting Officer.

(m)(1) The Government may, under the terms and conditions it prescribes, make partial payments and payments against costs incurred by the Contractor for the terminated portion of the contract, if the Contracting Officer believes the total of these payments will not exceed the amount to which the Contractor will be entitled.

(2) If the total payments exceed the amount finally determined to be due, the Contractor shall repay the excess to the Government upon demand, together with interest computed at the rate established by the Secretary of the Treasury under 50 U.S.C. App. 1215(b)(2). Interest shall be computed for the period from the date the excess payment is received by the Contractor to the date the excess is repaid. Interest shall not be charged on any excess payment due to a reduction in the Contractor's termination settlement proposal because of retention or other disposition of termination inventory until 10 days after the date of the retention or disposition, or a later date determined by the Contracting Officer because of the circumstances.

(n) Unless otherwise provided in this contract or by statute, the Contractor shall maintain all records and documents relating to the terminated portion of this contract for 3 years after final settlement. This includes all

books and other evidence bearing on the Contractor's costs and expenses under this contract. The Contractor shall make these records and documents available to the Government, at the Contractor's office, at all reasonable times, without any direct charge. If approved by the Contracting Officer, photographs, microphotographs, or other authentic reproductions may be maintained instead of original records and documents.

Alternate I (Sept 1996). If the contract is for construction, substitute the following paragraph (g) for paragraph (g) of the basic clause:

(g) If the Contractor and Contracting Officer fail to agree on the whole amount to be paid the Contractor because of the termination of work, the Contracting Officer shall pay the Contractor the amounts determined as follows, but without duplication of any amounts agreed upon under paragraph (f) of this clause:

(1) For contract work performed before the effective date of termination, the total (without duplication of any items) of—

(i) The cost of this work;

(ii) The cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract if not included in subdivision (g)(1)(i) of this clause; and

(iii) A sum, as profit on subdivision (g)(1)(i) of this clause, determined by the Contracting Officer under 49.202 of the Federal Acquisition Regulation, in effect on the date of this contract, to be fair and reasonable; however, if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, the Contracting Officer shall allow no profit under this subdivision (g)(1)(iii) and shall reduce the settlement to reflect the indicated rate of loss.

(2) The reasonable costs of settlement of the work terminated, including—

(i) Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;

(ii) The termination and settlement of subcontracts (excluding the amounts of such settlements); and

(iii) Storage, transportation, and other costs incurred, reasonably necessary for the preservation, protection, or disposition of the termination inventory.

Alternate II (Sept 1996). If the contract is with an agency of the U.S. Government or with State, local, or foreign governments or their agencies, and if the Contracting Officer determines that the requirement to pay interest on excess partial payments is inappropriate, delete paragraph (m)(2) of the basic clause.

Alternate III (Sept 1996). If the contract is for construction and with an agency of the U.S. Government or with State, local, or foreign governments or their agencies, substitute the following paragraph (g) for paragraph (g) of the basic clause. Paragraph (m)(2) may be deleted from the basic clause if the Contracting Officer determines that the requirement to pay interest on excess partial payments is inappropriate.

(g) If the Contractor and Contracting Officer fail to agree on the whole amount to be paid the Contractor because of the termination of work, the Contracting Officer shall pay the Contractor the amounts determined as follows, but without duplication of any amounts agreed upon under paragraph (f) of this clause:

(1) For contract work performed before the effective date of termination, the total (without duplication of any items) of—

(i) The cost of this work;

(ii) The cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract if not included in subdivision (g)(1)(i) of this clause; and

(iii) A sum, as profit on subdivision (g)(1)(i) of this clause, determined by the Contracting Officer under 49.202 of the Federal Acquisition Regulation, in effect on the date of this contract, to be fair and reasonable; however, if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, the Contracting Officer shall allow no profit under this subdivision (iii) and shall reduce the settlement to reflect the indicated rate of loss.

(2) The reasonable costs of settlement of the work terminated, including—

(i) Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;

(ii) The termination and settlement of subcontracts (excluding the amounts of such settlements); and

(iii) Storage, transportation, and other costs incurred, reasonably necessary for the preservation, protection, or disposition of the termination inventory.

Purpose: Allows the owner the right to terminate the contractor's right to progress under the contract. This is a significant right to breach the contract. The clause also details the steps to be taken by the contractor when a contract is terminated. This clause protects the owner in the event the project cannot be completed for reasons outside the control of the owner (e.g., changes in congressional funding). Otherwise, termination should be carefully considered.

52.249-10 Default (Fixed-Price Construction)

(a) If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in this contract including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or the separable part of the work) that has been delayed. In this event, the Government may take over the work and complete it by contract or otherwise, and may take possession of and use any materials, appliances, and plant on the work site necessary for completing the work. The Contractor and its sureties shall be liable for any damage to the Government resulting from the Contractor's refusal or failure to complete the work within the specified time, whether or not the Contractor's right to proceed with the work is terminated. This liability includes any increased costs incurred by the Government in completing the work.

(b) The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if—

(1) The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include—

(i) Acts of God or of the public enemy,

(ii) Acts of the Government in either its sovereign or contractual capacity,

(iii) Acts of another Contractor in the performance of a contract with the Government,

(iv) Fires,

(v) Floods,

(vi) Epidemics,

(vii) Quarantine restrictions,

(viii) Strikes,

(ix) Freight embargoes,

(x) Unusually severe weather, or

(xi) Delays of subcontractors or suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers; and

(2) The Contractor, within 10 days from the beginning of any delay (unless extended by the Contracting Officer), notifies the Contracting Officer in writing of the causes of delay. The Contracting Officer shall ascertain the facts and the extent of delay. If, in the judgment of the Contracting Officer, the findings of fact warrant such action, the time for completing the work shall be extended. The findings of the Contracting Officer shall be final and conclusive on the parties, but subject to appeal under the Disputes clause.

(c) If, after termination of the Contractor's right to proceed, it is determined that the Contractor was not in default, or that the delay was excusable, the rights and obligations of the parties will be the same as if the termination had been issued for the convenience of the Government.

(d) The rights and remedies of the Government in this clause are in addition to any other rights and remedies provided by law or under this contract.

Alternate I (Apr 1984). If the contract is for dismantling, demolition, or removal of improvements, substitute the following paragraph (a) for paragraph (a) of the basic clause:

(a)(1) If the Contractor refuses or fails to prosecute the work, or any separable part, with the diligence that will insure its completion within the time specified in this contract, including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work or the part of the work that has been delayed. In this event, the Government may take over the work and complete it by contract or otherwise, and may take possession of and use any materials, appliances, and plant on the work site necessary for completing the work.

(2) If title to property is vested in the Contractor under this contract, it shall revest in the Government regardless of any other clause of this contract, except for property that the Contractor has disposed of by bona fide sale or removed from the site.

(3) The Contractor and its sureties shall be liable for any damage to the Government resulting from the Contractor's refusal or failure to complete the work within the specified time, whether or not the Contractor's right to proceed with the work is terminated. This liability includes any increased costs incurred by the Government in completing the work.

Alternate II (Apr 1984). If the contract is to be awarded during a period of national emergency, paragraph (b)(1) below may be substituted for paragraph (b)(1) of the basic clause:

(1) The delay in completing the work arises from causes other than normal weather beyond the control and without the fault or negligence of the Contractor. Examples of such causes include—

(i) Acts of God or of the public enemy,

(ii) Acts of the Government in either its sovereign or contractual capacity,

(iii) Acts of another Contractor in the performance of a contract with the Government,

(iv) Fires,

(v) Floods,

(vi) Epidemics,

(vii) Quarantine restrictions,

(viii) Strikes,

(ix) Freight embargoes,

(x) Unusually severe weather, or

(xi) Delays of subcontractors or suppliers at any tier arising from causes other than normal weather beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers; and

Alternate III (Apr 1984). If the contract is for dismantling, demolition, or removal of improvements and is to be awarded during a period of national emergency, substitute the following paragraph (a) for paragraph (a) of the basic clause. The following paragraph (b)(1) may be substituted for paragraph (b)(1) of the basic clause:

(a)(1) If the Contractor refuses or fails to prosecute the work, or any separable part, with the diligence that will insure its completion within the time specified in this contract, including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work or the part of the work that has been delayed. In this event, the Government may take over the work and complete it by contract or otherwise, and may take possession of and use any materials, appliances, and plant on the work site necessary for completing the work.

(2) If title to property is vested in the Contractor under this contract, it shall revest in the Government regardless of any other clause of this contract, except for property that the Contractor has disposed of by bona fide sale or removed from the site.

(3) The Contractor and its sureties shall be liable for any damage to the Government resulting from the Contractor's refusal or failure to complete the work within the specified time, whether or not the Contractor's right to proceed with the work is terminated. This liability includes any increased costs incurred by the Government in completing the work.

(b) The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if—

(1) The delay in completing the work arises from causes other than normal weather beyond the control and without the fault or negligence of the Contractor. Examples of such causes include—

(i) Acts of God or of the public enemy,

(ii) Acts of the Government in either its sovereign or contractual capacity,

(iii) Acts of another Contractor in the performance of a contract with the Government,

(iv) Fires,

(v) Floods,

(vi) Epidemics,

(vii) Quarantine restrictions,

(viii) Strikes,

(ix) Freight embargoes,

(x) Unusually severe weather, or

(xi) Delays of subcontractors or suppliers at any tier arising from causes other than normal weather beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers; and

Purpose: This clause allows the owner to terminate the contractor's right to proceed when they fail to perform and describes the rights of the parties when a termination for default occurs. The owner may allow additional time to complete the work for one of the reasons identified in the clause.

Federal Acquisition Regulation (FAR) Clauses – A/E Services

52.244-4 Subcontractors and Outside Associates and Consultants (Architect-Engineer Services)

Any subcontractors and outside associates or consultants required by the Contractor in connection with the services covered by the contract will be limited to individuals or firms that were specifically identified and agreed to during negotiations. The Contractor shall obtain the Contracting Officer's written consent before making any substitution for these subcontractors, associates, or consultants.

Purpose: This clause requires the A/E to notify the owner if they make any changes to the team performing the work that is identified in the contract.

52.232-10 Payments under Fixed-Price Architect-Engineer Contracts

(a) Estimates shall be made monthly of the amount and value of the work and services performed by the Contractor under this contract which meet the standards of quality established under this contract. The estimates, along with any supporting data required by the Contracting Officer, shall be prepared by the Contractor and submitted along with its voucher.

(b) After receipt of each substantiated voucher, the Government shall pay the voucher as approved by the Contracting Officer or authorized representative. The Contracting Officer shall require a withholding from amounts due under paragraph (a) of this clause of up to 10 percent only if the Contracting Officer determines that such a withholding is necessary to protect the Government's interest and ensure satisfactory completion of the contract. The amount withheld shall be determined based upon the Contractor's performance record under this contract. Whenever the Contracting Officer determines that the work is substantially complete and that the amount retained is in excess of the amount adequate for the protection of the Government, the Contracting Officer shall release the excess amount to the Contractor.

(c) Upon satisfactory completion by the Contractor and final acceptance by the Contracting Officer of all the work done by the Contractor under the "Statement of Architect-Engineer Services", the Contractor will be paid the unpaid balance of any money due for work under the statement, including all withheld amounts.

(d) Before final payment under the contract, or before settlement upon termination of the contract, and as a condition precedent thereto, the Contractor shall execute and deliver to the Contracting Officer a release of all claims against the Government arising under or by virtue of this contract, other than any claims that are specifically excepted by the Contractor from the operation of the release in amounts stated in the release.

(e) Notwithstanding any other provision in this contract, and specifically paragraph (b) of this clause, progress payments shall not exceed 80 percent on work accomplished on undefinitized contract actions. A "contract action" is any action resulting in a contract, as defined in FAR Subpart 2.1, including contract modifications for additional supplies or services, but not including contract modifications that are within the scope and under the terms of the contract, such as contract modifications issued pursuant to the Changes clause, or funding and other administrative changes.

Purpose: This clause establishes a framework for requesting and authorizing payments based on work completed.

52.236-22 Design Within Funding Limitations

(a) The Contractor shall accomplish the design services required under this contract so as to permit the award of a contract, using standard Federal Acquisition Regulation procedures for the construction of the facilities designed at a price that does not exceed the estimated construction contract price as set forth in paragraph (c) of this clause. When bids or proposals for the construction contract are received that exceed the estimated price, the contractor shall perform such redesign and other services as are necessary to permit contract award within the funding limitation. These additional services shall be performed at no increase in the price of this contract. However, the Contractor shall not be required to perform such additional services

at no cost to the Government if the unfavorable bids or proposals are the result of conditions beyond its reasonable control.

(b) The Contractor will promptly advise the Contracting Officer if it finds that the project being designed will exceed or is likely to exceed the funding limitations and it is unable to design a usable facility within these limitations. Upon receipt of such information, the Contracting Officer will review the Contractor's revised estimate of construction cost. The Government may, if it determines that the estimated construction contract price set forth in this contract is so low that award of a construction contract not in excess of such estimate is improbable, authorize a change in scope or materials as required to reduce the estimated construction cost to an amount within the estimated construction contract price set forth in paragraph (c) of this clause, or the Government may adjust such estimated construction contract price. When bids or proposals are not solicited or are unreasonably delayed, the Government shall prepare an estimate of constructing the design submitted and such estimate shall be used in lieu of bids or proposals to determine compliance with the funding limitation.

(c) The estimated construction contract price for the project described in this contract is $_____.

Purpose: This clause advises the A/E of the construction budget and requires them to redesign if the market prices to construct the project are in excess of the amount stated in the contract.

52.236-23 Responsibility of the Architect-Engineer Contractor

(a) The Contractor shall be responsible for the professional quality, technical accuracy, and the coordination of all designs, drawings, specifications, and other services furnished by the Contractor under this contract. The Contractor shall, without additional compensation, correct or revise any errors or deficiencies in its designs, drawings, specifications, and other services.

(b) Neither the Government's review, approval or acceptance of, nor payment for, the services required under this contract shall be construed to operate as a waiver of any rights under this contract or of any cause of action arising out of the performance of this contract, and the Contractor shall be and remain liable to the Government in accordance with applicable law for all damages to the Government caused by the Contractor's negligent performance of any of the services furnished under this contract.

(c) The rights and remedies of the Government provided for under this contract are in addition to any other rights and remedies provided by law.

(d) If the Contractor is comprised of more than one legal entity, each such entity shall be jointly and severally liable hereunder.

Purpose: This clause requires the A/E to make corrections to the designs produced in the event of error and advises the A/E that owner acceptance does not relieve the A/E of any responsibility for the design.

52.236-25 Requirements for Registration of Designers

Architects or engineers registered to practice in the particular professional field involved in a State, the District of Columbia, or an outlying area of the United States shall prepare or review and approve the design of architectural, structural, mechanical, electrical, civil, or other engineering features of the work.

Purpose: Requires approval of the design by registered professionals to ensure the design meets all code and safety requirements. The clause can be revised to require registration in the state in which construction will take place.

APPENDIX V

OMB CIRCULAR A-87

Cost Principles for State, Local, and Indian Tribal Governments

APPENDIX V – COST PRINCIPLES FOR STATE, LOCAL, AND INDIAN TRIBAL GOVERNMENTS (OMB CIRCULAR A-87 – REVISED 5/10/04)

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Cost Principles for State, Local, and Indian Tribal Governments

1. ***Purpose.*** This Circular establishes principles and standards for determining costs for Federal awards carried out through grants, cost reimbursement contracts, and other agreements with State and local governments and federally recognized Indian tribal governments (governmental units).

2. ***Authority.*** This Circular is issued under the authority of the Budget and Accounting Act of 1921, as amended; the Budget and Accounting Procedures Act of 1950, as amended; the Chief Financial Officers Act of 1990; Reorganization Plan No. 2 of 1970; and Executive Order No. 11541 ("Prescribing the Duties of the Office of Management and Budget and the Domestic Policy Council in the Executive Office of the President").

3. ***Background.*** As part of the governmentwide grant streamlining effort under P.L. 106-107, Federal Financial Award Management Improvement Act of 1999, OMB led an interagency workgroup to simplify and make consistent, to the extent feasible, the various rules used to award Federal grants. An interagency task force was established in 2001 to review existing cost principles for Federal awards to State, local, and Indian tribal governments; Colleges and Universities; and Non-Profit organizations. The task force studied Selected Items of Cost in each of the three cost principles to determine which items of costs could be stated consistently and/or more clearly. A proposed revised Circular reflecting the results of those efforts was issued on August 12, 2002 at 67 FR 52558. Extensive comments on the proposed revisions, discussions with interest groups, and related developments were considered in developing this revision.

4. ***Rescissions.*** This Circular rescinds and supersedes Circular A 87, as amended, issued May 4, 1995.

5. ***Policy.*** This Circular establishes principles and standards to provide a uniform approach for determining costs and to promote effective program delivery, efficiency, and better relationships between governmental units and the Federal Government. The principles are for determining allowable costs only. They are not intended to identify the circumstances or to dictate the extent of Federal and governmental unit participation in the financing of a particular Federal award. Provision for profit or other increment above cost is outside the scope of this Circular.

6. ***Definitions.*** Definitions of key terms used in this Circular are contained in Attachment A, Section B.

7. ***Required Action.*** Agencies responsible for administering programs that involve cost reimbursement contracts, grants, and other agreements with governmental units shall issue regulations to implement the provisions of this Circular and its Attachments.

8. ***OMB Responsibilities.*** The Office of Management and Budget (OMB) will review agency regulations and implementation of this Circular, and will provide policy interpretations and assistance to insure effective and efficient implementation. Any exceptions will be subject to approval by OMB. Exceptions will only be made in particular cases where adequate justification is presented.

9. ***Information Contact.*** Further information concerning this Circular may be obtained by contacting the Office of Federal Financial Management, Financial Standards and Reporting Branch, Office of Management and Budget, Washington, DC 20503, telephone 202 395 3993.

10. ***Policy Review Date.*** OMB Circular A 87 will have a policy review three years from the date of issuance.

- Except as otherwise provided herein, these rules are effective June 9, 2004.

Attachment A General Principles for Determining Allowable Costs
Attachment B Selected Items of Cost
Attachment C State/Local Wide Central Service Cost Allocation Plans

Attachment D Public Assistance Cost Allocation Plans
Attachment E State and Local Indirect Cost Rate Proposals

ATTACHMENT A - Circular No. A 87

GENERAL PRINCIPLES FOR DETERMININGALLOWABLE COSTS

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A. ***Purpose and Scope***

1. Objectives. This Attachment establishes principles for determining the allowable costs incurred by State, local, and federally recognized Indian tribal governments (governmental units) under grants, cost reimbursement contracts, and other agreements with the Federal Government (collectively referred to in this Circular as "Federal awards"). The principles are for the purpose of cost determination and are not intended to identify the circumstances or dictate the extent of Federal or governmental unit participation in the financing of a particular program or project. The principles are designed to provide that Federal awards bear their fair share of cost recognized under these principles except where restricted or prohibited by law. Provision for profit or other increment above cost is outside the scope of this Circular.

2. Policy guides.

a. The application of these principles is based on the fundamental premises that:

(1) Governmental units are responsible for the efficient and effective administration of Federal awards through the application of sound management practices.

(2) Governmental units assume responsibility for administering Federal funds in a manner consistent with underlying agreements, program objectives, and the terms and conditions of the Federal award.

(3) Each governmental unit, in recognition of its own unique combination of staff, facilities, and experience, will have the primary responsibility for employing whatever form of organization and management techniques may be necessary to assure proper and efficient administration of Federal awards.

b. Federal agencies should work with States or localities which wish to test alternative mechanisms for paying costs for administering Federal programs. The Office of Management and Budget (OMB) encourages Federal agencies to test fee for service alternatives as a replacement for current cost reimbursement payment methods in response to the National Performance Review's (NPR) recommendation. The NPR recommended the fee for service approach to reduce the burden associated with maintaining systems for charging administrative costs to Federal programs and preparing and approving cost allocation plans. This approach should also increase incentives for administrative efficiencies and improve outcomes.

3. Application.

a. These principles will be applied by all Federal agencies in determining costs incurred by governmental units under Federal awards (including subawards) except those with (1) publicly financed educational institutions subject to OMB Circular A 21, "Cost Principles for Educational Institutions," and (2) programs administered by publicly owned hospitals and other providers of medical care that are subject to requirements promulgated by the sponsoring Federal agencies. However, this Circular does apply to all central service and department/agency costs that are allocated or billed to those educational institutions, hospitals, and other providers of medical care or services by other State and local government departments and agencies.

b. All subawards are subject to those Federal cost principles applicable to the particular organization concerned. Thus, if a subaward is to a governmental unit (other than a college, university or hospital), this Circular shall apply; if a subaward is to a commercial organization, the cost principles applicable to commercial organizations shall apply; if a subaward is to a college or university, Circular A 21 shall apply; if a subaward is to a hospital, the cost principles used by the Federal awarding agency for awards to hospitals shall apply, subject to the provisions of subsection A.3.a. of this Attachment; if a subaward is to some other non profit organization, Circular A 122, "Cost Principles for Non Profit Organizations," shall apply.

c. These principles shall be used as a guide in the pricing of fixed price arrangements where costs are used in determining the appropriate price.

d. Where a Federal contract awarded to a governmental unit incorporates a Cost Accounting Standards (CAS) clause, the requirements of that clause shall apply. In such cases, the governmental unit and the cognizant Federal agency shall establish an appropriate advance agreement on how the governmental unit will comply with applicable CAS requirements when estimating, accumulating and reporting costs under CAS covered contracts. The agreement shall indicate that OMB Circular A 87 requirements will be applied to other Federal awards. In all cases, only one set of records needs to be maintained by the governmental unit.

e. Conditional exemptions.

(1) OMB authorizes conditional exemption from OMB administrative requirements and cost principles circulars for certain Federal programs with statutorily authorized consolidated planning and consolidated administrative funding, that are identified by a Federal agency and approved by the head of the Executive department or establishment. A Federal agency shall consult with OMB during its consideration of whether to grant such an exemption.

(2) To promote efficiency in State and local program administration, when Federal non entitlement programs with common purposes have specific statutorily authorized consolidated planning and consolidated administrative funding and where most of the State agency's resources come from non Federal sources, Federal agencies may exempt these covered State administered, non entitlement grant programs from certain OMB grants management requirements. The exemptions would be from all but the allocability of costs provisions of OMB Circulars A 87 (Attachment A, subsection C.3), "Cost Principles for State, Local, and Indian Tribal Governments," A 21 (Section C, subpart 4), "Cost Principles for Educational Institutions," and A 122 (Attachment A, subsection A.4), "Cost Principles for Non Profit Organizations," and from all of the administrative requirements provisions of OMB Circular A 110, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non Profit Organizations," and the agencies' grants management common rule.

(3) When a Federal agency provides this flexibility, as a prerequisite to a State's exercising this option, a State must adopt its own written fiscal and administrative requirements for expending and accounting for all funds, which are consistent with the provisions of OMB Circular A 87, and extend such policies to all subrecipients. These fiscal and administrative requirements must be sufficiently specific to ensure that: funds are used in compliance with all applicable Federal statutory and regulatory provisions, costs are reasonable and necessary for operating these programs, and funds are not be used for general expenses required to carry out other responsibilities of a State or its subrecipients.

B. ***Definitions***

1. "Approval or authorization of the awarding or cognizant Federal agency" means documentation evidencing consent prior to incurring a specific cost. If such costs are specifically identified in a Federal award document, approval of the document constitutes approval of the costs. If the costs are covered by a State/local wide cost allocation plan or an indirect cost proposal, approval of the plan constitutes the approval.

2. "Award" means grants, cost reimbursement contracts and other agreements between a State, local and Indian tribal government and the Federal Government.

3. "Awarding agency" means (a) with respect to a grant, cooperative agreement, or cost reimbursement contract, the Federal agency, and (b) with respect to a subaward, the party that awarded the subaward.

4. "Central service cost allocation plan" means the documentation identifying, accumulating, and allocating or developing billing rates based on the allowable costs of services provided by a governmental unit on a centralized basis to its departments and agencies. The costs of these services may be allocated or billed to users.

5. "Claim" means a written demand or written assertion by the governmental unit or grantor seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of award terms, or other relief arising under or relating to the award. A voucher, invoice or other routine request for

payment that is not a dispute when submitted is not a claim. Appeals, such as those filed by a governmental unit in response to questioned audit costs, are not considered claims until a final management decision is made by the Federal awarding agency.

6. "Cognizant agency" means the Federal agency responsible for reviewing, negotiating, and approving cost allocation plans or indirect cost proposals developed under this Circular on behalf of all Federal agencies. OMB publishes a listing of cognizant agencies.

7. "Common Rule" means the "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments; Final Rule" originally issued at 53 FR 8034 8103 (March 11, 1988). Other common rules will be referred to by their specific titles.

8. "Contract" means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to): awards and notices of awards; job orders or task orders issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and, bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301 et seq.

9. "Cost" means an amount as determined on a cash, accrual, or other basis acceptable to the Federal awarding or cognizant agency. It does not include transfers to a general or similar fund.

10. "Cost allocation plan" means central service cost allocation plan, public assistance cost allocation plan, and indirect cost rate proposal. Each of these terms are further defined in this section.

11. "Cost objective" means a function, organizational subdivision, contract, grant, or other activity for which cost data are needed and for which costs are incurred.

12. "Federally recognized Indian tribal government" means the governing body or a governmental agency of any Indian tribe, band, nation, or other organized group or community (including any native village as defined in Section 3 of the Alaska Native Claims Settlement Act, 85 Stat. 688) certified by the Secretary of the Interior as eligible for the special programs and services provided through the Bureau of Indian Affairs.

13. "Governmental unit" means the entire State, local, or federally recognized Indian tribal government, including any component thereof. Components of governmental units may function independently of the governmental unit in accordance with the term of the award.

14. "Grantee department or agency" means the component of a State, local, or federally recognized Indian tribal government which is responsible for the performance or administration of all or some part of a Federal award.

15. "Indirect cost rate proposal" means the documentation prepared by a governmental unit or component thereof to substantiate its request for the establishment of an indirect cost rate as described in Attachment E of this Circular.

16. "Local government" means a county, municipality, city, town, township, local public authority, school district, special district, intrastate district, council of governments (whether or not incorporated as a non profit corporation under State law), any other regional or interstate government entity, or any agency or instrumentality of a local government.

17. "Public assistance cost allocation plan" means a narrative description of the procedures that will be used in identifying, measuring and allocating all administrative costs to all of the programs administered or supervised by State public assistance agencies as described in Attachment D of this Circular.

18. "State" means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments.

C. ***Basic Guidelines***

1. Factors affecting allowability of costs. To be allowable under Federal awards, costs must meet the following general criteria:

a. Be necessary and reasonable for proper and efficient performance and administration of Federal awards.

b. Be allocable to Federal awards under the provisions of this Circular.

c. Be authorized or not prohibited under State or local laws or regulations.

d. Conform to any limitations or exclusions set forth in these principles, Federal laws, terms and conditions of the Federal award, or other governing regulations as to types or amounts of cost items.

e. Be consistent with policies, regulations, and procedures that apply uniformly to both Federal awards and other activities of the governmental unit.

f. Be accorded consistent treatment. A cost may not be assigned to a Federal award as a direct cost if any other cost incurred for the same purpose in like circumstances has been allocated to the Federal award as an indirect cost.

g. Except as otherwise provided for in this Circular, be determined in accordance with generally accepted accounting principles.

h. Not be included as a cost or used to meet cost sharing or matching requirements of any other Federal award in either the current or a prior period, except as specifically provided by Federal law or regulation.

i. Be the net of all applicable credits.

j. Be adequately documented.

2. Reasonable costs. A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. The question of reasonableness is particularly important when governmental units or components are predominately federally funded. In determining reasonableness of a given cost, consideration shall be given to:

a. Whether the cost is of a type generally recognized as ordinary and necessary for the operation of the governmental unit or the performance of the Federal award.

b. The restraints or requirements imposed by such factors as: sound business practices; arms length bargaining; Federal, State and other laws and regulations; and, terms and conditions of the Federal award.

c. Market prices for comparable goods or services.

d. Whether the individuals concerned acted with prudence in the circumstances considering their responsibilities to the governmental unit, its employees, the public at large, and the Federal Government.

e. Significant deviations from the established practices of the governmental unit which may unjustifiably increase the Federal award's cost.

3. Allocable costs.

a. A cost is allocable to a particular cost objective if the goods or services involved are chargeable or assignable to such cost objective in accordance with relative benefits received.

b. All activities which benefit from the governmental unit's indirect cost, including unallowable activities and services donated to the governmental unit by third parties, will receive an appropriate allocation of indirect costs.

c. Any cost allocable to a particular Federal award or cost objective under the principles provided for in this Circular may not be charged to other Federal awards to overcome fund deficiencies, to avoid restrictions imposed by law or terms of the Federal awards, or for other reasons.

d. Where an accumulation of indirect costs will ultimately result in charges to a Federal award, a cost allocation plan will be required as described in Attachments C, D, and E.

4. Applicable credits.

a. Applicable credits refer to those receipts or reduction of expenditure type transactions that offset or reduce expense items allocable to Federal awards as direct or indirect costs. Examples of such transactions are: purchase discounts, rebates or allowances, recoveries or indemnities on losses, insurance refunds or rebates, and adjustments of overpayments or erroneous charges. To the extent that such credits accruing to or received by the governmental unit relate to allowable costs, they shall be credited to the Federal award either as a cost reduction or cash refund, as appropriate.

b. In some instances, the amounts received from the Federal Government to finance activities or service operations of the governmental unit should be treated as applicable credits. Specifically, the concept of netting such credit items (including any amounts used to meet cost sharing or matching requirements) should be recognized in determining the rates or amounts to be charged to Federal awards. (See Attachment B, item 11, "Depreciation and use allowances," for areas of potential application in the matter of Federal financing of activities.)

D. ***Composition of Cost***

1. Total cost. The total cost of Federal awards is comprised of the allowable direct cost of the program, plus its allocable portion of allowable indirect costs, less applicable credits.

2. Classification of costs. There is no universal rule for classifying certain costs as either direct or indirect under every accounting system. A cost may be direct with respect to some specific service or function, but indirect with respect to the Federal award or other final cost objective. Therefore, it is essential that each item of cost be treated consistently in like circumstances either as a direct or an indirect cost. Guidelines for determining direct and indirect costs charged to Federal awards are provided in the sections that follow.

E. ***Direct Costs***

1. General. Direct costs are those that can be identified specifically with a particular final cost objective.

2. Application. Typical direct costs chargeable to Federal awards are:

a. Compensation of employees for the time devoted and identified specifically to the performance of those awards.

b. Cost of materials acquired, consumed, or expended specifically for the purpose of those awards.

c. Equipment and other approved capital expenditures.

d. Travel expenses incurred specifically to carry out the award.

3. Minor items. Any direct cost of a minor amount may be treated as an indirect cost for reasons of practicality where such accounting treatment for that item of cost is consistently applied to all cost objectives.

F. ***Indirect Costs***

1. General. Indirect costs are those: (a) incurred for a common or joint purpose benefiting more than one cost objective, and (b) not readily assignable to the cost objectives specifically benefitted, without effort disproportionate to the results achieved. The term "indirect costs," as used herein, applies to costs of this type originating in the grantee department, as well as those incurred by other departments in supplying goods, services, and facilities. To facilitate equitable distribution of indirect expenses to the cost objectives served, it may be necessary to establish a number of pools of indirect costs within a governmental unit department or in other agencies providing services to a governmental unit department.

Indirect cost pools should be distributed to benefitted cost objectives on bases that will produce an equitable result in consideration of relative benefits derived.

2. Cost allocation plans and indirect cost proposals. Requirements for development and submission of cost allocation plans and indirect cost rate proposals are contained in Attachments C, D, and E.

3. Limitation on indirect or administrative costs.

a. In addition to restrictions contained in this Circular, there may be laws that further limit the amount of administrative or indirect cost allowed.

b. Amounts not recoverable as indirect costs or administrative costs under one Federal award may not be shifted to another Federal award, unless specifically authorized by Federal legislation or regulation.

G. ***Interagency Services.*** The cost of services provided by one agency to another within the governmental unit may include allowable direct costs of the service plus a pro rate share of indirect costs. A standard indirect cost allowance equal to ten percent of the direct salary and wage cost of providing the service (excluding overtime, shift premiums, and fringe benefits) may be used in lieu of determining the actual indirect costs of the service. These services do not include centralized services included in central service cost allocation plans as described in Attachment C.

H. ***Required Certifications.*** Each cost allocation plan or indirect cost rate proposal required by Attachments C and E must comply with the following:

1. No proposal to establish a cost allocation plan or an indirect cost rate, whether submitted to a Federal cognizant agency or maintained on file by the governmental unit, shall be acceptable unless such costs have been certified by the governmental unit using the Certificate of Cost Allocation Plan or Certificate of Indirect Costs as set forth in Attachments C and E. The certificate must be signed on behalf of the governmental unit by an individual at a level no lower than chief financial officer of the governmental unit that submits the proposal or component covered by the proposal.

2. No cost allocation plan or indirect cost rate shall be approved by the Federal Government unless the plan or rate proposal has been certified. Where it is necessary to establish a cost allocation plan or an indirect cost rate and the governmental unit has not submitted a certified proposal for establishing such a plan or rate in accordance with the requirements, the Federal Government may either disallow all indirect costs or unilaterally establish such a plan or rate. Such a plan or rate may be based upon audited historical data or such other data that have been furnished to the cognizant Federal agency and for which it can be demonstrated that all unallowable costs have been excluded. When a cost allocation plan or indirect cost rate is unilaterally established by the Federal Government because of failure of the governmental unit to submit a certified proposal, the plan or rate established will be set to ensure that potentially unallowable costs will not be reimbursed.

ATTACHMENT B – Circular No. A 87

SELECTED ITEMS OF COST

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26. Materials and supplies costs
27. Meetings and conferences
28. Memberships, subscriptions, and professional activity costs
29. Patent costs
30. Plant and homeland security costs
31. Pre award costs
32. Professional service costs
33. Proposal costs
34. Publication and printing costs
35. Rearrangement and alteration costs
36. Reconversion costs
37. Rental costs of building and equipment
38. Royalties and other costs for the use of patents
39. Selling and marketing
40. Taxes
41. Termination costs applicable to sponsored agreements
42. Training costs
43. Travel costs

Sections 1 through 43 provide principles to be applied in establishing the allowability or unallowability of certain items of cost. These principles apply whether a cost is treated as direct or indirect. A cost is allowable for Federal reimbursement only to the extent of benefits received by Federal awards and its conformance with the general policies and principles stated in Attachment A to this Circular. Failure to mention a particular item of cost in these sections is not intended to imply that it is either allowable or unallowable; rather, determination of allowability in each case should be based on the treatment or standards provided for similar or related items of cost.

1. ***Advertising and public relations costs.***

a. The term advertising costs means the costs of advertising media and corollary administrative costs.

   Advertising media include magazines, newspapers, radio and television, direct mail, exhibits, electronic or computer transmittals, and the like.

b. The term public relations includes community relations and means those activities dedicated to maintaining the image of the governmental unit or maintaining or promoting understanding and favorable relations with the community or public at large or any segment of the public.

c. The only allowable advertising costs are those which are solely for:

   (1) The recruitment of personnel required for the performance by the governmental unit of obligations arising under a Federal award;

   (2) The procurement of goods and services for the performance of a Federal award;

(3) The disposal of scrap or surplus materials acquired in the performance of a Federal award except when governmental units are reimbursed for disposal costs at a predetermined amount; or

(4) Other specific purposes necessary to meet the requirements of the Federal award.

d. The only allowable public relations costs are:

(1) Costs specifically required by the Federal award;

(2) Costs of communicating with the public and press pertaining to specific activities or accomplishments which result from performance of Federal awards (these costs are considered necessary as part of the outreach effort for the Federal award); or

(3) Costs of conducting general liaison with news media and government public relations officers, to the extent that such activities are limited to communication and liaison necessary keep the public informed on matters of public concern, such as notices of Federal contract/grant awards, financial matters, etc.

e. Costs identified in subsections c and d if incurred for more than one Federal award or for both sponsored work and other work of the governmental unit, are allowable to the extent that the principles in Attachment A, sections E. ("Direct Costs") and F. ("Indirect Costs") are observed.

f. Unallowable advertising and public relations costs include the following:

(1) All advertising and public relations costs other than as specified in subsections c, d, and e;

(2) Costs of meetings, conventions, convocations, or other events related to other activities of the governmental unit, including:

(a) Costs of displays, demonstrations, and exhibits;

(b) Costs of meeting rooms, hospitality suites, and other special facilities used in conjunction with shows and other special events; and

(c) Salaries and wages of employees engaged in setting up and displaying exhibits, making demonstrations, and providing briefings;

(3) Costs of promotional items and memorabilia, including models, gifts, and souvenirs;

(4) Costs of advertising and public relations designed solely to promote the governmental unit.

2. ***Advisory councils.*** Costs incurred by advisory councils or committees are allowable as a direct cost where authorized by the Federal awarding agency or as an indirect cost where allocable to Federal awards.

3. ***Alcoholic beverages.*** Costs of alcoholic beverages are unallowable.

4. ***Audit costs and related services.***

a. The costs of audits required by, and performed in accordance with, the Single Audit Act, as implemented by Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations" are allowable. Also see 31 USC 7505(b) and section 230 ("Audit Costs") of Circular A-133.

b. Other audit costs are allowable if included in a cost allocation plan or indirect cost proposal, or if specifically approved by the awarding agency as a direct cost to an award.

c. The cost of agreed-upon procedures engagements to monitor subrecipients who are exempted from A-133 under section 200(d) are allowable, subject to the conditions listed in A-133, section 230 (b)(2).

5. ***Bad debts.*** Bad debts, including losses (whether actual or estimated) arising from uncollectable accounts and other claims, related collection costs, and related legal costs, are unallowable.

6. ***Bonding costs.***

a. Bonding costs arise when the Federal Government requires assurance against financial loss to itself or others by reason of the act or default of the governmental unit. They arise also in instances where the governmental unit requires similar assurance. Included are such bonds as bid, performance, payment, advance payment, infringement, and fidelity bonds.

b. Costs of bonding required pursuant to the terms of the award are allowable.

c. Costs of bonding required by the governmental unit in the general conduct of its operations are allowable to the extent that such bonding is in accordance with sound business practice and the rates and premiums are reasonable under the circumstances.

7. ***Communication costs.*** Costs incurred for telephone services, local and long distance telephone calls, telegrams, postage, messenger, electronic or computer transmittal services and the like are allowable.

8. ***Compensation for personal services.***

a. General. Compensation for personnel services includes all remuneration, paid currently or accrued, for services rendered during the period of performance under Federal awards, including but not necessarily limited to wages, salaries, and fringe benefits. The costs of such compensation are allowable to the extent that they satisfy the specific requirements of this Circular, and that the total compensation for individual employees:

(1) Is reasonable for the services rendered and conforms to the established policy of the governmental unit consistently applied to both Federal and non Federal activities;

(2) Follows an appointment made in accordance with a governmental unit's laws and rules and meets merit system or other requirements required by Federal law, where applicable; and

(3) Is determined and supported as provided in subsection h.

b. Reasonableness. Compensation for employees engaged in work on Federal awards will be considered reasonable to the extent that it is consistent with that paid for similar work in other activities of the governmental unit. In cases where the kinds of employees required for Federal awards are not found in the other activities of the governmental unit, compensation will be considered reasonable to the extent that it is comparable to that paid for similar work in the labor market in which the employing government competes for the kind of employees involved. Compensation surveys providing data representative of the labor market involved will be an acceptable basis for evaluating reasonableness.

c. Unallowable costs. Costs which are unallowable under other sections of these principles shall not be allowable under this section solely on the basis that they constitute personnel compensation.

d. Fringe benefits.

(1) Fringe benefits are allowances and services provided by employers to their employees as compensation in addition to regular salaries and wages. Fringe benefits include, but are not limited to, the costs of leave, employee insurance, pensions, and unemployment benefit plans. Except as provided elsewhere in these principles, the costs of fringe benefits are allowable to the extent that the benefits are reasonable and are required by law, governmental unit employee agreement, or an established policy of the governmental unit.

(2) The cost of fringe benefits in the form of regular compensation paid to employees during periods of authorized absences from the job, such as for annual leave, sick leave, holidays, court leave, military leave, and other similar benefits, are allowable if: (a) they are provided under established written leave policies; (b) the costs are equitably allocated to all related activities, including Federal awards; and, (c) the accounting basis (cash or accrual) selected for costing each type of leave is consistently followed by the governmental unit.

(3) When a governmental unit uses the cash basis of accounting, the cost of leave is recognized in the period that the leave is taken and paid for. Payments for unused leave when an employee retires or terminates employment are allowable in the year of payment provided they are

allocated as a general administrative expense to all activities of the governmental unit or component.

(4) The accrual basis may be only used for those types of leave for which a liability as defined by Generally Accepted Accounting Principles (GAAP) exists when the leave is earned. When a governmental unit uses the accrual basis of accounting, in accordance with GAAP, allowable leave costs are the lesser of the amount accrued or funded.

(5) The cost of fringe benefits in the form of employer contributions or expenses for social security; employee life, health, unemployment, and worker's compensation insurance (except as indicated in section 22, Insurance and indemnification); pension plan costs (see subsection e.); and other similar benefits are allowable, provided such benefits are granted under established written policies. Such benefits, whether treated as indirect costs or as direct costs, shall be allocated to Federal awards and all other activities in a manner consistent with the pattern of benefits attributable to the individuals or group(s) of employees whose salaries and wages are chargeable to such Federal awards and other activities.

e. Pension plan costs. Pension plan costs may be computed using a pay as you go method or an acceptable actuarial cost method in accordance with established written policies of the governmental unit.

(1) For pension plans financed on a pay as you go method, allowable costs will be limited to those representing actual payments to retirees or their beneficiaries.

(2) Pension costs calculated using an actuarial cost based method recognized by GAAP are allowable for a given fiscal year if they are funded for that year within six months after the end of that year. Costs funded after the six month period (or a later period agreed to by the cognizant agency) are allowable in the year funded. The cognizant agency may agree to an extension of the six month period if an appropriate adjustment is made to compensate for the timing of the charges to the Federal Government and related Federal reimbursement and the governmental unit's contribution to the pension fund. Adjustments may be made by cash refund or other equitable procedures to compensate the Federal Government for the time value of Federal reimbursements in excess of contributions to the pension fund.

(3) Amounts funded by the governmental unit in excess of the actuarially determined amount for a fiscal year may be used as the governmental unit's contribution in future periods.

(4) When a governmental unit converts to an acceptable actuarial cost method, as defined by GAAP, and funds pension costs in accordance with this method, the unfunded liability at the time of conversion shall be allowable if amortized over a period of years in accordance with GAAP.

(5) The Federal Government shall receive an equitable share of any previously allowed pension costs (including earnings thereon) which revert or inure to the governmental unit in the form of a refund, withdrawal, or other credit.

f. Post retirement health benefits. Post retirement health benefits (PRHB) refers to costs of health insurance or health services not included in a pension plan covered by subsection e. for retirees and their spouses, dependents, and survivors. PRHB costs may be computed using a pay as you go method or an acceptable actuarial cost method in accordance with established written polices of the governmental unit.

(1) For PRHB financed on a pay as you go method, allowable costs will be limited to those representing actual payments to retirees or their beneficiaries.

(2) PRHB costs calculated using an actuarial cost method recognized by GAAP are allowable if they are funded for that year within six months after the end of that year. Costs funded after the six month period (or a later period agreed to by the cognizant agency) are allowable in the year funded. The cognizant agency may agree to an extension of the six month period if an appropriate adjustment is made to compensate for the timing of the charges to the Federal Government and related Federal reimbursements and the governmental unit's contributions to the PRHB fund. Adjustments may be made by cash refund, reduction in current year's PRHB costs,

or other equitable procedures to compensate the Federal Government for the time value of Federal reimbursements in excess of contributions to the PRHB fund.

(3) Amounts funded in excess of the actuarially determined amount for a fiscal year may be used as the government's contribution in a future period.

(4) When a governmental unit converts to an acceptable actuarial cost method and funds PRHB costs in accordance with this method, the initial unfunded liability attributable to prior years shall be allowable if amortized over a period of years in accordance with GAAP, or, if no such GAAP period exists, over a period negotiated with the cognizant agency.

(5) To be allowable in the current year, the PRHB costs must be paid either to:

(a) An insurer or other benefit provider as current year costs or premiums, or

(b) An insurer or trustee to maintain a trust fund or reserve for the sole purpose of providing post retirement benefits to retirees and other beneficiaries.

(6) The Federal Government shall receive an equitable share of any amounts of previously allowed post retirement benefit costs (including earnings thereon) which revert or inure to the governmental unit in the form of a refund, withdrawal, or other credit.

g. Severance pay.

(1) Payments in addition to regular salaries and wages made to workers whose employment is being terminated are allowable to the extent that, in each case, they are required by (a) law, (b) employer employee agreement, or (c) established written policy.

(2) Severance payments (but not accruals) associated with normal turnover are allowable. Such payments shall be allocated to all activities of the governmental unit as an indirect cost.

(3) Abnormal or mass severance pay will be considered on a case by case basis and is allowable only if approved by the cognizant Federal agency.

h. Support of salaries and wages. These standards regarding time distribution are in addition to the standards for payroll documentation.

(1) Charges to Federal awards for salaries and wages, whether treated as direct or indirect costs, will be based on payrolls documented in accordance with generally accepted practice of the governmental unit and approved by a responsible official(s) of the governmental unit.

(2) No further documentation is required for the salaries and wages of employees who work in a single indirect cost activity.

(3) Where employees are expected to work solely on a single Federal award or cost objective, charges for their salaries and wages will be supported by periodic certifications that the employees worked solely on that program for the period covered by the certification. These certifications will be prepared at least semi annually and will be signed by the employee or supervisory official having first hand knowledge of the work performed by the employee.

(4) Where employees work on multiple activities or cost objectives, a distribution of their salaries or wages will be supported by personnel activity reports or equivalent documentation which meets the standards in subsection (5) unless a statistical sampling system (see subsection (6)) or other substitute system has been approved by the cognizant Federal agency. Such documentary support will be required where employees work on:

(a) More than one Federal award,

(b) A Federal award and a non Federal award,

(c) An indirect cost activity and a direct cost activity,

(d) Two or more indirect activities which are allocated using different allocation bases, or

(e) An unallowable activity and a direct or indirect cost activity.

(5) Personnel activity reports or equivalent documentation must meet the following standards:

(a) They must reflect an after the fact distribution of the actual activity of each employee,

(b) They must account for the total activity for which each employee is compensated,

(c) They must be prepared at least monthly and must coincide with one or more pay periods, and

(d) They must be signed by the employee.

(e) Budget estimates or other distribution percentages determined before the services are performed do not qualify as support for charges to Federal awards but may be used for interim accounting purposes, provided that:

(i) The governmental unit's system for establishing the estimates produces reasonable approximations of the activity actually performed;

(ii) At least quarterly, comparisons of actual costs to budgeted distributions based on the monthly activity reports are made. Costs charged to Federal awards to reflect adjustments made as a result of the activity actually performed may be recorded annually if the quarterly comparisons show the differences between budgeted and actual costs are less than ten percent; and

(iii) The budget estimates or other distribution percentages are revised at least quarterly, if necessary, to reflect changed circumstances.

(6) Substitute systems for allocating salaries and wages to Federal awards may be used in place of activity reports. These systems are subject to approval if required by the cognizant agency. Such systems may include, but are not limited to, random moment sampling, case counts, or other quantifiable measures of employee effort.

(a) Substitute systems which use sampling methods (primarily for Temporary Assistance to Needy Families (TANF), Medicaid, and other public assistance programs) must meet acceptable statistical sampling standards including:

(i) The sampling universe must include all of the employees whose salaries and wages are to be allocated based on sample results except as provided in subsection (c);

(ii) The entire time period involved must be covered by the sample; and

(iii) The results must be statistically valid and applied to the period being sampled.

(b) Allocating charges for the sampled employees' supervisors, clerical and support staffs, based on the results of the sampled employees, will be acceptable.

(c) Less than full compliance with the statistical sampling standards noted in subsection (a) may be accepted by the cognizant agency if it concludes that the amounts to be allocated to Federal awards will be minimal, or if it concludes that the system proposed by the governmental unit will result in lower costs to Federal awards than a system which complies with the standards.

(7) Salaries and wages of employees used in meeting cost sharing or matching requirements of Federal awards must be supported in the same manner as those claimed as allowable costs under Federal awards.

i. Donated services.

(1) Donated or volunteer services may be furnished to a governmental unit by professional and technical personnel, consultants, and other skilled and unskilled labor. The value of these services is not reimbursable either as a direct or indirect cost. However, the value of donated services may be used to meet cost sharing or matching requirements in accordance with the provisions of the Common Rule.

(2) The value of donated services utilized in the performance of a direct cost activity shall, when material in amount, be considered in the determination of the governmental unit's indirect costs or rate(s) and, accordingly, shall be allocated a proportionate share of applicable indirect costs.

(3) To the extent feasible, donated services will be supported by the same methods used by the governmental unit to support the allocability of regular personnel services.

9. ***Contingency provisions.*** Contributions to a contingency reserve or any similar provision made for events the occurrence of which cannot be foretold with certainty as to time, intensity, or with an assurance of their happening, are unallowable. The term "contingency reserve" excludes self-insurance reserves (see Attachment B, section 22.c.), pension plan reserves (see Attachment B, section 8.e.), and post-retirement health and other benefit reserves (see Attachment B, section 8.f.) computed using acceptable actuarial cost methods.

10. ***Defense and prosecution of criminal and civil proceedings, and claims.***

a. The following costs are unallowable for contracts covered by 10 U.S.C. 2324(k), "Allowable costs under defense contracts."

(1) Costs incurred in defense of any civil or criminal fraud proceeding or similar proceeding (including filing of false certification brought by the United States where the contractor is found liable or has pleaded nolo contendere to a charge of fraud or similar proceeding (including filing of a false certification).

(2) Costs incurred by a contractor in connection with any criminal, civil or administrative proceedings commenced by the United States or a State to the extent provided in 10 U.S.C. 2324(k).

b. Legal expenses required in the administration of Federal programs are allowable. Legal expenses for prosecution of claims against the Federal Government are unallowable.

11. ***Depreciation and use allowances.***

a. Depreciation and use allowances are means of allocating the cost of fixed assets to periods benefiting from asset use. Compensation for the use of fixed assets on hand may be made through depreciation or use allowances. A combination of the two methods may not be used in connection with a single class of fixed assets (e.g., buildings, office equipment, computer equipment, etc.) except as provided for in subsection g. Except for enterprise funds and internal service funds that are included as part of a State/local cost allocation plan, classes of assets shall be determined on the same basis used for the government-wide financial statements.

b. The computation of depreciation or use allowances shall be based on the acquisition cost of the assets involved. Where actual cost records have not been maintained, a reasonable estimate of the original acquisition cost may be used. The value of an asset donated to the governmental unit by an unrelated third party shall be its fair market value at the time of donation. Governmental or quasi-governmental organizations located within the same State shall not be considered unrelated third parties for this purpose.

c. The computation of depreciation or use allowances will exclude:

(1) The cost of land;

(2) Any portion of the cost of buildings and equipment borne by or donated by the Federal Government irrespective of where title was originally vested or where it presently resides; and

(3) Any portion of the cost of buildings and equipment contributed by or for the governmental unit, or a related donor organization, in satisfaction of a matching requirement.

d. Where the depreciation method is followed, the period of useful service (useful life) established in each case for usable capital assets must take into consideration such factors as type of construction, nature of the equipment used, historical usage patterns, technological developments, and the renewal and replacement policies of the governmental unit followed for the individual items or classes of assets involved. In the absence of clear evidence indicating that

the expected consumption of the asset will be significantly greater in the early portions than in the later portions of its useful life, the straight line method of depreciation shall be used.

Depreciation methods once used shall not be changed unless approved by the Federal cognizant or awarding agency. When the depreciation method is introduced for application to an asset previously subject to a use allowance, the annual depreciation charge thereon may not exceed the amount that would have resulted had the depreciation method been in effect from the date of acquisition of the asset. The combination of use allowances and depreciation applicable to the asset shall not exceed the total acquisition cost of the asset or fair market value at time of donation.

e. When the depreciation method is used for buildings, a building's shell may be segregated from the major component of the building (e.g., plumbing system, heating, and air conditioning system, etc.) and each major component depreciated over its estimated useful life, or the entire building (i.e., the shell and all components) may be treated as a single asset and depreciated over a single useful life.

f. Where the use allowance method is followed, the use allowance for buildings and improvements (including land improvements, such as paved parking areas, fences, and sidewalks) will be computed at an annual rate not exceeding two percent of acquisition costs. The use allowance for equipment will be computed at an annual rate not exceeding 6 2/3 percent of acquisition cost. When the use allowance method is used for buildings, the entire building must be treated as a single asset; the building's components (e.g., plumbing system, heating and air condition, etc.) cannot be segregated from the building's shell

The two percent limitation, however, need not be applied to equipment which is merely attached or fastened to the building but not permanently fixed to it and which is used as furnishings or decorations or for specialized purposes (e.g., dentist chairs and dental treatment units, counters, laboratory benches bolted to the floor, dishwashers, modular furniture, carpeting, etc.). Such equipment will be considered as not being permanently fixed to the building if it can be removed without the destruction of, or need for costly or extensive alterations or repairs, to the building or the equipment. Equipment that meets these criteria will be subject to the 6 2/3 percent equipment use allowance limitation.

g. A reasonable use allowance may be negotiated for any assets that are considered to be fully depreciated, after taking into consideration the amount of depreciation previously charged to the government, the estimated useful life remaining at the time of negotiation, the effect of any increased maintenance charges, decreased efficiency due to age, and any other factors pertinent to the utilization of the asset for the purpose contemplated.

h. Charges for use allowances or depreciation must be supported by adequate property records. Physical inventories must be taken at least once every two years (a statistical sampling approach is acceptable) to ensure that assets exist, and are in use. Governmental units will manage equipment in accordance with State laws and procedures. When the depreciation method is followed, depreciation records indicating the amount of depreciation taken each period must also be maintained.

12. ***Donations and contributions.***

a. Contributions or donations rendered. Contributions or donations, including cash, property, and services, made by the governmental unit, regardless of the recipient, are unallowable.

b. Donated services received:

(1) Donated or volunteer services may be furnished to a governmental unit by professional and technical personnel, consultants, and other skilled and unskilled labor. The value of these services is not reimbursable either as a direct or indirect cost. However, the value of donated services may be used to meet cost sharing or matching requirements in accordance with the Federal Grants Management Common Rule.

(2) The value of donated services utilized in the performance of a direct cost activity shall, when material in amount, be considered in the determination of the governmental unit's indirect costs or rate(s) and, accordingly, shall be allocated a proportionate share of applicable indirect costs.

(3) To the extent feasible, donated services will be supported by the same methods used by the governmental unit to support the allocability of regular personnel services.

13. ***Employee morale, health, and welfare costs.***

a. The costs of employee information publications, health or first-aid clinics and/or infirmaries, recreational activities, employee counseling services, and any other expenses incurred in accordance with the governmental unit's established practice or custom for the improvement of working conditions, employer-employee relations, employee morale, and employee performance are allowable.

b. Such costs will be equitably apportioned to all activities of the governmental unit. Income generated from any of these activities will be offset against expenses.

14. ***Entertainment.*** Costs of entertainment, including amusement, diversion, and social activities and any costs directly associated with such costs (such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities) are unallowable.

15. ***Equipment and other capital expenditures.***

a. For purposes of this subsection 15, the following definitions apply:

(1) "Capital Expenditures" means expenditures for the acquisition cost of capital assets (equipment, buildings, land), or expenditures to make improvements to capital assets that materially increase their value or useful life. Acquisition cost means the cost of the asset including the cost to put it in place. Acquisition cost for equipment, for example, means the net invoice price of the equipment, including the cost of any modifications, attachments, accessories, or auxiliary apparatus necessary to make it usable for the purpose for which it is acquired. Ancillary charges, such as taxes, duty, protective in transit insurance, freight, and installation may be included in, or excluded from the acquisition cost in accordance with the governmental unit's regular accounting practices.

(2) "Equipment" means an article of nonexpendable, tangible personal property having a useful life of more than one year and an acquisition cost which equals or exceeds the lesser of the capitalization level established by the governmental unit for financial statement purposes, or $5000.

(3) "Special purpose equipment" means equipment which is used only for research, medical, scientific, or other technical activities. Examples of special purpose equipment include microscopes, x-ray machines, surgical instruments, and spectrometers.

(4) "General purpose equipment" means equipment, which is not limited to research, medical, scientific or other technical activities. Examples include office equipment and furnishings, modular offices, telephone networks, information technology equipment and systems, air conditioning equipment, reproduction and printing equipment, and motor vehicles.

b. The following rules of allowability shall apply to equipment and other capital expenditures:

(1) Capital expenditures for general purpose equipment, buildings, and land are unallowable as direct charges, except where approved in advance by the awarding agency.

(2) Capital expenditures for special purpose equipment are allowable as direct costs, provided that items with a unit cost of $5000 or more have the prior approval of the awarding agency.

(3) Capital expenditures for improvements to land, buildings, or equipment which materially increase their value or useful life are unallowable as a direct cost except with the prior approval of the awarding agency.

(4) When approved as a direct charge pursuant to Attachment B, section 15.b (1), (2), and (3) above, capital expenditures will be charged in the period in which the expenditure is incurred, or as otherwise determined appropriate and negotiated with the awarding agency. In addition, Federal awarding agencies are authorized at their option to waive or delegate the prior approval requirement.

(5) Equipment and other capital expenditures are unallowable as indirect costs. However, see section 11, Depreciation and use allowance, for rules on the allowability of use allowances or depreciation on buildings, capital improvements, and equipment. Also, see section 37, Rental costs, concerning the allowability of rental costs for land, buildings, and equipment.

(6) The unamortized portion of any equipment written off as a result of a change in capitalization levels may be recovered by continuing to claim the otherwise allowable use allowances or depreciation on the equipment, or by amortizing the amount to be written off over a period of years negotiated with the cognizant agency.

(7) When replacing equipment purchased in whole or in part with Federal funds, the governmental unit may use the equipment to be replaced as a trade-in or sell the property and use the proceeds to offset the cost of the replacement property.

16. ***Fines and penalties.*** Fines, penalties, damages, and other settlements resulting from violations (or alleged violations) of, or failure of the governmental unit to comply with, Federal, State, local, or Indian tribal laws and regulations are unallowable except when incurred as a result of compliance with specific provisions of the Federal award or written instructions by the awarding agency authorizing in advance such payments.

17. ***Fund raising and investment management costs.***

a. Costs of organized fund raising, including financial campaigns, solicitation of gifts and bequests, and similar expenses incurred to raise capital or obtain contributions are unallowable, regardless of the purpose for which the funds will be used.

b. Costs of investment counsel and staff and similar expenses incurred to enhance income from investments are unallowable. However, such costs associated with investments covering pension, self insurance, or other funds which include Federal participation allowed by this Circular are allowable.

c. Fund raising and investment activities shall be allocated an appropriate share of indirect costs under the conditions described in subsection C.3.b. of Attachment A.

18. ***Gains and losses on disposition of depreciable property and other capital assets and substantial relocation of Federal programs.***

a. (1) Gains and losses on the sale, retirement, or other disposition of depreciable property shall be included in the year in which they occur as credits or charges to the asset cost grouping(s) in which the property was included. The amount of the gain or loss to be included as a credit or charge to the appropriate asset cost grouping(s) shall be the difference between the amount realized on the property and the undepreciated basis of the property.

(2) Gains and losses on the disposition of depreciable property shall not be recognized as a separate credit or charge under the following conditions:

(a) The gain or loss is processed through a depreciation account and is reflected in the depreciation allowable under sections 11 and 15.

(b) The property is given in exchange as part of the purchase price of a similar item and the gain or loss is taken into account in determining the depreciation cost basis of the new item.

(c) A loss results from the failure to maintain permissible insurance, except as otherwise provided in subsection 22.d.

(d) Compensation for the use of the property was provided through use allowances in lieu

of depreciation.

b. Substantial relocation of Federal awards from a facility where the Federal Government participated in the financing to another facility prior to the expiration of the useful life of the financed facility requires Federal agency approval. The extent of the relocation, the amount of the Federal participation in the financing, and the depreciation charged to date may require negotiation of space charges for Federal awards.

c. Gains or losses of any nature arising from the sale or exchange of property other than the property covered in subsection a., e.g., land or included in the fair market value used in any adjustment resulting from a relocation of Federal awards covered in subsection b. shall be excluded in computing Federal award costs.

19. ***General government expenses.***

a. The general costs of government are unallowable (except as provided in Attachment B, section 43, Travel costs). These include:

(1) Salaries and expenses of the Office of the Governor of a State or the chief executive of a political subdivision or the chief executive of federally recognized Indian tribal government;

(2) Salaries and other expenses of a State legislature, tribal council, or similar local governmental body, such as a county supervisor, city council, school board, etc., whether incurred for purposes of legislation or executive direction;

(3) Costs of the judiciary branch of a government;

(4) Costs of prosecutorial activities unless treated as a direct cost to a specific program if authorized by program statute or regulation (however, this does not preclude the allowability of other legal activities of the Attorney General); and

(5) Costs of other general types of government services normally provided to the general public, such as fire and police, unless provided for as a direct cost under a program statute or regulation.

b. For federally recognized Indian tribal governments and Councils Of Governments (COGs), the portion of salaries and expenses directly attributable to managing and operating Federal programs by the chief executive and his staff is allowable.

20. ***Goods or services for personal use.*** Costs of goods or services for personal use of the governmental unit's employees are unallowable regardless of whether the cost is reported as taxable income to the employees.

21. ***Idle facilities and idle capacity.***

a. As used in this section the following terms have the meanings set forth below:

(1) "Facilities" means land and buildings or any portion thereof, equipment individually or collectively, or any other tangible capital asset, wherever located, and whether owned or leased by the governmental unit.

(2) "Idle facilities" means completely unused facilities that are excess to the governmental unit's current needs.

(3) "Idle capacity" means the unused capacity of partially used facilities. It is the difference between: (a) that which a facility could achieve under 100 percent operating time on a one-shift basis less operating interruptions resulting from time lost for repairs, setups, unsatisfactory materials, and other normal delays; and (b) the extent to which the facility was actually used to meet demands during the accounting period. A multi-shift basis should be used if it can be shown that this amount of usage would normally be expected for the type of facility involved.

(4) "Cost of idle facilities or idle capacity" means costs such as maintenance, repair, housing, rent, and other related costs, e.g., insurance, interest, property taxes and depreciation or use allowances.

b. The costs of idle facilities are unallowable except to the extent that:

(1) They are necessary to meet fluctuations in workload; or

(2) Although not necessary to meet fluctuations in workload, they were necessary when acquired and are now idle because of changes in program requirements, efforts to achieve more economical operations, reorganization, termination, or other causes which could not have been reasonably foreseen. Under the exception stated in this subsection, costs of idle facilities are allowable for a reasonable period of time, ordinarily not to exceed one year, depending on the initiative taken to use, lease, or dispose of such facilities.

c. The costs of idle capacity are normal costs of doing business and are a factor in the normal fluctuations of usage or indirect cost rates from period to period. Such costs are allowable, provided that the capacity is reasonably anticipated to be necessary or was originally reasonable and is not subject to reduction or elimination by use on other Federal awards, subletting, renting, or sale, in accordance with sound business, economic, or security practices. Widespread idle capacity throughout an entire facility or among a group of assets having substantially the same function may be considered idle facilities.

22. ***Insurance and indemnification.***

a. Costs of insurance required or approved and maintained, pursuant to the Federal award, are allowable.

b. Costs of other insurance in connection with the general conduct of activities are allowable subject to the following limitations:

(1) Types and extent and cost of coverage are in accordance with the governmental unit's policy and sound business practice.

(2) Costs of insurance or of contributions to any reserve covering the risk of loss of, or damage to, Federal Government property are unallowable except to the extent that the awarding agency has specifically required or approved such costs.

c. Actual losses which could have been covered by permissible insurance (through a self insurance program or otherwise) are unallowable, unless expressly provided for in the Federal award or as described below. However, the Federal Government will participate in actual losses of a self insurance fund that are in excess of reserves. Costs incurred because of losses not covered under nominal deductible insurance coverage provided in keeping with sound management practice, and minor losses not covered by insurance, such as spoilage, breakage, and disappearance of small hand tools, which occur in the ordinary course of operations, are allowable.

d. Contributions to a reserve for certain self insurance programs including workers compensation, unemployment compensation, and severance pay are allowable subject to the following provisions:

(1) The type of coverage and the extent of coverage and the rates and premiums would have been allowed had insurance (including reinsurance) been purchased to cover the risks. However, provision for known or reasonably estimated self insured liabilities, which do not become payable for more than one year after the provision is made, shall not exceed the discounted present value of the liability. The rate used for discounting the liability must be determined by giving consideration to such factors as the governmental unit's settlement rate for those liabilities and its investment rate of return.

(2) Earnings or investment income on reserves must be credited to those reserves.

(3) Contributions to reserves must be based on sound actuarial principles using historical experience and reasonable assumptions. Reserve levels must be analyzed and updated at least biennially for each major risk being insured and take into account any reinsurance, coinsurance, etc. Reserve levels related to employee related coverages will normally be limited to the value of claims (a) submitted and adjudicated but not paid, (b) submitted but not adjudicated, and (c)

incurred but not submitted. Reserve levels in excess of the amounts based on the above must be identified and justified in the cost allocation plan or indirect cost rate proposal.

(4) Accounting records, actuarial studies, and cost allocations (or billings) must recognize any significant differences due to types of insured risk and losses generated by the various insured activities or agencies of the governmental unit. If individual departments or agencies of the governmental unit experience significantly different levels of claims for a particular risk, those differences are to be recognized by the use of separate allocations or other techniques resulting in an equitable allocation.

(5) Whenever funds are transferred from a self insurance reserve to other accounts (e.g., general fund), refunds shall be made to the Federal Government for its share of funds transferred, including earned or imputed interest from the date of transfer.

e. Actual claims paid to or on behalf of employees or former employees for workers' compensation, unemployment compensation, severance pay, and similar employee benefits (e.g., subsection 8.f. for post retirement health benefits), are allowable in the year of payment provided (1) the governmental unit follows a consistent costing policy and (2) they are allocated as a general administrative expense to all activities of the governmental unit.

f. Insurance refunds shall be credited against insurance costs in the year the refund is received.

g. Indemnification includes securing the governmental unit against liabilities to third persons and other losses not compensated by insurance or otherwise. The Federal Government is obligated to indemnify the governmental unit only to the extent expressly provided for in the Federal award, except as provided in subsection d.

h. Costs of commercial insurance that protects against the costs of the contractor for correction of the contractor's own defects in materials or workmanship are unallowable.

23. ***Interest.***

a. Costs incurred for interest on borrowed capital or the use of a governmental unit’s own funds, however represented, are unallowable except as specifically provided in subsection b. or authorized by Federal legislation.

b. Financing costs (including interest) paid or incurred which are associated with the otherwise allowable costs of building acquisition, construction, or fabrication, reconstruction or remodeling completed on or after October 1, 1980 is allowable subject to the conditions in (1) through (4) of this section 23.b. Financing costs (including interest) paid or incurred on or after September 1, 1995 for land or associated with otherwise allowable costs of equipment is allowable, subject to the conditions in (1) through (4).

(1) The financing is provided (from other than tax or user fee sources) by a bona fide third party external to the governmental unit;

(2) Thee assets are used in support of Federal awards;

(3) Earnings on debt service reserve funds or interest earned on borrowed funds pending payment of the construction or acquisition costs are used to offset the current period's cost or the capitalized interest, as appropriate. Earnings subject to being reported to the Federal Internal Revenue Service under arbitrage requirements are excludable.

(4) For debt arrangements over $1 million, unless the governmental unit makes an initial equity contribution to the asset purchase of 25 percent or more, the governmental unit shall reduce claims for interest cost by an amount equal to imputed interest earnings on excess cash flow, which is to be calculated as follows. Annually, non-Federal entities shall prepare a cumulative (from the inception of the project) report of monthly cash flows that includes inflows and outflows, regardless of the funding source. Inflows consist of depreciation expense, amortization of capitalized construction interest, and annual interest cost. For cash flow calculations, the annual inflow figures shall be divided by the number of months in the year (i.e., usually 12) that the building is in service for monthly amounts. Outflows consist of initial equity contributions, debt

principal payments (less the pro rata share attributable to the unallowable costs of land) and interest payments. Where cumulative inflows exceed cumulative outflows, interest shall be calculated on the excess inflows for that period and be treated as a reduction to allowable interest cost. The rate of interest to be used to compute earnings on excess cash flows shall be the three-month Treasury bill closing rate as of the last business day of that month.

(5) Interest attributable to fully depreciated assets is unallowable.

24. ***Lobbying.***

a. General. The cost of certain influencing activities associated with obtaining grants, contracts, cooperative agreements, or loans is an unallowable cost. Lobbying with respect to certain grants, contracts, cooperative agreements, and loans shall be governed by the common rule, "New Restrictions on Lobbying" published at 55 FR 6736 (February 26, 1990), including definitions, and the Office of Management and Budget "Government wide Guidance for New Restrictions on Lobbying" and notices published at 54 FR 52306 (December 20, 1989), 55 FR 24540 (June 15, 1990), and 57 FR 1772 (January 15, 1992), respectively.

b. Executive lobbying costs. Costs incurred in attempting to improperly influence either directly or indirectly, an employee or officer of the Executive Branch of the Federal Government to give consideration or to act regarding a sponsored agreement or a regulatory matter are unallowable. Improper influence means any influence that induces or tends to induce a Federal employee or officer to give consideration or to act regarding a federally sponsored agreement or regulatory matter on any basis other than the merits of the matter.

25. ***Maintenance, operations, and repairs.*** Unless prohibited by law, the cost of utilities, insurance, security, janitorial services, elevator service, upkeep of grounds, necessary maintenance, normal repairs and alterations, and the like are allowable to the extent that they: (1) keep property (including Federal property, unless otherwise provided for) in an efficient operating condition, (2) do not add to the permanent value of property or appreciably prolong its intended life, and (3) are not otherwise included in rental or other charges for space. Costs which add to the permanent value of property or appreciably prolong its intended life shall be treated as capital expenditures (see sections 11 and 15).

26. ***Materials and supplies costs.***

a. Costs incurred for materials, supplies, and fabricated parts necessary to carry out a Federal award are allowable.

b. Purchased materials and supplies shall be charged at their actual prices, net of applicable credits. Withdrawals from general stores or stockrooms should be charged at their actual net cost under any recognized method of pricing inventory withdrawals, consistently applied. Incoming transportation charges are a proper part of materials and supplies costs.

c. Only materials and supplies actually used for the performance of a Federal award may be charged as direct costs.

d. Where federally donated or furnished materials are used in performing the Federal award, such materials will be used without charge.

27. ***Meetings and conferences.*** Costs of meetings and conferences, the primary purpose of which is the dissemination of technical information, are allowable. This includes costs of meals, transportation, rental of facilities, speakers' fees, and other items incidental to such meetings or conferences. But see Attachment B, section 14, Entertainment costs.

28. ***Memberships, subscriptions, and professional activity costs.***

a. Costs of the governmental unit’s memberships in business, technical, and professional organizations are allowable.

b. Costs of the governmental unit’s subscriptions to business, professional, and technical periodicals are allowable.

c. Costs of membership in civic and community, social organizations are allowable as a direct cost with the approval of the Federal awarding agency.

d. Costs of membership in organizations substantially engaged in lobbying are unallowable.

29. ***Patent costs.***

a. The following costs relating to patent and copyright matters are allowable:

(i) cost of preparing disclosures, reports, and other documents required by the Federal award and of searching the art to the extent necessary to make such disclosures;

(ii) cost of preparing documents and any other patent costs in connection with the filing and prosecution of a United States patent application where title or royalty-free license is required by the Federal Government to be conveyed to the Federal Government; and

(iii) general counseling services relating to patent and copyright matters, such as advice on patent and copyright laws, regulations, clauses, and employee agreements (but see Attachment B, sections 32, Professional service costs, and 38, Royalties and other costs for use of patents and copyrights).

b. The following costs related to patent and copyright matter are unallowable:

(i) Cost of preparing disclosures, reports, and other documents and of searching the art to the extent necessary to make disclosures not required by the award

(ii) Costs in connection with filing and prosecuting any foreign patent application, or (ii) any United States patent application, where the Federal award does not require conveying title or a royalty-free license to the Federal Government (but see Attachment B, section 38., Royalties and other costs for use of patents and copyrights).

30. ***Plant and homeland security costs.*** Necessary and reasonable expenses incurred for routine and homeland security to protect facilities, personnel, and work products are allowable. Such costs include, but are not limited to, wages and uniforms of personnel engaged in security activities; equipment; barriers; contractual security services; consultants; etc. Capital expenditures for homeland and plant security purposes are subject to section 15., Equipment and other capital expenditures, of this Circular.

31. ***Pre award costs.*** Pre award costs are those incurred prior to the effective date of the award directly pursuant to the negotiation and in anticipation of the award where such costs are necessary to comply with the proposed delivery schedule or period of performance. Such costs are allowable only to the extent that they would have been allowable if incurred after the date of the award and only with the written approval of the awarding agency.

32. ***Professional service costs.***

a. Costs of professional and consultant services rendered by persons who are members of a particular profession or possess a special skill, and who are not officers or employees of the governmental unit, are allowable, subject to subparagraphs b and c when reasonable in relation to the services rendered and when not contingent upon recovery of the costs from the Federal Government.

In addition, legal and related services are limited under Attachment B, section 10.

b. In determining the allowability of costs in a particular case, no single factor or any special combination of factors is necessarily determinative. However, the following factors are relevant:

(1) The nature and scope of the service rendered in relation to the service required.

(2) The necessity of contracting for the service, considering the governmental unit's capability in the particular area.

(3) The past pattern of such costs, particularly in the years prior to Federal awards.

(4) The impact of Federal awards on the governmental unit's business (i.e., what new problems have arisen).

(5) Whether the proportion of Federal work to the governmental unit's total business is such as to influence the governmental unit in favor of incurring the cost, particularly where the services rendered are not of a continuing nature and have little relationship to work under Federal grants and contracts.

(6) Whether the service can be performed more economically by direct employment rather than contracting.

(7) The qualifications of the individual or concern rendering the service and the customary fees charged, especially on non-Federal awards.

(8) Adequacy of the contractual agreement for the service (e.g., description of the service, estimate of time required, rate of compensation, and termination provisions).

c. In addition to the factors in subparagraph b, retainer fees to be allowable must be supported by available or rendered evidence of bona fide services available or rendered.

33. ***Proposal costs.*** Costs of preparing proposals for potential Federal awards are allowable. Proposal costs should normally be treated as indirect costs and should be allocated to all activities of the governmental unit utilizing the cost allocation plan and indirect cost rate proposal. However, proposal costs may be charged directly to Federal awards with the prior approval of the Federal awarding agency.

34. ***Publication and printing costs.***

a. Publication costs include the costs of printing (including the processes of composition, plate-making, press work, binding, and the end products produced by such processes), distribution, promotion, mailing, and general handling. Publication costs also include page charges in professional publications.

b. If these costs are not identifiable with a particular cost objective, they should be allocated as indirect costs to all benefiting activities of the governmental unit.

c. Page charges for professional journal publications are allowable as a necessary part of research costs where:

(1) The research papers report work supported by the Federal Government: and

(2) The charges are levied impartially on all research papers published by the journal, whether or not by federally sponsored authors

35. ***Rearrangement and alteration costs.*** Costs incurred for ordinary and normal rearrangement and alteration of facilities are allowable. Special arrangements and alterations costs incurred specifically for a Federal award are allowable with the prior approval of the Federal awarding agency.

36. ***Reconversion costs.*** Costs incurred in the restoration or rehabilitation of the governmental unit's facilities to approximately the same condition existing immediately prior to commencement of Federal awards, less costs related to normal wear and tear, are allowable.

37. ***Rental costs of buildings and equipment.***

a. Subject to the limitations described in subsections b. through d. of this section, rental costs are allowable to the extent that the rates are reasonable in light of such factors as: rental costs of comparable property, if any; market conditions in the area; alternatives available; and, the type, life expectancy, condition, and value of the property leased. Rental arrangements should be reviewed periodically to determine if circumstances have changed and other options are available.

b. Rental costs under "sale and lease back" arrangements are allowable only up to the amount that would be allowed had the governmental unit continued to own the property. This amount would include expenses such as depreciation or use allowance, maintenance, taxes, and insurance

c. Rental costs under "less-than-arms-length" leases are allowable only up to the amount (as explained in Attachment B, section 37.b) that would be allowed had title to the property vested in the governmental unit. For this purpose, a less-than-arms-length lease is one under which one

party to the lease agreement is able to control or substantially influence the actions of the other. Such leases include, but are not limited to those between (i) divisions of a governmental unit; (ii) governmental units under common control through common officers, directors, or members; and (iii) a governmental unit and a director, trustee, officer, or key employee of the governmental unit or his immediate family, either directly or through corporations, trusts, or similar arrangements in which they hold a controlling interest. For example, a governmental unit may establish a separate corporation for the sole purpose of owning property and leasing it back to the governmental unit

d. Rental costs under leases which are required to be treated as capital leases under GAAP are allowable only up to the amount (as explained in subsection b) that would be allowed had the governmental unit purchased the property on the date the lease agreement was executed. The provisions of Financial Accounting Standards Board Statement 13, Accounting for Leases, shall be used to determine whether a lease is a capital lease. Interest costs related to capital leases are allowable to the extent they meet the criteria in Attachment B, section 23. Unallowable costs include amounts paid for profit, management fees, and taxes that would not have been incurred had the governmental unit purchased the facility.

38. ***Royalties and other costs for the use of patents.***

a. Royalties on a patent or copyright or amortization of the cost of acquiring by purchase a copyright, patent, or rights thereto, necessary for the proper performance of the award are allowable unless:

(1) The Federal Government has a license or the right to free use of the patent or copyright.

(2) The patent or copyright has been adjudicated to be invalid, or has been administratively determined to be invalid.

(3) The patent or copyright is considered to be unenforceable.

(4) The patent or copyright is expired.

b. Special care should be exercised in determining reasonableness where the royalties may have been arrived at as a result of less-than-arm's-length bargaining, e.g.:

(1) Royalties paid to persons, including corporations, affiliated with the governmental unit.

(2) Royalties paid to unaffiliated parties, including corporations, under an agreement entered into in contemplation that a Federal award would be made.

(3) Royalties paid under an agreement entered into after an award is made to a governmental unit.

c. In any case involving a patent or copyright formerly owned by the governmental unit, the amount of royalty allowed should not exceed the cost which would have been allowed had the governmental unit retained title thereto.

39. ***Selling and marketing.*** Costs of selling and marketing any products or services of the governmental unit are unallowable (unless allowed under Attachment B, section 1. as allowable public relations costs or under Attachment B, section 33. as allowable proposal costs.

40. ***Taxes.***

a. Taxes that a governmental unit is legally required to pay are allowable, except for self assessed taxes that disproportionately affect Federal programs or changes in tax policies that disproportionately affect Federal programs. This provision becomes effective for taxes paid during the governmental unit's first fiscal year that begins on or after January 1, 1998, and applies thereafter

b. Gasoline taxes, motor vehicle fees, and other taxes that are in effect user fees for benefits provided to the Federal Government are allowable.

c. This provision does not restrict the authority of Federal agencies to identify taxes where Federal participation is inappropriate. Where the identification of the amount of unallowable taxes would

require an inordinate amount of effort, the cognizant agency may accept a reasonable approximation thereof.

41. ***Termination costs applicable to sponsored agreements.*** Termination of awards generally gives rise to the incurrence of costs, or the need for special treatment of costs, which would not have arisen had the Federal award not been terminated. Cost principles covering these items are set forth below. They are to be used in conjunction with the other provisions of this Circular in termination situations.

a. The cost of items reasonably usable on the governmental unit's other work shall not be allowable unless the governmental unit submits evidence that it would not retain such items at cost without sustaining a loss. In deciding whether such items are reasonably usable on other work of the governmental unit, the awarding agency should consider the governmental unit's plans and orders for current and scheduled activity.

   Contemporaneous purchases of common items by the governmental unit shall be regarded as evidence that such items are reasonably usable on the governmental unit's other work. Any acceptance of common items as allocable to the terminated portion of the Federal award shall be limited to the extent that the quantities of such items on hand, in transit, and on order are in excess of the reasonable quantitative requirements of other work.

b. If in a particular case, despite all reasonable efforts by the governmental unit, certain costs cannot be discontinued immediately after the effective date of termination, such costs are generally allowable within the limitations set forth in this Circular, except that any such costs continuing after termination due to the negligent or willful failure of the governmental unit to discontinue such costs shall be unallowable.

c. Loss of useful value of special tooling, machinery, and equipment is generally allowable if:

   (1) Such special tooling, special machinery, or equipment is not reasonably capable of use in the other work of the governmental unit,

   (2) The interest of the Federal Government is protected by transfer of title or by other means deemed appropriate by the awarding agency, and

   (3) The loss of useful value for any one terminated Federal award is limited to that portion of the acquisition cost which bears the same ratio to the total acquisition cost as the terminated portion of the Federal award bears to the entire terminated Federal award and other Federal awards for which the special tooling, machinery, or equipment was acquired.

d. Rental costs under unexpired leases are generally allowable where clearly shown to have been reasonably necessary for the performance of the terminated Federal award less the residual value of such leases, if:

   (1) the amount of such rental claimed does not exceed the reasonable use value of the property leased for the period of the Federal award and such further period as may be reasonable, and

   (2) the governmental unit makes all reasonable efforts to terminate, assign, settle, or otherwise reduce the cost of such lease. There also may be included the cost of alterations of such leased property, provided such alterations were necessary for the performance of the Federal award, and of reasonable restoration required by the provisions of the lease.

e. Settlement expenses including the following are generally allowable:

   (1) Accounting, legal, clerical, and similar costs reasonably necessary for:

      (a) The preparation and presentation to the awarding agency of settlement claims and supporting data with respect to the terminated portion of the Federal award, unless the termination is for default (see Subpart __.44 of the Grants Management Common Rule implementing OMB Circular A-102); and

      (b) The termination and settlement of subawards.

   (2) Reasonable costs for the storage, transportation, protection, and disposition of property

provided by the Federal Government or acquired or produced for the Federal award, except when grantees or contractors are reimbursed for disposals at a predetermined amount in accordance with Subparts__.31 and ___.32 of the Grants Management Common Rule implementing OMB Circular A-102.

f. Claims under subawards, including the allocable portion of claims which are common to the Federal award, and to other work of the governmental unit are generally allowable.

An appropriate share of the governmental unit's indirect expense may be allocated to the amount of settlements with subcontractors and/or subgrantees, provided that the amount allocated is otherwise consistent with the basic guidelines contained in Attachment A. The indirect expense so allocated shall exclude the same and similar costs claimed directly or indirectly as settlement expenses.

42. ***Training costs.*** The cost of training provided for employee development is allowable.

43. ***Travel costs.***

a. General. Travel costs are the expenses for transportation, lodging, subsistence, and related items incurred by employees who are in travel status on official business of the governmental unit. Such costs may be charged on an actual cost basis, on a per diem or mileage basis in lieu of actual costs incurred, or on a combination of the two, provided the method used is applied to an entire trip and not to selected days of the trip, and results in charges consistent with those normally allowed in like circumstances in the governmental unit's non-federally sponsored activities. Notwithstanding the provisions of Attachment B, section 19, General government expenses, travel costs of officials covered by that section are allowable with the prior approval of an awarding agency when they are specifically related to Federal awards.

b. Lodging and subsistence. Costs incurred by employees and officers for travel, including costs of lodging, other subsistence, and incidental expenses, shall be considered reasonable and allowable only to the extent such costs do not exceed charges normally allowed by the governmental unit in its regular operations as the result of the governmental unit's written travel policy. In the absence of an acceptable, written governmental unit policy regarding travel costs, the rates and amounts established under subchapter I of Chapter 57, Title 5, United States Code ("Travel and Subsistence Expenses; Mileage Allowances"), or by the Administrator of General Services, or by the President (or his or her designee) pursuant to any provisions of such subchapter shall apply to travel under Federal awards (48 CFR 31.205-46(a)).

c. Commercial air travel.

(1) Airfare costs in excess of the customary standard commercial airfare (coach or equivalent), Federal Government contract airfare (where authorized and available), or the lowest commercial discount airfare are unallowable except when such accommodations would:

(a) require circuitous routing;
(b) require travel during unreasonable hours;
(c) excessively prolong travel;
(d) result in additional costs that would offset the transportation savings; or
(e) offer accommodations not reasonably adequate for the traveler's medical needs. The governmental unit must justify and document these conditions on a case-by-case basis in order for the use of first-class airfare to be allowable in such cases.

(2) Unless a pattern of avoidance is detected, the Federal Government will generally not question a governmental unit's determinations that customary standard airfare or other discount airfare is unavailable for specific trips if the governmental unit can demonstrate either of the following: (a) that such airfare was not available in the specific case; or (b) that it is the governmental unit's overall practice to make routine use of such airfare.

d. Air travel by other than commercial carrier. Costs of travel by governmental unit-owned, -leased, or -chartered aircraft include the cost of lease, charter, operation (including personnel costs), maintenance, depreciation, insurance, and other related costs. The portion of such costs that

exceeds the cost of allowable commercial air travel, as provided for in subsection c., is unallowable.

e. Foreign travel. Direct charges for foreign travel costs are allowable only when the travel has received prior approval of the awarding agency. Each separate foreign trip must receive such approval. For purposes of this provision, "foreign travel" includes any travel outside Canada, Mexico, the United States, and any United States territories and possessions. However, the term "foreign travel" for a governmental unit located in a foreign country means travel outside that country.

ATTACHMENT C – Circular No. A 87

STATE/LOCAL WIDE CENTRAL SERVICE COST ALLOCATION PLANS

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A. ***General.***

1. Most governmental units provide certain services, such as motor pools, computer centers, purchasing, accounting, etc., to operating agencies on a centralized basis. Since federally supported awards are performed within the individual operating agencies, there needs to be a process whereby these central service costs can be identified and assigned to benefitted activities on a reasonable and consistent basis. The central service cost allocation plan provides that process. All costs and other data used to distribute the costs included in the plan should be supported by formal accounting and other records that will support the propriety of the costs assigned to Federal awards.

2. Guidelines and illustrations of central service cost allocation plans are provided in a brochure published by the Department of Health and Human Services entitled "A Guide for State and Local

Government Agencies: Cost Principles and Procedures for Establishing Cost Allocation Plans and Indirect Cost Rates for Grants and Contracts with the Federal Government." A copy of this brochure may be obtained from the Superintendent of Documents, U.S. Government Printing Office.

B. ***Definitions.***

1. "Billed central services" means central services that are billed to benefitted agencies and/or programs on an individual fee for service or similar basis. Typical examples of billed central services include computer services, transportation services, insurance, and fringe benefits.

2. "Allocated central services" means central services that benefit operating agencies but are not billed to the agencies on a fee for service or similar basis. These costs are allocated to benefitted agencies on some reasonable basis. Examples of such services might include general accounting, personnel administration, purchasing, etc.

3. "Agency or operating agency" means an organizational unit or sub division within a governmental unit that is responsible for the performance or administration of awards or activities of the governmental unit.

C. ***Scope of the Central Service Cost Allocation Plans.*** The central service cost allocation plan will include all central service costs that will be claimed (either as a billed or an allocated cost) under Federal awards and will be documented as described in section E. Costs of central services omitted from the plan will not be reimbursed.

D. ***Submission Requirements.***

1. Each State will submit a plan to the Department of Health and Human Services for each year in which it claims central service costs under Federal awards. The plan should include (a) a projection of the next year's allocated central service cost (based either on actual costs for the most recently completed year or the budget projection for the coming year), and (b) a reconciliation of actual allocated central service costs to the estimated costs used for either the most recently completed year or the year immediately preceding the most recently completed year.

2. Each local government that has been designated as a "major local government" by the Office of Management and Budget (OMB) is also required to submit a plan to its cognizant agency annually. OMB periodically lists major local governments in the Federal Register.

3. All other local governments claiming central service costs must develop a plan in accordance with the requirements described in this Circular and maintain the plan and related supporting documentation for audit. These local governments are not required to submit their plans for Federal approval unless they are specifically requested to do so by the cognizant agency. Where a local government only receives funds as a sub recipient, the primary recipient will be responsible for negotiating indirect cost rates and/or monitoring the sub recipient's plan.

4. All central service cost allocation plans will be prepared and, when required, submitted within six months prior to the beginning of each of the governmental unit's fiscal years in which it proposes to claim central service costs. Extensions may be granted by the cognizant agency on a case by case basis.

E. ***Documentation Requirements for Submitted Plans.*** The documentation requirements described in this section may be modified, expanded, or reduced by the cognizant agency on a case by case basis. For example, the requirements may be reduced for those central services which have little or no impact on Federal awards. Conversely, if a review of a plan indicates that certain additional information is needed, and will likely be needed in future years, it may be routinely requested in future plan submissions. Items marked with an asterisk (*) should be submitted only once; subsequent plans should merely indicate any changes since the last plan.

1. General. All proposed plans must be accompanied by the following: an organization chart sufficiently detailed to show operations including the central service activities of the State/local government whether or not they are shown as benefiting from central service functions; a copy of the Comprehensive Annual Financial Report (or a copy of the Executive Budget if budgeted costs are being proposed) to support the allowable costs of each central service activity included in the plan; and, a certification (see subsection 4.) that the plan was prepared in accordance with this Circular, contains only allowable costs, and was

prepared in a manner that treated similar costs consistently among the various Federal awards and between Federal and non Federal awards/activities.

2. Allocated central services. For each allocated central service, the plan must also include the following: a brief description of the service*, an identification of the unit rendering the service and the operating agencies receiving the service, the items of expense included in the cost of the service, the method used to distribute the cost of the service to benefitted agencies, and a summary schedule showing the allocation of each service to the specific benefitted agencies. If any self insurance funds or fringe benefits costs are treated as allocated (rather than billed) central services, documentation discussed in subsections 3.b. and c. shall also be included.

3. Billed services.

a. General. The information described below shall be provided for all billed central services, including internal service funds, self insurance funds, and fringe benefit funds.

b. Internal service funds.

(1) For each internal service fund or similar activity with an operating budget of $5 million or more, the plan shall include: a brief description of each service; a balance sheet for each fund based on individual accounts contained in the governmental unit's accounting system; a revenue/expenses statement, with revenues broken out by source, e.g., regular billings, interest earned, etc.; a listing of all non operating transfers (as defined by Generally Accepted Accounting Principles (GAAP)) into and out of the fund; a description of the procedures (methodology) used to charge the costs of each service to users, including how billing rates are determined; a schedule of current rates; and, a schedule comparing total revenues (including imputed revenues) generated by the service to the allowable costs of the service, as determined under this Circular, with an explanation of how variances will be handled.

(2) Revenues shall consist of all revenues generated by the service, including unbilled and uncollected revenues. If some users were not billed for the services (or were not billed at the full rate for that class of users), a schedule showing the full imputed revenues associated with these users shall be provided. Expenses shall be broken out by object cost categories (e.g., salaries, supplies, etc.).

c. Self insurance funds. For each self insurance fund, the plan shall include: the fund balance sheet; a statement of revenue and expenses including a summary of billings and claims paid by agency; a listing of all non operating transfers into and out of the fund; the type(s) of risk(s) covered by the fund (e.g., automobile liability, workers' compensation, etc.); an explanation of how the level of fund contributions are determined, including a copy of the current actuarial report (with the actuarial assumptions used) if the contributions are determined on an actuarial basis; and, a description of the procedures used to charge or allocate fund contributions to benefitted activities. Reserve levels in excess of claims (1) submitted and adjudicated but not paid, (2) submitted but not adjudicated, and (3) incurred but not submitted must be identified and explained.

d. Fringe benefits. For fringe benefit costs, the plan shall include: a listing of fringe benefits provided to covered employees, and the overall annual cost of each type of benefit; current fringe benefit policies*; and procedures used to charge or allocate the costs of the benefits to benefitted activities. In addition, for pension and post retirement health insurance plans, the following information shall be provided: the governmental unit's funding policies, e.g., legislative bills, trust agreements, or State mandated contribution rules, if different from actuarially determined rates; the pension plan's costs accrued for the year; the amount funded, and date(s) of funding; a copy of the current actuarial report (including the actuarial assumptions); the plan trustee's report; and, a schedule from the activity showing the value of the interest cost associated with late funding.

4. Required certification. Each central service cost allocation plan will be accompanied by a certification in the following form:

CERTIFICATE OF COST ALLOCATION PLAN

This is to certify that I have reviewed the cost allocation plan submitted herewith and to the best of my knowledge and belief:

(1) All costs included in this proposal [identify date] to establish cost allocations or billings for [identify period covered by plan] are allowable in accordance with the requirements of OMB Circular A 87, "Cost Principles for State, Local, and Indian Tribal Governments," and the Federal award(s) to which they apply. Unallowable costs have been adjusted for in allocating costs as indicated in the cost allocation plan.

(2) All costs included in this proposal are properly allocable to Federal awards on the basis of a beneficial or causal relationship between the expenses incurred and the awards to which they are allocated in accordance with applicable requirements. Further, the same costs that have been treated as indirect costs have not been claimed as direct costs. Similar types of costs have been accounted for consistently.

I declare that the foregoing is true and correct.

Governmental Unit:_____
Signature: _____
Name of Official:_____
Title:_____
Date of Execution:_____

F. ***Negotiation and Approval of Central Service Plans.***

1. All proposed central service cost allocation plans that are required to be submitted will be reviewed, negotiated, and approved by the Federal cognizant agency on a timely basis. The cognizant agency will review the proposal within six months of receipt of the proposal and either negotiate/approve the proposal or advise the governmental unit of the additional documentation needed to support/evaluate the proposed plan or the changes required to make the proposal acceptable. Once an agreement with the governmental unit has been reached, the agreement will be accepted and used by all Federal agencies, unless prohibited or limited by statute. Where a Federal funding agency has reason to believe that special operating factors affecting its awards necessitate special consideration, the funding agency will, prior to the time the plans are negotiated, notify the cognizant agency.

2. The results of each negotiation shall be formalized in a written agreement between the cognizant agency and the governmental unit. This agreement will be subject to re opening if the agreement is subsequently found to violate a statute or the information upon which the plan was negotiated is later found to be materially incomplete or inaccurate. The results of the negotiation shall be made available to all Federal agencies for their use.

3. Negotiated cost allocation plans based on a proposal later found to have included costs that: (a) are unallowable (i) as specified by law or regulation, (ii) as identified in Attachment B of this Circular, or (iii) by the terms and conditions of Federal awards, or (b) are unallowable because they are clearly not allocable to Federal awards, shall be adjusted, or a refund shall be made at the option of the Federal cognizant agency. These adjustments or refunds are designed to correct the plans and do not constitute a reopening of the negotiation.

G. ***Other Policies.***

1. Billed central service activities. Each billed central service activity must separately account for all revenues (including imputed revenues) generated by the service, expenses incurred to furnish the service, and profit/loss.

2. Working capital reserves. Internal service funds are dependent upon a reasonable level of working capital reserve to operate from one billing cycle to the next. Charges by an internal service activity to provide for the establishment and maintenance of a reasonable level of working capital reserve, in addition to the full recovery of costs, are allowable. A working capital reserve as part of retained earnings of up to 60 days cash expenses for normal operating purposes is considered reasonable. A working

capital reserve exceeding 60 days may be approved by the cognizant Federal agency in exceptional cases.

3. Carry forward adjustments of allocated central service costs. Allocated central service costs are usually negotiated and approved for a future fiscal year on a "fixed with carry forward" basis. Under this procedure, the fixed amounts for the future year covered by agreement are not subject to adjustment for that year. However, when the actual costs of the year involved become known, the differences between the fixed amounts previously approved and the actual costs will be carried forward and used as an adjustment to the fixed amounts established for a later year. This "carry forward" procedure applies to all central services whose costs were fixed in the approved plan. However, a carry forward adjustment is not permitted, for a central service activity that was not included in the approved plan, or for unallowable costs that must be reimbursed immediately.

4. Adjustments of billed central services. Billing rates used to charge Federal awards shall be based on the estimated costs of providing the services, including an estimate of the allocable central service costs. A comparison of the revenue generated by each billed service (including total revenues whether or not billed or collected) to the actual allowable costs of the service will be made at least annually, and an adjustment will be made for the difference between the revenue and the allowable costs. These adjustments will be made through one of the following adjustment methods: (a) a cash refund to the Federal Government for the Federal share of the adjustment, (b) credits to the amounts charged to the individual programs, (c) adjustments to future billing rates, or (d) adjustments to allocated central service costs. Adjustments to allocated central services will not be permitted where the total amount of the adjustment for a particular service (Federal share and non Federal) share exceeds $500,000.

5. Records retention. All central service cost allocation plans and related documentation used as a basis for claiming costs under Federal awards must be retained for audit in accordance with the records retention requirements contained in the Common Rule.

6. Appeals. If a dispute arises in the negotiation of a plan between the cognizant agency and the governmental unit, the dispute shall be resolved in accordance with the appeals procedures of the cognizant agency.

7. OMB assistance. To the extent that problems are encountered among the Federal agencies and/or governmental units in connection with the negotiation and approval process, OMB will lend assistance, as required, to resolve such problems in a timely manner.

ATTACHMENT D – Circular No. A 87

PUBLIC ASSISTANCE COST ALLOCATION PLANS

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F. Unallowable Costs

A. ***General.*** Federally financed programs administered by State public assistance agencies are funded predominately by the Department of Health and Human Services (HHS). In support of its stewardship requirements, HHS has published requirements for the development, documentation, submission, negotiation, and approval of public assistance cost allocation plans in Subpart E of 45 CFR Part 95. All administrative costs (direct and indirect) are normally charged to Federal awards by implementing the public assistance cost allocation plan. This Attachment extends these requirements to all Federal

agencies whose programs are administered by a State public assistance agency. Major federally financed programs typically administered by State public assistance agencies include: Temporary Assistance to Needy Families (TANF), Medicaid, Food Stamps, Child Support Enforcement, Adoption Assistance and Foster Care, and Social Services Block Grant.

B. ***Definitions.***

1. "State public assistance agency" means a State agency administering or supervising the administration of one or more public assistance programs operated by the State as identified in Subpart E of 45 CFR Part 95. For the purpose of this Attachment, these programs include all programs administered by the State public assistance agency.

2. "State public assistance agency costs" means all costs incurred by, or allocable to, the State public assistance agency, except expenditures for financial assistance, medical vendor payments, food stamps, and payments for services and goods provided directly to program recipients.

C. ***Policy.*** State public assistance agencies will develop, document and implement, and the Federal Government will review, negotiate, and approve, public assistance cost allocation plans in accordance with Subpart E of 45 CFR Part 95. The plan will include all programs administered by the State public assistance agency. Where a letter of approval or disapproval is transmitted to a State public assistance agency in accordance with Subpart E, the letter will apply to all Federal agencies and programs. The remaining sections of this Attachment (except for the requirement for certification) summarize the provisions of Subpart E of 45 CFR Part 95.

D. ***Submission, Documentation, and Approval of Public Assistance Cost Allocation Plans.***

1. State public assistance agencies are required to promptly submit amendments to the cost allocation plan to HHS for review and approval.

2. Under the coordination process outlined in subsection E, affected Federal agencies will review all new plans and plan amendments and provide comments, as appropriate, to HHS. The effective date of the plan or plan amendment will be the first day of the quarter following the submission of the plan or amendment, unless another date is specifically approved by HHS. HHS, as the cognizant agency acting on behalf of all affected Federal agencies, will, as necessary, conduct negotiations with the State public assistance agency and will inform the State agency of the action taken on the plan or plan amendment.

E. ***Review of Implementation of Approved Plans.***

1. Since public assistance cost allocation plans are of a narrative nature, the review during the plan approval process consists of evaluating the appropriateness of the proposed groupings of costs (cost centers) and the related allocation bases. As such, the Federal Government needs some assurance that the cost allocation plan has been implemented as approved. This is accomplished by reviews by the funding agencies, single audits, or audits conducted by the cognizant audit agency.

2. Where inappropriate charges affecting more than one funding agency are identified, the cognizant HHS cost negotiation office will be advised and will take the lead in resolving the issue(s) as provided for in Subpart E of 45 CFR Part 95.

3. If a dispute arises in the negotiation of a plan or from a disallowance involving two or more funding agencies, the dispute shall be resolved in accordance with the appeals procedures set out in 45 CFR Part 75. Disputes involving only one funding agency will be resolved in accordance with the funding agency's appeal process.

4. To the extent that problems are encountered among the Federal agencies and/or governmental units in connection with the negotiation and approval process, the Office of Management and Budget will lend assistance, as required, to resolve such problems in a timely manner.

F. ***Unallowable Costs.*** Claims developed under approved cost allocation plans will be based on allowable costs as identified in this Circular. Where unallowable costs have been claimed and reimbursed, they will be refunded to the program that reimbursed the unallowable cost using one of the following methods: (a) a cash refund, (b) offset to a subsequent claim, or (c) credits to the amounts charged to individual awards.

ATTACHMENT E – Circular No. A 87

STATE AND LOCAL INDIRECT COST RATE PROPOSALS

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A. ***General.***

1. Indirect costs are those that have been incurred for common or joint puroses. These costs benefit more than one cost objective and cannot be readily identified with a particular final cost objective without effort disproportionate to the results achieved. After direct costs have been determined and assigned directly to Federal awards and other activities as appropriate, indirect costs are those remaining to be allocated to benefitted cost objectives. A cost may not be allocated to a Federal award as an indirect cost if any other cost incurred for the same purpose, in like circumstances, has been assigned to a Federal award as a direct cost.

2. Indirect costs include (a) the indirect costs originating in each department or agency of the governmental unit carrying out Federal awards and (b) the costs of central governmental services distributed through the central service cost allocation plan (as described in Attachment C) and not otherwise treated as direct costs.

3. Indirect costs are normally charged to Federal awards by the use of an indirect cost rate. A separate indirect cost rate(s) is usually necessary for each department or agency of the governmental unit claiming indirect costs under Federal awards. Guidelines and illustrations of indirect cost proposals are provided in

a brochure published by the Department of Health and Human Services entitled "A Guide for State and Local Government Agencies: Cost Principles and Procedures for Establishing Cost Allocation Plans and Indirect Cost Rates for Grants and Contracts with the Federal Government." A copy of this brochure may be obtained from the Superintendent of Documents, U.S. Government Printing Office.

4. Because of the diverse characteristics and accounting practices of governmental units, the types of costs which may be classified as indirect costs cannot be specified in all situations. However, typical examples of indirect costs may include certain State/local wide central service costs, general administration of the grantee department or agency, accounting and personnel services performed within the grantee department or agency, depreciation or use allowances on buildings and equipment, the costs of operating and maintaining facilities, etc.

5. This Attachment does not apply to State public assistance agencies. These agencies should refer instead to Attachment D.

B. ***Definitions.***

1. "Indirect cost rate proposal" means the documentation prepared by a governmental unit or subdivision thereof to substantiate its request for the establishment of an indirect cost rate.

2. "Indirect cost rate" is a device for determining in a reasonable manner the proportion of indirect costs each program should bear. It is the ratio (expressed as a percentage) of the indirect costs to a direct cost base.

3. "Indirect cost pool" is the accumulated costs that jointly benefit two or more programs or other cost objectives.

4. "Base" means the accumulated direct costs (normally either total direct salaries and wages or total direct costs exclusive of any extraordinary or distorting expenditures) used to distribute indirect costs to individual Federal awards. The direct cost base selected should result in each award bearing a fair share of the indirect costs in reasonable relation to the benefits received from the costs.

5. "Predetermined rate" means an indirect cost rate, applicable to a specified current or future period, usually the governmental unit's fiscal year. This rate is based on an estimate of the costs to be incurred during the period. Except under very unusual circumstances, a predetermined rate is not subject to adjustment. (Because of legal constraints, predetermined rates are not permitted for Federal contracts; they may, however, be used for grants or cooperative agreements.) Predetermined rates may not be used by governmental units that have not submitted and negotiated the rate with the cognizant agency. In view of the potential advantages offered by this procedure, negotiation of predetermined rates for indirect costs for a period of two to four years should be the norm in those situations where the cost experience and other pertinent facts available are deemed sufficient to enable the parties involved to reach an informed judgment as to the probable level of indirect costs during the ensuing accounting periods.

6. "Fixed rate" means an indirect cost rate which has the same characteristics as a predetermined rate, except that the difference between the estimated costs and the actual, allowable costs of the period covered by the rate is carried forward as an adjustment to the rate computation of a subsequent period.

7. "Provisional rate" means a temporary indirect cost rate applicable to a specified period which is used for funding, interim reimbursement, and reporting indirect costs on Federal awards pending the establishment of a "final" rate for that period.

8. "Final rate" means an indirect cost rate applicable to a specified past period which is based on the actual allowable costs of the period. A final audited rate is not subject to adjustment.

9. "Base period" for the allocation of indirect costs is the period in which such costs are incurred and accumulated for allocation to activities performed in that period. The base period normally should coincide with the governmental unit's fiscal year, but in any event, shall be so selected as to avoid inequities in the allocation of costs.

C. ***Allocation of Indirect Costs and Determination of Indirect Cost Rates.***

1. General.

   a. Where a governmental unit's department or agency has only one major function, or where all its major functions benefit from the indirect costs to approximately the same degree, the allocation of indirect costs and the computation of an indirect cost rate may be accomplished through simplified allocation procedures as described in subsection 2.

   b. Where a governmental unit's department or agency has several major functions which benefit from its indirect costs in varying degrees, the allocation of indirect costs may require the accumulation of such costs into separate cost groupings which then are allocated individually to benefitted functions by means of a base which best measures the relative degree of benefit. The indirect costs allocated to each function are then distributed to individual awards and other activities included in that function by means of an indirect cost rate(s).

   c. Specific methods for allocating indirect costs and computing indirect cost rates along with the conditions under which each method should be used are described in subsections 2, 3 and 4.

2. Simplified method.

   a. Where a grantee agency's major functions benefit from its indirect costs to approximately the same degree, the allocation of indirect costs may be accomplished by (1) classifying the grantee agency's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate which is used to distribute indirect costs to individual Federal awards. The rate should be expressed as the percentage which the total amount of allowable indirect costs bears to the base selected. This method should also be used where a governmental unit's department or agency has only one major function encompassing a number of individual projects or activities, and may be used where the level of Federal awards to that department or agency is relatively small.

   b. Both the direct costs and the indirect costs shall exclude capital expenditures and unallowable costs. However, unallowable costs must be included in the direct costs if they represent activities to which indirect costs are properly allocable.

   c. The distribution base may be (1) total direct costs (excluding capital expenditures and other distorting items, such as pass through funds, major subcontracts, etc.), (2) direct salaries and wages, or (3) another base which results in an equitable distribution.

3. Multiple allocation base method.

   a. Where a grantee agency's indirect costs benefit its major functions in varying degrees, such costs shall be accumulated into separate cost groupings. Each grouping shall then be allocated individually to benefitted functions by means of a base which best measures the relative benefits.

   b. The cost groupings should be established so as to permit the allocation of each grouping on the basis of benefits provided to the major functions. Each grouping should constitute a pool of expenses that are of like character in terms of the functions they benefit and in terms of the allocation base which best measures the relative benefits provided to each function. The number of separate groupings should be held within practical limits, taking into consideration the materiality of the amounts involved and the degree of precision needed.

   c. Actual conditions must be taken into account in selecting the base to be used in allocating the expenses in each grouping to benefitted functions. When an allocation can be made by assignment of a cost grouping directly to the function benefitted, the allocation shall be made in that manner. When the expenses in a grouping are more general in nature, the allocation should be made through the use of a selected base which produces results that are equitable to both the Federal Government and the governmental unit. In general, any cost element or related factor associated with the governmental unit's activities is potentially adaptable for use as an allocation base provided that: (1) it can readily be expressed in terms of dollars or other quantitative measures (total direct costs, direct salaries and wages, staff hours applied, square feet used,

hours of usage, number of documents processed, population served, and the like), and (2) it is common to the benefitted functions during the base period.

d. Except where a special indirect cost rate(s) is required in accordance with subsection 4, the separate groupings of indirect costs allocated to each major function shall be aggregated and treated as a common pool for that function. The costs in the common pool shall then be distributed to individual Federal awards included in that function by use of a single indirect cost rate.

e. The distribution base used in computing the indirect cost rate for each function may be (1) total direct costs (excluding capital expenditures and other distorting items such as pass through funds, major subcontracts, etc.), (2) direct salaries and wages, or (3) another base which results in an equitable distribution. An indirect cost rate should be developed for each separate indirect cost pool developed. The rate in each case should be stated as the percentage relationship between the particular indirect cost pool and the distribution base identified with that pool.

4. Special indirect cost rates.

a. In some instances, a single indirect cost rate for all activities of a grantee department or agency or for each major function of the agency may not be appropriate. It may not take into account those different factors which may substantially affect the indirect costs applicable to a particular program or group of programs. The factors may include the physical location of the work, the level of administrative support required, the nature of the facilities or other resources employed, the organizational arrangements used, or any combination thereof. When a particular award is carried out in an environment which appears to generate a significantly different level of indirect costs, provisions should be made for a separate indirect cost pool applicable to that award. The separate indirect cost pool should be developed during the course of the regular allocation process, and the separate indirect cost rate resulting therefrom should be used, provided that: (1) the rate differs significantly from the rate which would have been developed under subsections 2. and 3., and (2) the award to which the rate would apply is material in amount.

b. Although this Circular adopts the concept of the full allocation of indirect costs, there are some Federal statutes which restrict the reimbursement of certain indirect costs. Where such restrictions exist, it may be necessary to develop a special rate for the affected award. Where a "restricted rate" is required, the procedure for developing a non restricted rate will be used except for the additional step of the elimination from the indirect cost pool those costs for which the law prohibits reimbursement.

D. ***Submission and Documentation of Proposals.***

1. Submission of indirect cost rate proposals.

a. All departments or agencies of the governmental unit desiring to claim indirect costs under Federal awards must prepare an indirect cost rate proposal and related documentation to support those costs. The proposal and related documentation must be retained for audit in accordance with the records retention requirements contained in the Common Rule.

b. A governmental unit for which a cognizant agency assignment has been specifically designated must submit its indirect cost rate proposal to its cognizant agency. The Office of Management and Budget (OMB) will periodically publish lists of governmental units identifying the appropriate Federal cognizant agencies. The cognizant agency for all governmental units or agencies not identified by OMB will be determined based on the Federal agency providing the largest amount of Federal funds. In these cases, a governmental unit must develop an indirect cost proposal in accordance with the requirements of this Circular and maintain the proposal and related supporting documentation for audit. These governmental units are not required to submit their proposals unless they are specifically requested to do so by the cognizant agency. Where a local government only receives funds as a sub recipient, the primary recipient will be responsible for negotiating and/or monitoring the sub recipient's plan.

c. Each Indian tribal government desiring reimbursement of indirect costs must submit its indirect cost proposal to the Department of the Interior (its cognizant Federal agency).

d. Indirect cost proposals must be developed (and, when required, submitted) within six months after the close of the governmental unit's fiscal year, unless an exception is approved by the cognizant Federal agency. If the proposed central service cost allocation plan for the same period has not been approved by that time, the indirect cost proposal may be prepared including an amount for central services that is based on the latest federally approved central service cost allocation plan. The difference between these central service amounts and the amounts ultimately approved will be compensated for by an adjustment in a subsequent period.

2. Documentation of proposals. The following shall be included with each indirect cost proposal:

a. The rates proposed, including subsidiary work sheets and other relevant data, cross referenced and reconciled to the financial data noted in subsection b. Allocated central service costs will be supported by the summary table included in the approved central service cost allocation plan. This summary table is not required to be submitted with the indirect cost proposal if the central service cost allocation plan for the same fiscal year has been approved by the cognizant agency and is available to the funding agency.

b. A copy of the financial data (financial statements, comprehensive annual financial report, executive budgets, accounting reports, etc.) upon which the rate is based. Adjustments resulting from the use of unaudited data will be recognized, where appropriate, by the Federal cognizant agency in a subsequent proposal.

c. The approximate amount of direct base costs incurred under Federal awards. These costs should be broken out between salaries and wages and other direct costs.

d. A chart showing the organizational structure of the agency during the period for which the proposal applies, along with a functional statement(s) noting the duties and/or responsibilities of all units that comprise the agency. (Once this is submitted, only revisions need be submitted with subsequent proposals.)

3. Required certification. Each indirect cost rate proposal shall be accompanied by a certification in the following form:

CERTIFICATE OF INDIRECT COSTS

This is to certify that I have reviewed the indirect cost rate proposal submitted herewith and to the best of my knowledge and belief:

(1) All costs included in this proposal [identify date] to establish billing or final indirect costs rates for [identify period covered by rate] are allowable in accordance with the requirements of the Federal award(s) to which they apply and OMB Circular A 87, "Cost Principles for State, Local, and Indian Tribal Governments." Unallowable costs have been adjusted for in allocating costs as indicated in the cost allocation plan.

(2) All costs included in this proposal are properly allocable to Federal awards on the basis of a beneficial or causal relationship between the expenses incurred and the agreements to which they are allocated in accordance with applicable requirements. Further, the same costs that have been treated as indirect costs have not been claimed as direct costs. Similar types of costs have been accounted for consistently and the Federal Government will be notified of any accounting changes that would affect the predetermined rate.

I declare that the foregoing is true and correct.

Governmental Unit: _____
Signature: _____
Name of Official: _____
Title: _____
Date of Execution: _____

E. ***Negotiation and Approval of Rates.***

1. Indirect cost rates will be reviewed, negotiated, and approved by the cognizant Federal agency on a timely basis. Once a rate has been agreed upon, it will be accepted and used by all Federal agencies unless prohibited or limited by statute. Where a Federal funding agency has reason to believe that special operating factors affecting its awards necessitate special indirect cost rates, the funding agency will, prior to the time the rates are negotiated, notify the cognizant Federal agency.

2. The use of predetermined rates, if allowed, is encouraged where the cognizant agency has reasonable assurance based on past experience and reliable projection of the grantee agency's costs, that the rate is not likely to exceed a rate based on actual costs. Long term agreements utilizing predetermined rates extending over two or more years are encouraged, where appropriate.

3. The results of each negotiation shall be formalized in a written agreement between the cognizant agency and the governmental unit. This agreement will be subject to re opening if the agreement is subsequently found to violate a statute, or the information upon which the plan was negotiated is later found to be materially incomplete or inaccurate. The agreed upon rates shall be made available to all Federal agencies for their use.

4. Refunds shall be made if proposals are later found to have included costs that (a) are unallowable (i) as specified by law or regulation, (ii) as identified in Attachment B of this Circular, or (iii) by the terms and conditions of Federal awards, or (b) are unallowable because they are clearly not allocable to Federal awards. These adjustments or refunds will be made regardless of the type of rate negotiated (predetermined, final, fixed, or provisional).

F. ***Other Policies.***

1. Fringe benefit rates. If overall fringe benefit rates are not approved for the governmental unit as part of the central service cost allocation plan, these rates will be reviewed, negotiated and approved for individual grantee agencies during the indirect cost negotiation process. In these cases, a proposed fringe benefit rate computation should accompany the indirect cost proposal. If fringe benefit rates are not used at the grantee agency level (i.e., the agency specifically identifies fringe benefit costs to individual employees), the governmental unit should so advise the cognizant agency.

2. Billed services provided by the grantee agency. In some cases, governmental units provide and bill for services similar to those covered by central service cost allocation plans (e.g., computer centers). Where this occurs, the governmental unit should be guided by the requirements in Attachment C relating to the development of billing rates and documentation requirements, and should advise the cognizant agency of any billed services. Reviews of these types of services (including reviews of costing/billing methodology, profits or losses, etc.) will be made on a case by case basis as warranted by the circumstances involved.

3. Indirect cost allocations not using rates. In certain situations, a governmental unit, because of the nature of its awards, may be required to develop a cost allocation plan that distributes indirect (and, in some cases, direct) costs to the specific funding sources. In these cases, a narrative cost allocation methodology should be developed, documented, maintained for audit, or submitted, as appropriate, to the cognizant agency for review, negotiation, and approval.

4. Appeals. If a dispute arises in a negotiation of an indirect cost rate (or other rate) between the cognizant agency and the governmental unit, the dispute shall be resolved in accordance with the appeals procedures of the cognizant agency.

5. Collection of unallowable costs and erroneous payments. Costs specifically identified as unallowable and charged to Federal awards either directly or indirectly will be refunded (including interest chargeable in accordance with applicable Federal agency regulations).

6. OMB assistance. To the extent that problems are encountered among the Federal agencies and/or governmental units in connection with the negotiation and approval process, OMB will lend assistance, as required, to resolve such problems in a timely manner.

Appendix VI
Property

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APPENDIX VI – PROPERTY

A. Real Property Transferred as Part of an ISDEAA Construction Project

Legal Authority:

The Indian Self Determination and Education Assistance Act (ISDEAA) authorizes donations of real property to Tribes pursuant to a construction project contract or agreement. Both Title I and Title V have sections concerning the donation of real property and these sections are almost identical

Section 105(f) for Title I and Section 512(c) both require that the real property be donated "in connection with" a self determination contract or a compact/funding agreement. 25 U.S.C. § 450j(f). 42 U.S.C. 458aaa-11(c). Both sections also state that when the Secretary of DHHS acquires real property for donation to a Tribal contractor, the Secretary "determines the property is appropriate for use by the tribe or tribal organization for a purpose for which a self-determination contract or grant agreement [compact or funding agreement] is authorized under this Act." See Sections 105(f)(3) and 512(c)(3).

The federal regulations implementing these statutory sections of the ISDEAA are at Subpart J of Part 900, Title 25 of the Code of Federal Regulations for Title I construction contracts, and at Subpart N of Part 137, Title 42 of the Code of Federal Regulations for Title V construction project agreements. Both Subpart J and Subpart N assign ownership of the completed project to the Tribal contractor at its option. For Title I, 25 C.F.R. §900.125(c)(1) directs the agency to Subpart I if the Tribal contractor chooses to take title to the finished project: "If the Indian Tribe or tribal organization elects not to take title (pursuant to subpart I) to the Federal property used in carrying out the contract. . ." Subpart I of Part 900 is entitled "Property Donation Procedures" and states: "The Indian Tribe or tribal organization shall take title to all property unless the Indian Tribe or tribal organization requests that the United States retain the title." 25 C.F.R. §87(c)(1). Moreover, if the project is not constructed on land held in trust for the Tribal contractor and that contractor requests title to the property, "the Secretary shall take the necessary action under Federal law and regulations to transfer the fee title." 25 C.F.R. § 900.88(a). The Title V, Subpart N regulation is consistent with its Title I counterpart: "The Self Governance Tribe takes title to the real property unless the Self Governance Tribe requests that the Secretary take title to the property." 42 C.F.R. § 137.371.

What form the IHS must use to transfer title to the Tribal contractor once that contractor has made the election to take ownership in the construction contract or construction project agreement is in part determined by who owns the land upon which the project is being built. Most ISDEAA construction projects are performed on trust land, meaning land that the United States holds in trust for the Tribe (25 C.F.R §151.2(d)), or on restricted land, meaning land in which the Tribe holds title but cannot be alienated or encumbered by the Tribe without the consent of the United States (25 C.F.R. §151.2(e)). In these two situations where the United States has a property interest in the land upon which the project will be built, the IHS uses a Transfer Agreement to pass ownership of the project to the Tribal contractor (see sample included in this Appendix). Another scenario is when the Tribal contractor is building on land owned by the IHS that is not trust or restricted land, and wants to take ownership to both the land and the project. If the IHS determines that it is no longer using the land to carry out its mission, then a quitclaim deed is used to transfer the property (see sample included in this Appendix). This deed should take the form required by the law of the State the land is located in so that the deed may be recorded with the local recording district office. Please contact the Office of the General Counsel for assistance with drafting the quitclaim deed and recording it for the Tribal contractor.

One final scenario that the IHS has occasionally encountered is when a Tribal contractor requests that the project be constructed on a Tribe's private property that is not held in trust or in restricted status. The IHS must have explicit statutory authority to expend funds to improve private

property. Consequently, the IHS will inform the Tribal contractor to contact its Congressional Representative to obtain the requisite statutory authority.

What all of these transfer mechanisms have in common is a use restriction and reversionary language. The use restriction comports with the ISDEAA's mandate the property transferred at the behest of the Tribal constructor be used "in connection with" the IHS services that the Tribe carries out under its service contract or compact/funding agreement, as already explained above. The reversionary interest allows the IHS to reclaim the property if it is no longer being used in support of its ISDEAA service contract or compact, such as when a Tribe withdraws from participating in Self Determination or Self Governance, rescinds its service programs, or has its service programs reassumed by the IHS. 25 U.S.C. §§ 25 U.S.C. § 450j(f)(2)(B). 42 U.S.C. 458aaa-11(c)(2)(B).

Please contact HQ DFO Realty for assistance in determining the type of conveyance document. DFO Realty in coordination with OGC will assist with drafting the quitclaim deed and transfer agreement, along with recording the proper document for the tribal contractor. In addition to the Checklist for Transferring Real Property, included with the samples in this Appendix, the OEHE Technical Manual at Part 32-1 contains the process for acquiring real property for construction projects.

B. Sample Quitclaim Deed

QUITCLAIM DEED

This indenture, made this _____ day of_____, 20XX, between the United States of America, acting by and through the Secretary of the United States Department of Health and Human Services (HHS), by the Director of the Indian Health Service (IHS), HHS (hereinafter referred to as "Grantor") and the [tribal name] organized under the laws of the State of [State] (hereinafter referred to as "Grantee"), under Section 512(c) of Title V of the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. §458aaa-11(c), Public Law 93-638, and regulations at 42 C.F.R. § 137.215.

RECITALS

WHEREAS, the Grantee, pursuant to the terms and conditions of its Self-Governance Compact and Funding Agreement with the IHS under Title V of the ISDEAA and its implementing regulations, operates a broad range of health programs at the [state property/site];

WHEREAS, the Grantor under Section 512(c)(1) of the ISDEAA intends to furnish the Property described in this Deed to the Grantee for use in support of the health programs described in the Grantee's Self-Governance Funding Agreement.

WHEREAS, in accordance with the provisions of Title V of the ISDEAA a Tribe or Tribal Contractor may acquire title to IHS property for any purpose for which the [tribal name]'s Self Governance Compact and Funding Agreement are authorized under Title V, and

NOW THEREFORE, the Grantor, for and in consideration of the foregoing and of the observance and performance by the Grantee of the covenants, conditions, considerations and restrictions hereinafter contained and other good and valuable consideration, the receipt of which is hereby acknowledged, does hereby grant, convey, quitclaim, remise, release and relinquish to the Grantee, its successors and assigns, without warranty (except as is specifically provided herein), excepting and reserving such rights as may arise from the operation of the terms and conditions, reservations, and covenants hereinafter expressed, all right, title and interest, claim and demand which the United States of America has in and to the Property, situated in the City of , State of and described as follows:

Plat information - Subdivision No. X, USS XXXX\, Lot X, Block XXX, County / State, containing XXX acres (XXXXXX sq. ft.), recorded in the XXXXXX Recording District, City/County, State, on Month/Day/Year.

RIGHT OF ENTRY

The Grantor conveys this Property to the Grantee except for, and reserved unto the United States of America and its assigns, at no cost to the Government, pursuant to 42 U.S.C. § 9620(h), the right of access and entry to all portions of the Property for environmental investigation, remediation or other environmental response or corrective action. This reservation includes the right of access to and use of available utilities at reasonable cost to the United States of America. These rights shall be exercisable in any case in which remedial action, response action or other environmental corrective action is found to be necessary after the date of this conveyance, or in which access is necessary to carry out a remedial action, response action or environmental corrective action on adjoining property.

Pursuant to this reservation, the United States of America, and its respective officers, agents, employees, contractors and subcontractors shall have the right, upon reasonable advance written notice to the Grantee, its successors and assigns, to enter the Property and conduct investigations and surveys, to include drilling, test-pitting, borings, data and records compilation and other activities related to environmental investigation, and to carry out remedial removal or other environmental corrective actions as required or necessary, including but not limited to the installation and operation of monitoring wells and treatment facilities. Any such entry, including such activities, responses, remedial actions or other environmental corrective actions shall be coordinated with the Grantee, its successors and assigns and shall be performed in a manner that minimizes interruption with activities of authorized occupants and minimizes the potential damage to any permanent structure placed on the Property after the date of this deed.

TERMS AND CONDITIONS

This conveyance is subject to any and all other existing easements, encumbrances, covenants, restrictions, reservations or conditions affecting the above described Property whether or not the same appear on record.

The Grantor conveys the Property to the Grantee subject, also, to each of the following terms and conditions, which shall be binding upon and enforceable against the Grantee, its successors and assigns, and shall also be covenants running with the land to which the United States of America shall be deemed a beneficiary of each of the following without regard to whether it remains the owner of any portion or interest in the Property and shall have a right to enforce each of these following terms, conditions, and covenants in any court of competent jurisdiction; provided, however, the United States shall have no affirmative duty to any successor in title to this conveyance or other interested party to enforce any of the following covenants hereinafter stated and agreed to by the Grantee:

1. That the Property will be used exclusively for the purpose of providing health care to American Indians and Alaska Natives in accordance with the terms and conditions of Grantee's Self-Governance Compact and Funding Agreement with the Indian Health Service under Title V of the ISDEAA and its implementing regulations, with such incidental exceptions as the Grantor, its successor and assigns and delegates may approve in writing and for no other purpose;

2. That the Grantee will not resell, lease, mortgage, encumber or otherwise dispose of any portion of the Property or any interest therein, except as the Grantor or its successor in function may authorize in writing. Grantor will consider whether Grantee's request under this paragraph is consistent with the programs, functions, services and activities set forth in the Grantee's Self-Governance Funding Agreement. This shall include prior written approval for certain contracts that would impact the value of the Property, conveyances of real property or other transactions as the Grantor or its successor in function may determine appropriate. The Grantee hereby agrees that, at the time such authorization is given by the Grantor for any sale, lease, mortgage, encumbrance or other disposition of the Property, the Grantor may require the Grantee to provide the Grantor with a security interest in any proceeds from such sale, lease, mortgage, encumbrance, or other disposition that has not been used for the promotion of health for American Indians or Alaska Native people or any incidental exceptions approved in writing by the Grantor;

3. That the Grantee, its successors and assigns for the Property or any part or interest thereof, will comply with the requirements of section 606 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. § 122); the Fair Housing Act (42 U.S.C. § 3601-19); Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), and all applicable implementing regulations of the Grantor issued pursuant to said Acts and now in effect.

4. The Grantee, in performing any work of dismantling, removal, restoration, or construction of, to, or on the Property shall comply with the requirements of section 606 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. § 122); the Fair Housing Act (42 U.S.C. § 3601-19); Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), and all applicable implementing regulations of the Grantor pursuant to said Acts.

5. The Grantee agrees that the paragraph immediately above will be inserted in all of its subcontracts. For the purpose of this paragraph, a subcontract is defined as any contract entered into by any of the Grantee's contractors with any individual, partnership, association, corporation, estate or trust, or other business enterprise, or other legal entity for a specific part of the work to be performed in connection with this deed, provided, however, that a contract for the furnishing of standard commercial articles or raw material shall not be considered a subcontract.

REMEDIES FOR BREACH OF THE TERMS AND CONDITIONS

In the event of a breach of any of the terms and conditions set forth above, whether caused by the legal or other inability of the Grantee, its successors and assigns, to perform any of the obligations herein set forth, the Grantor or its successor in function will, at its option, have an immediate right of reentry thereon, and to cause all right, title, and interest in and to the Property to revert to the United States of America, and the Grantee, its successors and assigns, shall forfeit all right, title, and interest in and to the Property and to any and all of the tenements, hereditaments, and appurtenances thereunto belonging.

Provided that; the failure of the Grantor or its successor in function to insist on any one or more instances of complete performance of any of the said terms and conditions, covenants, or restrictions contained in this deed or to exercise any of the rights or options under this deed, shall not be construed as a waiver or a relinquishment of any of the rights of the United States of America or the Grantor under this deed that may accrue because of a breach of any of the terms and conditions, covenants, or restrictions contained herein, or be construed as a waiver or relinquishment of any future performance with respect to any such terms and conditions, covenants, or restrictions, but the Grantee's obligations with respect to such future performance shall continue in full force and effect.

In the event title to the Property or any part thereof is reverted to the United States of America for noncompliance or is voluntarily reconveyed in lieu of reverter, the Grantee, its successors or assigns, at the option of the Grantor, or its successor in function, shall be responsible for and shall be required to reimburse the United States of America for the decreased value of the Property that is not the result of reasonable wear and tear, an act of God, or alterations and conversions made by the Grantee, its successors or assigns to adapt the Property to and for the health care uses for which the Property was transferred consistent with the programs, functions, services, and activities recited in Section 3 of the Grantee's Self-Governance Funding Agreement. In addition, the United States of America shall be reimbursed for such damage, including such costs as may be incurred in recovering title to or possession of the Property as it may sustain as a result of such noncompliance.

In the event that the Grantor exercises its option to revert all right, title, and interest in and to the Property to the Grantor, or the Grantee voluntarily returns title to the Property in lieu of reverter, the Grantee shall provide protection to and maintenance of the Property at all times until such time as title is actually reverted or returned to and accepted by the Grantor. Such protection and maintenance shall, at a minimum, conform to the standards prescribed by the General Services Administration, Federal Property Management Regulations, 41 C.F.R. §102-75.

In the event the Property or any part thereof is sold, leased, disposed of, or used for purposes other than those designated in Term and Condition Number One above, or should the Grantee ever rescind, retrocede, or withdraw from the performance of the programs, services, functions or activities it agreed to perform under the Self-Governance compact and funding agreement that the Property was conveyed to support, the Property shall revert to the United States in accordance with Section 512(c) of the Act, 25 U.S.C. §458aaa-11(c), and all revenues there from or the reasonable value, as determined by the Grantor, deriving directly or indirectly from such sale, lease, disposal or use, shall be considered to have been received and held in trust by the Grantee for the United States of America and shall be subject to the direction and control of the Grantor, or its successor in function; but the provisions of this paragraph shall not impair or affect the rights reserved to the Grantor, under any other provision of this deed.

ENVIRONMENTAL PROVISIONS

Notice of Hazardous Substance Activity Pursuant to Section 120(h)(3)(A)(i) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (CERCLA)(42 U.S.C. §9620(h)(3)(A)(i)), and based upon a complete search of agency files, the Grantor gives notice that **"Exhibit A"** herein incorporated provides the following information: (1) the type and quantity of hazardous substances that were known to have been released or disposed of or stored for one year or more on the Property; (2) the time such storage, release or disposal took place; and (3) a description of remedial action taken, if any.

CERCLA Covenant Grantor warrants that all remedial action necessary to protect the human health and the environment regarding hazardous substances that were stored, released or disposed of on the Property and any petroleum product or its derivative that was stored, released or disposed on the Property has been taken before the date of this conveyance. The Grantor further warrants that any additional response action found to be necessary after the date of conveyance regarding such a hazardous substance, any petroleum product or its derivative relative to the Property shall be conducted by the United States of America, if it is determined that such a hazardous substance, petroleum product or its derivative contaminated the Property prior to the date of conveyance, whether or not the substance or product or derivative is identified in the pre-transfer environmental investigation.

(1) This CERCLA Covenant shall not apply:

(a) in any case in which the Grantee, its successors or assigns, or any successor in interest to the Property or part thereof is a declared Potentially Responsible Party (PRP) by the United States Environmental Protection Agency (EPA), the Alaska Department of Environmental Conservation (ADEC), or any federal or state court with jurisdiction with respect to the Property immediately prior to the date of conveyance; OR

(b) to the extent that any such additional response action or part thereof found to be necessary is the result of an act or failure to act of the Grantee, its successors or assigns, or any party in possession after the date of conveyance that either:

(i) results in a release or threatened release of a hazardous substance that was not located on the Property on the date of this conveyance; OR

(ii) seriously causes or exacerbates the release or threatened release of hazardous substance the existence and location of which was known and identified to the applicable regulatory authority as of the date of this conveyance.

(2) In the event Grantee, its successors or assigns seeks to have the United States conduct any additional response action and, as a condition precedent to the United States incurring any additional cleanup obligation and related expenses, the Grantee, its successors or assigns shall provide the United States at least 45 days written notice of such a claim. In order for the 45 day period to commence, such notice must affirm that Grantee, its successors or assigns has not been declared a PRP for the Property by the EPA, ADEC, or any federal or state court with jurisdiction; nor is otherwise disqualified from coverage by this Covenant under the terms of either (1)(b)(i) or (ii) above.

Damages from Subsequent Contamination The Grantee agrees that it is solely liable for any damages to the Property or injury to any person due to additional contamination after the date of this conveyance.

Grantee Covenant Grantee covenants and agrees for itself, its successors and assigns, that the Property is transferred on an "as is, where is," basis, without warranty of any kind, either expressed or implied, including as to the condition of the Property (except as expressly cited in this deed). Grantee also covenants and agrees for itself, its successors and assigns, that Grantor has no obligation to provide any additions, improvements, or alterations to the Property except as stated in this conveyance for the purpose of environmental remediation.

IN WITNESS WHEREOF, Grantor has caused this instrument to be executed as of the date and year first written above.

UNITED STATES OF AMERICA

Acting through the Secretary of Health and Human Services, and through the Director of the Indian Health Service,

By: _____
Gary J. Hartz, P.E.
Director, Office of Environmental Health and Engineering
Indian Health Service
United Stated Department of Health and Human Services

ACKNOWLEDGMENT

STATE OF MARYLAND

COUNTY OF _____

On this _____ day of _____, 20XX , before me the undersigned personally appeared Gary J. Hartz, known to me to be the Director, Office of Environmental Health and Engineering, United States Department of Health and Human Services, and known to me to be the person who executed the foregoing instrument on behalf of the Secretary of the United States Department of Health and Human Services, for the United States of America, and acknowledged to me that he subscribed to the said instrument in the name of the Secretary of the United States Department of Health and Human Services and on behalf of the United States of America.

Witness my hand and official seal.

_____
Notary Public

My commission expires:_____

ACCEPTANCE

The [Tribal Name] hereby accepts this deed and thereby agrees to all the terms, covenants, conditions, and restrictions contained therein.

By _____
Tribal Representative
Tribal Name
Address
Address

ACKNOWLEDGMENT

STATE OF XXXXXX

COUNTY/BOROUGH OF _____

On this _____ day of _____, 20XX, before me, a Notary Public in and for the City of XXXXXX, State of XXXXXXX, personally appeared, Tribal Representative's name, known to me to be the title, and known to me to be the person who executed the foregoing instrument on behalf of Tribe, and acknowledged to me that he executed the same as the free act and deed of Tribe.

Witness my hand and official seal.

_____
Notary Public

My commission expires:_____

EXHIBIT A

Exhibit A constitutes disclosures in compliance with the requirements of Section 9620(h), Title 42 of the United States Code, also known as the Comprehensive Environmental Response, Compensation, and Liability Act, as well as the Environmental Protection Agency's regulations at Part 373, Title 40 of the Code of Federal Regulations. The following hazardous substances are reportable under Sections 302.4 and 373.2, Title 40 of the Code of Federal Regulations. These substances have the characteristic of ignitability and have been stored for one year or more and/or are currently stored on the Property as described in the Quitclaim Deed to which this Exhibit A is attached and hereby incorporated by reference. Figure 2 of Exhibit A, dated December 2008 indicates the locations on the property where these substances were stored. Exhibit A is based upon information derived from a complete search of the files of the Indian Health Service of the United States Department of Health and Human Services, as required by

Section 373.1, Title 40 of the Code of Federal Regulations.

- Diesel Fuel: 22,000 gallons total (two 10,000-gallon above-ground storage tanks (AST) and one 2,000-gallon AST)
- Gasoline: 6,000 gallons (one 6,000-gallon AST)
- Used Oil: 1,980 gallons (thirty six 55-gallon drums stored near the onsite fuel dispenser)

C. Sample Transfer Agreement

TRANSFER AGREEMENT

THIS TRANSFER AGREEMENT entered into this ____ day of _____, 2011, between THE UNITED STATES OF AMERICA, acting by and through the Secretary of Health and Human Services, by duly designated officers and employees of the Indian Health Service, hereinafter called the Grantor, acting pursuant to Title V of the Indian Self-Determination and Education Assistance Act (ISDEAA), Public Law 93-638, as amended (25 U.S.C. §§ 458aaa *et seq.)*,[or "Title I of the Indian Self-Determination and Education Assistance Act (ISDEAA), Public Law 93-638, as amended (25 U.S.C. §§ 450 *et seq.)*")]and the [tribal name], hereinafter called the Grantee;

WITNESSETH THAT:

The Grantor is transferring title to [identify property] , described as the Property (Exhibit 1).

Title to the Property has been requested by tribal resolution from the [tribe and tribal resolution number], copy attached as Exhibit 2, and made a part hereof.

WHEREAS, the buildings are located [describe facts, such as, a portion of land being held as Indian Trust land, which is under Indian Health Service control. The Indian Health Service will return 0.546 acres of the 7.7 acres held in trust by Indian Health Service to the Bureau of Indian Affairs to continue to be held in trust for the benefit of the].

WHEREAS, it is agreed that the Grantee in accordance with Section 900.87 of the Public Law 93-638, may obtain title to the Property furnished by the Grantor for use in the performance of the Public Law 93-638, as amended, Title V Tribal Health Compact. [or "Title I Model Contract."]

NOW THEREFORE:

The Grantor in consideration of the observance and performance by the Grantee of the covenants, conditions, restrictions, and reservations hereafter contained, has transferred, and conveyed and does by these presents hereby transfer, and convey unto the Grantee, under and subject to the conditions hereinafter set out, its right, title, and interest in and to the Property exclusive of the land and air rights.

In consideration of this transfer the Grantee covenants and agrees to accept the Property '*as is*' and '*where is*' without warranty or guaranty as to title, quality, quantity, character, condition, size, kind, or that the same is in condition or fit to be used for the purpose as identified in the current Title V funding agreement [or "current Title I annual funding agreement"] for the administration of all areas of health planning,

funding, program operations, activities functions and services Indian Health Service transferred to the Grantee. The Grantee agrees to accept and assume full responsibility for the custody, care and protection of the Property on and after the _____ day of _____, 20XX.

In the event the Property or any portion thereof is sold, leased, or otherwise disposed of in a manner not authorized by the Grantor, such sale, lease, or other disposal shall at the option of the Grantor be deemed to be for the benefit of and on account of the United States of America, and the Grantor shall be entitled to the proceeds of any such sale, lease, or other disposal. If a portion of the premises is sold, leased, or otherwise disposed of, then the exercise of the option provided in this paragraph shall not constitute a waiver of or release from conditions, covenants, and restrictions contained in this agreement with respect to the balance of the Property.

The Grantee hereby acknowledges that lead-based paint is present on the Property. The attached Lead-based Paint Inspection report (Exhibit 3) identifies those areas of the Property that contain lead-based paint.

The Grantee covenants and agrees that it will comply with all Federal, State, local and other applicable laws regarding the lead-based paint hazards with respect to the Property. The Grantee further agrees that the Property will not be used as housing whereby any children age 6 or under will reside or is expected to reside until such time as all lead-based paint hazards have been removed from the Property. The Grantee further agrees that the Property or any portion of the Property will not be used as a child occupied facility (e.g., day-care centers, preschools, kindergarten, etc.) to be visited regularly by the same child, age 6 years or under, whether two days any week or regularly until all lead-based paint hazards have been removed from the Property.

The Grantee hereby acknowledges the required disclosure, in accordance with the Residential Lead-Based Paint Hazard Reduction Act of 1992, at 42 U.S.C. §4852d (Title X), of the presence of any known lead-based paint and/or lead-based paint hazards in target housing constructed prior to 1978 on the Property. This disclosure includes the receipt of available records and reports pertaining to lead-based paint and lead-based paint hazards; receipt of the lead hazard information pamphlet; and inclusion of the 24 CFR Part 35 and 40 CFR Part 745 disclosure and lead warning language in its contract of sale. The Grantee further acknowledges that Grantee was given the opportunity to inspect, and thereby, assess the Property for lead-based paint hazards.

The Grantee covenants and agrees that in its use and occupancy of the Property it will comply with 24 CFR Part 35 and 40 CFR Part 745 and all applicable Federal, State and local laws relating to lead-based paint; and that the United States of America assumes no liability for damages for property damage, personal injury illness, disability, or death, to Grantee, its successors or assigns, or to any other person, including members of the general public, arising from or incident to the purchase, transportation, removal, handling, use, disposition, or other activity

causing or leading to contact of any kind whatsoever with lead-based paint on the Property described in this deed, whether Grantee, and its successors or assigns, have properly warned or failed to properly warn the individual(s) injured. Grantee further agrees to indemnify, defend and hold harmless the United States of America from any and all loss, judgment, claims, demands, expenses or damages, of whatever nature which might arise or be made against the United States of America, due to, or relating to the presence of lead-based paint hazard on the Property, any related abatement activities or the disposal of any material from the abatement process.

The Grantee hereby acknowledges that asbestos containing materials are present on the Property. The attached Asbestos Survey report (Exhibit 4) identifies those areas of the Property that contain asbestos containing materials.

The Grantee covenants and agrees, on behalf of itself, its successors and assigns, that in its use and occupancy of the Property, it will comply with all Federal, State and local laws relating to asbestos; and that by acceptance of this Deed, the Grantee further agrees for itself, its assigns and every successor in interest to the Property, or any part thereof, that it shall recognize that the United States assumes no liability and that the Grantee will be solely liable for all costs relating to all debts, duties, obligations, liabilities, suits, claims, demands, causes of action, damages, losses, cost and expenses (including without limitation, attorneys' fees and expenses and court costs) which may arise from or incident to the purchase, transportation, removal, handling, use, disposition, or other activity causing or leading to contact of any kind whatsoever with asbestos on the Property, whether the Grantee, its successors or assigns, have properly warned or failed to properly warn the individual(s) injured. To the extent that any current or future Federal law would require the United States to conduct any post-transfer environmental remediation of the Property for asbestos hazards that existed on the Property prior to transfer, the Grantor covenants that the United States will conduct such remediation.

In the event the Grantee does not comply with any one or more of the foregoing covenants, conditions, or restrictions for any cause whatsoever whether due to the legal or other inability of the Grantee to perform any of them, or in the event of retrocession, rescission, or termination, then, at the option of the Secretary, title to such property shall revert to the Grantor to continue provision of health care services to Native Americans, in accordance with Section 516(c)of Title V of the ISDEAA.

PROVIDED, HOWEVER, that the failure of the Grantor to insist in any one or more instances upon complete performance of any of the terms, covenants, conditions, or restrictions, contained in this agreement, or to exercise any of its rights or options under this agreement, shall not be construed as a waiver or a relinquishment of any of the rights of the United States of America or the Grantor under this agreement or accruing because of a breach of any of the terms, covenants, conditions, or restrictions contained herein, or construed as a waiver or relinquishment of future

performance with respect to any such terms, covenants, conditions, or restrictions, but the Grantee=s obligations with respect to such rights and to such future performance shall continue in full force and effect.

The Grantee may, with the consent of the Grantor, secure abrogation of the covenants, conditions, restrictions, and reservations contained herein for all or any part of the Property, if said abrogation is requested in writing and is determined by the Grantor to promote or accommodate the program of use for which this transfer is made.

No member of or delegate to Congress or Resident Commissioner shall be admitted to any share or part of this agreement or to any benefit that may arise there from; but this provision shall not be construed to extend to this agreement if made with a corporation for its general benefit.

The Grantee warrants that it has not employed any person to solicit or secure this sale upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Grantor the right to annul the transfer or at its option to recover from the Grantee the amount of such commission, percentage, brokerage, or contingent fee in addition to the consideration herewith set forth. This warranty shall not apply to commissions payable by the Grantee upon this transfer secured or made through bona fide established commercial agencies maintained by the Grantee for the purpose of doing business.

The Grantee, in performing any work of dismantling, removal, restoration, or construction of or to the Property shall comply with the requirements of 41 CFR Parts 102-74, and 102-76, and Title VI of the Civil Rights Act of 1964 (P.L. 88-35) by not discriminating against any employee or applicant for employment because of race, color, creed, or national origin. The Grantee will further comply with the requirements of section 504 of the Rehabilitation Act of 1973 (P.L. 93-112) and the Americans with Disabilities Act Accessibility Guidelines.

The Grantee agrees that the provisions of the paragraph immediately above will be inserted in all of its subcontracts. For the purpose of this paragraph, a subcontract is defined as any contract, entered into by the contractor with any individual, partnership, association, corporation, estate or trust, or other business enterprise, or other legal entity for a specific part of the work to be performed in connection with this agreement; provided, however, that a contract for the furnishing of standard or commercial articles or raw material shall not be considered as a subcontract.

IN WITNESS WHEREOF, the parties hereto have executed this instrument as of the day and year first above written.

UNITED STATES OF AMERICA

Acting by and through the Secretary of
Health and Human Services

By_____

Gary J. Hartz, P.E.

Director, Office of Environmental Health and Engineering

Indian Health Service

ACKNOWLEDGMENT

STATE OF MARYLAND)

COUNTY OF MONTGOMERY)

On this _____day of _____ 20XX, before me, the undersigned officer, personally appeared Gary J. Hartz, P.E., known to me to be the Director, Office of Environmental Health and Engineering, Indian Health Service, Department of Health and Human Services, and known to me to be the person who executed the foregoing instrument on behalf of the Secretary of Health and Human Services, for the United States of America, and acknowledged to me that he subscribed to the said instrument in the name of the Secretary of Health and Human Services and on behalf of the United States of America.

Witness my hand and official seal.

(SEAL) _____

Notary Public

My commission expires: _____

ACCEPTANCE

The _____, hereby accepts this Agreement of Sale and thereby accepts and agrees to all the terms, covenants, conditions and restrictions contained therein.

By_____

[Tribal Representative]

[Title]

ACKNOWLEDGMENT

STATE OF)

COUNTY OF)

On this____ day of_____, 20XX, before me, _____, a Notary Public in and for the County of , State of , personally appeared [tribal representative's name and title], known to me to be the person who executed the foregoing instrument on behalf of the [tribe], and acknowledged to me that he executed the same as the free act and deed of said [tribe].

Witness my hand and official seal.

(SEAL) _____

Notary Public

My commission expires: _____

D. Real Property Reporting Formatting

Real Property Report Format
Reference Technical Handbook for Environmental Health and Engineering
Volume IV - Real Property, Part 30 - Asset Management
EXHIBIT V

TRIBAL SUBMISSION OF REAL PROPERTY REPORTS

TRIBE/TRIBAL ORGANIZATION LETTERHEAD
(SAMPLE FOR ILLUSTRATIVE PURPOSES ONLY -Site, Cost & Descriptive items are fictional)

DATE:

FROM: ABC Health Corporation
Facilities Manager

SUBJECT: **XYZ Health Care Facility Name, CITY, ST**
PROJECT NO and Name. [Enter project number, and Name of Project]
INSTALLATION NO. [Enter Installation Number],
INSTALLATION NAME. [Enter Installation Name],
TRIBAL FINAL REAL PROPERTY REPORT FOR
FEDERALLY OWNED FACILITIES

TO: Name, Area Realty Management Officer
IHS Area

THROUGH: IHS Project Engineer: _____

This tribal Final Real Property Capitalization Package provides an overview of the project summary, space allocation, appropriations, project milestones, and project costs including common costs and costs associated with land improvements, construction, equipment, and post-construction.

1. Project Summary

This project requested Maintenance and Improvement (M&I) funding to renovate the XYZ Hospital's Information System Department computer room. Under this project, the computer room was expanded into adjacent space to meet the needs of computer equipment and new air conditioning equipment. A new UPS system was installed and sized to allow for anticipated growth of the department. The design of these modifications has already been accomplished through a contract with a mechanical engineering firm.

2. Space Allocation

Type of Space	Gross Sq ft.	Gross M^2
If in no square footage was added during this project, place the following statement here: "No square footage was added during this project." If square footage was added identify current building(s) and/or provide new building description and use.		
Total Space		

3. Funding

Funding Type	Amount
M&I Amount Transferred	$
Third Party Collections	$
Other Sources of Funds Identify: Tribe/TO Contributions (Attach Gifting Letter and Approval, if appropriate)	$
Sub-Total	$
Unused, held for future project	$
Total Funding	**$**

4. Project Milestones/Timelines

Milestone	Date Achieved
Project Start	
Facility Placed in Service	
Project Completed	
(List other milestones if applicable)	

5. Common Costs *(i.e., Costs for studies, A/E Designs, Site Selection, C/A, interest, legal, permits, printing, etc.)*

Description	Capitalized Amount	Expensed Amount
A/E Fees	$	$
Criteria Changes (describe below)	$	$
Total Common Costs	**$**	**$**

Identify Common Costs:

_____

_____

_____

6. **Land Improvements –** *List costs associated with environmental, demolition, disposal, site preparation, etc.*

Description	Capitalized Amount	Expensed Amount
If no land improvements were made under this project, enter the following statement here: "No land improvements were made during this project." If land improvements were made, enter the description(s) of the improvement(s) and indicate the amount.	$	$
If included, describe actions below	$	$
	$	$
Total Land Improvement Cost	**$**	**$**

Identify Land Improvements:

_____
_____
_____
_____
_____

7. **Buildings (Building Number and Description as identified in the IHS Real Property Inventory).** *Projects affecting multiple buildings and structures shall be listed separately with capitalized and expensed costs for each broken out and proportioned by percentage of common costs*

Building No.	Description	Percent of Common Costs
BLS No.	Office	100%

8. **Other Major Structures (i.e. parking lots, sidewalks, roads, water systems, sanitary sewer, electrical system).** *Projects affecting multiple structures shall be listed separately with capitalized and expensed costs for each broken out and proportioned by percentage of common costs*

BLS No./Structure Describe Change	Description	Percent of Common Costs

9. Construction

Description	Capitalized Amount	Expensed Amount
Base Bid	$	$
Contract Modifications	$	$
Total Construction Cost	**$**	**$**

10. Equipment

(Not included in construction contract of item 9 above)

Description	Capitalized Amount	Expensed Amount
Universal Power System for CPU	$	$
Air Conditioning Unit and Installation	$	$
Total Equipment Cost	**$**	**$**

11. Post-Construction

(Not included in construction contract of item 9 above)

Description	Capitalized Amount	Expensed Amount
Start-Up and Commissioning – Identify below	$	$
Total Construction Cost	**$**	**$**

Identify Improvements:

_____

_____

_____

_____

12. Summary of Contract/Project Costs (Total capitalized and expensed amount should match the Tribal General Ledger Summary).

Description	Capitalized Amount	Expensed Amount
Total Common Costs	$	$
Total Land Improvement Cost	$	$
Total Construction Cost	$	$
Total Equipment Cost	$	$
Total Post-Construction Cost	$	$
Grand Total Project Cost	**$**	**$**

_____ _____

Signature Date Signed

_____

Type Project Officer's Name

_____

Type Project Officers Title

Attachments: (attach all items listed below)

- **Transfer of Funds Correspondence (IHS/T/TO)**
- **Project Summary Document (w/approval page)**
- **Approved FEPP List Showing Project Name and Number**
- **List of FEDS items corrected by this project**
- **Gifting Letter, if appropriate from other sources of funds**
- **General Ledger Summary or Financial Statements (project costs should match closeout report)**
- **Floor plans indicating changes, additions, deletions, etc.**

cc:
The IHS Area Facility Engineer
The IHS APO
The TPO

CHIEF TRIBAL FINANCIAL OFFICER CERTIFICATION:

I certify that the capitalized and expensed amounts for this final report were extracted from the attached tribe's General Ledger Summary. A successful independent audit of the organization was conducted in accordance with the Single Audit Act for the period in which the project was awarded and funded improvements completed. This information will enable the Indian Health Service to carry out its responsibilities under the Chief Financial Officers Act of 1990 for reporting capital improvements made to federal facilities.

Signature _____ Date: _____
( )
Type Name of Tribe's Chief Financial Officer

_____
Type Name of Tribe/Tribal Organization

E. Personal Property Transfer Form

Insert Name of Tribe

Contract No. _____ Date: _____

Documentation of Equipment Transfer

From the _____Tribe of Indians to the Indian Health Service

In accordance with the contract, the _____*tribe*_____ is responsible for the planning and acquisition of all Group I, II, and III equipment. This document provides final acceptance by the Indian Health Service of the attached equipment list which includes the following information:

- Item Number
- Description
- Model Number
- Quantity
- Vendor
- Manufacturer
- Purchase Price
- IHS Bar Code Number
- Additional Description

Comments:

_____

_____

_____

Final Acceptance requires the following signatures:

_____ _____

Tribe Authorized Signatory Date

Print Name:

_____ _____

Service Unit Property Authorized Signatory Date

Print Name:

_____ _____

IHS Designated Official for Technical Matters Date

Print Name:

_____ _____

Contracting Officer, Indian Health Service Date

Print Name:

GLOSSARY OF ACRONYMS AND ABBREVIATIONS

CCA	Construction Contract Administration
CFR	Code of Federal Regulation
CPM	Critical Path Method
CSC	Contract Support Costs
DES	Division of Engineering Services
FBES	Facilities Budget Estimating System
FEP	Facilities Engineering Plan
FEHS	Facilities and Environmental Health Support
HFCPS	Health Facilities Construction Priority System
IDC	Indirect Cost
IHS	Indian Health Service
ISDEAA	Public Law 93-638, Indian Self Determination and Education Assistance Act
M&I	Maintenance and Improvement
MOA	Memorandum of Agreement
OEHE	Office of Environmental Health and Engineering
OGC	Office of General Counsel
PFSA	Program, Function, Service and Activity
PJD	Program Justification Document
PJDQ	Program Justification Document for Quarters
POR	Program of Requirements
Pre-con	Pre-construction
PSD	Project Summary Document
PL	Public Law
PLT	Project Leadership Team
Rep	Representative
RFP	Request for Proposal
RRM	Resource Requirements Methodology
SFC	Sanitation Facilities Construction
SU	Service Unit
T-I	Title I of Public Law 93-638
T-V	Title V of Public Law 93-638
TERO	Tribal Employment Rights Office
USC	United States Code