DEPARTMENT OF HEALTH & HUMAN SERVICES Public Health Service

Indian Health Service
Rockville MD 20852

Jun 12 2013

Dear Tribal Leader:

I am writing to provide an update on Contract Support Costs (CSC). Since my last letter on March 26, 2013, there have been some developments on the Indian Health Service (IHS) implementation of the *Salazar v. Ramah Navajo Chapter* Supreme Court decision. These updates involve future appropriations, as well as the settlement of Contract Disputes Act (CDA) claims by Tribes for CSC in past years and CSC processes.

Future Appropriations

In terms of appropriations, the fiscal year (FY) 2014 President's Budget Request was released and included a proposed $124 million increase for the IHS. The request included the following increases: $77 million for additional staffing for newly constructed and replacement facilities; $35 million for Contract Health Services (CHS) medical inflation costs, along with a proposal to rename the CHS program as the "Purchased/Referred Care (PRC) program; $6 million for federal and Tribal pay costs; and most important for this context, $5.8 million for an increase in CSC. Overall, the President's Budget for FY 2014 included enough deficit reduction to replace the need for sequestration while still protecting important budget priorities, including the IHS. Currently, the President's Budget Request for FY 2014 is under consideration by Congress. You can see a copy of the Congressional Justification at: http://www.ihs.gov/BudgetFormulation/index.cfm?module=dsp_bf_congressional.

Soon after the release of the FY 2014 President's Budget, the Administration heard from Tribes about the proposal for new appropriations language for CSC. This approach, included in the request for both the Bureau of Indian Affairs (BIA) and the IHS, includes a line-item appropriation with a maximum amount of funding available for each Tribal contract or compact. At several events including a listening session on April 23 and a conference call on May 29, the Administration heard input from Tribes on this issue.

In *Ramah*, the Supreme Court determined that, for past years, the federal government owes the full CSC incurred by each Tribe under its contract, as long as the total CSC appropriation was sufficient to fund the CSC of the Tribe, even if the appropriations were insufficient to fund the costs of all Tribes. The Supreme Court recognized that the claims for unpaid CSC in prior years must proceed under the CDA and will be payable from the Judgment Fund. The decision also acknowledged that a continuing issue remains for future years because the Indian Self-Determination and Education Assistance Act (ISDEAA) includes authorizing language that requires the federal government to pay each Tribe's full CSC; however, the Supreme Court also stated that Congress has historically not appropriated sufficient amounts to pay the full CSC of all Tribes. The Supreme Court identified five legislative options:

1. Amend the ISDEAA to remove the mandate to contract;
2. Amend the ISDEAA to give flexibility on the amount paid for CSC;
3. Impose a moratorium on new contracts;
4. Appropriate sufficient funds to meet the full CSC need of all Tribes;
5. Enact line-item appropriations allocating the amount of CSC for each contract.

The Administration has heard the Tribes' request for full funding for CSC, but the difficult budget climate has not allowed large increases in the budget. Given the current budget discussions in Congress, the Administration proposed one of those options as a short-term approach that is consistent with the focus on reducing the federal deficit.

The FY 2014 President's Budget reflects the challenge of funding in the difficult budget climate we currently face. Unlike other agencies that may have experienced cuts, IHS was able to request a $124 million increase. The funding needed to meet all Tribal priorities fully exceeded the proposed increase, and a balance had to be struck. The goal of the IHS is to fund as many of the top Tribal priorities as possible within the level of the request.

While the Administration recognizes that Tribes want full funding of their needs based budget, the climate in Congress right now is focused on reducing federal expenditures, not increasing them. The IHS has been very fortunate over the past years to receive increases. Fully funding the CSC need would require Congress to divert funding from other budget priorities, such as Contract Health Services, Current Services, and additional staffing for newly constructed and replacement health facilities.

I am grateful for the work of the IHS Tribal Budget Formulation Workgroup, as they have been able to make helpful recommendations on Tribal budget priorities and have even discussed prioritization of budget priorities in the event that all requests could not be funded. When we have been able to propose larger increases, we have proposed larger increases for many budget items, including CSC. When we are not able to propose large increases, we have tried to satisfy as many budget priorities as possible from the amount of the proposed increase. The Tribal Budget Formulation process has made it clear that there are many budget priorities.

The other options identified by the Supreme Court are options that we believe Tribes would not choose, although they do address the issue identified by the Supreme Court of reconciling the ISDEAA with insufficient CSC appropriations from Congress. The three other options would involve changes to the ISDEAA, which we have heard from Tribes is not desired. Regardless, the Administration considers the FY 2014 budget proposal to be an interim solution, and is interested in discussing a long term solution.

This is certainly a challenging problem that warrants further discussion. The IHS plans to discuss this issue in as many forums as possible and to consider the input of our advisory groups, such as the IHS Tribal Budget Formulation Workgroup, the Tribal Self-Governance Advisory Committee, and the Direct Service Tribes Advisory Committee. Tribal leaders have suggested

convening a smaller group of leadership to discuss options to present to all Tribes, and we are working out how this might occur. The IHS Tribal Budget Formulation process is still our main source of consultation input on budget priorities, and their recommendations and input are extremely important because they are representative of all Areas that have undergone a budget formulation process. In the meantime, you are welcome to submit input at any time on the topic of CSC appropriations.

CDA Claims for CSC in Past Years

In terms of CDA claims for unpaid CSC in past years, the IHS continues to make progress and to prioritize the resolution of claims presented to the Agency in the most efficient manner and through settlement wherever possible. While the IHS and Tribal attorneys have some disagreements on the interpretation of the *Ramah* decision and the ISDEAA, we have moved forward with a case management plan for settling all CSC claims currently on appeal to the Civilian Board of Contract Appeals.

In response to input from Tribes, the IHS also recently announced an alternative procedural option for resolving claims for unpaid CSC in past years:

- Traditional procedure. Under this option, the IHS and the Tribe will have in-depth discussions of the Tribe's claims and share documentation in an effort to reach agreement on a final amount of unpaid CSC. The benefit of this option is that the mutual exchange of information and documentation ensures the highest level of confidence in the final agreed-upon amount.

- Alternative procedure. Under this option, a Tribe can request that the IHS perform its analysis based on the agency's documentation and then make a one-time, non-negotiable offer to settle the Tribe's claims. The Tribe may choose to settle for the offered amount and resolve the claim(s). The Tribe may also choose to reject the offer and instead return to the traditional in-depth option. The benefit of this option is it is simpler and less time-consuming for Tribes.

Regardless of the process selected, the IHS will be devoting the same effort to analyzing the claims in order to ensure that the Agency consistently determines the appropriate CSC amount for each claim.

One question we have for Tribes is whether those Tribes who choose the second option should be able to "jump ahead" of other Tribes. For example, in the case management plan filed with the Board, the parties have agreed to proceed in order of the date on which a Tribe appealed its claims. We would appreciate your input on the following question: should a Tribe that elects the second option be able to move ahead more quickly, or should those appeals continue to be addressed in order of presentation, regardless of which option is chosen? The same question applies to claims still pending before the contracting officer or awarding official.

CSC Processes

The IHS has also been making improvements in our CSC implementation processes to make them more efficient, accurate, and consistent with our policy as well as consistent across the IHS Areas. As we hear more in the consultation about the appropriations and CSC claims issues, we will eventually reconvene the CSC workgroup to take another look at the IHS CSC policy to see if further changes are needed. We have now submitted all CSC Need Reports to Congress from FY 2003 to FY 2012 and welcome input on our process for developing the Need Reports in the future, as we have heard from Tribes that they want more interaction and discussion before we submit these reports to Congress. We are interested in reviewing options for these types of discussions in the context of our requirements for clearance of Congressional reports. Your thoughts on this topic are welcome.

Thank you for your input on CSC so far. I look forward to hearing more from you on the topics addressed in this update. Please send your comments to consultation@ihs.gov or to the address below:

Yvette Roubideaux, M.D., M.P.H.
Acting Director
Indian Health Service
801 Thompson Ave, Suite 440
Rockville, MD 20852

Sincerely,

/Yvette Roubideaux/

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