



APR 13 2018

Dear Tribal Leader:

I am writing to initiate Tribal Consultation on the Indian Health Service (IHS) Indian Health Manual, Part 6 – *Services to Tribal Governments and Organizations*, Chapter 3 – *Contract Support Costs* (CSC) (“CSC policy”), specifically, section 6-3.2E(3) – *Alternative Methods for Calculating Indirect Costs Associated with Recurring Service Unit Shares* (commonly known as the “97/3 Method or 97/3 Split”).

The initial step of the Tribal Consultation will consist of a 30-day comment period, through May 18, 2018, to gather input from you on a recommendation made by the IHS CSC Workgroup, as well as other views or recommendations you may have to offer. During this time, the IHS also will continue to have internal discussions amongst our Federal team.

In conjunction with CSC Tribal Consultation activities between the years of 2012-2015, Federal and Tribal members of the IHS CSC Workgroup worked aggressively and diligently in 2016 to review and make policy recommendations for IHS consideration with regard to updating a 10-year-old policy. This required extensive consideration of major critical events such as the Supreme Court’s decision in *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182 (2012) and subsequent legislation, e.g., Fiscal Year 2014 Consolidated Appropriations Act. The IHS considered the IHS CSC Workgroup’s recommendations based on the best, available facts and that information was used to make a fair and impartial policy decision. The IHS fully engaged in Tribal Consultation on the draft CSC policy prior to making final policy decisions and published the revised CSC policy on October 26, 2016.

After a year of implementing the October 26, 2016-revised CSC policy, the IHS became aware that section 6-3.2E(3) may not conform in all cases with the statutory authority of the Indian Self-Determination and Education Assistance Act (ISDEAA) at 25 U.S.C. § 5325(a). As this may have a significant legal and financial impact on the Federal Government, the IHS made the decision to immediately and temporarily rescind section 6-3.2E(3), as outlined in the December 21, 2017-dated Tribal Leader Letter.

The policy provision, as written, may be interpreted as providing a unilateral option, available only to a Tribe or Tribal Organization, to apply the “97/3 Method” or “97/3 Split,” regardless of documented, relevant information or past negotiations. This is not a proper use of Federal funds if the resulting amount is in excess of the eligible CSC funding. The IHS and the Tribe or Tribal Organization must have the opportunity to jointly negotiate, in good faith, an amount consistent with the law.

On March 6-7, 2018, the IHS CSC Tribal/Federal Workgroup met in Albuquerque, New Mexico, to discuss this important issue and complete work needed to further develop and/or modify the IHS CSC policy provision and practices.

As a starting point for input, I offer the IHS CSC Workgroup's recommendation for a 30-day comment period – changes in **bold** text reflect changes to the 2016 CSC policy:

3. Alternative Methods for Calculating IDC Associated With Recurring Service Unit Shares. The provisions of this section E(3) shall apply to the negotiation of indirect CSC funding in or after FY 2016 and to the calculation of duplication under 25 U.S.C. § 5325(a)(3), when: i) an awardee assumes a new or expanded PFSA or added staff associated with a joint venture (in which case the review is limited to those new or expanded PFSA or those additional staff); ii) an awardee includes new types of costs not previously included in the IDC pool that is associated with IHS programs, resulting in a change of more than 5% in the value of the IDC pool (in which case the review will be conducted under Alternative A and will be limited to those new types of costs); or iii) an awardee proposes and renegotiates the amount.

**Limited to the above circumstances**, the awardee shall elect the method for determining the amount of IDC associated with the Service Unit shares and the remaining IDC that may be eligible for CSC funding, to identify duplication, if any, pursuant to 25 U.S.C. § 5325(a)(3), using one of two options listed below **or any other mutually acceptable approach**. **In connection with 3.iii, above, if an earlier funding agreement reflects a prior identification of duplicated Service Unit costs, then the parties shall negotiate a new duplicate amount considering the alternatives available under Alternative A, Alternative B, or any other mutually acceptable approach.**

The IHS remains concerned that the IHS CSC Workgroup's proposed language does not account for all instances in which the 97/3 Split provision of the 2016 CSC policy will not conform to the requirements of the ISDEAA. In such instances, a bilateral decision, rather than unilateral decision, should be jointly made to ensure compliance with the ISDEAA.

In addition to the IHS CSC Workgroup's recommendation above, IHS also is considering the following options, to address concerns that are not addressed by the IHS CSC Workgroup's proposal. Changes in **bold** text reflect changes to the 2016 CSC policy:

3. Alternative Methods for Calculating IDC Associated With Recurring Service Unit Shares. The provisions of this section E(3) shall apply to the negotiation of indirect CSC funding **for ISDEAA agreements entered into in or after FY 2017** and to the calculation of duplication under 25 U.S.C. § 5325(a)(3), when: i) an awardee assumes a new or expanded PFSA or added staff associated with a joint venture (in which case the

review is limited to those new or expanded PFSA or those additional staff); ii) an awardee includes new types of costs not previously included in the IDC pool that is associated with IHS programs, resulting in a change of more than 5% in the value of the IDC pool (in which case the review will be conducted under Alternative A and will be limited to those new types of costs); or iii) an awardee proposes and renegotiates the amount.

Two options to consider for the following paragraph:

**Option 1:** **Limited** to the above circumstances, the awardee **and IHS** shall **negotiate** the amount of IDC associated with the Service Unit shares and the remaining IDC that may be eligible for CSC funding, to identify duplication, if any, pursuant to 25 U.S.C. § 5325(a)(3), **using** one of two options listed below, **or any other mutually acceptable approach.**

**Option 2:** Pursuant to the above circumstances, the awardee **and the Area Director or his or her designee** shall **jointly determine, on a case-by-case basis, the appropriate method** for determining the amount of IDC associated with the Service Unit shares and the remaining IDC that may be eligible for CSC funding, to identify duplication, if any, pursuant to 25 U.S.C. § 5325(a)(3), **using** one of two options listed below, **or any other mutually acceptable approach.**

I look forward to hearing your input on how best to modify section 6-3.2E(3) of the CSC policy. Please feel free to share your recommendations on the proposed language provided by the IHS CSC Workgroup, viewpoints as to whether or not the IHS should permanently rescind this section of the policy, or any other modifications that you would recommend. As previously mentioned, the IHS takes these issues seriously and will continue to have internal discussions with our Federal team.

Please submit your input no later than May 18, 2018. You can submit your recommendations by e-mail or by postal mail to the address below.

Thank you for support and partnership in addressing the important issue.

Sincerely,

/Michael D. Weahkee/

RADM Michael D. Weahkee, MBA, MHSA  
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Acting Director

Send input by e-mail to:	<a href="mailto:consultation@ihs.gov">consultation@ihs.gov</a> Subject line: CSC “97/3 Method” Tribal Consultation
Send input by postal mail to:	RADM Michael D. Weahkee, MBA, MHSA Assistant Surgeon General, U.S. Public Health Service Acting Director Indian Health Service 5600 Fishers Lane Mail Stop: 08E86 Rockville, MD 20857