

APPENDICES

APPENDICES

**A - DEPARTMENT OF THE INTERIOR AND DEPARTMENT
OF HEALTH AND HUMAN SERVICES INDIAN
SELF-DETERMINATION INTERNAL AGENCY
PROCEDURES WORKGROUP CHARGE**

**B - INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE
ACT, P.L. 93-638, AS AMENDED**

**C - INDIAN SELF-DETERMINATION ACT REGULATIONS,
25 C.F.R. PART 900**

**D - DELEGATIONS OF AUTHORITY
Indian Health Service
Bureau of Indian Affairs**

**DEPARTMENT OF THE INTERIOR
AND
DEPARTMENT OF HEALTH AND HUMAN SERVICES
INDIAN SELF-DETERMINATION INTERNAL AGENCY
PROCEDURES WORKGROUP**

CHARGE

I. Official Designation

Indian Self-Determination Internal Agency Procedures Workgroup (IAPWG or Workgroup).

II. Purpose

This Charge establishes a workgroup to create a proposed internal agency procedures (IAP) manual for use by the Department of the Interior (DOI) and the Department of Health and Human Services (HHS) to implement the Indian Self-Determination and Education Assistance Act, Public Law (P.L.) 93-638 (Act), as amended, and regulations. The establishment of the IAPWG shall provide a non-exclusive means of tribal participation pursuant to the Act and the Federal Register notice of June 24, 1996 (pp. 32485 and 32500).

III. Goals and Objectives

The IAPWG will provide information and advice to the DOI and the HHS. The objective of the IAPWG will be to provide consensus recommendations on a proposed IAP manual to the Departments on the adoption of joint IAP to eliminate internal Federal obstacles that could affect uniform and efficient administration of the Act.

The IAPWG shall prepare a proposed IAP manual that facilitates the contracting process contained in the Act and regulations, and that is fully consistent with and does not reinterpret policies contained in the Act and regulations. To the extent references to policies in the Act or regulations are included, they shall only be

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

quoted verbatim or referred to by citation. The text of the Act and regulations shall be made a part of the proposed IAP manual.

IV. Duration

The IAPWG will be established from the date of the initial meeting on December 4, 1996, in Nashville, Tennessee.

V. Termination Date

The IAPWG will terminate September 30, 1997[*], or upon adoption of Federal IAP by the DOI and HHS implementing the Act, whichever occurs first. The Charge and IAPWG continuance may be extended if requested by the Departments to complete the development of the IAP.

VI. Workgroup Leadership

One DOI representative and one HHS representative will be designated by their respective departments to serve as Federal co-chairs. Four tribal co-chairs will be designated by the tribal Workgroup membership.

VII. Composition and Authority of Workgroup Members

(a) IAPWG Membership

Tribal Membership: The following tribal representatives were recommended to serve on the IAPWG:

<u>Area</u>	<u>Member</u>	<u>Alternate</u>
Aberdeen	Judy Kessler	Dani Petersen
Alaska/Juneau	Katherine Grosdidier	Margaret Roberts
Albuquerque	Robert Newcombe	Faron B. Baltazar
Bemidji/ Minneapolis	Deanna L. Bauman	L. John Lufkins
Billings	Janice Hawley	Marlene Bear Walter

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

<u>Area</u>	<u>Member</u>	<u>Alternate</u>
California/ Sacramento	Anthony Largo	Leah Exendine
Nashville	Buford L. Rolin	James T. Martin
Navajo	Britt E. Clapham	Milton Bluehouse
Oklahoma	Ed Mouss	James Factor
Phoenix/ Tucson	Margo Cowan	Lloyd B. Miller
Portland	Julia A. Davis	Mary L. Kalloch

Federal Government Membership: Federal representatives will be:

DOI

James J. Thomas
Deborah J. Maddox
Willa B. Perlmutter

HHS

Douglas P. Black
Ronald B. Demaray
Duke McCloud
Les M. Morris
Thomas W. Hertz

(B) Quorum

A quorum of the Workgroup requires the presence of at least one-half of the tribal representatives designated as Workgroup members and one-half of the Federal Government representatives from each Department.

VIII. Role of the Workgroup

The role of the IAPWG is to attempt to provide consensus advice and to create a proposed IAP manual for the DOI and HHS to implement the Act and regulations.

The IAPWG must follow each meeting's agenda, as recommended by the Workgroup members and approved by the co-chairs.

The IAPWG meetings will be facilitated by a facilitator agreed to by the co-chairs.

The IAPWG shall keep summaries of each meeting.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

If the IAPWG reaches a consensus on a proposed IAP manual, the IAPWG shall transmit to both Departments a report containing the proposed IAP manual. If the IAPWG does not reach a consensus on a proposed IAP manual, the IAPWG may transmit to both Departments a report specifying any areas in which a consensus has been reached together with the views on non-consensus issues. The IAPWG may include in a report any other information, recommendations, or materials that the IAPWG considers appropriate. Any IAPWG member may include as an addendum to the report additional information, recommendations, or materials. Prior to the adoption of any IAP manual the Secretaries of HHS and DOI shall meet and discuss the IAP manual with the IAPWG members and disclose any position inconsistent with tribal representatives' recommendations.

IX. Meetings

The exact date, time, place, purpose, and the proposed agenda for each meeting normally will be faxed or mailed to each IAPWG member and Bureau of Indian Affairs/Indian Health Service Area Office prior to each meeting. The notice also will include a statement that the meeting is open to the public.

X. Compensation for Services

Members of the IAPWG shall receive no additional pay, allowance, or benefits by reason of their service on the Workgroup. While away from their place of residence or business and in the performance of services for the IAPWG, Workgroup members may be authorized to be reimbursed for travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in Federal Government services.

XI. Authority

Public Law 103-413 and the Federal Register notice of June 24, 1996 (pp. 32485 and 32500) authorizes establishment of the IAPWG, section 204(b) of the Unfunded Mandates Reform Act of 1995, P.L. 104-4, and the Office of Management and Budget guidance explaining the exemption, published at Vol. 60 Federal Register p. 50653.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

/s/ Hilda A. Manuel
Hilda A. Manuel
Deputy Commissioner of
Indian Affairs
Bureau of Indian Affairs

/s/ Michael H. Trujillo, M.D.
Michael H. Trujillo, M.D., M.P.H.
Assistant Surgeon General
Director
Indian Health Service

2/4/97
Date

2/4/97
Date

***NOTE:** An Amendment to the Charge extended the termination date of the IAPWG from September 30, 1997, to June 30, 1998.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

APPENDIX B

INDEX

**INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT,
P.L. 93-638, AS AMENDED**

	PAGE
Title of Act	B-3
SECTION 2: Congressional Statement of Findings [25 USC 450].	B-3
SECTION 3: Congressional Declaration of Policy [25 USC 450a].	B-4
SECTION 4: Definitions [25 USC 450b].	B-4
SECTION 5: Reporting and Audit Requirements [25 USC Sec. 450c].	B-6
SECTION 6: Penalties [25 USC Sec. 450d].	B-7
SECTION 7: Wage and Labor Standards [25 USC Sec. 450e].	B-8
SECTION 8: Carryover of Funds.	B-8
SECTION 9: Grant and Cooperative Agreements [25 USC Sec. 450e-1].	B-9
TITLE I: Indian Self-Determination Act	B-10
SECTION 101: [Title Cite].	B-10
SECTION 102: Self-determination contracts [25 USC Sec. 450f].	B-10
SECTION 103: Grants to Tribal Organizations or Tribes [25 USC Sec. 450h].	B-14
SECTION 104: Personnel [25 USC Sec. 450i].	B-15
SECTION 105: Administrative Provisions [25 USC Sec. 450j].	B-19
SECTION 106: [Contract Funding] [25 USC Sec. 450j-1].	B-25
SECTION 107: Promulgation of Rules and Regulations [25 USC Sec. 450k].	B-31
SECTION 108: Contract or Grant specifications [25 USC Sec. 450l].	B-29

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

INDEX

**INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT,
P.L. 93-638, AS AMENDED**

	PAGE
SECTION 109: Reassumption of Programs [25 USC Sec. 450m].	B-38
SECTION 110: [Contract Appeals] [25 USC Sec. 450m-1].	B-38
SECTION 111: Sovereign Immunity and Trusteeship Rights Unaffected [25 USC Sec. 450n]	B-39
[Added]	
TITLE III: Tribal Self-Governance Demonstration Project B-40	
TITLE IV: Tribal Self-Governance	B-45

**Public Law 93-638
93rd Congress, S. 1017
January 4, 1975**

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, That this Act may be cited as the "Indian Self-Determination and Education Assistance Act".

CONGRESSIONAL STATEMENT OF FINDINGS

SEC 2 [25 USC 450]. (a) 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) 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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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

CONGRESSIONAL DECLARATION OF POLICY

SEC. 3 [25 USC 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.

DEFINITIONS

SEC. 4 [25 USC 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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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 **[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 **[450e-1]**) entered into under this subchapter 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 **[FOOTNOTE]** the last proviso in section 450j(a) of this title, no contract (or grant or cooperative agreement utilized under section 9 of this Act **[450e-1]**) entered into under title I of this Act shall be construed to be a procurement contract;

[FOOTNOTE: So in original. Probably should be 'provided in'.]

(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--

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

- (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.

REPORTING AND AUDIT REQUIREMENTS

SEC 5 [25 USC 450c]. (a)(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 **[FOOTNOTE]** United States Code, and a brief annual program report.

[FOOTNOTE: So in original. Probably should be followed by a comma.]

(b) 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) 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) Except as provided in section 8 **[13a]** or 106(a)(3) of this Act **[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.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(e) 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)(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.

(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.

PENALTIES

SEC. 6. [25 USC 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.

WAGE AND LABOR STANDARDS

SEC. 7 [25 USC 450e]. (a) 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), and section 2 **[40 U.S.C. 276c]** of the Act of June 13, 1934 **[48 Stat. 948]**.

(b) 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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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 [**25 U.S.C. 1452; 88 Stat. 77**].

(c) 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.

CARRYOVER OF FUNDS

SEC. 8. 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), 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.

GRANT AND COOPERATIVE AGREEMENTS

SEC 9 [25 USC 450e-1]. The provisions of this Act shall not be subject to the requirements of chapter 63 of title 31: Provided, That a grant agreement or a cooperative agreement may be utilized in lieu of a contract under sections 102 [**450f**] and 103 [**450g**] of this Act when mutually agreed to by the appropriate Secretary and the tribal organization involved.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

TITLE I - INDIAN SELF-DETERMINATION ACT

SEC. 101. This title may be cited as the "Indian Self-Determination Act".

SELF-DETERMINATION CONTRACTS

SEC. 102 [25 USC 450f]. (a)(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 --

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

(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), as amended (42 U.S.C. 2001 et seq.);

(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 contractable. The administrative functions referred to in the preceding sentence shall be contractable 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;

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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

- (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); 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, 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),

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). 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) 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,

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(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).

(c)(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 [25 U.S.C. 145 et seq] the Indian financing Act of 1974 of this title, 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) 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 prior to, including, or after December 22, 1987, 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 November 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 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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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)(1) With respect to any hearing or appeal conducted pursuant to subsection (b)(3), 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.

GRANTS TO INDIAN TRIBAL ORGANIZATIONS OR TRIBES

SEC. 103 [25 USC 450h]. (a) 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 (25 USC 13; 42 Stat. 208), 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 [450f] of this Act and the additional costs associated with the initial years of operation under such a contract or contracts; or

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(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 18 USC, chapter 53) 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) The Secretary of Health and Human Services may, in accordance with regulations adopted pursuant to section 107 **[450k]** of this Act, 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 **[450g]** of this Act.

(c) 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) 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) **[450f(a)(1)]** of this Act; or

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

(e) 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

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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

PERSONNEL

SEC. 104 [25 USC 450I]. (a) Section 3371(2) of chapter 33 of title 5, United States Code, is amended (1) by deleting the word "and" immediately after the semicolon in clause (A); (2) by deleting the period at the end of clause (B) and inserting in lieu thereof a semicolon and the word "and"; and (3) by adding at the end thereof the following new clause:

"(C) 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), 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(m) of the Indian Self-Determination and Education Assistance Act."

(b) The Act of August 5, 1954 (68 Stat. 674), as amended, is further amended by adding a new section 8 after section 7 of the Act, as follows:

"Sec. 8. In accordance with subsection (d) of section 214 of the Public Health Service Act (58 Stat. 690), as amended, 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 and 103 of the Indian Self-Determination and Education Assistance Act".

(c) paragraph (2) of subsection (a) of section 6 of the Military Selective Service Act of 1967 (81 Stat. 100), as amended, is amended by inserting after the words "Environmental Science Services Administration" the words "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".

(d) Section 502 of the Intergovernmental Personnel Act of 1970 (84 Stat. 1909, 1925) is amended--

(1) by deleting the word "and" after paragraph (3);

(2) by deleting the period after paragraph (4) and inserting in lieu thereof a semicolon and the word "and"; and

(3) by adding at the end thereof the following new paragraph:

"(5) Notwithstanding the population requirements of section 203(a) and 303(c) of this Act, a 'local government' and a 'general local government' also mean the recognized governing body of an Indian tribe, band, pueblo, or other organized groups of community, including any Alaska Native village, as defined in the Alaska Native Claims Settlement Act (85 Stat. 688), which performs substantial governmental functions. The requirements of section 203(c) and 303(d) of this Act,

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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."

(e) 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 (43 USC 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, 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, 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, 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 (5 USC 8348); 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, 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 (5 USC 8909); 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.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(4) To retain coverage, rights, and benefits under chapter 87 ("Life Insurance") of title 5, United States Code, 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 (5 USC 8714); 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.

(f) 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) 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) 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) 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) 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 USC 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 with **[FOOTNOTE]** 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.

[FOOTNOTE: So in original. Probably should be 'WITH'.]

(k) Section 3372(a) of title 5, United States Code, is further amended to add the following to the end thereof: "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."

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(l) Section 3372 of title 5, United States Code, is further amended by adding a new subsection (d) as follows:

"(d) Where the employee is assigned to a tribal organization, the employee shall be eligible for promotions, periodic step-increases, additional step-increases, merit pay, and cash awards, as defined in chapter 53 and 54 of this title, on the same basis as other Federal employee."

(m) The status of an Indian (as defined in section 19 of the Act of June 18, 1934 (25 USC 479; 48 Stat. 988)) appointed (except temporary appointments) to the Federal service under an excepted appointment under the authority of section 472 of this title, 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.

ADMINISTRATIVE PROVISIONS

Sec. 105 (a)(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 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:

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

- (I) The Federal Property and Administrative Services Act of 1949 (40 U.S.C. 471 et seq.).
- (II) Section 3709 of the Revised Statutes.
- (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).
- (V) Section 13 of the Act of Oct. 3, 1944 (58 Stat. 770; chapter 479).
- (VI) Chapters 21, 25, 27, 29, and 31 of title 44, United States Code.
- (VII) Section 2 of the Act of June 13, 1934 (48 Stat 948, chapter 483).
- (VIII) Sections 1 through 12 of the Act of June 30, 1936 (49 Stat. 2036 et seq. chapter 881).
- (IX) The Service Control Act of 1965 (41 U.S.C. 351 et seq.).
- (X) The Small Business Act (15 U.S.C. 631 et seq.).
- (XI) Executive Order Nos. 12138, 11246, 11701 and 11758.

(b) Payments of any grants or under any contracts pursuant to sections 102 **[450f]** and 103 **[450h]** of this title 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)(1) A self-determination contract shall be -

(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)(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) 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,

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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) In connection with any self-determination contract or grant made pursuant to section 102 or 103 **[450f or 450h]** of this title, 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) The contracts authorized under section 102 **[450f]** of this Act and grants pursuant to section 103 **[450h]** of this Act 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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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) Contracts and grants with tribal organizations pursuant to sections 102 [450f] and 103 [450h] of this Act 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)(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.

(j) 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.

(k) 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 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.

(l)(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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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)(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; and

(B) section 314 of the Department of the Interior and Related Agencies Appropriations Act, 1991 (104 Stat. 1959).

(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), 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 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, 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).

(4)(A) 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.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(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 (including providing opportunity for an appeal pursuant to section 102(b)).

(n) 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.

[CONTRACT FUNDING]

SEC. 106 [25 USC 450j-1]. (a)(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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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.

(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.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(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) 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)[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) The Secretary shall provide an annual report in writing on or before May 15 of each year to the Congress on the implementation of this Act. Such report shall include --

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

(2) an accounting of any deficiency of funds needed to provide required contract support costs to all contractors for the current fiscal year;

(3) the indirect costs rate and type of rate for each tribal organization negotiated with the appropriate Secretary;

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(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 pools ; and

(6) an accounting of any deficiency of funds needed to maintain the preexisting level of services to any 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 to a different accounting cycle, as authorized by section 105(d).

(d)(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) 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) 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, 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 **[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, 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 (25 USC 476, 48 Stat. 984).

(g) 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.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(h) 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) 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) 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) 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.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(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)(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) 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) 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) 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.

PROMULGATION OF RULES AND REGULATIONS

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

SEC 107 [25 USC 450k]. (a)(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, 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, property donation procedures arising under section 105(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 18 months after the date of enactment of the Indian Self-Determination Contract Reform Act of 1994.

(b) 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, and the Secretary is authorized to repeal any regulation inconsistent with the provisions of this Act. **[FOOTNOTE]**

[FOOTNOTE: PUBLIC LAW 103-435 FURTHER AMENDED THE INDIAN SELF DETERMINATION ACT BY PROVIDING THAT "SECTION 107(B)(2)" BE AMENDED BY STRIKING "COMMITTEE ON INTERIOR AND INSULAR AFFAIRS" AND INSERTING " COMMITTEE ON NATURAL RESOURCES". SECTION 107(B)(2) WAS REPEALED BY PUBLIC LAW 103-413.]

(c) 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 Committees on Interior and Insular Affairs **[FOOTNOTE 1]** of the United States Senate and 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.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(d)(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, 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.

(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) 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.

CONTRACT OR GRANT SPECIFICATIONS.

SEC. 108 [25 USC 450I]. (a) 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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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

(b) 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, United States Code.

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

" SECTION 1. AGREEMENT BETWEEN THE SECRETARY AND THE XX 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 [insert name] 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, 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 [insert number of years] years on 105(d)(1) of such Act (25 U.S.C. 450j(d)), 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).

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

"(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).

"(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, 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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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, 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, 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.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

"(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 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 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.--

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

"(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, 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 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.--

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

"(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) and section 16 of the Act of June 18, 1934 (48 Stat. 987, chapter 576; 25 U.S.C. 476), 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 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) 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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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 XX 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), 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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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 [insert name] 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 agreement is hereby incorporated in its entirety in this Contract and attached to this Contract as attachment 2."

REASSUMPTION OF PROGRAMS

SEC. 109 [25 USC 450m]. Each contract or grant agreement entered into pursuant to sections 102 [450f], 103 [450h], and 104 [Footnote] 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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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 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 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.).

[Footnote: Original sections 102 and 103 combined into section 102 and original section 104 redesignated as section 103 by P.L. 100-472. Retained reference to section 104 is a drafting oversight.]

[CONTRACT APPEALS]

SEC. 110 [25 USC 450M-1]. (a) 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 to finding under section 102(a)(2) or to compel the Secretary to award and fund an approved self-determination contract).

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

(c) The Equal Access to Justice Act (Public **[FOOTNOTE]** Law 96-481, Act of October 1, **[FOOTNOTE]** 1980; 92 **[FOOTNOTE]** Stat. 2325, as amended), 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 October 5, 1988, by tribal organizations regarding self-determination contracts.

[FOOTNOTE: So IN ORIGINAL. PROBABLY SHOULD BE `PUBLIC', `21', AND `94', RESPECTIVELY.]

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(d) 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 USC 607).

(e) 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 disposed of before October 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 October 5, 1988.

SOVEREIGN IMMUNITY AND TRUSTEESHIP RIGHTS UNAFFECTED

SEC. 111 [25 USC 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.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

TITLE III - TRIBAL SELF-GOVERNANCE DEMONSTRATION PROJECT

Title III of Pub. L. 93-638, as added by Pub. L. 100-472, title II, Sec. 209, Oct. 5, 1988, 102 Stat. 2296, and amended by Pub. L. 102-184, Sec. 2-6, Dec. 4, 1991, 105 Stat. 1278, provided that:

Sec. 301. The Secretary of the Interior shall, for a period not to exceed eight years following enactment of this title (Oct. 5, 1988), conduct a research and demonstration project to be known as the Tribal Self-Governance Project according to the provisions of this title.

Sec. 302. (a) The Secretary shall select thirty tribes to participate in the demonstration project, as follows:

(1) a tribe that successfully completes a Self-Governance Planning Grant, authorized by Conference Report 100-498 to accompany H.J. Res. 395, One Hundredth Congress, first session (Pub. L. 100-202) shall be selected to participate in the demonstration project; and

(2) the Secretary shall select, in such a manner as to achieve geographic representation, the remaining tribal participants from the pool of qualified applicants. In order to be in the pool of qualified applicants -

'(A) the governing body of the tribe shall request participation in the demonstration project;

'(B) such tribe shall have operated two or more mature contracts; and

'(C) such tribe shall have demonstrated, for the previous three fiscal years, financial stability and financial management capability as evidenced by such tribe having no significant and material audit exceptions in the required annual audit of such tribe's self-determination contracts.

Sec. 303. (a) The Secretary is directed to negotiate, and to enter into, an annual written funding agreement with the governing body of a participating tribal government that successfully completes its Self-Governance Planning Grant. Such annual written funding agreement -

(1) shall authorize the tribe to plan, conduct, consolidate, and administer programs, services and functions of the Department of the Interior that are otherwise available to Indian tribes or Indians, including but not limited to, the Act of April 16, 1934 (48 Stat. 596) (25 U.S.C. 452 et seq.), as amended, and the Act of November 2, 1921 (42 Stat. 208) (25 U.S.C. 13);

(2) subject to the terms of the written agreement authorized by this title, shall authorize the tribe to redesign programs, activities, functions or services and to reallocate funds for such programs, activities, functions or services;

(3) shall not include funds provided pursuant to the Tribally Controlled Community College Assistance Act (Public Law 95-471) (25 U.S.C. 1801 et seq.), for elementary and secondary schools under the Indian School Equalization Formula pursuant to title XI of the Education Amendments of 1978 (Public Law 95-561, as amended) (25 U.S.C. 2001 et

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

seq.), or for either the Flathead Agency Irrigation Division or the Flathead Agency Power Division: Provided, That nothing in this section shall affect the contractability of such divisions under section 102 of this Act (25 U.S.C. 450f);

(4) shall specify the services to be provided, the functions to be performed, and the responsibilities of the tribe and the Secretary pursuant to this agreement;

(5) shall specify the authority of the tribe and the Secretary, and the procedures to be used, to reallocate funds or modify budget allocations within any project year;

(6) shall, except as provided in paragraphs (1) and (2), provide for payment by the Secretary to the tribe of funds from one or more programs, services, functions, or activities in an amount equal to that which the tribe would have been eligible to receive under contracts and grants under this Act (Pub. L. 93-638, see Short Title note under section 450 of this title), including direct program costs and indirect costs, and for any funds which are specifically related to the provision by the Secretary of services and benefits to the tribe and its members: Provided, however, That funds for trust services to individual Indians are available under this written agreement only to the extent that the same services which would have been provided by the Secretary are provided to individual Indians by the tribe;

(7) shall not allow the Secretary to waive, modify or diminish in any way the trust responsibility of the United States with respect to Indian tribes and individual Indians which exists under treaties, Executive orders, and Acts of Congress;

(8) shall allow for retrocession of programs or portions thereof pursuant to section 105(e) of this Act (25 U.S.C. 450j(e)); and

(9) shall be submitted by the Secretary ninety days in advance of the proposed effective date of the agreement to each tribe which is served by the agency which is serving the tribe which is a party to the funding agreement and to the Congress for review by the Select Committee on Indian Affairs of the Senate and the Committee on Interior and Insular Affairs of the House of Representatives.

(b) For the year for which, and to the extent to which, funding is provided to a tribe pursuant to this title, such tribe -

(1) shall not be entitled to contract with the Secretary for such funds under section 102 (25 U.S.C. 450f), except that such tribe shall be eligible for new programs on the same basis as other tribes; and

(2) shall be responsible for the administration of programs, services and activities pursuant to agreements under this title.

(c) At the request of the governing body of the tribe and under the terms of an agreement pursuant to subsection (a), the Secretary shall provide funding to such tribe to implement the agreement.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(d) For the purpose of section 110 of this Act (25 U.S.C. 450m-1) the term 'contract' shall also include agreements authorized by this title; except that for the term of the authorized agreements under this title, the provisions of section 2103 of the Revised Statutes of the United States (25 U.S.C. 81), and section 16 of the Act of June 18, 1934 (25 U.S.C. 476), shall not apply to attorney and other professional contracts by participating Indian tribal governments operating under the provisions of this title.

(e) To the extent feasible, the Secretary shall interpret Federal laws and regulations in a manner that will facilitate the agreements authorized by this title.

(f) To the extent feasible, the Secretary shall interpret Federal laws and regulations in a manner that will facilitate the inclusion of activities, programs, services, and functions in the agreements authorized by this title.

Sec. 304. The Secretary shall identify, in the President's annual budget request to the Congress, any funds proposed to be included in the Tribal Self-Governance Project. The use of funds pursuant to this title shall be subject to specific directives or limitations as may be included in applicable appropriations Acts.

Sec. 305. The Secretary shall submit to the Congress a written report on July 1 and January 1 of each of the five years following the date of enactment of this title (Oct. 5, 1988) on the relative costs and benefits of the Tribal Self-Governance Project. Such report shall be based on mutually determined baseline measurements jointly developed by the Secretary and participating tribes, and shall separately include the views of the tribes.

Sec. 306. Nothing in this title shall be construed to limit or reduce in any way the services, contracts or funds that any other Indian tribe or tribal organization is eligible to receive under section 102 (25 U.S.C. 450f) or any other applicable Federal law and the provisions of section 110 of this Act (25 U.S.C. 450m-1) shall be available to any tribe or Indian organization which alleges that a funding agreement is in violation of this section.

Sec. 307. For the purpose of providing planning and negotiation grants to the ten tribes added by section 3 of the Tribal Self-Governance Demonstration Project Act to the number of tribes set forth by section 302 of this Act (as in effect before the date of enactment of this section (Dec. 4, 1991)), there is authorized to be appropriated \$700,000.

Sec. 308. (a) The Secretary of Health and Human Services, in consultation with the Secretary of the Interior and Indian tribal governments participating in the demonstration project under this title, shall conduct a study for the purpose of determining the feasibility of extending the demonstration project under this title to the activities, programs, functions, and services of the Indian Health Service. The Secretary shall report the results of such study, together with his recommendations, to the Congress within the 12-month period following the date of the enactment of the Tribal Self-Governance Demonstration Project Act (Dec. 4, 1991).

(b) The Secretary of Health and Human Services may establish within the Indian Health Service an office of self-governance to be responsible for coordinating the activities necessary to carry out the study required under subsection (a).

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Sec. 309. The Secretary of the Interior shall conduct a study for the purpose of determining the feasibility of including in the demonstration project under this title those programs and activities excluded under section 303(a)(3). The Secretary of the Interior shall report the results of such study, together with his recommendations, to the Congress within the 12-month period following the date of the enactment of the Tribal Self-Governance Demonstration Project Act (Dec. 4, 1991).

SEC. 201. SHORT TITLE.

This title may be cited as the "Tribal Self-Governance Act of 1994".

SEC. 202. FINDINGS.

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 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 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; and
- (5) Congress has reviewed the results of the Tribal Self-Governance Demonstration Project and finds that--

(A) transferring control to tribal governments, upon tribal request, over funding and decisionmaking for Federal programs, services, functions, and activities, or portions thereof, is an effective way to implement the Federal policy of government-to-government relations with Indian tribes; and

(B) transferring control to tribal governments, upon tribal request, over funding and decisionmaking for Federal programs, services, functions, and activities strengthens the Federal policy of Indian self-determination.

SEC. 203. DECLARATION OF POLICY.

It is the policy of this title to permanently establish and implement tribal self-governance--

- (1) to enable the United States to maintain and improve its unique and continuing relationship with, and responsibility to, Indian tribes;
- (2) to permit each Indian tribe to choose the extent of the participation of such tribe in self-governance;

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

- (3) to coexist with the provisions of the Indian Self-Determination Act relating to the provision of Indian services by designated Federal agencies;
- (4) to ensure the continuation of the trust responsibility of the United States to Indian tribes and Indian individuals;
- (5) to permit an orderly transition from Federal domination of programs and services to provide Indian tribes with meaningful authority to plan, conduct, redesign, and administer programs, services, functions, and activities that meet the needs of the individual tribal communities; and
- (6) to provide for an orderly transition through a planned and measurable parallel reduction in the Federal bureaucracy.

SEC. 204. TRIBAL SELF-GOVERNANCE.

The Indian Self-Determination and Education Assistance Act is amended by adding at the end the following new title:

"TITLE IV--TRIBAL SELF-GOVERNANCE

"SEC. 401. ESTABLISHMENT.

"The Secretary of the Interior (hereinafter in this title referred to as the `Secretary') shall establish and carry out a program within the Department of the Interior to be known as Tribal Self-Governance (hereinafter in this title referred to as `Self-Governance') in accordance with this title.

"SEC. 402. SELECTION OF PARTICIPATING INDIAN TRIBES.

"(a) CONTINUING PARTICIPATION.--Each Indian tribe that is participating in the Tribal Self-Governance Demonstration Project at the Department of the Interior under title III on the date of enactment of this title shall thereafter participate in Self-Governance under this title and cease participation in the Tribal Self-Governance Demonstration Project under title III with respect to the Department of the Interior.

"(b) ADDITIONAL PARTICIPANTS.--(1) In addition to those Indian tribes participating in Self-Governance under subsection (a), the Secretary, acting through the Director of the Office of Self-Governance, may select up to 20 new tribes per year from the applicant pool described in subsection (c) to participate in Self-Governance.

"(2) If each tribe requests, two or more otherwise eligible Indian tribes may be treated as a single Indian tribe for the purpose of participating in Self-Governance as a consortium.

"(c) APPLICANT POOL.--The qualified applicant pool for Self-Governance shall consist of each tribe that--

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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

"(2) has requested participation in Self-Governance by resolution or other official action by the tribal governing body; and

"(3) has demonstrated, for the previous three fiscal years, financial stability and financial management capability as evidenced by the tribe having no material audit exceptions in the required annual audit of the self-determination contracts of the tribe.

"(d) PLANNING PHASE.--Each Indian tribe seeking to begin participation in Self-Governance shall complete a planning phase in accordance with this subsection. The tribe shall be eligible for a grant to plan and negotiate participation in Self-Governance. The planning phase shall include--

"(1) legal and budgetary research; and

"(2) internal tribal government planning and organizational preparation.

"SEC. 403. FUNDING AGREEMENTS.

"(a) AUTHORIZATION.--The Secretary shall negotiate and enter into an annual written funding agreement with the governing body of each participating tribal government in a manner consistent with the Federal Government's laws and trust relationship to and responsibility for the Indian people.

"(b) CONTENTS.--Each funding agreement shall--

"(1) authorize the tribe to plan, conduct, consolidate, and administer programs, services, functions, and activities, or portions thereof, administered by the Department of the Interior through the Bureau of Indian Affairs, without regard to the agency or office of the Bureau of Indian Affairs within which the program, service, function, and activity, or portion thereof, is performed, including funding for agency, area, and central office functions in accordance with subsection (g)(3), and including any program, service, function, and activity, or portion thereof, administered under the authority of-- "(A) the Act of April 16, 1934 (25 U.S.C. 452 et seq.); "(B) the Act of November 2, 1921 (25 U.S.C. 13); and "(C) programs, services, functions, and activities or portions thereof administered by the Secretary of the Interior that are otherwise available to Indian tribes or Indians for which appropriations are made to agencies other than the Department of the Interior;

"(2) subject to such terms as may be negotiated, authorize the tribe to plan, conduct, consolidate, and administer programs, services, functions, and activities, or portions thereof, administered by the Department of the Interior, other than through the Bureau of Indian Affairs, that are otherwise available to Indian tribes or Indians, as identified in section 405(c), except that nothing in this subsection may be construed to provide any tribe with a preference with respect to the opportunity of the tribe to administer programs, services, functions, and activities, or portions thereof, unless such preference is otherwise provided for by law;

"(3) subject to the terms of the agreement, authorize the tribe to redesign or consolidate programs, services, functions, and activities, or portions thereof, and reallocate funds for such programs, services, functions, and activities, or portions thereof, except that, with respect to

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

the reallocation, consolidation, and redesign of programs described in paragraph (2), a joint agreement between the Secretary and the tribe shall be required;

"(4) prohibit the inclusion of funds provided--

"(A) pursuant to the Tribally Controlled Community College Assistance Act of 1978 (25 U.S.C. 1801 et seq.); "(B) for elementary and secondary schools under the formula developed pursuant to section 1128 of the Education Amendments of 1978 (25 U.S.C. 2008); and

"(C) the Flathead Agency Irrigation Division or the Flathead Agency Power Division, except that nothing in this section shall affect the contract authority of such divisions under section 102;

"(5) specify the services to be provided, the functions to be performed, and the responsibilities of the tribe and the Secretary pursuant to the agreement;

"(6) authorize the tribe and the Secretary to reallocate funds or modify budget allocations within any year, and specify the procedures to be used;

"(7) allow for retrocession of programs or portions of programs pursuant to section 105(e);

"(8) provide that, for the year for which, and to the extent to which, funding is provided to a tribe under this section, the tribe--

"(A) shall not be entitled to contract with the Secretary for such funds under section 102, except that such tribe shall be eligible for new programs on the same basis as other tribes; and

"(B) shall be responsible for the administration of programs, services, functions, and activities pursuant to agreements entered into under this section; and

"(9) prohibit the Secretary 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, and other laws.

"(c) ADDITIONAL ACTIVITIES.--Each funding agreement negotiated pursuant to subsections (a) and (b) may, in accordance to such additional terms as the parties deem appropriate, also include other programs, services, functions, and activities, or portions thereof, administered by the Secretary of the Interior which are of special geographic, historical, or cultural significance to the participating Indian tribe requesting a compact.

"(d) PROVISIONS RELATING TO THE SECRETARY.--Funding agreements negotiated between the Secretary and an Indian tribe shall include provisions--

"(1) to monitor the performance of trust functions by the tribe through the annual trust evaluation, and

"(2) for the Secretary to reassume a program, service, function, or activity, or portions thereof, if there is a finding of imminent jeopardy to a physical trust asset, natural resources, or public health and safety.

"(e) CONSTRUCTION PROJECTS.--(1) 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 and Federal acquisition regulations in any funding agreement entered into under this Act. Absent a negotiated agreement, such provisions and regulatory requirements shall not apply.

"(2) In all construction projects performed pursuant to this title, the Secretary shall ensure that proper health and safety standards are provided for in the funding agreements.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

"(f) SUBMISSION FOR REVIEW.--Not later than 90 days before the proposed effective date of an agreement entered into under this section, the Secretary shall submit a copy of such agreement to--"(1) each Indian tribe that is served by the Agency that is serving the tribe that is a party to the funding agreement; "(2) the Committee on Indian Affairs of the Senate; and "(3) the Subcommittee on Native American Affairs of the Committee on Natural Resources of the House of Representatives.

"(g) PAYMENT.--(1) At the request of the governing body of the tribe and under the terms of an agreement entered into under this section, the Secretary shall provide funding to the tribe to carry out the agreement.

"(2) The funding agreements authorized by this title and title III of this Act shall provide for advance payments to the tribes in the form of annual or semi-annual installments at the discretion of the tribes.

"(3) Subject to paragraph (4) of this subsection and paragraphs (1) through (3) of subsection (b), the Secretary shall provide funds to the tribe under an agreement under this title for programs, services, functions, and activities, or portions thereof, in an amount equal to the amount that the tribe would have been eligible to receive under contracts and grants under this Act, including amounts for direct program and contract support costs and, in addition, any funds that are specifically or functionally related to the provision by the Secretary of services and benefits to the tribe or its members, without regard to the organization level within the Department where such functions are carried out.

"(4) Funds for trust services to individual Indians shall be available under an agreement entered into under this section only to the extent that the same services that would have been provided by the Secretary are provided to individual Indians by the tribe.

"(h) CIVIL ACTIONS.--(1) Except as provided in paragraph (2), for the purposes of section 110, the term `contract' shall include agreements entered into under this title.

"(2) For the period that an agreement entered into under this title is in effect, the provisions of section 2103 of the Revised Statutes of the United States (25 U.S.C. 81), and section 16 of the Act of June 18, 1934 (25 U.S.C. 476), shall not apply to attorney and other professional contracts by Indian tribal governments participating in Self-Governance under this title.

"(i) FACILITATION.--(1) Except as otherwise provided by law, the Secretary shall interpret each Federal law and regulation in a manner that will facilitate--

"(A) the inclusion of programs, services, functions, and activities in the agreements entered into under this section; and

"(B) the implementation of agreements entered into under this section.

"(2)(A) A tribe may submit a written request for a waiver to the Secretary identifying the regulation sought to be waived and the basis for the request.

"(B) Not later than 60 days after receipt by the Secretary of a written request by a tribe to waive application of a Federal regulation for an agreement entered into under this section, the

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Secretary shall either approve or deny the requested waiver in writing to the tribe. 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. The Secretary's decision shall be final for the Department.

"(j) FUNDS.--All funds provided under funding agreements entered into pursuant to this Act, and all funds provided under contracts or grants made pursuant to this Act, shall be treated as non-Federal funds for purposes of meeting matching requirements under any other Federal law.

"(k) DISCLAIMER.--Nothing in this section is intended or shall be construed to expand or alter existing statutory authorities in the Secretary so as to authorize the Secretary to enter into any agreement under sections 403(b)(2) and 405(c)(1) with respect to functions that are inherently Federal or where the statute establishing the existing program does not authorize the type of participation sought by the tribe: Provided, however an Indian tribe or tribes need not be identified in the authorizing statute in order for a program or element of a program to be included in a compact under section 403(b)(2).

"SEC. 404. BUDGET REQUEST.

"The Secretary shall identify, in the annual budget request of the President to the Congress under section 1105 of title 31, United States Code, any funds proposed to be included in agreements authorized under this title.

"SEC. 405. REPORTS.

"(a) REQUIREMENT.--The Secretary shall submit to Congress a written report on January 1 of each year following the date of enactment of this title regarding the administration of this title.

"(b) CONTENTS.--The report shall--

"(1) identify the relative costs and benefits of Self-Governance;

"(2) identify, 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;

"(3) identify the funds transferred to each Self-Governance tribe and the corresponding reduction in the Federal bureaucracy;

"(4) include the separate views of the tribes; and "(5) include the funding formula for individual tribal shares of Central Office funds, together with the comments of affected Indian tribes, developed under subsection (d).

"(c) REPORT ON NON-BIA PROGRAMS.--(1) In order to optimize opportunities for including non-Bureau of Indian Affairs programs, services, functions, and activities, or portions thereof, in agreements with tribes participating in Self-Governance under this title, the Secretary shall--

"(A) review all programs, services, functions, and activities, or portions thereof, administered by the Department of the Interior, other than through the Bureau of Indian Affairs, without regard to the agency or office concerned; and "(B) not later than 90 days after the date of enactment of this title, provide to the appropriate committees of Congress a listing of all such programs, services, functions, and activities, or portions thereof, that the Secretary determines, with the concurrence of tribes participating in Self-Governance under this title, are eligible for inclusion in such agreements at the request of a participating Indian tribe.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

"(2) The Secretary shall establish programmatic targets, after consultation with tribes participating in Self-Governance under this title, to encourage bureaus of the Department to assure that a significant portion of such programs, services, functions, and activities are actually included in the agreements negotiated under section 403.

"(3) The listing and targets under paragraphs (1) and (2) shall be published in the Federal Register and be made available to any Indian tribe participating in Self-Governance under this title. The list shall be published before January 1, 1995, and annually thereafter by January 1 preceding the fiscal year in which the targets are to be met.

"(4) Thereafter, the Secretary shall annually review and publish in the Federal Register, after consultation with tribes participating in Self-Governance under this title, a revised listing and programmatic targets.

"(d) REPORT ON CENTRAL OFFICE FUNDS.--Within 90 days after the date of the enactment of this title, the Secretary shall, in consultation with Indian tribes, develop a funding formula to determine the individual tribal share of funds controlled by the Central Office of the Bureau of Indian Affairs for inclusion in the Self-Governance compacts. The Secretary shall include such formula in the annual report submitted to the Congress under subsection (b), together with the views of the affected Indian tribes.

"SEC. 406. DISCLAIMERS.

"(a) OTHER SERVICES, CONTRACTS, AND FUNDS.--Nothing in this title shall be construed to limit or reduce in any way the services, contracts, or funds that any other Indian tribe or tribal organization is eligible to receive under section 102 or any other applicable Federal law.

"(b) FEDERAL TRUST RESPONSIBILITIES.--Nothing in this Act shall be construed to diminish the Federal trust responsibility to Indian tribes, individual Indians, or Indians with trust allotments.

"(c) APPLICATION OF OTHER SECTIONS OF ACT.--All provisions of sections 6, 102(c), 104, 105(f), 110, and 111 of this Act shall apply to agreements provided under this title.

"SEC. 407. REGULATIONS.

"(a) IN GENERAL.--Not later than 90 days after the date of enactment of this title, at the request of a majority of the Indian tribes with agreements under this title, the Secretary shall initiate procedures under subchapter III of chapter 5 of title 5, United States Code, to negotiate and promulgate such regulations as are necessary to carry out this title.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

"(b) COMMITTEE.--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 representatives of Indian tribes with agreements under this title.

"(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 the Indian tribes.

"(d) EFFECT.--The lack of promulgated regulations shall not limit the effect of this title.

"SEC. 408. AUTHORIZATION OF APPROPRIATIONS.

"There are authorized to be appropriated such sums as may be necessary to carry out this title."

Speaker of the House of Representatives.

Vice President of the United States and

President of the Senate.

There are no more items to read.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

APPENDIX C

QUICK FEDERAL REGISTER (TEXT)
L-S Document 562498

On 06/24/96
[L-S document 562498, 61 FR 32482, 6706 lines]

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

25 CFR Part 900

RINs 1076-AD21; 0905-AC98

Indian Self-Determination and Education Assistance Act Amendments

AGENCIES: Departments of the Interior and Health and Human Services.

ACTION: Final rule.

SUMMARY: The Secretaries of the Department of Interior (DOI) and the Department of Health and Human Services (DHHS) hereby issue a joint rule to implement section 107 of the Indian Self-Determination Act, as amended, including Title I, Pub. L. 103-413, the Indian Self-Determination Contract Reform Act of 1994. This joint rule, as required by section 107(a)(2)(A)(ii) of the Act, will permit the Departments to award contracts and grants to Indian tribes without the unnecessary burden or confusion associated with having two sets of rules for single program legislation. In section 107(a)(1) of the Act Congress delegated to the Departments limited legislative rulemaking authority in certain specified subject matter areas, and the joint rule addresses only those specific areas. As required by section 107(d) of the Act, the Departments have developed this final rule with active tribal participation, using the guidance of the Negotiated Rulemaking Act.

DATES: This rule will become effective on August 23, 1996.

FOR FURTHER INFORMATION CONTACT: James Thomas, Division of Self-Determination Services, Bureau of Indian Affairs, Department of the Interior, Room 4627, 1849 C Street N.W.,

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Washington, DC 20240, Telephone (202) 208-5727 or Merry Elrod, Division of Self-Determination Services, Office of Tribal Activities, Indian Health Service, Room 6A-19, 5600 Fishers Lane, Parklawn Building, Rockville, MD 20857, Telephone (301) 443-6840/1104/1044.

SUPPLEMENTARY INFORMATION: The 1975 Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, gave Indian tribes the authority to contract with the Federal government to operate programs serving their tribal members and other eligible persons. The Act was further amended by the Technical Assistance Act and other Acts, Pub. L. 98-250; Pub. L. 100-202; Interior Appropriations Act for Fiscal Year 1988, Pub. L. 100-446; Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. 100-472; Indian Reorganization Act Amendments of 1988, Pub. L. 100-581; miscellaneous Indian Law Amendments, Pub. L. 101-301; Pub. L. 101-512; Indian Self-Determination and Education Assistance Act Amendments of 1990, Pub. L. 101-644; Pub. L. 102-184; Pub. L. 103-138; Indian Self-Determination Act Amendments of 1994, Pub. L. 103-413; and Pub. L. 103-435. Of these, the most significant were Pub. L. 100-472 (the 1988 Amendments) and Pub. L. 103-413 (the 1994 Amendments).

The 1988 Amendments substantially revised the Act in order "to increase tribal participation in the management of Federal Indian programs and to help ensure long-term financial stability for tribally-run programs." Senate Report 100-274 at 2. The 1988 Amendments were also "intended to remove many of the administrative and practical barriers that seem to persist under the Indian-Self-Determination Act." *Id.* at 2. In fashioning the amendments, Congress directed that the two Departments develop implementing regulations over a 10-month period with the active participation of tribes and tribal organizations. In this regard, Congress delegated to the Departments broad legislative rulemaking authority.

Initially the two Departments worked closely with Indian tribes and tribal organizations to develop new implementing regulations, culminating in a joint compromise September 1990 draft regulation reflecting substantial tribal input. Thereafter, however, the two Departments continued work on the draft regulation without any further tribal input. The revised proposed regulation was completed under the previous administration, and the current administration published the proposed regulation (1994 NPRM) for public comment on January 20, 1994, at 59 FR 3166. In so doing, the current administration expressed its concern over the absence of tribal participation in the regulation drafting process in the years following August 1990, and invited tribes to review the 1994 NPRM closely for possible revisions.

Tribal reaction to the January 1994 proposed regulation was extremely critical. Tribes, tribal organizations, and national Indian organizations criticized both the content of the 1994 NPRM and its length, running over 80 pages in the Federal Register. To address tribal concerns in revising the proposed regulations into final form, the Departments committed to establish a Federal advisory committee that would include at least 48 tribal representatives from throughout the country, and be jointly funded by the two Departments.

In the meantime, Congress renewed its examination into the regulation drafting process, and the extent to which events since the 1988 amendments, including the lengthy and controversial regulation development process, justified revisiting the Act anew. This Congressional review eventually led to the October 1994 amendments. (Similar efforts by tribal representatives to secure amendments to the Act in response to the developing regulations had been considered by Congress in 1990 and 1992.)

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

The 1994 amendments comprehensively revisit almost every section of the original Act, including amending the Act to override certain provisions in the January 1994 NPRM. Most importantly for this new NPRM, the 1994 amendments also remove Congress' prior delegation to the Departments of general legislative rulemaking authority. Instead, the Departments' authority is strictly limited to certain areas, a change explained in the Senate report that accompanied the final version of the bill:

Section 105 of the bill addresses the Secretaries' authority to promulgate interpretative regulations in carrying out the mandates of the Act. It amends section 107 (a) and (b) of the Act by limiting the delegated authorization of the Secretaries to promulgate regulations. This action is a direct result of the failure of the Secretaries to respond promptly and appropriately to the comprehensive amendments developed by this committee six years ago.

* * * * *

Section 105(l) amends section 107(a) by delegating to the Secretary the authority only to promulgate implementing regulations in certain limited subject matter areas. By and large these areas correspond to the areas of concern identified by the Departments in testimony and in discussions. Beyond the areas specified in subsection (a) * * * no further delegated authority is conferred.

Sen. Rep. No. 103-374 at 14. For this reason, the new rule covers substantially fewer topics than the January 1994 NPRM.

As specified by Congress, the new rule is limited to regulations relating to chapter 171 of title 28 of the 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 of the Act; property donation procedures arising under section 105(f) of the Act; 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. All but three of these permitted regulatory topics--discretionary grant procedures, internal agency procedures, and tribal organization relinquishment procedures--are addressed in this rule.

The 1994 amendments also required that, if the Departments elected to promulgate regulations, the Departments must use the notice and comment procedures of the Administrative Procedure Act, and must promulgate the regulations as a single set of regulations in title 25 of the Code of Federal Regulations. Section 107(a)(2). Finally, the 1994 amendments required that any regulations must be developed with the direct participation of tribal representatives using as a guide the Negotiated Rulemaking Act of 1990. This latter requirement is also explained in the accompanying Senate Report:

To remain consistent with the original intent of the Act and to ensure that the input received from the tribes and tribal organizations in the regulation drafting process is not disregarded as has previously been the case, section 107 also has been amended by adding a new subsection (d), requiring the Secretaries to employ the negotiated rulemaking process.

Sen. Rep. No. 103-374 at 14. As a result of the October 1994 amendments and

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

earlier initiatives previously discussed, the Departments chartered a negotiated rulemaking committee under the Federal Advisory Committee Act. The committee's purpose was to develop regulations that implement amendments to the Act.

The advisory committee had 63 members. Forty-eight of these members represented Indian tribes--two tribal members from each BIA area and two from each IHS area. Nine members were from the Department of the Interior and six members were from the Department of Health and Human Services. Additionally, four individuals from the Federal Mediation and Conciliation Service served as facilitators. The committee was co-chaired by four tribal representatives and two Federal representatives. While the committee was much larger than those usually chartered under the Negotiated Rulemaking Act, its larger size was justified due to the diversity of tribal interests and programs available for contracting under the Act.

In order to complete the regulations within the statutory timeframe, the committee divided the areas subject to regulation among six working groups. The workgroups made recommendations to the committee on whether regulations in a particular area were desirable. If the committee agreed that regulations were desirable, the workgroups developed options for draft regulations. The workgroups presented their options to the full committee, where the committee discussed them and eventually developed the proposed regulations.

The first meeting of the committee was in April of 1995. At that meeting, the committee established six workgroups, a meeting schedule, and a protocol for deliberations. Between April and September of 1995, the committee met five times to discuss draft regulations produced by the workgroups. Each of these meetings generally lasted three days. Additionally, the workgroups met several more times between April and September to develop recommendations for the committee to consider.

The policy of the Departments was, whenever possible, to afford the public an opportunity to participate in the rulemaking process. All of the sessions of the committee were announced in the Federal Register and were open to the public.

The Departments published draft regulations in a Notice of Proposed Rulemaking in the Federal Register on January 24, 1996, at 61 FR 2038. (1996 NPRM) In the 1996 NPRM, the Departments invited the public to comment on the draft provisions. In addition, the Departments outlined five areas in which the Committee had not yet reached consensus and asked for public comments specifically addressing those topics.

Ultimately, the Departments received approximately 76 comments from Indian tribes and tribal organizations, addressing virtually every aspect of the proposed regulation. The full committee reconvened in Denver between April 29, 1996 and May 3, 1996 to review the comments, to evaluate changes suggested by the comments, and to approve final regulatory language.

As a result of that meeting, the full committee was able to transmit a report to the Secretaries which included consensus regulatory language on all but four issues: internal agency procedures; contract renewal proposals; conflicts of interest; and construction management services. Tribal and Federal representatives prepared non-consensus reports on these four issues, which were submitted to the Secretaries for a decision. One additional question arose, pertaining to Sec. 900.3(b)(11) of the regulation, and that was also referred to the Secretaries. On May 23, 1996 a delegation of tribal representatives met with the Chiefs of Staff of the two departments to present the tribal view of the unresolved issues. Decisions have been made based upon the arguments presented at that meeting, and the regulation incorporates those decisions.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

The Departments commend the ability of the committee to cooperate and develop a rule that addresses the interests of the tribes and the Federal agencies. This negotiated rulemaking process has been a model for developing successful Federal and tribal partnerships in other endeavors. The consensus process allowed for true bilateral negotiations between the Federal government and the tribes in the best spirit of the government-to-government relationship.

In developing regulatory language, consensus was reached on the regulations which follow under subparts "A" through "P". In addition, at the request of tribal and Federal representatives, the Secretaries agreed to publish additional introductory materials under subpart "A."

Summary of Regulations and Comments Received

The narrative and discussion of comments below is keyed to specific subparts of the rule. Matters addressed under the heading "Key Areas of Disagreement" in the Notice of Proposed Rulemaking are discussed under the appropriate Subpart.

Subpart A--Policy

Summary of Subpart

This subpart contains key congressional policies contained in the Act and adds several Secretarial policies that will guide the Secretaries' implementation of the Act.

A number of comments recommended that the statement that tribal records are exempt from disclosure under the Freedom of Information Act (Sec. 900.2(d)) be further explained to include annual audit reports prepared by tribal contractors and tribal records archived by the Federal government. The suggestion regarding archived tribal records has been adopted. However, section 7502(f) of the Single Audit Act of 1984, 31 U.S.C. 7502(f), and OMB Circular No. A-128, Audits of State and Local Governments, subparagraph 13(e), state that single audit reports shall be available for public inspection within 30 days after the completion of the audit. Therefore, these audit reports are available for public inspection.

Numerous comments expressed concern over the nonapplicability of the Privacy Act to tribal medical records, in section 900.2(e). Although section 108(b) of the Act is binding in this respect, Subpart C (Sec. 900.8) has been amended to address the confidentiality of medical records. Indian Tribes and tribal organizations remain free to adopt their own confidentiality procedures, including procedures that are similar to Privacy Act procedures.

A large number of comments urged that the NPRM be amended to include a Secretarial policy to interpret Federal laws and regulations in a manner that will facilitate the inclusion of programs in contracts authorized by the Act. In response to these comments, the Committee has added the language in Secretarial policy statement in Sec. 900.3(b)(8). This policy is not intended to limit in any manner the scope of programs, functions, services or activities that are contractible under section 102(a)(1) of the Act.

Discussion of Comments

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Several comments recommended that various policy statements be clarified to reflect the congressional policy that funds for programs, services, functions and activities are transferred to tribal contractors when contracts are awarded under the Act. These comments have been adopted and appropriate changes made to Sec. 900.3(a)(4), Sec. 900.3(b)(4) and Sec. 900.3(b)(9).

One comment found the last two words of Sec. 900.3(a)(8) confusing due to the inclusion of the words "as appropriate." In response, these words have been deleted in the final rule.

Several comments recommended that the phrase "and for which funds are appropriated by Congress" be deleted from the Secretarial policy statement set forth in Sec. 900.3(b)(1). The Committee agreed and deleted this phrase in the final rule.

The Committee revised 900.3(b)(7) (referring to the scope of programs that are contractible under the Act) to be consistent with the new policy set forth in 900.3(b)(8).

Several comments urged that Sec. 900.d(b)(9) be amended to articulate more clearly the Secretaries' duty to commence planning for the transfer of programs to tribal operation immediately upon receipt of a contract proposal. In response to the comments, Sec. 900.3(b)(9) has been revised.

A large number of comments urged that the provision regarding Federal program guidelines, manuals, or policy directives set forth in Sec. 900.5 of the NPRM be revised to refer more generally to any unpublished requirements. In response to these comments, Sec. 900.5 has been revised in the final rule.

Some comments urged that language be included to identify the inherent Federal functions that cannot lawfully be carried out by an Indian tribe or tribal organization, and that therefore may not be contracted under the Act.

The Committee did not adopt these comments due to the subject-matter limitations on its rulemaking authority set forth in section 107(a)(1) of the Act. Similarly, the Committee did not address comments relating to the appropriate uses of program income generated under the Federal Medicare and Medicaid programs.

One comment expressed concern regarding the absence of clear provisions for tribal participation in the administration of Federal Indian programs. No change was made as this concern is already dealt with in Sec. 900.3(a)(1).

One comment recommended that the Secretary adopt a policy that Indian tribes participate in the development of the budgets of agencies other than the Indian Health Service and the Bureau of Indian Affairs. The Committee did not adopt this proposal due to the subject-matter limitation set forth in section 107(a)(1) of the Act, and the limitation in section 106(I) of the Act regarding tribal participation.

One comment urged that the Secretarial policy regarding tribal participation in budgetary matters set forth in Sec. 900.3(b)(6) be more clearly articulated as a mandatory duty. Nothing in the new regulation is intended to change the Department's current consultation requirements. Accordingly, no change was made in the text of the regulation.

A few comments urged that the phrase "for the benefit of Indians because of their status as Indians" or the phrase "for the benefit of Indians" be further defined in the regulation. The Committee rejected suggestions that the concept of "contractibility" be further explored in the regulations due to the specific subject-matter limitations of section 107(a)(1) of the Act.

Subpart B--Definitions

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Summary of Subpart

Subpart B sets forth definitions for key terms used in the balance of the regulations. Terms unique to one subpart are generally defined in that subpart, rather than in subpart B.

Summary of Comments

In response to one comment regarding the term "awarding official" the definition has been revised and an additional sentence added to make clear that an "awarding official" need not necessarily be a warranted contracting officer. Who the awarding official is in a particular situation will depend on to whom the Secretary has delegated authority to award the contract.

In response to comments regarding the scope of Subpart C (which deals with "initial contract proposals"), the term "initial contract proposal" has been added as a new definition in the final rule. The definition clarifies that the requirements for an "initial contract proposal" do not apply to other proposals such as proposals to renew contracts governing programs, services, functions or activities that are already under tribal operation.

In response to one comment regarding the procedural aspects of reassumption, the definition of "reassumption" has been revised to refer the reader to the notice and other procedures set forth in Subpart P. One comment requested that the term "Indian tribe" be revised. The Committee rejected the comment in favor of the definition of this term already set forth in the statute and repeated in Sec. 900.6 of the final rule.

Two comments urged that the Secretary add a new definition of the term "consultation" to establish a framework for this activity. The Committee rejected this proposal as beyond the scope of subjects which may be regulated under section 107(a)(1) of the Act. Similarly, the Committee rejected requests that the regulations include a definition of "trust responsibility."

In the NPRM, the public was invited to comment on the disagreement within the Committee regarding the development of internal agency procedures. Specifically, as noted in 61 FR at 2039-2040, tribal representatives on the Committee urged that internal agency procedures be developed in precisely the same fashion as other regulations implementing the Indian Self-Determination Act Amendments of 1994, through the use of the negotiated rulemaking process. Federal representatives on the Committee supported instead a joint tribal and Federal commitment to work together to generate a procedural manual which would promote the purposes underlying the Act and facilitate contracting by Indian tribes and tribal organizations. The Federal committee members proposed committing to a firm timeline within which to produce such a manual. Further, the Federal Government committed to "meaningful consultation" throughout the manual development process.

The Departments received many comments from tribal representatives addressing the issue of internal agency procedures as a subject for negotiated rulemaking. Those comments consistently supported the tribal proposal to include a Subpart in the regulation concerning internal agency procedures.

Many of the comments indicated a belief that all internal agency procedures under which Indian tribes and tribal organizations exercise their self-determination should be promulgated by negotiated rulemaking. Those comments cited sections 107 (a) and (d) of the Act as authority for their recommendation.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Tribal representatives also indicated a concern that absent formal rulemaking, Federal agencies might use internal procedures to circumvent the policies underlying the Act, thwarting the intent to simplify the contracting process and free Indian tribes from excessive Federal control. Two comments suggested that negotiating rulemaking procedures will ensure that Federal agencies would be bound to follow uniform procedures to implement and interpret the Act and the regulations.

Two other comments wanted the regulation to state explicitly that the Secretaries lack authority to interpret the meaning or application of any provision of the Act or the regulations. Tribal representatives feared that a myriad of letters containing policy statements and correspondence interpreting reporting requirements would result if internal agency procedures are not tied to formal rulemaking.

In response to the Federal proposal as detailed in the NPRM, several comments stated that it would not be acceptable to develop a manual in a setting which is less formal and structured than a negotiated rulemaking committee. In addition, comments objected that developing such a manual after the publication of a final regulation would violate the mandatory deadline imposed on the Secretaries by Congress.

Several comments were suspicious of the government's commitment to seek tribal consultation on internal agency procedures. They stated that consultation alone would be insufficient to ensure that Indian tribes and tribal organizations are accorded the full benefits of the Act. Without full and active participation, one comment stated, Indian tribes would be in the position of attempting to change decisions made in advance by Federal agencies.

The Departments agree to an enhanced consultation process in developing procedures that do not involve resource allocation issues. Features of this enhanced process could include facilitation by professional facilitators, consensus decision-making, opportunity for comment by tribal entities, and reporting of decisions to the Secretaries. The Departments will convene a meeting to begin this process within sixty days of the regulations becoming effective.

Subpart C--Contract Proposal Contents

Summary of Regulation

Subpart C contains provisions relating to initial contract proposal contents. In this area, the committee opted to have minimal regulations. Subpart C consists of a checklist of 13 items that must be addressed in a proposal. In addition, the regulation contains a provision relating to the availability of technical assistance to assist Indian tribes and tribal organizations in preparing a contract proposal, and a provision relating to the identification of Federal property that the tribe or tribal organization intends to use during contract performance.

Summary of Comments

Several comments recommended amending Sec. 900.7 to permit the Secretary to provide technical assistance funding in addition to technical assistance. To reflect the concerns the two sentences were added at the end of the section. The first sentence authorizes the Secretary to make technical assistance grants, and the second authorizes an Indian tribe or tribal organization to request reimbursement of pre-award costs for obtaining technical assistance under the Act.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

One comment recommended the insertion of objective standards in Sec. 900.7 to measure the authenticity of a claim that technical assistance cannot be provided due to the availability of appropriations. This recommendation was not adopted because the provision that technical assistance be subject to the availability of appropriations comes directly from Section 103(d) of the Act. In addition, it is clear that if qualified agency personnel are available, technical assistance will be provided to prepare an initial contract proposal.

Several comments recommended deleting the word "must" and inserting the word "should" in the first sentence of Sec. 900.8. This recommendation was not adopted because the proposal requirements in this subsection represent the minimum amount of information required for the Departments to approve a proposal.

Several comments generally objected to Sec. 900.8 on the grounds that it requires the production of information that the Federal Government has no right to know, or that is in excess of statutory requirements. Although some modifications were made to Sec. 900.8 in response to comments, it is the consensus of the Committee that the information included in the final version of Sec. 900.8 is necessary to protect Indian tribes or tribal organizations, or because it is essential information required by the Departments in order to be able to review or decline a contract proposal, to determine whether any of the statutory declination criteria exist.

A number of comments expressed concern that Sec. 900.8(d) does not clearly bar the Secretary from revising service area boundaries over the objections of tribes located in an established service area. This recommendation was not adopted because it is the intent of this provision for the applicant to define the service area. This specific provision was debated at length by the Negotiated Rulemaking Committee, and the proposed regulatory provision in Sec. 900.8(d) is the compromise agreed to by consensus of the Committee.

In response to a comment, the words "an identification" were deleted from Sec. 900.8(e), and replaced with the words "the name, title," for clarification purposes.

In response to a comment, the words "a description" were deleted from Sec. 900.8(g)(3), and replaced with the words "an identification" for clarification purposes.

In response to a comment, Sec. 900.8(g)(7) was amended to read "minimum staff qualifications proposed by the Indian tribe or tribal organization, if any" for clarification purposes.

In response to several comments objecting to the requirement in Sec. 900.8(g)(4) that financial, procurement, and property management standards be included in the proposal, reference to these standards was deleted from this subsection, and a new subsection (g)(8) was added to require a statement that the Indian tribe or tribal organization meet minimum procurement, property, and financial management standards set forth in Subpart F, subject to waivers that may have been granted under Subpart K.

In response to several comments requesting that the words "tribal shares" be defined, Sec. 900.8(h)(1) was modified by removing these words and inserting "the Indian tribe or tribal organization's share of funds."

In response to a comment, Sec. 900.8(h)(2) was amended by including the word "start-up" after the word "one-time" to make this section consistent with the Act.

Several comments objected to the use of the word "budget" in Sec. 900.8(h), and to the level of detail required under this subsection. This subsection was redrafted to delete the word "budget" wherever it appears, and replace it with "amount of funds requested" or "funding request." In addition, Secs. 900.8(h)(1) (i), (ii), and (iii) were deleted.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

In response to a comment that the information sought in Sec. 900.8(h)(5) was unnecessary, this subsection was redrafted for clarification purposes, and the words "[a]t the option of the Indian tribe or tribal organization" were added at the beginning of the subsection.

A new subparagraph (m) was added to Sec. 900.8 to provide that in its contract proposal, an Indian tribe or tribal organization must state that it will implement procedures appropriate to the program being contracted to assure the confidentiality of information relating to the financial affairs of individual Indians obtained under a proposed contract, and of medical records, or as otherwise required by law. While tribal comments objected to the imposition of regulatory procedures on confidentiality of personal financial information, many comments were received from Indian tribes indicating a concern that the confidentiality of personal medical records in the hands of tribal contractors be preserved, notwithstanding the opinion of DHHS Office of General Counsel that the Privacy Act does not apply to such records. The provision for such an assurance with respect to personal financial information resulted from a compromise in the Committee between the Federal and tribal positions.

In response to a comment suggesting that Indian tribes or tribal organizations should receive a list of Federal property used in carrying out programs to be contracted, a new question and answer were added immediately preceding Sec. 900.10. In response to a comment, this new section also includes a requirement that the condition of the property be described.

In response to a comment, Sec. 900.11(a)(4) was modified to add the words "real and personal" before the word "property" for clarification purposes.

Several comments requested clarification regarding whether the contract proposal becomes part of the contract document. In response, a new question and answer were added to clarify that the contract proposal becomes part of the final contract only by mutual agreement of the parties.

Several comments suggested that Subpart C be clarified to address what is contractible and what is inherently Federal and thus residual. The Committee did not adopt the suggestion. Federal agency decisions regarding residual functions are subject to the appeals process.

Subpart D--Review and Approval of Contract Proposals

Summary of Regulation

Although this topic is part of the declination process, it has been pulled out for separate treatment to facilitate a clearer understanding of the entire contracting process. In this area, the committee opted to have minimal regulations. This subpart details what the Secretary must do upon receiving a contract proposal, the time frames applicable to Secretarial review, how the 90-day review period can be extended, and what happens if a proposal is not declined within the 90-day period.

Summary of Comments

One comment indicated that the word "Secretary" in this Subpart does not define where the proposal should actually be submitted. Subpart B defines the word "Secretary" to include either

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Secretary or their delegates. It is clear that a proposal should therefore be submitted to the agency with jurisdiction over the program to be contracted, i.e., the Bureau of Indian Affairs, the Indian Health Service, the Bureau of Land Management, the National Park Service, etc.

A comment suggested amending Sec. 900.15(a) to require the Secretary to return any proposal lacking the required authorizing resolution(s) to the applicant without further action. This suggestion was not adopted because Sec. 900.15(b) requires that the applicant be notified of any missing information. It should be clear, however, that Section 102(a)(2) of the Act only requires the Secretary to consider a proposal if "so authorized by an Indian tribe" pursuant to the tribal resolution required under Section 102(a)(1) of the Act. Therefore, although technically outside of the enumerated declination criteria in Section 102(a)(2) of the Act, it is also clear that the Act precludes the approval of any proposal and award of any self-determination contract absent an authorizing tribal resolution.

Several comments requested that the 15-day timeframe in Sec. 900.15 be cut to 10 days. This suggestion was not adopted because 15 days are needed to evaluate the application. The word "request" was added before the words "that the items" in this subsection for clarification purposes, and in response to several comments.

Several comments expressed concerns with the failure of this Subpart to specify what happens when a proposal is approved. The comments recommended addressing the award and funding of the contract. In response to these concerns, the question and the answer in Sec. 900.16 were amended to reflect that the award of the contract occurs upon approval of the proposal. Also, the committee added the words "and add to the contract the full amount of funds pursuant to Sec. 106(a) of the Act" were added at the end of Sec. 900.18. Also, a new section was added to explain what happens when a proposal is approved.

One comment suggested adding a provision in Sec. 900.18 to provide that costs incurred after the 90-day period be deemed allowable costs under the contract and be reimbursed. This suggestion was not adopted because it is beyond the scope of this Subpart.

A comment inquired whether the 90-day period continues to run if the Indian tribe is notified that there are missing items, or whether the 90-day period starts only when there is a complete proposal. The regulation in Sec. 900.15(b) requires the Secretary to notify the applicant of any missing items, and to request the applicant to furnish these items within 15 days. If the applicant fails to submit the missing items altogether, the Secretary must either approve or decline the proposal that was received within 90 days of receipt. Similarly, if the applicant submits the missing items within the 15-day deadline, the 90-day period continues to run from the time of receipt of the original proposal.

Subpart E--Declination Procedures

Summary of Subpart

This subpart implements sections 102 (a)(2), (a)(4), (b) and (d) of the Act. It restates the statutory grounds for declining a contract proposal, clarifies that a proposal cannot be declined based on any objection that will be overcome through the contract, and details procedures applicable for partial declinations. Subpart E also informs Indian tribes and tribal organizations of the requirements the Secretary must follow when a declination finding is made, contains provisions for technical assistance to Indian tribes and tribal organizations to avoid a declination finding, and to overcome stated declination grounds after a declination finding is made.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Summary of Comments

Several comments noted that the proposed regulations fail to address the continuation of mature contracts, and recommended that this issue be addressed. This recommendation was not adopted because there is no statutory authority to issue regulations on the mature contract process. In addition, the right to mature contracts is addressed in Section 105(c)(1) of the Act and in the Model Contract under Section 108 of the Act. Continuation of any contract is also addressed in Sec. 900.32 of the final rule.

One comment recommended that declination of construction contracts be addressed in this Subpart. This recommendation was not adopted because this issue is addressed in Sec. 900.123 of the final rule.

Several comments recommended a further explanation of the criteria in Sec. 900.22. These comments were not adopted because it was decided not to interpret the declination criteria in the regulation, but to leave their interpretation to case-by-case adjudication.

One comment suggested adding an applicant's failure to submit the single agency audit report and/or failure to correct prior audit deficiencies as a declination ground in Sec. 900.22. This comment was not adopted because there is no statutory authority to add declination criteria to those specified in Section 102(a)(2) of the Act.

In response to a comment, the reference to Section 106 of the Act in Sec. 900.26 was replaced with a reference to Section 102(a) of the Act.

There were numerous comments objecting to the document disclosure provisions in Sec. 900.27 of NPRM (now Sec. 900.29). In response to these objections, Sec. 900.27(a) was amended to delete the words "when appropriate" and replace them with the words "within 20 days." In addition, Sec. 900.27(c) was deleted in its entirety.

Several comments requested that the Secretary's burden of proof when declining a proposal in Sec. 900.297(a) be changed to "clear and convincing evidence." This recommendation was not adopted because it is different from the statutory burden of proof contained in Section 102(a)(2) of the Act.

A comment requested that the technical assistance to be provided in Sec. 900.30 be clearly identified. This recommendation was not adopted because the type of technical assistance required will vary with each proposal. It is impossible to define generally the type of technical assistance required for all proposals.

Pursuant to several comments, the word "substantively" was deleted from two places in Sec. 900.32, and replaced by the word "substantially."

The Committee received several comments regarding the ability of the BIA and other agencies of the Department of the Interior to review contract renewal proposals for declination issues, where the renewal proposal is substantially similar to the contract previously held by that Indian tribe or tribal organization. In the past, as a matter of practice, neither IHS nor the BIA has reviewed contract renewal proposals for declination issues. Therefore, the Departments have agreed that IHS and the BIA will not use the declination process in contract renewals where there is no material or significant change to the contract. However, as no past practice exists for the non-BIA agencies within DOI, those agencies will have discretion to use the declination process in appropriate contract renewal situations. The regulatory language of Sec. 900.32 has been amended to reflect this decision.

Subpart F--Standards for Tribal or Tribal Organization Management Systems

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Summary of Subpart

Indian self-determination contracts are unique agreements because, by definition, they are not procurement contracts, discretionary grants or cooperative agreements. This means that none of the usual procurement or grant regulations apply to the management of the Federal funds provided under these contracts. The absence of established guidelines presented a special challenge to the committee to develop standards which would assure appropriate stewardship of the Federal funds and other assets being transferred through these contracts. Deliberations on this issue led to the review of OMB Circular A-102 and the Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments (the "Common Rule"). Although an Indian self-determination contract is not a discretionary grant, the Common Rule provides certain government-to-government management principles that apply to discretionary Federal grants to states, local governments, and Indian tribes.

The Common Rule has two-tiered management rules. On one tier, it generally defers to state law and regulations and accepts a state's management standards without imposing more detailed requirements. On the second tier, other local governments and Indian tribes (which vary greatly in size and structure) must observe the Rule's more detailed standards for the management of Federal grants.

In the interest of giving greater recognition to the government-to-government relationship which exists between Indian tribes and the Federal government, and to transfer greater responsibility to Indian tribes commensurate with their status, the committee established standards permitting the management of contract resources in accordance with tribal laws, regulations and procedures, just as the Common Rule permits states to manage Federal resources in accordance with state laws and procedures. Systems established by Indian tribes will govern the administration of contracts provided that they include the core management principles or standards adopted from the Common Rule which the committee determined best meet the needs of Indian tribes and tribal organizations.

Subpart F contains provisions relating to the following management standards: (1) Financial Management; (2) Procurement Management and (3) Property Management. In all of these areas the advisory committee designed minimal regulations that focus on the minimum standards for the performance of the three management systems used by Indian tribes and tribal organizations when carrying out self-determination contracts.

The standards contained in this subpart are designed to be the targets which the Indian tribe and tribal organization's management systems should be designed and implemented to meet. The management systems themselves are to be designed by the Indian tribe or tribal organization.

Section 900.36 contains general provisions which apply to all management system standards contained in this subpart. Subpart F includes provisions that: (1) Identify the management systems that are addressed; (2) set forth the requirements imposed; (3) limit the applicability of OMB circulars; (4) provide that the Indian tribe or tribal organization has the option to impose these standards upon subcontractors; (5) identify the difference between a standard and a system; and (6) specify when the management standards and management systems are evaluated.

Section Sec. 900.44 contains the standards for financial management systems. Subpart F establishes the minimum requirements for seven elements including: (1) Financial reports; (2) accounting records; (3) internal control; (4) budget control; (5) allowable costs; (6) source documentation; and (7) cash management.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Section 900.47 contains standards for procurement management systems. This subpart establishes the minimum requirements for seven elements: (1) To ensure that vendors and subcontractors perform in accordance with the terms of purchase orders or contracts; (2) to require the Indian tribe or tribal organization to maintain standards of conduct for employees award contracts to avoid any conflict of interest; (3) to review proposed procurements to avoid buying unnecessary or duplicative items; (4) to provide full and open competition, to the extent feasible in the local area, subject to the Indian preference and tribal preference provisions of the Act; (5) to ensure that procurement awards are made only to entities that have the ability to perform consistent with the terms of the award; (6) to maintain records on significant history of all major procurements; and (7) to establish that the Indian tribe or tribal organization is solely responsible for processing and settling all contractual and administrative issues arising out of a procurement. In addition, the regulation provides that each Indian tribe or tribal organization must establish its own small purchase threshold and definition of "major procurement transactions"; establish minimum requirements for subcontract terms, and include a provision in its subcontracts that addresses the application of Federal laws, regulations and executive orders to subcontractors.

Section 900.51 contains the minimum requirements for property management systems. Subpart F addresses the standards for both Federally-titled property and property titled to an Indian tribe or tribal organization, with differences based upon who possesses title to the property. As a general rule the requirements for property where the Federal agency retains title are higher than requirements for property where the Indian tribe or tribal organization holds the title. Subpart F addresses elements including: (1) Property inventories; (2) maintenance of property; (3) differences in inventory and control requirements for property where the Federal agency retains title to the property; and (4) the disposal requirements for Federal property.

Summary of Comments

A comment requested that the rule clarify the application of Office of Management & Budget (OMB) Circulars or portions of OMB Circulars that apply to the operation of Indian Self-Determination Act contracts.

Section 900.37 specifies that the only OMB Circulars that apply to self-determination contracts are those (1) Incorporated the by Act, such as OMB Circular A-128, "Audits of States and Local Governments"; (2) adopted by these regulations; or (3) agreed to by the Indian tribe or tribal organization pursuant to negotiations with the Secretary. In regard to these regulations, Sec. 900.45(e) identifies the appropriate OMB Circular Cost Principles that should be used in determining the propriety of contract costs.

One comment asked the Committee to delete Sec. 900.40(a) because it is overreaching and exceeds statutory requirements. This section was a fundamental underpinning of the entire Subpart. The negotiators agreed that the regulations would include standards, to be treated as minimum requirements, for the administration of contracts. For an initial contract proposal only, Federal officials may review the standards proposed by the Indian tribe or tribal organization, to determine that they meet or exceed these minimum regulatory requirements. Indian tribes or tribal organizations are responsible for the implementation of administrative systems that meet the standards and that are subject to review in accordance with the Single

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Agency Audit requirements as provided in Section 5(f) of the Act. In many respects, this dichotomy between the standards and systems was designed to acknowledge the unique and special nature of self-determination contracts (non-procurement intergovernmental agreements) and a shift in the regulatory emphasis from the unnecessary and burdensome review of systems to an emphasis on the acceptance of fundamental guiding management principles. This approach is consistent with provisions in the Act at Sections 5(b), 102(a)(2), 105(a)(1) (2) and (3) and 107(a)(1) and in the Model Contract Section 108(b)(7)(c). For these reasons no change was made in Sec. 900.40.

It was suggested that the Committee delete the words "or tribal organization" in Sec. 900.42 from both the question and the answer as this section applies only to Indian tribes. The comment was correct and the words have been deleted.

The Committee was requested to clarify the period of time that Indian tribes and tribal organizations must retain records of contract operations. A new Sec. 900.41 was created to address these issues. That section specifies that Indian tribes and tribal organizations should keep: (1) Financial records for three years from the date of the single audit submission; (2) procurement records for three years from the date of final payment to the supplier; and (3) property management records for three years from the date of disposition, replacement or transfer of the property. In addition, records related to litigation, audit exceptions and claims should be retained until the action is completed.

One comment suggested that the regulation provide for the Secretary to obtain consistent and timely financial information to respond to Congressional inquiries and to otherwise support budget justifications. Section 900.45(a) was amended by adding a provision that provides for the submission of a Financial Status Report, SF 269A. The frequency of submission of the SF 269A remains the subject of negotiation between the Indian tribe or tribal organization and the Secretary. The Department expect that the frequency will not be less than once per year. This change only affects how the information is transmitted to the government and is consistent with Section 5(f)(2) of the Act.

The committee was asked to specify which of the three Office of Management and Budget Circulars dealing with cost principles apply to a tribal organization. In that regard, a tribal organization could be a chartered entity of a tribe, a non-profit organization, and/or an educational institution.

Section 900.45(e) has been amended by revising the parenthetical statement and including a chart to clarify the application of the Office of Management & Budget circulars. The parenthetical statement makes clear that which circular is applicable is negotiable with the Secretary and that current agreements concerning Office of Management & Budget cost principles need not be renegotiated.

The committee was asked to adopt proposed clarifying language for Subsection 900.45(g). The regulations were amended to adopt the suggested language that provides a more accurate description of the standards for a cash management component of financial management systems.

One comment suggested adding the following new language to Sec. 900.45(h):

If an Indian tribe or tribal organization contracts to assume a program, service, function, or activity which includes a physical trust asset or natural resource, the Indian tribe or tribal organization shall enter upon its financial management system and provide for an accurate, current, and complete disclosure of the value of those assets, provide for an accurate, current and complete disclosure of funds by source and application utilized to keep the physical trust assets or natural resources in good repair and maintenance; provide for an accurate, current, and complete disclosure of any increase or decrease in the valuation of the asset; and provide for an accurate, current and complete disclosure of any other costs, function or activity which would improve, increase, or cause

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

devaluation or decrease in the value of the physical trust asset or natural resource as would be required to account for any asset using generally accepted accounting principles and standards.

The Committee did not include this provision principally because it is beyond the scope of these regulations. Currently, the United States does not track the values of natural resources (i.e. national parks or Indian lands) in this fashion. Therefore, no financial basis exists to begin the process. The cost of establishing the basis would undermine and frustrate self-determination contracting. While the proposal has merits, it would not be possible to implement it effectively until appropriate guidance is issued on valuation of Federal natural resources, the United States enters the information in its financial records, and funds are made available to tribal governments to cover the cost of implementation. In regard to guidance, the Federal Accounting Standards Advisory Board has not issued any authoritative instructions on the valuation of Federal natural resources. This matter is currently under consideration by the Board.

Another comment asked the Committee to revise Sec. 900.46 to require the Secretary to be held to a "strict standard of compliance with the terms of the contract and the annual funding agreement." Further, the comment suggested deleting the words "In regard to paragraph (g) of Sec. 900.44 [of the NPRM]" and "based upon the payment schedule provided for in." The Committee was asked to add "in strict compliance with" for the last phrase deleted. Section 900.46 was amended to make this section of the regulations consistent with the statute.

A comment recommended that Sec. 900.48(c) be amended to include provisions requiring "cost and price analysis" in the procurement standards. Subsection Sec. 900.48(c) was amended by adding the phrase "and ensure the reasonableness of the price" at the end of the subsection. This was done to ensure that cost or price analysis be considered in all procurements, but to avoid the application of a full Federal procurement-type cost or price analysis since self-determination contracts are not subject to the Federal Acquisition Regulations (FARs). It is the responsibility of the Indian tribe or tribal organization to design a procurement system based upon the standards in Subpart F. The amendment will require those systems to consider the "reasonableness of price" when making procurement purchases.

The Committee was asked to clarify Sec. 900.50, including the provision of further guidance about the application of tribal law generally and the application of Tribal Employment Rights Ordinances (TERO) specifically. Sec. 900.50 was substantially revised, to make clear that subcontracts by an Indian tribe or tribal organization may require the subcontractor to comply with certain provisions of the Act and other Federal laws. The new language informs subcontractors that they are responsible for identifying and complying with applicable Federal laws and regulations. The section was further amended to provide that, to the extent the Secretary and the Indian tribe or tribal organization identify and specify laws and regulations that are applicable to subcontracts in the negotiation of the self-determination contract, those identified and specified provisions will then be included in subcontracts.

These regulations do not specifically address the application of tribal law, but establish minimum standards for the operations of management systems. Indian tribes may exercise discretion and create higher standards by operation or enactment of tribal law. Similarly, an Indian tribe may seek a waiver of a standard as noted in Sec. 900.36 of the regulations. Nothing in the regulations is designed to supersede or suspend the operation of tribal law that meets these standards. Further nothing in the regulations affects the operation of tribal law to activities not paid for by self-determination contract funds.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Sections 7(b) and (c) of the Act authorize the application of Indian Preference and Tribal Preference (TERO) in the performance of a self-determination contract. To the extent a TERO ordinance is consistent with the terms of Section 7(b) and (c) of the Act it can be made applicable to procurement subcontracts.

Property Management

The Committee was asked to define "sensitive property" in Sec. 900.52, and as a result, a definition of "sensitive personal property" was inserted at Sec. 900.52(b). That definition includes all firearms and provides that the Indian tribes and tribal organization are to define such other personal property "that is subject to theft and pilferage." Since the activities vary from contract to contract to such a large extent, the committee decided that a locally-created definition best meets the needs of all contractors.

One comment indicated Sec. 900.60(b) might require revision regarding the authority of an Indian tribe or tribal organization to dispose of Federal property. The Committee revised subsection (b) of Sec. 900.60 by deleting all of subsection (1), that previously allowed for disposal if the Secretary failed to respond to a disposal request. As a result, if the Secretary fails to respond to a request from an Indian tribe or tribal organization within the sixty day period, the Indian tribe or tribal organization may return the Federal property to the Secretary. The Secretary is required to accept the property and is required to reimburse the contractor for all costs associated with the transfer. This ensures that Indian tribes and tribal organizations have a process to dispose of unneeded Federal property, and the reimbursement of transfer costs should provide the Secretary with an incentive to respond in a timely fashion to disposal requests.

The committee was asked to clarify that the property disposal procedures in Sec. 900.60 only apply to personal property, because the answer to the question uses the terms "personal property" and "property." Using the term "property" which, by definition, includes both real and personal property, creates ambiguity about application of the paragraph to the disposal of real property.

Section 900.60 only applies to the disposal of personal property. The matter has been clarified through editorial revision of the introductory question, to read as follows: "How does an Indian tribe or tribal organization dispose of Federal personal property?"

Subpart G--Programmatic Reports and Data Requirements

Summary of Subpart

This brief subpart provides for the negotiation of all reporting and data requirements between the Indian tribe or tribal organization and the Secretary. Failure to reach an agreement on specific reporting and data requirements is subject to the declination process. Although the Indian Health Service proposes to develop a uniform data set, that data set will only be used as a guide for negotiation of specific requirements.

Summary of Comments

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

One comment argued for the revision of Sec. 900.65, that provides for the submission of programmatic reports and data "to meet the needs of the contracting parties." The comment was concerned that the section could be used to force Federal minimum reporting requirements upon Indian tribes and tribal organizations despite the provision in Section 5(f) of the Act that make reporting the subject of negotiations.

Section 900.65 has been amended to address the comment. A new introductory sentence was added that makes clear that unless there is a statutory requirement, these regulations create no mandatory reporting requirements. The negotiation of reporting is to be responsive to the needs of the parties and appropriate for the purpose of the contract. This provides the Indian tribe or tribal organization, as well as the Secretary, with guidance and limits for negotiations. Furthermore, because of the numerous comments made concerning the Sec. 900.65 provision, "meet the needs of the contracting parties," and the amendment noted above, Sec. 900.67 was also amended to make it consistent with Sec. 900.65 by substituting, "which responds to the needs of the contracting parties," for "meets the needs of the contracting parties".

The Committee was asked to clarify grammar in Sec. 900.68. The Committee concluded that the word "for" was inadvertently included in the first line of Sec. 900.68. The "for" has been and a comma added between "set" and "applicable" in the first line. This should eliminate the confusion.

Subpart H--Lease of Tribally-Owned Buildings by the Secretary

Summary of Subpart

Section 105(l) of the Act authorizes the Secretary to lease tribally-owned or tribally-leased facilities and allows for the definition of "other reasonable expenses" to be determined by regulation. This subpart provides a non-exclusive list of cost elements that may be included as allowable costs under a lease between the Indian tribe or tribal organization and the Secretary. It further clarifies that except for "fair market rental," the same types of costs may be recovered as direct or indirect charges under a self-determination contract.

The Subpart was substantially revised based upon comments received following the NPRM. Please note that two sections have been added, and previous Sec. 900.71 and Sec. 900.72 have now become Sec. 900.73 and Sec. 900.74 respectively.

Summary of Comments

Comments requested that the Committee specify the type of account and the guardian of the account for a reserve for replacement of facilities identified in Sec. 900.70(c).

The final regulation adds two new sections to accomplish this. New Sec. 900.71 was added to set forth the type of account as a "special revenue fund" or a "capital project fund." New Sec. 900.72 was also added to provide that the Indian tribe or tribal organization is the guardian of the fund. It permits fund investments in a manner consistent with the laws, regulations and policies of the Indian tribe or tribal organization, subject to lease terms and the self-determination contract.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

The Committee was asked to add landscaping costs to those items of cost included in Sec. 900.70(e)(1-16). No such addition was made as the Committee believed that such costs were included in either subsection (8) or subsection (16) of Sec. 900.70(e).

Likewise, another comment suggested adding profit to those matters listed in Sec. 900.70(e). In the Committee's view, a lease based upon fair market value provides for the recovery of profit, adjusted as appropriate, based upon the Federal Share (if any) of acquisition or construction. Therefore, no change was made to this provision.

The committee was asked to identify the source of funds for these lease payments. The source of funds is a subject of negotiation between the parties to a self-determination contract.

Subpart I--Property Donation Procedures

Summary of Subpart

This subpart establishes procedures to implement section 105(f) of the Act. Section 900.85 provides a statement of the purpose of the subpart and explains that while the Secretary has discretion in the donation of excess and surplus property, "maximum" consideration must be given to an Indian tribe or tribal organization's request.

This subpart also contains a provision for the Secretary to elect to reacquire property under specific conditions. It clarifies that certain property is eligible for operation and maintenance funding, as well as for replacement funding on the same basis as if title to the property were held by the United States.

Section 900.87 provides for the transfer of property used in connection with a self-determination contract. It provides slightly different procedures for personal property versus real property furnished before the effective date of the 1994 amendments and another procedure for property furnished after the enactment of the 1994 amendments.

Sections 900.91 and 900.92 address Sec. 105(f)(2)(A) of the Act, which provides that a tribal contractor automatically takes title to property acquired with contract funds unless an election is made not to do so. It also addresses the process for requesting that real property be placed "in trust."

Section 900.97 addresses BIA and IHS excess property donation while Sec. 900.102 addresses excess or surplus property from other Agencies.

Summary of Comments

The committee was asked to clarify this Subpart as it is confusing and generally repetitive. The Subpart addresses the methodology that provides property to Indian tribes and tribal organizations pursuant to the Indian Self-Determination Act. Because there are several classes of property, with varying rights and mechanisms, the Subpart must address each separately. In order to reduce confusion, the final regulations provide more uniformity depending on the property type.

It was suggested that the Committee restore the language that was initially adopted by the Committee, but not included, in Sec. 900.86. The language change in the NPRM accommodates the use of "plain English" and was not intended to change the manner in which the Secretary exercised discretion. The Committee has reinstated the originally-approved version by striking the words "give maximum weight" and substituting "exercise discretion in a way that gives maximum effect"

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

following the word "will" in the first line of the answer in Sec. 900.86. A similar amendment can be found at Sec. 900.97(a).

To ensure clarity, several comments requested that the regulation specify as to whether property is real property or personal property in given instances. The Committee has used the word "property" in these regulations to mean both real and personal property except where not applicable to one or the other type of property. If either the words "real" or "personal" modify "property" that provision is limited to that type of property.

The committee was asked to change the incorrect reference to 41 CFR 101-47, 202.2(b)(10) in Secs. 900.87 (b)(2) and (c)(2). The miscitation has been corrected.

In addition, the committee was asked to delete the terms "justify and certify" in Sec. 900.86 as well as Sec. 900.97 and Sec. 900.104 because these terms frustrate the statutory intent and limit access to property needed to carry out self-determination contracts. The Committee amended the above-noted sections and substituted "state how" or "statement of how" for the "justify and certify" provision. This was done to make clear that what is needed is a concise, simple statement of how the subject property is "appropriate for use for a purpose of which a self-determination contract is authorized under the Act," the statutory language. The Committee expects that the deletion of the terms "justify or certify" makes it clear that no detailed submission will be required by the Secretary or his designee.

Comments requested revision in the process described in Sec. 900.87 pertaining to property that was made available before or after October 25, 1994. The Committee has chosen not to make changes, as the October 25, 1994 date is the result of the 1994 Amendments to the Act. That date is the effective date of Public Law 103-413. Those amendments provided at Section 105 of the Act that Indian tribes or tribal organizations could take title to government-furnished property used in performance of the contract property unless the Indian tribe or tribal organization preferred the Secretary to retain title. Prior to October 25, 1994, title to such property remained with the Secretary.

This provision allows an Indian tribe or tribal organization to receive title to government-furnished property put in use prior to October 25, 1994. In part, that allows Indian tribes or tribal organizations greater flexibility with the Property Management standards in Subpart F above. For these, reasons no further changes were made in Sec. 900.87.

One comment suggested that the regulation clarify the references to the value of property subject to reacquisition or acquisition by the Secretary at the time of retrocession, reassumption, termination or expiration of the contract. Among the concerns expressed were the value at the time of reacquisition, whether it was acquisition or reacquisition, the lack of consideration of depreciation, and the use of property by multiple contracts when only one or a portion of one contract triggers this issue. These comments relate to Sections 900.89, 900.93, and 900.100, all of which address this issue depending upon the class of property.

The Committee took action to make uniform sections 900.89, 900.93, and 900.100. These new sections all contain an additional subsection that addresses the issue of property used in multiple contracts. This new subsection provides that the Secretary and contractor shall negotiate an "acceptable arrangement" for continued sharing and the title to the property.

In order to address current value (at the time of retrocession, etc.) the section was revised to "current fair market" and another clause was added, "less the cost of improvements borne by the Indian tribe or tribal organization." This was done so that where an Indian tribe or tribal

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

organization has made improvements to a piece of property, the value of the improvements is factored into arriving at the \$5,000 value threshold. The Committee also reviewed the depreciation questions but concluded that the current fair market value approach would adequately take these factors into consideration. Moreover, since services would be provided to Indian beneficiaries by the Secretary, the best approach with the reacquired property was current fair market value.

In regard to Sec. 900.93, one comment proposed a change to the question by substituting "reacquire" for "acquire." Upon review the Committee concluded that "acquire" was the correct term because this section addresses contractor-purchased property. In that instance, the Secretary has never had title and "acquire" is the proper term.

The revisions to the above-noted sections have also been incorporated into Subpart P of the regulations. No further comments will be discussed in this preamble on Sections 900.89, 900.93, or 900.100 since the operative provisions are now uniform.

With regard to Sections 900.96 and 900.103, several comments asked when the Secretary will notify Indian tribes and tribal organizations about the availability of excess BIA and IHS personal property and GSA excess and surplus property. Suggestions of quarterly or semi-annually were made. At both Sec. 900.96 and Sec. 900.103 the term "not less than annually" has been added. This creates a minimum requirement that the Secretary must meet yet allows for more frequent notices.

Some comments asked the Committee to provide further instruction in Sec. 900.97(b) relating to multiple requests by contractors the same excess or surplus property.

The Committee revised these subsections to clarify what will occur in that situation. In regard to personal property, the request first received by the Secretary will have precedence. If the requests are received by the Secretary on the same date, the requestor with the lowest transportation costs will prevail.

A technical amendment was made to Sec. 900.97(c) by changing "piece of real property" to "parcel of real property."

The committee was asked to delete the reference to the Federal Property Management Regulation, 41 CFR Chapter 101, as that reference had at Sec. 900.104(b) the potential to incorporate an entirely different set of regulations, not consistent with the Act. The references to the Federal Property Management Regulation (FPMR) and 41 CFR Chapter 101 were deleted and "Section 900.86 of this Subpart" was substituted. The Committee made this revision to reflect that these regulations are unique to self-determination contracts and to avoid any conflict between these regulations and the FPMR.

Several comments were made concerning the need for the Secretary to act expeditiously to acquire excess or surplus government property when the property is frozen by the Indian tribe or tribal organization, in Sec. 900.104(c). The Committee revised subsection (c) of Sec. 900.104 by harmonizing the several suggestions.

Several comments called for clarification of Sec. 900.107 by explaining which type of property remains eligible for replacement funding. The Committee changed the question in Sec. 900.107 and deleted "Yes" from the answer. This makes clear that government-furnished property, contractor-purchased property and excess BIA and IHS property are eligible for replacement funding consistent with Section 105(f) of the Act. Only excess or surplus government property from other agencies is not eligible for such replacement.

Subpart J--Construction Contracts

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Summary of Subpart

Subpart J addresses the process by which an Indian tribe or tribal organization may contract for construction activities or portions thereof. The subpart is written to inform readers of the breadth and scope of construction contracting activities conducted by the Departments, and provides opportunities for Indian tribes or tribal organizations to choose the degree to which they wish to participate in those activities. The subpart provides for extensive cooperation and sharing of information between the Departments and an Indian tribe or tribal organization throughout the construction process. The subpart provides for different construction contracting methods, such as award of contracts through subpart J, award of contracts through section 108 of the Act, and award of grants in lieu of contracts depending on the degree of Federal involvement and the phase(s) of construction activities for which the Indian tribe or tribal organization seeks to contract.

The construction process is described in phases, starting with a preplanning phase, followed by a planning phase, a design phase, and a construction phase. Provisions are included so an Indian tribe or tribal organization can seek a contract through section 108 of the Act for the planning phase and for construction management services. It is not required that these functions be pursued through a section 108 contract: if the Indian tribe or tribal organization so elects, these activities can be part of a subpart J contract.

Definitions are provided that are specific to this subpart and this subpart establishes new procedures to facilitate tribal contracting, through such measures as tribal notification and other provisions. The subpart promotes the exploration of alternative contracting methods, and eliminates the applicability of the Federal acquisition regulations except as may be mutually agreed to by the parties.

The subpart describes the process for negotiating a construction contract, including the process for arriving at a fair and reasonable price, and details the process for resolving disagreements in the contracting process. The subpart also sets forth minimum requirements for contract proposals, and details the respective roles of tribes and the Secretary.

The subpart promotes tribal flexibility in several areas, including through periodic payments at least quarterly, and the payment of contingency funds to be administered by the tribal contractor.

Summary of Comments

Approximately 185 comments were received from non-governmental representatives, most of these from Nations and tribes rather than individuals. This preamble reflects the committee response to each comment in a section-by-section format. References to no action being taken by the Committee indicate that no change was made to the regulation.

Several comments proposed that the phrase "or real property" be added after "Federal facilities." The comments were adopted to ensure that related construction work was covered under Subpart J. The new phrase adds "and/or other related work" after "demolition."

Eight comments argued that supportive administrative functions should be specifically recognized as contractible in the language of Sec. 900.111. The Committee decided that the language was adequate as published. One comment proposed adding "or tribal organization authorized" after "tribe." This comment was adopted.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

One comment proposed to add a bid award phase. The comment was not adopted because it is presently included in the individual phases described in the regulation. Three comments stated that tribal involvement was not included in the site selection process. Site selection was adopted and inserted into subsection 900.112(a)(2) and (3). One comment proposed to add "assessment and" after "initial" at Sec. 900.112(a)(1) and "associated activities" after "assessments" at Sec. 900.112(b)(2). Both comments were adopted.

Several comments stated that Sec. 900.113(b) implies that Indian tribes and tribal organizations will always subcontract with a consultant rather than using tribal employees to perform certain functions. This was not the intent of the proposed regulation. The Committee adopted the proposed language: "An Indian tribe or tribal organization's employee or construction management services consultant (typically an engineer or architect) performs such activities as:" and struck "The construction management services consultant (typically an engineer or architect) assists and advises the Indian tribe or tribal organizations in such activities as."

Five comments suggested that the phrase "and real property" should be included at Sec. 900.113(c) after "Buildings and Facilities." The committee took no action on these comments.

Three comments stated that the critical distinction between construction contracts and section 108 model agreements are the requirements which apply to each. The committee took no action on this comment.

One comment stated that Sec. 900.115(b)(1) should be clarified to indicate that the term "Act" refers to the Office of Federal Procurement Policy Act. The comment was adopted and the work "such" was deleted and the word "that" was inserted.

Nine comments suggested that cost reimbursement contracts should also allocate the risk. The Committee took no action. One comment suggested replacing "fixed-price" with "negotiated." The Committee adopted "negotiated" and inserted it before "fixed-price" in both the question and response.

Two comments stated that subsection 900.117(a)(2) treats the consequences of the Secretary's failure to act in a way that is very unfavorable to Indian tribes and, therefore, against the policy of the Self-Determination Act. The comments argued that the Secretary's failure to act should render the POR accepted rather than rejected. The Committee did not agree on this change.

Three comments stated that this section should contain standards or other objective criteria against which the POR will be reviewed. The Committee concluded that these criteria will be negotiated between the parties and identified in the contract. One comment suggested revising the timeframes contained in the subsection to accommodate a shorter construction period due to weather concerns. The Committee decided to add a subsection at the end of Subpart J to address this issue.

Seven comments argued that construction management services may be performed by tribal employees. The Committee adopted the language "and/or tribal or tribal organization employees" after "consultants."

The Committee received two comments on subsection 900.120. The first urged that the 30-day time period be reduced to 14 days. The Committee did not agree with this change. The second comment recommended inserting the word "shall" in place of "will" and inserting "By registered mail with return receipt in order to document mailing after notify." This language was adopted.

The Committee received eight comments on subsection 900.121 of the NPRM. Six suggested inserting the word "each" before the word "phase," requiring the Secretary to notify Indian tribes and tribal organizations before each phase. One comment proposed adding the following language:

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

"Failure of the tribe or tribal organization to notify the Secretary within 45 days after receiving Secretarial notice described in Sec. 900.120 shall not serve as a bar to the applicant tribe or tribal organization from contracting for the desired project." Although the proposed language accurately reflects a Comptroller General's Opinion, the Committee did not agree to this addition. To resolve the impasse, the Committee struck subsection 900.121 in its entirety.

Eight comments suggested adding language to Sec. 900.121 to clarify who will be solicited and how. The committee took no action on these suggestions.

Three comments stated that section 105(m) of the Act establishes a negotiation process to be invoked at the tribes' option, and section 105(m) language should be reflected in subsection 900.122 rather than imposing a mandatory process that may not be applicable in all situations. The regulation will be interpreted consistently with the applicable statutory provisions. The reference "in accordance with section 900.121(a)" was stricken since Sec. 900.121 was in its entirety. One comment suggested changing "will" to "shall" after "Secretary" in Sec. 900.122(a). This change was adopted.

Eight comments stated that the language of this section should be changed to mirror the requirements found at Sec. 900.29. The Committee took no action on these comments. One comment suggested adding "and provide all documents relied on in making the declination decision" at Sec. 900.123(b)(1) after the words "in writing." The Committee agreed to this language with the addition after the word "decision" of "within 20 days of such decision." The Committee did not agree to the proposed addition of subsection 900.124(b)(1)(I): "The Secretary shall be barred from relying on any and all such documents which are not provided in any defense of this declination decision." The regulation therefore does not address what the Secretary may or may not rely upon, leaving such matters for decision by administrative bodies or the courts.

Three comments on Sec. 900.124 stated that the requirements for grants are not clear. The Committee took no action.

Five comments raised the issue of the applicability of the Contract Work Hours Act. The Committee agreed that the applicability of the Contract Work Hours Act and other laws is adequately addressed in Sec. 900.125(d). Accordingly, the reference to the Contract Work Hours Act at Sec. 900.125(c)(4) was deleted.

One comment stated that Sec. 900.125(c)(1) requires the contract to state that the tribal contractor will not alter title to real property "without permission and instructions from the awarding Agency" and is, therefore, inconsistent with section 105(f) of the Act, which states that title to property furnished by the Federal government for a contracted program "shall, unless otherwise requested by the tribe or tribal organization, vest in the appropriate tribe or tribal organization." The Committee adopted "elects not to take title (pursuant to Subpart I) to Federal property used in carrying out the contract" at Sec. 900.125(c)(1) after the word "organization." The Committee also struck the language "proposes to use Federal property in carrying out the contract."

One comment stated that "engineers" should be deleted at Sec. 900.126(a)(1) and Sec. 900.130(c)(1) because the Act does not require the use of licensed engineers, only architects. The comment was adopted and the word "engineers" was deleted from those sections.

One comment suggested that Sec. 900.125(a)(8) be expanded to include the following language after the word "manuals": "and the Secretary shall accept tribal proposals for alternatives which are consistent with or exceed Federal guidelines or manuals applicable to construction programs." The Committee adopted this language.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

One comment stated that Sec. 900.125(b)(8) was overreaching and required production of information that the Federal government had no legitimate need to know. The Committee compromised by agreeing to strike the language as written and to substitute the following: "(8) Identify if the tribe or tribal organization has a CMS contract related to this project," and added after the word "section" at Sec. 900.125(b)(4) "and minimum staff qualifications proposed by the tribe or tribal organization, if any."

One comment proposed adding language at Sec. 900.125(d) which would include tribal laws, ordinances and resolutions. The Committee agreed and added the sentence "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."

Three comments questioned the applicability of Sec. 900.126 to cost reimbursement, fixed-price and non-construction contract construction activities. The Committee took no action.

Ten comments proposed changes to the provision on contingency funds. Four suggested the following language: "the amount of the contingency provided shall be 10 percent of the contingency funds, whichever is greater." Two comments proposed that 100 percent of the available contingency should be open for negotiation and one comment advocated that 100 percent of the available contingency should be included in the contract. The comments proposed alternative language: "* * * allow all of the contingency funds to be transferred to the tribe unless the government could show proof as to why such funds should not be transferred." The Committee compromised on the following language: "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." Additionally, the following sentence was added to address concerns regarding funding: "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 Sec. 900.129(e)."

One comment objected to the term "contract budget," and urged the language be changed to "funding proposal." The Committee took no action, and noted that the present language was written to accommodate redistribution of funds within the budget.

One comment stated that the "fair and reasonable" language at Sec. 900.127(a) "gives too much discretion to government officials to determine what is fair and reasonable." The Committee adopted the reference to Sec. 900.129 at the end of Sec. 900.127(a).

Three comments raised the question of the applicability of Sec. 900.128 to cost reimbursement, fixed-price, and non-construction contract construction activities. The Committee took no action on this concern, but to clarify changes made at Sec. 900.127(e)(8), the following language at Sec. 900.128(d)(3): "including but not limited to contingency."

Seven comments stated that Sec. 900.129(e)(1) should be amended to reflect that only the amount in excess of the available amount may be declined. The Committee decided not to make the recommended change, but did adopt the following language after the word "Act" at Sec. 900.129(e)(1): "or, if the contract has been awarded, dispute the matter under the Contract Disputes Act."

One comment urged that Sec. 900.129(e)(2)(i) "should be modified to expressly authorize the parties to jointly agree on a lump-sum advance payment to generate earned interest, in order to bridge the gap between a fair and reasonable price and the amount available to the Secretary." The Committee added the phrase "advance payments in accordance with section 900.132" at Sec. 900.129(e)(2)(i) after "contingency funds."

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Three comments raised the applicability of Sec. 900.129 to cost reimbursement, fixed-price, and non-construction contract construction activities. The Committee took no action.

Five comments stated that architect and engineer services were appropriate at the design phase (Sec. 900.130(b)(1)) but not required at the construction phase and should be deleted. One comment addressed the language requiring licensed engineers at Secs. 900.130(b)(1) and (c)(1). The Committee struck "and engineers" in both places, and inserted the word "as" before "needed."

Three comments stated that language at Sec. 900.130(c)(5) should be changed to read: "The tribe or tribal organization may not issue a change order which is outside the general scope of work defined in the contract or which exceeds the contract budget including contingency funds without Secretarial approval." The Committee took no action.

One comment argued that the timing of the independent cost estimate should be clarified to facilitate negotiations. The Committee took no action.

Three comments raised the applicability of Sec. 900.130 to cost-reimbursement, fixed-price and non-construction contract construction activities. The Committee took no action.

One comment proposed that Sec. 900.130(b)(5) should delete the Secretarial approval and substitute "review and provide written comments." In compromise, the Committee adopted language which allows for Secretarial review and written comments on the project plans and specifications only at the concept phase, the schematic (or preliminary design) phase, the design development phase, and the final construction documents phase, and Secretarial approval of the project plans and specifications for general compliance with contract requirements only at the schematic (or preliminary design) phase and the final construction documents phase, or as otherwise negotiated.

One comment proposed replacing the word "shall" at Sec. 900.130(b)(8) with "may," and striking the last sentence requiring production of copies of contracts and subcontracts. In compromise, the Committee struck the following language: "of contracts and major subcontracts and modifications * * * and A/E service deliverables." At the end of the first sentence of Sec. 900.130(b)(8) the Committee adopted the following language: "including but not limited to descriptions of contracts, major subcontracts and modifications implemented during the report period and A/E service deliverables."

The Committee struck the following language at Sec. 900.130(c)(7)(ii): "of change orders, contracts and major subcontracts" and inserted at Sec. 900.130(c)(8) "contracts, major subcontracts, modifications."

One comment argued that Sec. 900.130(e) should require the Secretary to act "within 30 days or as negotiated between and agreed to by the parties." Another comment suggested that the word "sufficient" replace "additional" before "funds are awarded." The Committee took no action on the first comment and adopted the word "sufficient" in addition to, rather than in lieu of, "additional."

Six comments urged that Sec. 900.131(b)(7) be rewritten as follows: "The tribe or tribal organization may not issue a change order which is outside the general scope of work defined in the contract or which exceeds the contract budget including contingency funds without Secretarial approval." The Committee took no action.

Eight comments recommended the deletion of Sec. 900.131(b)(11)(i)(A), stating that this section takes authority from an Indian tribe when the tribe is acting as the contracting officer for its subcontracts. The Committee took no action.

Eight comments suggested that overhead costs should be included at Sec. 900.131(b)(11)(i)(D)(iii). The Committee adopted the language "including but not limited to overhead costs" before "reasonable costs."

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

One comment stated that the Secretary's role under Sec. 900.131 generally should be substantially narrower. Specifically, the comment stated: The Secretary should not have final approval authority over planning documents once a contract is set for planning activities, the Secretary should not retain final approval authority for general compliance with contract requirements, and the Secretary should not be able to decline acceptance of the constructed building or facility. The Secretary should instead be limited to monitoring contract performance and to invoking such remedies as may be available to the Secretary under the Contract Disputes Act or under other provisions of the Self-Determination Act. The Committee adopted compromise language on this issue at Sec. 900.130(b)(5).

One comment stated that the independent cost estimate described at Sec. 900.131(b)(4) is a fully contractible function and the report should be shared with both parties. The Committee took no action on this comment.

One comment urged that Sec. 900.131(b)(11)(i)(B) is unacceptable because it allows the Secretary subjective discretion to determine what is "materially non-compliant work." The Committee took no action on this comment.

Three comments questioned the applicability of Sec. 900.131 to cost-reimbursement, fixed-price and non-construction contract construction activities. The Committee took no action on those comments.

One comment proposed eliminating the Secretarial approval function at Sec. 900.131(b)(1) and inserting the word "maximum" before the words "tribal participation." The Committee adopted the word "comment" before "and approval functions" and "full" before "tribal participation." The Committee also adopted the words "in writing" with regard to Secretarial notification of any concerns or issues that may lead to disapproval and the words "and documents" after "relevant information." The Committee struck the language "accommodate tribal recommendations" and inserted "resolve all issues and concerns of the tribe or tribal organization" after the words "good faith effort to." The Committee added "appropriate" before the word "Secretary" at Sec. 900.131(b)(2).

One comment proposed changing Sec. 900.131(b)(4) to read "Secretary may rely on the Indian tribe's 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, striking the balance of the sentence. The Committee adopted this comment and, after "tribal organization," added the following: "and shall provide all supporting documentation of the independent cost estimate to the tribe or tribal organization within the 90-day time limit."

One comment proposed to strike "approve" at Sec. 900.131(b)(5) and insert "provide written comments." The Committee adopted the following language after "the Secretary shall have the authority to review": "for general compliance with the contract requirements and provide written comments on," and struck "approve for general compliance with contract requirements." After "final construction documents phase," the Committee also added "and approve for general compliance with contract requirements the project plans specifications only at the schematic phase and final construction documents phase."

One comment argued that Sec. 900.131(b)(9) be deleted and the following substituted: "The Secretary shall be limited to the number of on-site monitoring visits negotiated between and agreed upon by the parties." The Committee achieved consensus by striking "retains the right to" and inserting "may" after "the Secretary."

In response to a comment regarding Sec. 900.131(b)(1)(iii), the Committee inserted "including but not limited to overhead costs."

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

One comment proposed an additional subsection at Sec. 900.131(b)(13)(vi) to read: "The Indian tribe or tribal organization shall be compensated for reasonable costs incurred due to termination of the contract." The Committee adopted this comment.

One comment proposed adding "No further approval or justifying documentation by the contractor shall be required before expenditure of funds" to Sec. 900.134. The Committee adopted this suggestion.

Two additional subsections to Subpart J were adopted by the Committee. One responds to tribal concerns regarding the short period of actual time available to engage in construction activities where weather is an issue. The second clarifies that tribal employment rights ordinances do apply to construction contracts and subcontracts.

The Committees received comments urging both approval and rejection of Subpart J as proposed. The Committee only considered comments which addressed a specific subsection and/or proposed language.

Construction management services: Of the comments received regarding the proposed rule for construction activities under Public Law 93-638, many were directed towards the definition of Construction Management Services (CMS) and Construction Project Management (CPM) contained as part of the rule. Indeed, one comment, representative of several Indian tribes, ". . . objects to the excessively narrow definition of construction management services (Sec. 900.113(b)) in a fashion which unlawfully defeats the tribal right to contract for management services through an ordinary self-determination contract, contrary to section 4(m) of the Act." CMS is a management process for construction projects that in some instances can provide for project delivery. Several comments feel that the activities described in the definition of CPM should be considered CMS activities. The distinction is important in that the statute provides that self-determination contracts for CMS can be through the Section 108 Model Agreement and not through a self-determination construction contract (Subpart J) as the regulations require for conduct of CPM activities.

The statute does not provide a definition for CMS and efforts to develop a definition dominated Committee discussion through the regulation process. At the start of the negotiation process, discussion departed upon a path that quickly stalled in a quagmire of divided opinion as to the role, both appropriate and statutorily permissible, available to the Federal government in self-determination contracts involving construction. However, at no point was there any dispute between tribal or Federal representatives that a tribe can contract for all management functions of a construction contract. The dispute regarding this issue revolves around the contracting vehicle utilized--a self-determination contract versus a Section 108 Model Agreement--and not the contractibility of management functions. Consistent with the Federal argument for limited Federal involvement in construction projects was an unwavering view that a Model Agreement, invoked through provision CMS, could not be used to circumvent other provisions of the statute dealing with construction.

To move forward, the Committee set aside initial efforts to define roles and involvement, and instead focused on describing processes through which tribes could pursue construction activities. From these scenarios, much discussion ensued and the roles of each party developed. Through these efforts, the regulations evolved in a manner that provides for Indian tribes or tribal organizations to contract for a spectrum of responsibilities, ranging from oversight of Federal efforts to tribal responsibility for all aspects of the construction process, through multiple options of contracting

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

methods. From the standpoint of the tribal representatives that actively and consistently participated throughout the negotiation process, the practical effect of the CMS definition is negligible towards the overall goal of increasing tribal control of the contracting process. The limit of the Federal involvement, as described in Sec. 900.132 of the regulation, is a direct reflection of efforts to describe reasonable points of Federal involvement. Both tribal and Federal representatives of the Committee charged with developing the regulations agree that the end result reflects a lessening Federal involvement in and an increase of tribal control of the construction process through 638 contracting.

However, Federal and tribal committee members did not reach consensus on the definition of CMS. Tribal and federal representatives included this issue in their non-consensus reports. The tribal non-consensus position sought to eliminate the definition of "construction project management" and include a less restrictive definition of "construction management services" with conforming changes to the balance of Subpart J. Tribal representatives are of the view that these definitions inappropriately limit the scope of construction management activities which should be contractible outside Subpart J. They are further of the view that the precise contours of "construction management services" should be worked out on a case-by-case basis as tribes engage in negotiations with particular agencies over specific construction projects. Accordingly, the Departments did not change the definition of CPM.

While the Departments have given careful consideration to the views of the tribal representatives on this issue, they cannot accept the tribal proposal. The Departments are persuaded that, as a legal matter, the Act treats construction contracts governed by Subpart J differently from contracts for other activities which may be contracted using the model agreement in section 108 of the Act. The two definitions allow contracting under a section 108 model, agreement for certain administrative support, coordination, and monitoring activities. However, construction project design and construction activities (including day-to-day on site project management and administration) are appropriately contracted under Subpart J. Although the tribal representatives are of a different legal view, we believe that expanding the definition of "construction management services" so that construction projects may be conducted under a section 108 construction management agreement circumvents the statutory requirements for a construction contract between the government and the Indian tribe or tribal organization.

Subpart K--Waiver Procedures

Summary of Subpart

This subpart implements section 107(e) of the Act, which authorizes the Secretary to make exceptions to the regulations promulgated to implement the Act or to waive such regulations under certain circumstances. Section 107(e) of the Act provides that in reviewing waiver requests, the Secretary shall follow the time line, findings, assistance, hearing, and appeal procedures set forth in section 102 of the Act. Subpart K explains how an Indian tribe or tribal organization applies for a waiver, how the waiver request is processed, the applicable timeframes for approval or declination of waiver requests, and whether technical assistance is available. In addition, subpart K restates the declination criteria of section 102 of the Act, which apply to waiver requests, and specifies that a denial of a waiver request is appealable under subpart L of these regulations. Finally, subpart K implements section 107(b) of the Act by providing a process for a determination by the Secretary that

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

a law or regulation has been superseded by the provisions of the Indian Self-Determination Act, as amended.

Summary of Comments

Several comments indicated that the scope of Subpart K was unclear. Some argued that the scope should be narrowed to authorizing only waivers under Part 900, while others argued that it should be expanded to include other regulations as well. The language in Sec. 900.140 has been redrafted to clarify that the statutory waiver authority in Section 107(e) of the Act is limited to regulations under this Part. It should be noted that the Secretary of the Interior has the reserved authority to waive other regulations in 25 CFR if permitted by law. See 25 CFR 1.2.

One comment asked whether the Secretary can delegate his or her authority to waive regulations to lower administrative levels. The Secretary does have such authority, but has not chosen to exercise it.

One comment recommended a modifying of the last sentence of Sec. 900.143 to require a "clear and convincing" burden of proof on the Secretary where a waiver request is denied. This recommendation was rejected because it is different from the statutory burden of proof in Section 102(a)(2) of the Act.

One comment objected that the 90-day period in Sec. 900.143 was too long, and recommended shortening it to 30 days. This recommendation was rejected because it is contrary to the 90-day time frame in Section 102(a)(2) of the Act. Section 107(e) of the Act specifically provides that the timeline in Section 102 of the Act applies to the review of waiver requests.

One comment asked whether waivers can be granted even if they are against the law. Although such a clarification is unnecessary in this regulation, the Secretary is not authorized to waive any provision of the Act that may be restated in these regulations.

One comment stated that Sec. 900.146 should be amended to allow Indian tribes or tribal organizations the discretion to draw on expertise from other tribes and/or tribal organizations to meet their needs. To address this concern, Sec. 900.146 was amended to cross-reference the provision of technical assistance under Sec. 900.7.

One comment recommended the inclusion of an additional paragraph in Sec. 900.148 requiring the Secretary to attach a list of all applicable Federal requirements to each contract. This suggestion was not adopted because any addition to the contract must be by mutual agreement of the parties pursuant to Section 108 of the Act.

The Office of Management and Budget (OMB) expressed concern about recognition of its ultimate responsibility for the approval of waivers of any principles contained in OMB cost circulars. Therefore, in reviewing waivers of any cost principles, OMB requests that the Secretary consult with OMB prior to approving any requests under Subpart K.

Subpart L--Appeals

Summary of Subpart

The advisory committee decided to develop substantive regulations governing appeals of pre-award decisions by Federal officials. This subpart does not govern appeals of post-award decisions subject to the Contract Disputes Act, since the provisions governing disputes under a contract can be found in

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

subpart N of these regulations. Subpart L implements sections 102(b), 102(e), and 109 of the Act, as well as various other provisions requiring the Secretary to provide an administrative appeals process when making certain decisions under the Act. It provides a road map to the appeals process for Indian tribes and tribal organizations.

The regulation is divided in two parts: the first part concerns appeals from decisions relating to declination of a proposal, an amendment of a proposal, or a program redesign; non-emergency reassumption decisions; decisions to refuse to waive regulations under section 107(e) of the Act; disagreements over reporting requirements; decisions relating to mature status conversions; decisions relating to a request that a law or regulation has been superseded by the Act; and a catchall provision relating to any other preaward decisions, except Freedom of Information Act appeals and decisions relating to the award of discretionary grants under section 103 of the Act. The second part concerns decisions relating to emergency reassumptions under section 109 of the Act and decisions relating to suspension, withholding, or delay of payments under section 106(l) of the Act.

Subpart L allows for an informal conference to avoid more time-consuming and costly formal hearings, but delineates the appeal process available to Indian tribes and tribal organizations that are either unhappy with the results of the informal conference or who choose to bypass the informal process altogether. Subpart L also states that an Indian tribe or tribal organization may go directly to Federal district court rather than exhaust the administrative appeal process under this regulation.

Under the regulation, all appeals must be filed with the Interior Board of Indian Appeals. Hearings on the record are conducted by an Administrative Law Judge of the Department of the Interior's Office of Hearings and Appeals, Hearings Division, who renders a recommended decision. Objections to this recommended decision may be filed either with the Interior Board of Indian Appeals, if the case relates to a Department of the Interior decision, or with the Secretary for Health and Human Services, if the case relates to the Department of Health and Human Services.

The second part contains similar provisions concerning emergency reassumption and suspension decisions, but these decisions are treated separately because of the statutory requirement that a hearing on the record be held within ten days of the Secretary's notice of his or her intent to rescind and reassume a program immediately, or a notice of intent to suspend, withhold, or delay payment under a contract.

Summary of Comments

Several comments noted that the words "you" and "your" appear throughout this Subpart, rather than the words "Indian tribe" and "tribal organization." Where appropriate, the words "you" and "your" have been replaced throughout this Subpart.

Pursuant to several comments, Sec. 900.150 was amended by adding a new paragraph (j) subjecting decisions relating to requests for determination that a law or regulation has been superseded by the Act to the appeal procedures under this Subpart.

One comment objected to having IHS appeals go to the Interior Board of Indian Appeals (IBIA). This recommendation was not adopted because to have all appeals heard by a single administrative appeals body so that the Act and these regulations are uniformly interpreted by both Departments.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

One comment recommended that Indian tribes should be required to go through the administrative appeal process before going to Federal district court. This recommendation was not adopted because Section 110 of the Act specifically authorizes direct access to Federal courts.

One comment recommended that there be a mandatory completion time of six months from the time an Indian tribe or tribal organization files a notice of appeal to the time for a final decision from the IBIA. This recommendation was not adopted because there is no way for the IBIA to anticipate when all briefings, discovery extensions, and settlement discussions will be concluded. Flexibility needs to be maintained during this process. The regulation already includes time frames for the IBIA to render decisions once all required filings have been made. See, e.g., Sec. 900.167 and Sec. 900.174. One comment recommended enlarging the 30-day period in Sec. 900.152 to 90 days. This recommendation was not adopted because Sec. 900.159 already provides for an extension of time.

Several comments requested that Sec. 900.152 be clarified to provide that Indian tribes may appeal decisions made by agencies of DHHS besides the IHS. This recommendation was adopted, and the question in Sec. 900.152 was amended to reflect this clarification.

One comment suggested that Sec. 900.155(b) be redrafted to define the words "adequate representation" and suggested that the section be redrafted so that the costs of the appeal are chargeable either to the contract, if the tribe prevails on the appeal, or to the tribe if the appeal is unsuccessful. These recommendations were not adopted. Federal agencies reserve the rights to determine what is adequate representation in specific cases. To force tribes to repay the expense of appeals either through a charge to the contract or through tribal funds would be unjust and would discourage appeals which are well taken.

Many comments objected to a provision in Sec. 900.152 and Sec. 900.156 which provides that "the IBIA will determine whether you are entitled to a hearing." This sentence was deleted from these two sections. As pointed out in many comments, the standards governing these decisions are set forth in Sec. 900.160.

Several comments objected to the certification requirement in Sec. 900.158(d) because it is not a statutory requirement of the Act, and conflicts with the government-to-government relationship between tribes and U.S. Government. This recommendation was not adopted. The certification requirements here are the same as in courts and other administrative appeal forums. The purpose of the requirement is simply to ensure that the deciding official has been informed that his/her decision has been appealed, and that the IBIA be informed of this notification. It is not intended to be a burdensome requirement, but merely a certification that is obtained for information purposes.

Pursuant to a comment, the words "good reason" in Sec. 900.159 were changed to the words "valid reason."

One comment recommended deletion of Sec. 900.159 because any request for an extension should be made within the 30-day time frame in Sec. 900.158. This recommendation was not adopted because, although a matter of considerable debate during the Committee's negotiations, it was agreed that there could be extenuating circumstances that could prevent a Indian tribe or tribal organization from filing its notice of appeal within the 30-day time frame in Sec. 900.158.

One comment sought clarification of what happens if the IBIA determines not to grant an extension. If the IBIA determines that the appellant does not have a valid reason to extend the deadline, and the tribe disagrees with this determination, it can appeal that decision to Federal District Court pursuant to Section 110 of the Act.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Section 900.160(a) was restructured into two sentences for clarification purposes. The second sentence of Sec. 900.160 now begins with the words "[i]f so.

One comment recommended changing the 15-day time frame in Sec. 900.161(b) to a longer period. This recommendation was not adopted because it is the Committee's belief that the time frame is adequate to hold a pre-hearing conference.

Several comments suggested that Sec. 900.163 be amended to impose a clear and convincing evidence burden of proof on the Secretary. This recommendation was rejected because it is different from the statutory burden of proof in Section 102(a)(2) of the Act.

Several comments recommended rewriting the question in Sec. 900.163 to include all appealable issues. This recommendation was not adopted because the burden of proof is on the appellant to show by a preponderance of the evidence that the agency erred for issues under appeals in Secs. 900.150(h), (i), and (j). This is consistent with the usual Administrative Procedure Act standard.

One comment objected to the agency which is one of the parties to the appeal making the final decision in Sec. 900.167. The regulatory provision is consistent with the Act. Section 102(e)(2) of the Act provides that any decision which represents final agency action shall be made "by an official of the Department who holds a position at a higher organizational level within the Department * * * than the agency * * * in which the decision was made" or by an administrative judge.

Several comments noted that Subpart L does not address the statutory right of Indian tribes to recover attorney fees under the Equal Access to Justice Act (EAJA). In response to these comments, a new section was added at the end of Subpart L clarifying that EAJA applies to administrative appeals under this Subpart, and cross-referencing the appropriate EAJA regulations.

Subpart M--Federal Tort Claims Act Coverage

Summary of Subpart

Coverage of the Federal Tort Claims Act (FTCA) has been extended to Indian tribes, tribal organizations and Indian contractors carrying out contracts, grants, and cooperative agreements under the Act. This subpart explains which tort claims are covered by the FTCA and which tort claims are not covered by the FTCA, for both medical and non-medical related claims. It also provides for tribal assistance in giving notice of tort claims to the Federal agency involved, and in providing assistance during the administrative claim or litigation process.

Summary of Comments

Two comments stated that there should be no distinction between medical-related and non-medical-related functions under self-determination contracts for purposes of FTCA coverage, defense or payment. This comment was rejected because the medical provisions have a unique history grounded in the Public Health Service Act, and in Section 102(d) of the Act.

Several comments expressed concern that the proposed regulations lacked guidance regarding insurance. Insurance is beyond the scope of FTCA authority for these regulations.

Several comments stated that portions of this Subpart reflect a fundamental misunderstanding of the scope of the Federal government's obligation to defend and indemnify tribal contractors for non-tort claims and claims outside the contract. Another set of comments requested that Sec. 900.183

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

be amended to explain that an Indian tribe or tribal organization may not be sued for claims beyond the scope of the FTCA arising out of the performance of self-determination contracts. In amending Sec. 900.183, the Committee determined to narrow the scope of the regulation strictly to the remedial FTCA provisions of section 102(d) of the Act and section 314 of Public Law 101-512, as required by section 107(a)(1) of the Act. The Committee therefore chose not to address the extent to which Indian tribes or tribal organizations are protected from suits on other claims, which is beyond the scope of these regulations.

One comment recommended that "Indian contractor," as defined in Sec. 900.181(a), should be expanded to include non-medical services as well as medical services. Although the Eighth Circuit Court of Appeals (see *FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230) has interpreted this provision as applying only to health programs, Sec. 900.181(a)(3) was added to reflect the desire of some Indian tribes to continue disputing the scope of this term.

One comment recommended deleting Sec. 900.181(b) since "contract" is defined elsewhere. The comment was adopted.

One comment suggested clarifying Sec. 900.183(a) by stating with specificity which tort claims are barred. The comment was adopted and this section was changed.

One comment recommended Sec. 900.183(b) be amended by adding a new subsection including activities performed by an employee which are outside of the scope of employment. The comment was adopted.

One comment asked what law will be used to implement breach of contract claims and whether tribal contractors are subject to Federal employment statutes. The comment was rejected because this subject is beyond the scope of regulatory authority under section 107(a)(1) of the Act.

One comment questioned the reference to violations of the U.S. Constitution in Sec. 900.183(b)(4). The provision was deleted. As sovereigns pre-existing the Constitution, Indian tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on Federal and state authority. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). To the extent applicable, 28 U.S.C. 2679(b)(2) continues to be relevant.

Several comments asked whether tribal law applied to tort claims. No change was made because state law applies to the determination of liability for tort claims under the FTCA.

One comment suggested amending Sec. 900.188(c)(7) to add "including Federal employees assigned to the contractor," after the word "employees." The comment was adopted and the sentence re-written.

Two comments recommended that the notice requirements of 28 U.S.C. 2679(c) be referenced in Sec. 900.188(b). Also, one comment suggested adding the same notice provision to Sec. 900.203. The comments were adopted. One comment recommended synchronizing Sec. 900.206 with Sec. 900.192 so that the list of employees covered for non-medical-related claims is the same as for medical-related claims. The comment was adopted.

Subpart N--Post-Award Contract Disputes

Summary of Subpart

Under section 110(d) of the Act, the Contract Disputes Act (CDA) applies to post-award contract claims. This subpart explains when a CDA claim can be filed, the contents of a claim, and where to file

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

the claim. It also explains the difference in the handling of claims over \$100,000 and those less than that amount.

Summary of Comments

Several comments recommended that language from the withdrawn 1994 NPRM regarding the application of the Equal Access to Justice Act be incorporated into the Subpart. The comments were adopted by adding Sec. 900.216(c).

Several comments recommended adding paragraph 900.805(k) from the withdrawn 1994 NPRM regarding using accounting principles as "guides" rather "rigid measures" in IBCA appeals. The comments were adopted and a new section was added.

One comment was concerned that Sec. 900.217 was silent regarding the Tribal Court system alternative for alternative disputes resolution. A change was made in Sec. 900.217(b) to adopt this recommendation. Two comments indicated that Sec. 900.217(b) needs to add the right of the tribe, if it desires, to file in Federal District Court or the Court of Federal Claims. This concern is already addressed in Sec. 900.222.

Several comments recommended that Sec. 900.220(b) be revised to read: "supporting documents or data are accurate and complete to the best of the Indian tribe or tribal organization's knowledge and belief." The comments were adopted.

Two comments recommended that Sec. 900.224 be amended so that delay of the awarding official in making a final decision should be treated as though the claim were approved, rather than denied. These comments were rejected because the existing language is statutory.

Several comments recommended adding the following language to Sec. 900.227: "If a decision is withdrawn and a new decision acceptable to the contractor is not issued, the contractor may proceed with the appeal based on the new decision or, if no new decision is issued, proceed under Sec. 900.224." The comments were adopted and a new Sec. 900.227(c) was added.

One comment expressed concern that Sec. 900.230(a) requires an Indian tribe to keep performing its contract in spite of the possibility that the claim being appealed represents crucial operating funds from the contract. This is addressed by the limitation of cost clause of the model contract.

Subpart O--Conflicts of Interest

Summary of Subpart

Section 900.231 defines an organizational conflict of interest, and Sec. 900.233 defines personal conflicts of interest which could affect self-determination contracts. The balance of the subpart advises Indian tribes what must be done in the event a conflict arises. The subpart also provides that Indian tribes may elect to negotiate specific conflicts provisions on a contract-by-contract basis.

Summary of Comments

The area of conflict of interests--where an Indian tribe or tribal organization's and/or their employees' administrations of a self-determination contract affecting allottees and others could be impaired by financial bias--raises difficult questions for DOI, including the proper balance between

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

the Federal-tribal government-to-government relationship and the Secretary's mandated trust responsibility. Additional issues include the degree of monitoring required for conflicts, if any, where the United States contracts with Indian tribes to perform duties that directly affect the statutory rights of third parties. In attempting to reconcile these difficult questions, the DOI has opted for an approach that seeks to minimize intrusion and burden to Indian tribes and tribal organizations, yet provides for a degree of accountability where conflicts arise.

The Committee reached consensus on a personal conflict of interest provision in the procurement management standards in Subpart F. The Federal committee members believed this section should be supplemented by a regulation addressing conflicts of the Indian tribe or tribal organization itself and conflicts of individual employees involved in trust resource management. These regulations appear in Subpart O of the final regulation and only apply to contracts awarded by the DOI.

Several comments on the NPRM noted that no provision on conflicts of interest has previously been adopted in the 20 years of contracting trust programs. The need to address the conflicts issue in some form has become more apparent as the DOI's experience with 638 contracts has increased.

Some comments assert that excellent tribal track records make it clear that no federal regulation is necessary. Several other comments state that the NPRM proposal suggests that in the absence of regulation Indian tribes will engage in fraudulent actions. The DOI does not contend that there is a widespread problem of unmitigated conflicts of interest. Rather it is adopting the rule in recognition of its responsibility as trustee to ensure that in a trust relationship, the acts of its agents are in accordance with high fiduciary standards. Therefore, the rule is intended to protect trust beneficiaries. Because the regulation only requires an Indian tribe or tribal organization to provide notice in the case of an organizational conflicts of interest, compliance should not be burdensome.

Several comments stated that any potential conflict between a tribe and allottees is no different than any other relationship between a government and its citizens, where a government uses its own employees to value private land to be condemned for government purposes. Several other comments state the NPRM's "organizational conflict" proposal was vague and nonsensical since the United States retains a residual component (such as lease approval or taking fee land into trust status) which gives the DOI ample opportunity to protect the interests of the United States. A related comment stated that this proposal appeared to pass on to Indian tribes the costs of the federal government's continuing responsibilities as trustee, constituting an unauthorized failure to perform non-delegable functions.

The final regulations do address organizational conflicts, because there is a significant difference between the obligation of a trustee to a beneficiary and that of a government to a citizen. In response to these comments, the DOI significantly altered the organizational conflicts regulation from the NPRM. First, the final regulation clearly states that it only applies when the contract affects the interests of allottees, trust resources or statutory obligations to third parties. Second, the Indian tribe or tribal organization is only required to provide notice to the federal government when such a situation arises, that is not already covered in their 638 contract.

Several Indian tribes commented that Federal regulations must not dictate internal tribal operations in the area of personal conflicts of interest. Some of them acknowledge that the federal proposal would not be particularly burdensome, but state that it is inconsistent with the federal policy of Indian self-determination.

The personal conflict of interest provisions are narrowly drawn to cover only trust programs. While there is a strong federal policy of Indian self-determination, there is also a strong federal policy

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

of strict adherence to the trust responsibilities arising from treaty and statute. The self-determination statute does not sever the fiduciary relationship between the United States and Indian trust beneficiaries. For this reason the ethical standards involved are not solely an internal tribal concern.

One comment recommended reliance on tribal codes, supplemented by negotiated contract provisions, to protect against personal conflicts of interest. The comment analogized the federal proposal to unsatisfactory past experiences with BIA "model codes."

The rule accommodates tribal codes and negotiated contract provisions, that the Department agrees would be the ideal manner in which to address conflicts. However it also provides a rule to apply in the absence of tribal code or contract terms that adequately protect trust beneficiaries from conflicts of interest.

Several comments agree that regulations should address the problem of conflicts of interest arising from familial relations, organizational relations where elected officials also serve in programmatic capacities, and financial relations. These comments suggest that Indian tribes be authorized to employ their own written codes of standards of conducts. Until the Secretary approves such codes, the comments suggest terms that should apply that draw upon standards applicable to federal employees and other government contractors.

The Department agrees that regulations are needed and has provided in Sec. 900.236 that it will negotiate conflicts provisions in contracts, to displace these regulations if there is agreement to provide equivalent protection to these regulations. The Department's regulations focus solely on financial interests, and not familial and organizational relations, believing that the latter is more susceptible to internal tribal regulation. Because of concerns about tribal sovereignty, the final regulation does not require Departmental approval of tribal codes, except as agreed to in individual contract negotiations.

Some comments described the proposal in the NPRM as presenting micro-management opportunities for federal agency personnel inconsistent with a government-to-government relationship. To avoid micro-management, the final rule was modified, in the case of organizational conflicts, to require only notice to the DOI when and Indian tribe or tribal organization learns of the existence of a conflict. No mitigation plan, as proposed in the 1996 NPRM, is required. The personal conflicts regulation only requires the Indian tribe to address the conflict in a manner that enables the Department to meet its trust responsibilities.

Some comments recommended that Indian tribes and the DOI rely on contract-by-contract negotiations for addressing conflicts provision. As mentioned earlier, because of the trust and legal responsibilities of the Department, the regulations are necessary to address situations where terms cannot be negotiated in the short time permitted for negotiation.

Several Indian tribes commented that the Government does not similarly regulate its own actions, and consult with Indian tribes concerning conflicts with actions proposed on allottee properties. The DOI agrees that consultations is appropriate, but recognized that it has a very high duty to assure that actions taken with respect to allottee properties are consistent with its fiduciary responsibilities to those allottees. The rule does not require consultation with allottees on actions concerning tribal lands, or vice versa.

One comment written on behalf of several individual owners of trust resources, strongly supported the adoption of minimum standards to assure the integrity of the performance and administration of trust resources. The comment suggests that, at a minimum trust resources be subject to the same conflict standards applied to procurement in the proposed Sec. 900.48.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

The final rule is very similar to the agreed provisions in Sec. 900.48.

Subpart P--Retrocession and Reassumption Procedures

Summary of Subpart

Section 107(a)(1) of the Act authorizes the Secretaries to promulgate regulations governing retrocession and reassumption procedures. Sections 900.240 through 900.245 define retrocession, what entities are entitled to retrocede, tribal rights for contracting and funding as a result of retrocession, and tribal obligations regarding the return of property to the Secretary after retrocession.

Sections 900.246 through 900.256 explain what is meant by reassumption, the two types of reassumption authorized under the Act, necessary circumstances when using emergency and non-emergency reassumption authority, and Secretarial responsibilities, including detailed written notice requirements when reassumption is invoked. The subpart describes a number of activities after reassumption has been completed, such as authorization for "wind up" costs, tribal obligations regarding the return of property to the Secretary, and a funding reduction protection.

Summary of Comments

One comment recommended that the phrase "may retrocede a contract" be added to the end of the answer in Sec. 900.232 to provide a more complete answer to the question of who may retrocede a contract. This suggestion adds clarity to the answer, and has been adopted.

Several comments recommended that an additional question and answer be added to address when a retrocession becomes effective. The recommended language is contained in the Act, provides meaningful information to the users of this regulation, and has been adopted and inserted as a new Sec. 900.233.

Several comments recommended that the term "fair market" be added to the answer in Sec. 900.236 and Sec. 900.246 in describing the value of property to be returned to the Secretary in the event of a retrocession or reassumption. While the essence of this recommendation has been adopted, to remain consistent throughout the regulation the definition of "fair market" as provided in Subpart I will be restated in this Subpart. (Subpart I states "current fair market value, less the cost of improvements borne by the Indian tribe or tribal organization in excess of \$5,000.") Also, for clarity the word "requested" has been added to the answer in Sec. 900.236 in describing property to be returned to the Secretary.

One comment recommended that the answer provided in Sec. 900.238, which has (a) and (b) components, be reversed to track the order of the question and avoid confusion. This recommendation has been adopted to promote uniformity in this question and answer.

A comment recommended language be added to the answer in Sec. 900.239 incorporating the option for the award of grants to Indian tribes from the Secretary for technical assistance to overcome non-emergency deficiencies. While the exact language suggested is not used, the recommendation has been adopted since such grants are authorized under the Act.

Several comments recommended that language be added to Sec. 900.238(b)(1) dealing with the conditions for emergency reassumptions. These comments were not adopted because the language

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

now contained in Sec. 900.238(b)(1) precisely tracks the Act and the suggested additional language may confuse statutory intent.

One comment recommended that a statement be added to Sec. 900.242 that the Secretary will not rescind a contract until there is a final decision in any administrative hearing or appeal on a non-emergency reassumption. This recommendation has been adopted.

Internal Agency Procedures

The Departments' position is that a comprehensive manual for the internal management of self-determination contracts should not be developed through the formal rulemaking process. Internal agency procedures are more appropriately developed outside the negotiated rulemaking process, to allow flexibility in addressing practical considerations which arise in the field, and to allow maximum participation from those agency officials who bear much of the responsibility for implementing the Act to its fullest capability. The Federal position supports a joint tribal and Federal commitment to work together to generate a procedural manual which will promote the purposes underlying the Indian Self-Determination Act and facilitate contracting by Indian tribes and tribal organizations.

One goal of the full committee is to have uniform procedures for the implementation and interpretation of the act and these regulations which apply to all Federal agencies which administer contracted programs. The Federal members of the committee propose that the parties formally agree to work together to develop a manual which guides all contracting agencies through the contracting process. This is consistent with the position taken by the work group charged with making recommendations regarding internal agency procedures.

To that end, Federal committee members would commit to a firm time line within which to produce a manual.

Administrative Matters

This rule is a significant regulatory action Executive Order 12866 and requires review by the Office of Management and Budget.

The Departments certify that this rule will not have significant economic effects on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.).

In accordance with Executive Order 12630 the Department of the Interior and the Department of Health and Human Services have determined that this regulation does not have significant takings implications. The rule does not pertain to the taking of private property interests, nor does it have an effect on private property.

The Department of the Interior and the Department of Health and Human Services have determined that this rule does not have significant Federalism effects under Executive Order 12612 and will not interfere with the roles, rights, and responsibilities of states.

The Departments of the Interior and Health and Human Services have determined that this rule does not constitute a major Federal action significantly affecting the quality of the human environment and that no detailed statement is required under the National Environmental policy Act of 1969.

This rule imposes no unfunded mandates on any governmental or private entity in excess of \$100 million annually and is in compliance with the provisions of the Unfunded Mandates Act of 1995.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Paperwork Reduction Act of 1995

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.

The Departments estimate that the average burden of complying with the collection, broken down by subpart, will be as follows: Subpart C (Contract Proposal Contents), 222 hours; Subpart F (Standards for Tribal or Tribal Organization Management Systems), 250 hours; Subpart G (Programmatic Reports and Data Requirements), 150 hours; Subpart I (Property Donation Procedures), 10 hours; Subpart J (Construction), 564 hours; Subpart K (Waiver Procedures), 10 hours; and Subpart L (Appeals), 40 hours.

Responses to the collection of information under this regulation are required in order for Indian tribes or tribal organizations to obtain or retain benefits under the Act. However, not every tribal contractor will need to respond to each request for information contained in the regulation, as some of the requests pertain to specific situations or to certain types of self-determination contracts. Moreover, under section 5(f)(2) of the Act, tribal organizations are given authority to negotiate their individual reporting requirements with the Secretary on a contract-by-contract basis. Any disagreements over reporting requirements are subject to the declination criteria and procedures in section 102 of the Act and subpart E of the regulation.

There is no assurance of confidentiality provided to respondents concerning this information collection.

The Departments may not conduct or sponsor a collection of information, nor are Indian tribes or tribal organizations or other persons required to respond to such collections unless the Departments display a currently valid OMB control number.

List of Subjects in 25 CFR Part 900

Indians; Administrative practice and procedure, Buildings and facilities, Claims, Government contracts, Grant programs--Indians, Health care, Indians--business and finance, Government property management.

For the reasons given in the preamble, the Departments of the Interior and Health and Human Services hereby establish a new part 900 in chapter V of title 25 of the Code of Federal Regulations as set forth below.

Dated: June 14, 1996.

Bruce Babbitt,

Secretary of the Interior.

Dated: June 13, 1996.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Donna Shalala,

Secretary of Health and Human Services.

CHAPTER V--BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, AND INDIAN HEALTH SERVICE, DEPARTMENT OF HEALTH AND HUMAN SERVICES

PART 900--CONTRACTS UNDER THE INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

Subpart A--General Provisions

Sec.

900.1 Authority.

900.2 Purpose and scope.

900.3 Policy statements.

900.4 Effect on existing tribal rights.

900.5 Effect of these regulations on Federal program guidelines, manual, or policy directives.

Subpart B--Definitions

900.6 Definitions.

Subpart C--Contract Proposal Contents

900.7 What technical assistance is available to assist in preparing an initial contract proposal?

900.8 What must an initial contract proposal contain?

900.9 May the Secretary require an Indian tribe or tribal organization to submit any other information beyond that identified in 900.8?

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?

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?

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?

900.13 Does the contract proposal become part of the final contract?

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Subpart D--Review and Approval of Contract Proposals

- 900.14** What does this Subpart cover?
- 900.15** What shall the Secretary do upon receiving a proposal?
- 900.16** How long does the Secretary have to review and approve the proposal and award the contract, or decline a proposal?
- 900.17** Can the statutory 90-day period be extended?
- 900.18** What happens if a proposal is not declined within 90 days after it is received by the Secretary?
- 900.19** What happens when a proposal is approved?

Subpart E--Declination Procedures

- 900.20** What does this Subpart cover?
- 900.21** When can a proposal be declined?
- 900.22** For what reasons can the Secretary decline a proposal?
- 900.23** Can the Secretary decline a proposal where the Secretary's objection can be overcome through the contract?
- 900.24** Can a contract proposal for an Indian tribe's or tribal organization's share of administrative programs, functions, services, and activities be declined for any reason other than the five reasons specified in Sec. 900.22?
- 900.25** What if only a portion of a proposal raises one of the five declination criteria?
- 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?
- 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?
- 900.28** Is technical assistance available to an Indian tribe or tribal organization to avoid declination of a proposal?
- 900.29** What is the Secretary required to do if the Secretary decides to decline all or a portion of a proposal?
- 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?
- 900.31** When the Secretary declines all or a portion of a proposal, is an Indian tribe or tribal organization entitled to any appeal?
- 900.32** Can the Secretary decline an Indian tribe or tribal organization's proposed successor annual funding agreement?
- 900.33** Are all proposals to renew term contracts subject to the declination criteria?

Subpart F--Standards for Tribal or Tribal Organization Management Systems

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

General

900.35 What is the purpose of this Subpart?

900.36 What requirements are imposed upon Indian tribes or tribal organizations by this Subpart?

900.37 What provisions of Office of Management and Budget (OMB) circulars or the "common rule" apply to self-determination contracts?

900.38 Do these standards apply to the subcontractors of an Indian tribe or tribal organization carrying out a self-determination contract?

900.39 What is the difference between a standard and a system?

900.40 When are Indian tribe or tribal organization management standards and management systems evaluated?

900.41 How long must an Indian tribe or tribal organization keep management system records?

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?

900.43 What are the general financial management system standards that apply to a tribal organization carrying out a self-determination contract?

900.44 What minimum general standards apply to all Indian tribe or tribal organization financial management systems when carrying out a 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?

900.46 What requirements are imposed upon the Secretary for financial management by these standards?

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?

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?

900.49 What procurement standards apply to subcontracts?

900.50 What Federal laws, regulations, and Executive Orders apply to sub-contractors?

Property Management System Standards

900.51 What is an Indian tribe or tribal organization's property management system expected to do?

900.52 What type of property is the property management system required to track?

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

- 900.53** What kind of records shall the property management system maintain?
- 900.54** Should the property management system prescribe internal controls?
- 900.55** What are the standards for inventories?
- 900.56** What maintenance is required for property?
- 900.57** What if the Indian tribe or tribal organization chooses not to take title to property furnished or acquired under the contract?
- 900.58** Do the same accountability and control procedures described above apply to Federal property?
- 900.59** How are the inventory requirements for Federal property different than for tribal property?
- 900.60** How does an Indian tribe or tribal organization dispose of Federal property?

Subpart G--Programmatic Reports and Data Requirements

- 900.65** What programmatic reports and data shall the Indian tribe or tribal organization provide?
- 900.66** What 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)?
- 900.67** Will there be a uniform data set for all IHS programs?
- 900.68** Will this uniform data set be required of all Indian tribe or tribal organizations contracting with the IHS under the Act?

Subpart H--Lease of Tribally-Owned Buildings by the Secretary

- 900.69** What is the purpose of this Subpart?
- 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?
- 900.71** What type of reserve fund is anticipated for funds deposited into a reserve for replacement of facilities as specified in Sec. 900.70(c)?
- 900.72** Who is the guardian of the fund and may the funds be invested?
- 900.73** Is a lease with the Secretary the only method available to recover the types of cost described in 900.70?
- 900.74** How may an Indian tribe or tribal organization propose a lease to be compensated for the use of facilities?

Subpart I--Property Donation Procedures

General

- 900.85** What is the purpose of this Subpart?
- 900.86** How will the Secretary exercise discretion to acquire and donate BIA or IHS excess

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

property and excess and surplus Federal property to an Indian tribe or tribal organization?

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?

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?

900.89 When may the Secretary elect to reacquire government-furnished property whose title has been transferred to an Indian tribe or tribal organization?

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?

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)?

900.92 What should the Indian tribe or tribal organization do if it wants contractor-purchased real property to be taken into trust?

900.93 When may the Secretary elect to acquire title to contractor-purchased property?

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?

BIA and IHS Excess Property

900.95 What is BIA or IHS excess property?

900.96 How can Indian tribes or tribal organizations learn about BIA and IHS excess property?

900.97 How can an Indian tribe or tribal organization acquire excess BIA or IHS property?

900.98 Who takes title to excess BIA or IHS property donated to an 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?

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?

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?

Excess or Surplus Government Property of Other Agencies

900.102 What is excess or surplus government property of other agencies?

900.103 How can Indian tribes or tribal organizations learn about property that has been

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

designated as excess or surplus government property?

900.104 How may an Indian tribe or tribal organization receive excess or surplus government property of other agencies?

900.105 Who takes title to excess or surplus Federal property donated to an Indian tribe or tribal organization?

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?

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?

Subpart J--Construction

900.110 What does this Subpart cover?

900.111 What activities of construction programs are contractible?

900.112 What are construction phases?

900.113 Definitions.

900.114 Why is there a separate subpart in these regulations for construction contracts and grants?

900.115 How do self-determination construction contracts relate to ordinary Federal procurement contracts?

900.116 Are negotiated fixed-price contracts treated the same as cost-reimbursable contracts?

900.117 Do these "construction contract" regulations apply to planning services?

900.118 Do these "construction contract" regulations apply to construction management services?

900.119 To what extent shall the Secretary consult with affected Indian tribes before spending funds for any construction project?

900.120 How does an Indian tribe or tribal organization find out about a construction project?

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?

900.122 What does an Indian tribe or tribal organization do if it wants to secure a construction contract?

900.123 What happens if the Indian tribe or tribal organization and the Secretary cannot develop a mutually agreeable contract proposal?

900.124 May the Indian tribe or tribal organization elect to use a grant in lieu of a contract?

900.125 What shall a construction contract proposal contain?

900.126 Shall a construction contract proposal incorporate provisions of Federal construction guidelines and manuals?

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

- 900.127** What can be included in the Indian tribe or tribal organizations contract budget?
- 900.128** What funding shall the Secretary provide in a construction contract?
- 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?
- 900.130** What role does the Indian tribe or tribal organization play during the performance of a self-determination construction contract?
- 900.131** What role does the Secretary play during the performance of a self-determination construction contract?
- 900.132** Once a contract and/or grant is awarded, how will the Indian tribe or tribal organization receive payments?
- 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?
- 900.134** At the end of a self-determination construction contract, what happens to savings on a cost-reimbursement contract?
- 900.135** May the time frames for action set out in this Subpart be reduced?
- 900.136** Do tribal employment rights ordinances apply to construction contracts and subcontracts?
- 900.137** Do all provisions of the other subparts apply to contracts awarded under this subpart?

Subpart K--Waiver Procedures

- 900.140** Can any provision of the regulations under this Part be waived?
- 900.141** How does an Indian tribe or tribal organization get a waiver?
- 900.142** Does an Indian tribe or tribal organization's waiver request have to be included in an initial contract proposal?
- 900.143** How is a waiver request processed?
- 900.144** What happens if the Secretary makes no decision within the 90-day period?
- 900.145** On what basis may the Secretary deny a waiver request?
- 900.146** Is technical assistance available for waiver requests?
- 900.147** What appeal rights are available?
- 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?

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?
- 900.151** Are there any appeals this part does not cover?
- 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?
- 900.153** Does an Indian tribe or tribal organization have any options besides an appeal?
- 900.154** How does an Indian tribe or tribal organization request an informal conference?

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

- 900.155 How is an informal conference held?**
- 900.156 What happens after the informal conference?**
- 900.157 Is the recommended decision always 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?**
- 900.159 May an Indian tribe or tribal organization get an extension of time to file a notice of appeal?**
- 900.160 What happens after an Indian tribe or tribal organization files an appeal?**
- 900.161 How is a hearing arranged?**
- 900.162 What happens when a hearing is necessary?**
- 900.163 What is the Secretary's burden of proof for appeals from decisions under Sec. 900.150(a) through Sec. 900.150(g)?**
- 900.164 What rights do Indian tribes, tribal organizations, and the government have during the appeal process?**
- 900.165 What happens after the hearing?**
- 900.166 Is the recommended decision always 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?**
- 900.168 Will an appeal hurt the Indian tribe or tribal organization's position in other contract negotiations?**
- 900.169 Will the decisions on appeals be available for the public to review?**

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?**
- 900.171 Will there be a hearing?**
- 900.172 What happens after the hearing?**
- 900.173 Is the recommended decision always 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?**
- 900.175 Will an appeal hurt an Indian tribe or tribal organization's position in other contract negotiations?**
- 900.176 Will the decisions on appeals be available for the public to review?**

Applicability of the Equal Access to Justice Act

- 900.177 Does the Equal Access to Justice Act (EAJA) apply to appeals under this subpart?**

Subpart M--Federal Tort Claims Act Coverage General Provisions

- 900.180 What does this Subpart cover?**

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

- 900.181** What definitions apply to this subpart?
- 900.182** What other statutes and regulations apply to FTCA coverage?
- 900.183** Do Indian tribes and tribal organizations need to be aware of areas which FTCA does not cover?
- 900.184** Is there a deadline for filing FTCA claims?
- 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?
- 900.186** Is it necessary for a self-determination contract to include any clauses about Federal Tort Claims Act coverage?
- 900.187** Does FTCA apply to a self-determination contract if FTCA is not referenced in the contract?
- 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?
- 900.189** Does this coverage extend to subcontractors of self-determination contracts?

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?
- 900.191** Are employees of self-determination contractors providing health services under the self-determination contract protected by FTCA?
- 900.192** What employees are covered by FTCA for medical-related claims?
- 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?
- 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?
- 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?
- 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?
- 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?
- 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?
- 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?
- 900.200** May persons who are not Indians or Alaska Natives assert claims under FTCA?

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Procedure for Filing Medical-Related Claims

- 900.201 How should claims arising out of the performance of medical-related functions be filed?
- 900.202 What should a self-determination contractor or a contractor's employee do on receiving such a claim?
- 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?

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?
- 900.205 To what non-medical-related claims against self-determination contractors does FTCA apply?
- 900.206 What employees are covered by FTCA for non-medical-related claims?
- 900.207 How are non-medical related tort claims and lawsuits filed for IHS?
- 900.208 How are non-medical related tort claims and lawsuits filed for DOI?
- 900.209 What should a self-determination contractor or contractor's employee do on receiving a non-medical related tort claim?
- 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?

Subpart N--Post-Award Contract Disputes

- 900.215 What does this subpart cover?
- 900.216 What other statutes and regulations apply to contract disputes?
- 900.217 Is filing a claim under the CDA our only option for resolving post-award contract disputes?
- 900.218 What is a claim under the CDA?
- 900.219 How does an Indian tribe, tribal organization, or Federal agency submit a claim?
- 900.220 Does it make a difference whether the claim is large or small?
- 900.221 What happens next?
- 900.222 What goes into a decision?
- 900.223 When does an Indian tribe or tribal organization get the decision?
- 900.224 What happens if the decision does not come within that time?
- 900.225 Does an Indian tribe or tribal organization get paid immediately if the awarding official decides in its favor?
- 900.226 What rules govern appeals of cost disallowances?
- 900.227 Can the awarding official change the decision after it has been made?
- 900.228 Is an Indian tribe or tribal organization entitled to interest if it wins its claim?

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

900.229 What role will the awarding official play during an appeal?

900.230 What is the effect of a pending appeal?

Subpart O--Conflicts of Interest

900.231 What is an organizational conflict of interest?

900.232 What must an Indian tribe or tribal organization do if an organizational conflict of interest arises under a contract?

900.233 When must an Indian tribe or tribal organization regulate its employees or subcontractors to avoid a personal conflict of interest?

900.234 What types of personal conflicts of interest involving tribal officers, employees or subcontractors would have to be regulated by an Indian tribe?

900.235 What personal conflicts of interest must the standards of conduct regulate?

900.236 May an Indian tribe elect to negotiate contract provisions on conflict of interest to take the place of this regulation?

Subpart P--Retrocession and Reassumption Procedures

900.240 What does retrocession mean?

900.241 Who may retrocede a contract, in whole or in part?

900.242 What is the effective date of retrocession?

900.243 What effect will an Indian tribe or tribal organization's retrocession have on its rights to contract?

900.244 Will an Indian tribe or tribal organization's retrocession adversely affect funding available for the retroceded program?

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?

900.246 What does reassumption mean?

900.247 Under what circumstances is a reassumption considered an emergency instead of non-emergency reassumption?

900.248 In a non-emergency reassumption, what is the Secretary required to do?

900.249 What happens if the contractor fails to take corrective action to remedy the contract deficiencies identified in the notice?

900.250 What shall the second written notice include?

900.251 What is the earliest date on which the contract will be rescinded in a non-emergency reassumption?

900.252 In an emergency reassumption, what is the Secretary required to do?

900.253 What shall the written notice include?

900.254 May the contractor be reimbursed for actual and reasonable "wind up costs" incurred after the effective date of rescission?

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?

900.256 Will a reassumption adversely affect funding available for the reassumed program?

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Authority: 25 U.S.C. 450f et seq.

Subpart A--General Provisions

Sec. 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.

Sec. 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.

Sec. 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,

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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.

Sec. 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.

Sec. 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,

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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

Sec. 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 Interior Board of Contract Appeals.

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.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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

Sec. 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.

Sec. 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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(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.

Sec. 900.9 May the Secretary require an Indian tribe or tribal organization to submit any other information beyond that identified in Sec. 900.8?

No.

Sec. 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.

Sec. 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 Sec. 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.

Sec. 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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

funding information in the same detail and format as the original proposal and may also identify any significant proposed changes.

Sec. 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

Sec. 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.

Sec. 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 Sec. 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.

Sec. 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.

Sec. 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.

Sec. 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 Sec. 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.

Sec. 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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Sec. 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 Sec. 900.32.

Sec. 900.21 When can a proposal be declined?

As explained in Secs. 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.

Sec. 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.

Sec. 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.

Sec. 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 Sec. 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.

Sec. 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 Sec. 900.20, subject to any alteration in the scope of the proposal that the Secretary and the Indian tribe or tribal organization approve.

Sec. 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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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 Sec. 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.

Sec. 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.

Sec. 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.

Sec. 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 Sec. 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 Sec. 900.31.

Sec. 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.

Sec. 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.

Sec. 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.

Sec. 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

Sec. 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.

Sec. 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.

Sec. 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.

Sec. 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.

Sec. 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.

Sec. 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.

Sec. 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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Sec. 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.

Sec. 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.

Sec. 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.

Sec. 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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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.

Sec. 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

Sec. 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.

Sec. 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.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(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.

Sec. 900.49 What procurement standards apply to subcontracts?

Each subcontract entered into under the Act shall at a minimum:

(a) Be in writing;

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

- (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.**

Sec. 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

Sec. 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.**

Sec. 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.**

Sec. 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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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.

Sec. 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.**

Sec. 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.

Sec. 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.

Sec. 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.

Sec. 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.

Sec. 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**

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(c) The inventory shall report any increase or decrease of \$5,000 or more in the value of any item of real property.

Sec. 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

Sec. 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.

Sec. 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.

Sec. 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.

Sec. 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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Sec. 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.

Sec. 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;

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

- (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.

Sec. 900.71 What type of reserve fund is anticipated for funds deposited into a reserve for replacement of facilities as specified in Sec. 900.70(c)?

Reserve funds must be accounted for as a capital project fund or a special revenue fund.

Sec. 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.

Sec. 900.73 Is a lease with the Secretary the only method available to recover the types of cost described in Sec. 900.70?

No. With the exception of paragraph (i) in Sec. 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.

Sec. 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 Sec. 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 Sec. 900.70 only.

Subpart I--Property Donation Procedures

General

Sec. 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.

Sec. 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?

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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

Sec. 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).

Sec. 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:

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(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.

Sec. 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.

Sec. 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

Sec. 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.

Sec. 900.92 What should the Indian tribe or tribal organization do if it wants contractor-purchased real property to be taken into trust?

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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.

Sec. 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.

Sec. 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

Sec. 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.

Sec. 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.

Sec. 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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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.

Sec. 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.

Sec. 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.

Sec. 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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(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.

Sec. 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

Sec. 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).

Sec. 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.

Sec. 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 Sec. 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.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(e) The Secretary shall request a waiver of any fees for transfer of the property in accordance with applicable Federal regulations.

Sec. 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.

Sec. 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

Sec. 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

Sec. 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 Sec. 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.

Sec. 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.

Sec. 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 Sec. 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.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(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.

Sec. 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 Sec. 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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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.

Sec. 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.

Sec. 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 Sec. 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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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.

Sec. 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.

Sec. 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.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Sec. 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 Sec. 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.

Sec. 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.

Sec. 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,

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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.

Sec. 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]

Sec. 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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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.

Sec. 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 Sec. 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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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.

Sec. 900.124 May the Indian tribe or tribal organization 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.

Sec. 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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(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 Sec. 900.131; and

(4) Proposed methods to accommodate the responsibilities of the Indian tribe or tribal organization provided in Sec. 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 Sec. 900.127; and

(6) A period of performance for the conduct of all activities to be contracted;

(7) A payment schedule as described in Sec. 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 Sec. 900.5(d) from all Indian tribes benefitting from the contract proposal; and

(10) Any responsibilities, in addition to the Federal responsibilities listed in Sec. 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;

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(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.

Sec. 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.

Sec. 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 Sec. 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 Sec. 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:

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(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 Sec. 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.

Sec. 900.128 What funding shall the Secretary provide in a construction contract?

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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.

Sec. 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;

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(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 Sec. 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.

Sec. 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, Sec. 900.42 through Sec. 900.45 and implement a property management system in accordance with subpart F, Sec. 900.51 through Sec. 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.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(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 Sec. 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, Sec. 900.42 through Sec. 900.45 and implement a property management system in accordance with subpart F, Sec. 900.51 through Sec. 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;

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(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.

Sec. 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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(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.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(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.

Sec. 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 Sec. 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 Sec. 900.131(b)(11), Sec. 900.131(b)(12), or Sec. 900.131(b)(13).

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Sec. 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 Sec. 900.122 and Sec. 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 Sec. 900.120.

Sec. 900.134 At the end of a self-determination construction contract, what happens to savings on a cost-reimbursement contract?

The savings shall be used by the Indian tribe or tribal organization to provide additional services or benefits under the contract. Unexpended contingency funds obligated to the contract, and remaining at the end of the contract, are savings. No further approval or justifying documentation by the Indian tribe or tribal organization shall be required before expenditure of funds.

Sec. 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.

Sec. 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 Sec. 7(b) and Sec. 7(c) of the Act.

Sec. 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 Sec. 900.150 (d) and (e) of these regulations.

Subpart K--Waiver Procedures

Sec. 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.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Sec. 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.

Sec. 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.

Sec. 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.

Sec. 900.144 What happens if the Secretary makes no decision within the 90-day period?

The waiver request is deemed approved.

Sec. 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.

Sec. 900.146 Is technical assistance available for waiver requests?

Yes. Technical assistance is available as provided in section 900.7 to prepare a waiver request or to overcome any stated objection which the Secretary might have to the request.

Sec. 900.147 What appeal rights are available?

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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.

Sec. 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

Sec. 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.

Sec. 900.151 Are there any appeals this subpart does not cover?

This subpart does not cover:

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(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 Sec. 900.170 through Sec. 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.

Sec. 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, 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.

Sec. 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.

Sec. 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.

Sec. 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.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(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.

Sec. 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 900.157. You may request a hearing on the record. An appeal to the IBIA under 25 CFR 900.157 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.

Sec. 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 Sec. 900.159, the recommended decision becomes final.

Sec. 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, 4015 Wilson Boulevard, 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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(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.

Sec. 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.

Sec. 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 Sec. 900.150(a) through Sec. 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 Sec. 900.150(h), Sec. 900.150(i), or Sec. 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.

Sec. 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:

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

- (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.

Sec. 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.

Sec. 900.163 What is the Secretary's burden of proof for appeals from decisions under Sec. 900.150(a) through Sec. 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.

Sec. 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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(i) Any other procedural rights under the Administrative Procedure Act, 5 U.S.C. 556.
Sec. 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 900.165(b). 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. 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 900.165(c). An appeal to the IBIA under 25 CFR 900.165(c) shall be filed at the following address: Board of Indian Appeals, 4015 Wilson Boulevard, 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.

Sec. 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.

Sec. 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.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(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.

Sec. 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.

Sec. 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

Sec. 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, 4015 Wilson Boulevard, Arlington, VA 22203.

Sec. 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 Sec. 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.

Sec. 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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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 900.165(b). 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. 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 900.165(c). An appeal to the IBIA under 25 CFR 900.165(c) shall be filed at the following address: Board of Indian Appeals, 4015 Wilson Boulevard, 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.

Sec. 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.

Sec. 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.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(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.

Sec. 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.

Sec. 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

Sec. 900.177 Does the Equal Access to Justice Act (EAJA) apply to appeals under this subpart?

Yes. EAJA claims against the DOI or the DHHS will be heard by the IBIA under 43 CFR 4.601-4.619. For DHHS, appeals from the EAJA award will be according to 25 CFR 900.165(b).

Subpart M--Federal Tort Claims Act Coverage General Provisions

Sec. 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.

Sec. 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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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.

Sec. 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.

Sec. 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 Sec. 900.181(a)(1) and Sec. 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.

Sec. 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).

Sec. 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.

Sec. 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:

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(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.

Sec. 900.187 Does FTCA apply to a self-determination contract if FTCA is not referenced in the contract?

Yes.

Sec. 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;

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(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.

Sec. 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 Sec. 900.193 (for Sec. 900.183(b)(1)) or Sec. 900.183(b) (for Sec. 900.190).

Medical-Related Claims

Sec. 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 Sec. 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.

Sec. 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.

Sec. 900.192 What employees are covered by FTCA for medical-related claims?

(a) Permanent employees;

(b) Temporary employees;

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

- (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.

Sec. 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.

Sec. 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.

Sec. 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.

Sec. 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.)

Sec. 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.

Sec. 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?

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Yes.

Sec. 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.

Sec. 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

Sec. 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.

Sec. 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 Sec. 900.201 and notify the contractor's tort claims liaison.

Sec. 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 Sec. 900.188(c).

Non-Medical Related Claims

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Sec. 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 Sec. 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.

Sec. 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.

Sec. 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.

Sec. 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 Sec. 900.201 (for both Sec. 900.207 and Sec. 900.208).

Sec. 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 Sec. 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.

Sec. 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 Sec. 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.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Sec. 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

Sec. 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.

Sec. 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 Interior Board of Contract Appeals, 43 CFR 4.110-126; and

(c) The Equal Access to Justice Act, 5 U.S.C. 504 and 28 U.S.C. 2412 and regulations at 43 CFR 4.601 through 4.619 (DOI) and 45 CFR 13 (DHHS).

Sec. 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.

Sec. 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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(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.

Sec. 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.

Sec. 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.

Sec. 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.

Sec. 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 Interior Board of Contract Appeals (IBCA), U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203. If you decide to appeal, you shall, within 90 days from the date you receive this decision, mail or otherwise furnish

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

written notice to the IBCA and provide a copy to the individual from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, and refer to the decision and contract number. Instead of appealing to the IBCA, 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.

Sec. 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 not 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.

Sec. 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 Sec. 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 Sec. 900.222(e),

Sec. 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.

Sec. 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.

Sec. 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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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 Sec. 900.224.

(d) If an appeal or suit is filed, the awarding official may modify or withdraw his or her final decision.

Sec. 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.

Sec. 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.

Sec. 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.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(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

Sec. 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.

Sec. 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.

Sec. 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.

Sec. 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.

Sec. 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.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Sec. 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

Sec. 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.

Sec. 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.

Sec. 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.

Sec. 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.

Sec. 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.

Sec. 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?

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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.

Sec. 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.

Sec. 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.

Sec. 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.

Sec. 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.

Sec. 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

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(c) Instructions that explain the Indian tribe or tribal organization's right to a formal hearing within 30 days of receipt of the notice.

Sec. 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.

Sec. 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.

Sec. 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 Sec. 900.160 and Sec. 900.161 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.

Sec. 900.254 May the contractor be reimbursed for actual and reasonable "wind up costs" incurred after the effective date of rescission?

Yes.

Sec. 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.

Sec. 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.

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DELEGATIONS OF AUTHORITY

INDIAN HEALTH SERVICE

JULY 3, 1975 (SIGNED BY ASH)

SUPERSEDED

- **Delegation**

Redelegates authorities for Title I of the Indian Self-Determination and Education Assistance Act (ISDA), P.L. 93-638, to the Administrator, Health Services Administration except authority under §107 of Title I of the ISDA.

May be redelegated except authority under §105(b) of Title I of the ISDA.

- ***Supersedure***

Superseded by *June 30, 1993* delegation.

MAY 25, 1976 (SIGNED BY ACTING ASH)

SUPERSEDED

- **Delegation**

Delegates authority to the Administrator, Health Resources and Services Administration (HRSA), for P.L. 93-638, except §107 of Title I of the ISDA.

May be redelegated except authority under §106(b) for advance payments *may not* be redelegated lower than the Director, Indian Health Service (IHS).

- ***Supersedure***

Supersedes *March 12, 1976* delegation to the Assistant Secretary for Health (ASH).

Superseded by *June 30, 1993* delegation.

DELEGATIONS OF AUTHORITY (continued)

NOVEMBER 23, 1988 (SIGNED BY DIRECTOR, IHS)

SUPERSEDED

- **Delegation**

Delegates authority to Area Directors, et al, all authorities under Title I of the ISDA.

- ***Exceptions***

Advance payments.

Waive provisions of Federal contracting laws.

- ***Supersedure***

Supersedes *January 4, 1985* 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 1-5.2E-1.

Superseded by *March 14, 1996* delegation of authority to Director, Alaska Area from the DHO.

JUNE 30, 1993 (SIGNED BY SECRETARY, HHS)

- **Delegation**

Delegates to the ASH, with authority to redelegate, all authorities vested in the Secretary, HHS by the ISDA, P.L. 93-638, as amended.

DELEGATIONS OF AUTHORITY (continued)

- *Exclusions*

Authority to promulgate regulations under §107 of Title I of the ISDA, as amended.

Authority to submit reports to the Congress.

Establish advisory committees/national commissions, and appoint members to such committees/commissions.

- *Supersedure*

Supersedes *July 3, 1975* delegation from Secretary to ASH.

JUNE 30, 1993 (SIGNED BY ACTING ASH)

SUPERSEDED

- **Delegation**

Delegates to the Director, IHS, all authorities for P.L. 93-638, the ISDA, as amended.

- *Special Conditions*

Contracts *must* continue to be awarded and administered by Contracting Officers appointed pursuant to Federal and Department regulations until IHS obtains approval from the Deputy Assistant Secretary for Health Management Operations (DASHMO) for an alternative method of awarding and administering the contracts.

Authority to award self-governance (SG) compacts and annual funding agreements (AFAs) *may not* be exercised in fiscal year (FY) 94 until an implementation plan describing the methodology for administering the program is approved by the DASHMO.

DELEGATIONS OF AUTHORITY (continued)

- ***Exclusions***

Authority to promulgate regulations under §107 of Title I of the ISDA, as amended.

Authority to submit reports to the Congress.

Establish advisory committees/national commissions, and appoint members to such committees/commissions.

- ***Redelegation***

Authorities regarding the SG compacts and AFAs *may not* be redelegated.

- ***Supersedure***

Supersedes *May 25, 1976* delegation from the ASH to Administrator, HRSA for the ISDA as continued in the Reorganization Order of January 4, 1988 (52 FR 47053).

Superseded by *July 17, 1996* delegation of authority from the ASH to the Director, IHS.

MARCH 14, 1996 (SIGNED BY DIRECTOR, IHS)

- **Delegation**

Delegates authority to Director of Headquarters Operations (DHO) for application IHS-wide, all of the authorities of the ISDA, P.L. 93-638, as amended.

Authorities may be redelegated.

DELEGATIONS OF AUTHORITY (continued)

- ***Exclusions***

Authority to promulgate regulations under §107 of Title I of the ISDA, as amended.

Authority to submit reports to the Congress.

Establish advisory committees/national commissions, and appoint members to such committees/commissions.

- ***Supersedure***

Supersedes *November 23, 1988* delegation to the DHO and the Director, Alaska Area 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.

Previous redelegations of authority to officials within the IHS continue in effect to the extent they are consistent with this delegation and until they are superseded or cancelled by appropriate authority.

Does not supersede Indian Health Manual, Part 1, Chapter 5, Delegations of Authority, subject: Indian Self-Determination and Education Assistance Act, Title I, Exhibit 1-5.1J.

MARCH 14, 1996 (SIGNED BY DHO)

- **Delegation**

Delegates authority to the Director, Alaska Area IHS, for application within Alaska Area, all authorities of the ISDA, P.L. 93-638, as amended, including:

Authority to award contracts, and subsequent modifications to contracts, pursuant to Title I of P.L. 93-638, as amended.

DELEGATIONS OF AUTHORITY (continued)

Authority to issue AFAs for compacts awarded pursuant to Title III of P.L. 93-638, as amended.

Authority to sign amendments to compacts awarded pursuant to Title III of P.L. 93-638, as amended.

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.

Director, IHS, retains authority to sign all initial compact and initial AFA documents for awards made pursuant to Title III of P.L. 93-638, as amended.

AFAs for compacts awarded pursuant to Title III, §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.

- ***Exclusions***

Authority to promulgate regulations under §107 of Title I of the ISDA.

Authority to submit reports to the Congress.

Establish advisory committees/national commissions, and appoint members to such committees/commissions.

- ***Supersedure***

Supersedes *November 23, 1988* delegation of authority to 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.

DELEGATIONS OF AUTHORITY (continued)

Previous delegations of authority made to officials within the IHS may continue in effect to the extent that they are consistent with this delegation and until they are superseded or cancelled by appropriate authority.

JULY 17, 1996 (SIGNED BY THE ASH)

- **Delegation**

Delegates authority to the Director, IHS, with authority to redelegate, all authorities vested in the Secretary, HHS, by the ISDA (as delegated by the Secretary, HHS, June 30, 1993 to the ASH under the ISDA, P.L. 93-638, as amended), for the IHS.

- ***Exclusions***

Authority to promulgate regulations under §107 of Title I of the ISDA, as amended.

Authority to submit reports to the Congress.

Establish advisory committees/national commissions, and appoint members to such committees/commissions.

- ***Supersedure***

Supersedes *June 30, 1993* delegation to the Director, IHS, by the Acting ASH.

Previous redelegations of authority made to officials within the IHS continue in effect to the extent they are consistent with this delegation and until they are superseded or cancelled by appropriate authority.

DELEGATIONS OF AUTHORITY (continued)

BUREAU OF INDIAN AFFAIRS

The Bureau of Indian Affairs is in the process of creating an Indian Affairs Manual (IAM) showing its delegations of authority. When the delegations are shown in the newly created Manual, they can then be included in Appendix D of this Handbook.

TABLE OF CONTENTS (Continued)

APPENDICES (Continued)

E - STATUS OF IHS INDIAN SELF-DETERMINATION POLICIES

IHS Indian Self-Determination Memoranda (ISDMs)

IHS Indian Self-Determination Advisories (ISDAs)

IHS Indian Resource Liaison Advisories (IRLAs)

IHS Other Issuances

IHS Policy Letters (CPLs)

IHS Circulars

Special General Memoranda (SGMs)

**F - DESIGNATION OF DMO, DAE, CDFO, AND
AWARDING OFFICIALS - DOI**

Bureau of Indian Affairs

Bureau of Land Management

Minerals Management Service

Bureau of Reclamation

Fish and Wildlife Service

National Park Service

Indian Health Service

**G - ADDRESSES FOR SUBMITTING NOTICES OF INTENT AND
CONTRACT PROPOSALS**

Indian Health Service

Bureau of Land Management

Minerals Management Service

National Park Service

Bureau of Indian Affairs

Fish and Wildlife Service

Bureau of Reclamation

H - SUMMARY OF TIME FRAMES

TABLE OF CONTENTS (Continued)

APPENDICES

I - FEDERAL PAYMENT PROCEDURES

**Bureau of Indian Affairs
Bureau of Land Management
Minerals Management Service
Bureau of Reclamation
Fish and Wildlife Service
National Park Service
Indian Health Service**

J - PROTOTYPE LEASE AGREEMENT

**U.S. Government Lease Forms/Documents
for Real Property Lease Contracts
Standard Form 2**

K - PROPERTY DONATION FORMS

**GSA Form 1334
Form BIA-4335
DI-104
HHS-22
Standard Form 122
Standard Form 97**

L - HOW A CLAIM IS HANDLED UNDER THE FTCA

**Administrative and Judicial FTCA Claims Process
Flow Chart
Administrative and Judicial FTCA Claims Process**

M - TRAINING CORE CURRICULUM

**Training Objectives
Curriculum
Evaluation**

TABLE OF CONTENTS (Continued)

APPENDICES (Continued)

N - AUDIT GUIDANCE

OMB Circular No. A-128

OMB Circular No. A-133

OMB Circular No. A-133-Revised

Part 5, Indian Affairs Manual

HHS Chapter 1-105, Grants Administration Manual

O - [RESERVED]

P - RELEASE OF CLAIMS FORM

DI-137, Department of the Interior

PHS 3576, Department of Health and Human Services

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

APPENDIX E

STATUS OF IHS INDIAN SELF-DETERMINATION POLICIES
(Issued prior to 07/28/99)

PART A: IHS INDIAN SELF-DETERMINATION MEMORANDA (ISDMs)

Format	Policy	Date Issued	Title/Subject	Status as of 07/28/99
1. IHS ISDM	81-1	01/30/81	Simplifying Indian Self-Determination Contracting	Rescinded: Part 5, Chapter 5, Section 19, Indian Health Manual 09/30/94
2. IHS ISDM	81-2	01/30/81	Planning for Increased Indian Self-Determination Activities	Rescinded by IAP Handbook 07/28/99
3. IHS ISDM	81-3	04/17/81	Contracting Process Under the Indian Self-Determination Act	Rescinded by IAP Handbook 07/28/99
4. IHS ISDM	81-4	05/29/81	Minimum Health Program and Professional Standards	Rescinded by IAP Handbook 07/28/99
5. IHS ISDM	81-5	08/14/81	Funding Levels and Adjustments from P.L. 93-638 Contracts Negotiated on the Basis of Budget Proposals	Superseded 07/01/82 by ISDM 82-3
6. IHS ISDM	82-1 Amendment	01/27/82 09/19/85	Funding of Personnel to Operate Contracts Under the Indian Self-Determination Act	Rescinded by IAP Handbook 07/28/99
7. IHS ISDM	82-2	01/29/82	Implementation of Provision of Article VI of Sample 638 Cost Reimbursement Contract Relating to Program Income	Rescinded: Part 5, Chapter 5, Section 19, Indian Health Manual 09/30/94

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Format	Policy	Date Issued	Title/Subject	Status as of 07/28/99
8. IHS ISDM	82-3	07/01/82	Negotiation of P.L. 93-638 Contracts for FY 1983	Rescinded: Part 5, Chapter 5, Section 19, Indian Health Manual 09/30/94
9. IHS ISDM	82-4 Amendment	09/13/82 11/19/82	Funding of Fiscal Year 1983 P.L. 93-638 Contracts for FY 1984	Rescinded: Part 5, Chapter 5, Section 19, Indian Health Manual 09/30/94
10. IHS ISDM	83-1	07/29/83	Negotiation of P.L. 93-638 Contracts for FY 1984	Rescinded: Part 5, Chapter 5, Section 19, Indian Health Manual 09/30/94
11. IHS ISDM	83-1 Supplemental Instructions	08/22/83	Negotiation of P.L. 93-638 Contracts for FY 1984	Rescinded: Part 5, Chapter 5, Section 19, Indian Health Manual 09/30/94
12. IHS ISDM	83-2	07/28/83	Revision of Article XI - Administration of Government Property - in Sample 638 Cost Reimbursement Contract (ISDM 81-1)	Rescinded: Part 5, Chapter 5, Section 19, Indian Health Manual 09/30/94
13. IHS ISDM	83-3	09/21/83	Revision of Article VI - Savings/Unexpended Funds and Program Income under the Contract - in Sample P.L. 93-638 Cost Reimbursement Contract (ISDM 81-1)	Rescinded: Part 5, Chapter 5, Section 19, Indian Health Manual 09/30/94
14. IHS ISDM	84-1	08/21/84	Negotiation of P.L. 93-638 Contracts for FY 1985	Rescinded: Part 5, Chapter 5, Section 19, Indian Health Manual 09/30/94

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Format	Policy	Date Issued	Title/Subject	Status as of 07/28/99
15. IHS ISDM	85-1	01/04/85	Revision of Sample 638 Cost Reimbursement Contract Issued With ISDM 81-1	Rescinded: Part 5, Chapter 5, Section 19, Indian Health Manual 09/30/94
16. IHS ISDM	85-2	03/14/85	Method of Payment Clause - Amendment of Sample P.L. 93-638 Cost Reimbursement Contract Issued with ISDM 85-1	Rescinded: Part 5, Chapter 5, Section 19, Indian Health Manual 09/30/94
17. IHS ISDM	85-3	08/20/85	Negotiation of P.L. 93-638 contracts for Fiscal Year 1986	Rescinded: Part 5, Chapter 5, Section 19, Indian Health Manual 09/30/94
18. IHS ISDM	85-4	08/20/85	Funding of Non-Recurring Personnel Costs Under P.L. 93-638 Contracts	Superseded by IHS Circular 95-15, 9/29/95
19. IHS ISDM	86-1 Amendment	07/23/86 12/15/86	Negotiation of P.L. 93-638 Contracts for Fiscal Year 1987	Rescinded: Part 5, Chapter 5, Section 19, Indian Health Manual 09/30/94
20. IHS ISDM	87-1	03/06/87	Improvements in the P.L. 93-638 Contracting Process	Rescinded by IAP Handbook 07/28/99
21. IHS ISDM	87-2	06/23/87	Estimate Funding Level of P.L. 93-638 Contracts for Fiscal Year 1988	Rescinded: Part 5, Chapter 5, Section 19, Indian Health Manual 09/30/94
22. IHS ISDM	87-3	07/02/87	Contracting Under P.L. 93-638 for Architectural/Engineering Services and Construction for Indian Health Service Facilities	To be revised and reissued as a Circular

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Format	Policy	Date Issued	Title/Subject	Status as of 07/28/99
23. IHS ISDM	88-1	04/21/88	Implementation of Federal Tort Claims Act (FTCA) Coverage Extension - General Procedures	Superseded 11/21/88 by ISDM 89-1
24. IHS ISDM	88-2	08/11/88	Estimated Funding Level of P.L. 93-638 Contracts for Fiscal Years Beginning with FY 1989	Rescinded by IAP Handbook 07/28/99
25. IHS ISDM	89-1	11/21/89	FY 1989 Appropriations Act Amendments to Federal Tort Claims Act coverage Extension	Superseded 02/07/92 by ISDM 92-1
26. IHS ISDM	92-1	02/24/92	Coverage for Medical and Nonmedical Related Claims under the Federal Tort Claims Act for P.L. 93-638 Contractors and Grantees	Superseded by IAP Handbook 07/28/99
27. IHS ISDM	92-2	02/27/92	Contract Support Cost Policy	Superseded 04/12/96 by IHS Circular 96-04
28. IHS ISDM	92-3	06/04/92	Indian Health Service Headquarters P.L. 93-638 Leadership Team	Rescinded by IAP Handbook 07/28/99

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

APPENDIX E

STATUS OF IHS INDIAN SELF-DETERMINATION POLICIES

(Issued prior to 07/28/99)

PART B: IHS INDIAN SELF-DETERMINATION ADVISORIES (ISDAs)

Format	Policy	Date Issued	Title/Subject	Status as of 07/28/99
1. IHS ISDA	1.	04/02/82	Indian Self-Determination Memoranda (ISDM)	Rescinded: Part 5, Chapter 5, Section 19, Indian Health Manual 09/30/94
2. IHS ISDA	2.	04/02/82	Contractibility of IHS Headquarters and Area/Program Functions	Rescinded by IAP Handbook 07/28/99
3. IHS ISDA	3.	04/02/82	Title to Property Purchased with Program Income	Rescinded by IAP Handbook 07/28/99
4. IHS ISDA	4.	04/02/82	IHS and BIA P.L. 93-638 Regulations	Rescinded: Part 5, Chapter 5, Section 19, Indian Health Manual 09/30/94
5. IHS ISDA	5.	04/02/82	Intergovernmental Personnel Act (IPA) Leave-Without-Pay (LWOP) Assignments	Superseded. Included in Personnel Aspects of P.L. 93-638 Handbook; Handbook under revision
6. IHS ISDA	6.	06/25/82	Privacy Act-Disclosure to Tribal Officials	Rescinded by IAP Handbook 07/28/99

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Format	Policy	Date Issued	Title/Subject	Status as of 07/28/99
7. IHS ISDA	7.	06/25/82	Intergovernmental Personnel Act (IPA) Details and Indirect Costs	Superseded. Included in Personnel Aspects of P.L. 93-638 Handbook; Handbook under revision
8. IHS ISDA	8.	07/01/82	P.L. 93-638 - IPA/Detail Positions - Disposition of Personnel Funds When a Position is Temporarily Vacant	Superseded. Included in Personnel Aspects of P.L. 93-638 Handbook; Handbook under revision
9. IHS ISDA	9.	07/29/83	Tribal Resolutions Under Section 103(a) of the Indian Self-Determination Act (P.L. 93-638)	Rescinded: Part 5, Chapter 5, Section 19, Indian Health Manual 09/30/94
10. IHS ISDA	10.	07/29/83	Indian Self-Determination Act - Contracting for Tribal Health Board and Tribal Communication Network	Rescinded by IAP Handbook 07/28/99
11. IHS ISDA	11.	08/30/83	Fiscal Year 1983 Pay Act Distribution	Rescinded: Part 5, Chapter 5, Section 19, Indian Health Manual 09/30/94
12. IHS ISDA	12.	11/10/83	Retirement Contributions for Former Indian Health Service (IHS) Employees Working for Tribal Organizations	Superseded. Included in Personnel Aspects of P.L. 93-638 Handbook; Handbook under revision
13. IHS ISDA	13.	12/23/83	Malpractice Coverage of PHS/IHS Commissioned Officers Assigned to Indian Tribes Under the Indian Self-Determination Act	Superseded. Included in Personnel Aspects of P.L. 93-638 Handbook; Handbook under revision

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Format	Policy	Date Issued	Title/Subject	Status as of 07/28/99
14. IHS ISDA	14.	12/23/83	Physician Comparability Allowance for Physicians Assigned to Indian Organizations Under the Indian Self-Determination Act	Superseded. Included in Personnel Aspects of P.L. 93-638 Handbook; Handbook under revision
15. IHS ISDA	15.	04/16/84	Extension of Intergovernmental Personnel Act (IPA) Assignments Beyond Four Years Under Public Law 93-638 Contracts	Superseded. Included in Personnel Aspects of P.L. 93-638 Handbook; Handbook under revision
16. IHS ISDA	16.	04/16/84	Proposed Intergovernmental Personnel Act (IPA) Assignments Without Public Law 93-638 Contracts	Superseded. Included in Personnel Aspects of P.L. 93-638 Handbook; Handbook under revision
17. IHS ISDA	17.	06/05/84	Waiver of Requirements Concerning IPA Assignments Under P.L. 93-638 Contracts	Superseded. Included in Personnel Aspects of P.L. 93-638 Handbook; Handbook under revision
18. IHS ISDA	18.	06/05/84	IPA Assignments from the Indian Health Service (IHS) to Indian Tribes and Tribal Organizations Under P.L. 93-638 Contracts	Superseded. Included in Personnel Aspects of P.L. 93-638 Handbook; Handbook under revision
19. IHS ISDA	19. Revised	11/21/84 12/04/84	Adequacy of Trained Personnel Available to a Tribal Organization to Carry Out a Contract Under Public Law 93-638	Superseded. Included in Personnel Aspects of P.L. 93-638 Handbook; Handbook under revision
20. IHS ISDA	20.	11/21/84	Comparable Employment for Severance Pay Purposes When Tribal Employment is Declined	Superseded. Included in Personnel Aspects of P.L. 93-638 Handbook; Handbook under revision

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Format	Policy	Date Issued	Title/Subject	Status as of 07/28/99
21. IHS ISDA	21.	11/21/84	Retrocession - Personnel Policy Issues Under Public Law 93-638	Superseded. Included in Personnel Aspects of P.L. 93-638 Handbook; Handbook under revision
22. IHS ISDA	22.	04/15/85	Charging Indian Patients for Health Services	Rescinded by IAP Handbook 07/28/99
23. IHS ISDA	23.	04/15/85	Tribal Resolutions for Renewal P.L. 93-638 Contracts	Rescinded by IAP Handbook 07/28/99
24. IHS ISDA	24.	04/15/85	Indian Preference in Employment, Training, and Subcontracting Opportunities Under P.L. 93-638	Rescinded by IAP Handbook 07/28/99; covered in statute
25. IHS ISDA	25.	06/05/85	Licensing of Indian Health Service Health Professionals	Superseded. Included in Personnel Aspects of P.L. 93-638 Handbook; Handbook under revision
26. IHS ISDA	26.	01/06/86	Certain Civil Service Benefits for Former Federal Employees Working for Indian Tribes	Superseded. Included in Personnel Aspects of P.L. 93-638 Handbook; Handbook under revision
27. IHS ISDA	27.	04/10/87	Resource Allocation Methodology (RAM)	Rescinded: Part 5, Chapter 5, Section 19, Indian Health Manual 09/30/94
28. IHS ISDA	28.	07/28/88	Federal Tort Claims Act Coverage Extension (ISDM 81-1) - Coverage Extension Prospective Only	Superseded 11/21/88 by ISDM 89-1

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Format	Policy	Date Issued	Title/Subject	Status as of 07/28/99
29. IHS ISDA	29.	04/13/90	FY 1990 Appropriations Act Provision Expanding Temporary coverage to General Liability Claims Under the Federal Tort Claims Act	Rescinded: Part 5, Chapter 5, Section 19, Indian Health Manual 09/30/94
30. IHS ISDA	30.	05/17/91	Conversion of Indian Self- Determination Contracts or Agreement to a Calendar Year Basis	Rescinded by IAP Handbook 07/28/99
31. IHS ISDA	31.	08/13/93	Interim Clause for "Method of Payment" to be Incorporated in Section G.2., "Sample 638 Cost Reimbursement Contract," ISDM 87-1	Superseded 05/31/94 by ISDA 32
32. IHS ISDA	32.	05/31/94	Interim Clause for "Method of Payment" to be Incorporated in Section G.2., "Sample 638 Cost Reimbursement Contract," ISDM 87-1	Rescinded by IAP Handbook 07/28/99; covered in statute under Model Contract
33. IHS ISDA	33.	08/16/94	Public Law 101-630, Title IV, Indian Child Protection and Family Violence Prevention Act of 1990	Current. To be reissued as a Circular

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

APPENDIX E

STATUS OF IHS INDIAN SELF-DETERMINATION POLICIES
(Issued prior to 07/28/99)

PART C: IHS INDIAN RESOURCE LIAISON ADVISORIES (IRLAs)

Format	Policy	Date Issued	Title/Subject	Status as of 07/28/99
1. IHS IRLA	1.	07/22/83	Loss of Eligibility for Early Retirement Under the Provisions of P.L. 96-135	Current
2. IHS IRLA	2.	04/16/84	Clarification on Implementation of Public Law 96-135	Current
3. IHS IRLA	3.	01/10/86	Change in eligibility for Early Retirement Under the Provisions of Public Law 96-135	Current
4. IHS IRLA	4.	04/15/87	Effect of Transferring to Federal Employees Retirement System (FERS) on Eligibility for Early Retirement Under P.L. 93-638	Current

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

APPENDIX E

STATUS OF IHS INDIAN SELF-DETERMINATION POLICIES

(Issued prior to 07/28/99)

PART D: IHS OTHER ISSUANCES

Format	Policy	Date Issued	Title/Subject	Status as of 07/28/99
1. IHS	Handbook	06/06/86	Personnel Aspects of the Indian Self-Determination and Education Assistance Act Public Law 93-638 Handbook	Current. Handbook under revision; draft issued 4/15/94; revised draft issued 7/24/98
2. IHS	Guidebook	03/02/87	Indian Health Service Statement of Policy Resource Allocation Methodology	Current
3. IHS	Guidebook	11/06/91	Interim Guidebook on the Public Law 93-638 Contracting Process	Rescinded by IAP Handbook 07/28/99
4. IHS	Dear Tribal Leader Letter	06/16/97	Tribal Shares Transfer Policy	Current
5. IHS	Dear Tribal Leader Letter	07/27/97	CSC Policy - Base Budgets	Current

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

APPENDIX E

STATUS OF IHS INDIAN SELF-DETERMINATION POLICIES
(Issued prior to 07/28/99)

PART E: IHS POLICY LETTERS (CPLs)

Format	Policy	Date Issued	Title/Subject	Status as of 07/28/99
1. IHS CPL	89-1	03/09/89	Time Extension, New Contract Awards, Period of Performance	Rescinded: Prior to 1994
2. IHS CPL	89-2	03/00/89	Implementation of Interim Rule for Solicitation Provisions--Drug Free Workplace Act of 1988	Superseded 11/06/91 by the Interim Guidebook on the Public Law 93-638 Contracting Process Rescinded by IAP Handbook 07/28/99
3. IHS CPL	89-3	06/26/89	Guidance on Contracts Awarded Pursuant to Public Law 93-638 Pending Issuance of Amended Regulations (Excluding Construction, A&E and Small Purchases)	Rescinded by IAP Handbook 07/28/99
4. IHS CPL	89-4	08/14/89	Guidance on Implementation Aspects of the Amendments to P.L. 93-638 Related to Non-Construction Contracting	Rescinded by IAP Handbook 07/28/99
5. IHS CPL	89-5	09/01/89	Quarterly Reconciliation of Advances	Rescinded by IAP Handbook 07/28/99

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Format	Policy	Date Issued	Title/Subject	Status as of 07/28/99
6. IHS CPL ¹	89-6	10/03/89	Preparation of Approval for JOFOC for Acquisition Made Under Authority of the Buy Indian Act	Superseded 11/06/91 by the Interim Guidebook on the Public Law 93-638 Contracting Process Rescinded by IAP Handbook 07/28/99
7. IHS CPL	90-1	10/05/89	Approval of JOFOC Under Authority of the Buy Indian Act	Superseded 11/06/91 by the Interim Guidebook on the Public Law 93-638 Contracting Process
8. IHS CPL	90-2	10/19/89	Procurement Integrity--Public Law 93-638	Rescinded by IAP Handbook 07/28/99
9. IHS CPL	90-3	02/07/90	Appropriate Use of Indian Self-Determination Contracts	Rescinded by IAP Handbook 07/28/99
10. IHS CPL	90-4	01/18/90	Suspension of Procurement Integrity Provisions	Superseded 11/06/91 by the Interim Guidebook on the Public Law 93-638 Contracting Process
11. IHS CPL	90-5	02/08/90	Renewal Contracts with Urban Indian Organizations	Superseded 11/06/91 by the Interim Guidebook on the Public Law 93-638 Contracting Process
12. IHS CPL	90-6	03/13/90	Conversion of Indian Self-Determination contracts to Calendar Year Basis and Duration of Contract Extensions	Rescinded by IAP Handbook 07/28/99

¹Not applicable to ISDA contracts.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Format	Policy	Date Issued	Title/Subject	Status as of 07/28/99
13. IHS CPL	90-7	04/16/90	Increases in Preaward Review Thresholds for A&E and Construction Awards	To be reissued as a Circular
14. IHS CPL	90-8	04/19/90	Headquarters Review of Proposed Final Decisions	Rescinded by IAP Handbook 07/28/99
15. IHS CPL	90-9	06/11/90	Additional Streamlining and Simplification of Indian Self- Determination Non-Construction Contracts	Rescinded by IAP Handbook 07/28/99
16. IHS CPL ²	90-10	07/11/90	Buy Indian Policy	
17. IHS CPL	90-11	08/27/90	Area Office Contract Management	Rescinded by IAP Handbook 07/28/99
18. IHS CPL	90-12	09/06/90	Clarification and correction of Memorandum--Additional Streamlining and Simplification of Indian Self-Determination Non- Construction Contracts	Rescinded by IAP Handbook 07/28/99
19. IHS CPL ³	91-1	11/08/90	Policy for the Delegation of Authorities to Contracting Officers and Non-Acquisition Personnel	Rescinded: Part 5, Chapter 5, Section 19, Indian Health Manual 09/30/94

²Not applicable to ISDA contracts.

³Not applicable to ISDA contracts.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

APPENDIX E

STATUS OF IHS INDIAN SELF-DETERMINATION POLICIES
(Issued prior to 07/28/99)

PART F: IHS CIRCULARS

Format	Policy	Date Issued	Title/Subject	Status as of 07/28/99
1. IHS Circular	95-15	09/29/95	Funding of Personnel Costs Under P.L. 93-638 Contracts/Compacts	Current
2. IHS Circular	96-04	04/12/96	Contract Support Costs	Current
3. IHS Circular	97-07	07/25/97	Tribal Consultation and Participation Policy	Current

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

APPENDIX E

STATUS OF IHS INDIAN SELF-DETERMINATION POLICIES
(Issued prior to 07/28/99)

PART G: SPECIAL GENERAL MEMORANDA (SGMs)

Format	Policy	Date Issued	Title/Subject	Status as of 07/28/99
1. IHS SGM	97-1	12/4/97	New Federally Recognized/Restored Tribes Policy	Current.

DESIGNATION OF DMO, DAE, CDFO, AND AWARDING OFFICIALS - DOI		
Description	Organization	
	Bureau of Indian Affairs	Bureau of Land Management
Designated Management Official (DMO)	The Area Director or Superintendent with the authority to approve or decline a contract proposal within their respective jurisdiction.	The State Director (or designee) is authorized to approve, negotiate, and administer Title I, Indian Self-Determination Act contracts.
Designated Agency Employee (DAE)	Program official, management official, or contracting officer (will probably be different for each contract).	
Contract Designated Federal Official (CDFO)		Program official, management official, or contracting officer will probably be different for each contract.
Awarding Official (AO)	The obligation (award) of funds for 638 contracts is in accordance with existing State director procurement delegations. In most cases, the Awarding Official will be a Contracting Officer (CO). BLM State Office COs can award contracts up to \$100,000. Contracts above this amount must be awarded by the CO at BLM's National Business Center in Denver.	

**DESIGNATION OF DMO, DAE, CDFO, AND AWARDING OFFICIALS - DOI
(continued)**

Description	Organization	
	Minerals Management Service	Bureau of Reclamation
Designated Management Official (DMO)	The Associate Director for Royalty Management or his/her designee.	Regional Director or his designee, which could be the Deputy Regional Director, the American Affairs Program Manager, or other individual, as appropriate.
Designated Agency Employee (DAE)	Will be designated on a case-by-case basis, but typically will be the program's Self-Governance Coordinator.	Area Office Manager or his/her designee, which could be the Area Office Native American Affairs Coordinator, the Area Office Contracting Officer, or other individual, as appropriate.
Contract Designated Federal Official (CDFO)	Will be designated on a case-by-case basis, appropriate to the program being contracted.	
Awarding Official (AO)	The Associate Director for Royalty Management or his/her designee. The function may be further delegated.	Regional Director or his/her designee, which could be an Area Office Manager, an Area Contracting Officer, or other individual, as appropriate.

DESIGNATION OF DMO, DAE, CDFO, AND AWARDING OFFICIALS - DOI (continued)		
Description	Organization	
	Fish and Wildlife Service	National Park Service
Designated Management Official (DMO)	The Regional Director (or designee) is authorized to approve, negotiate and administer Title I, Indian Self-determination Act contracts.	The Regional director (or designee) is authorized to approve, negotiate, and administer Title I, Indian Self-Determination Act contracts.
Designated Agency Employee (DAE)	Program official, management official, or contracting officer (will probably be different for each contract).	Program official, management official, or contracting officer (will probably be different for each contract).
Contract Designated Federal Official (CDFO)		
Awarding Official (AO)	The obligation (award) of funds for 638 contracts is in accordance with existing Regional director procurement delegations. In most cases, the Awarding Official will be a Contracting Officer (CO).	The obligation (award) of funds for Indian Self-Determination contracts is in accordance with existing Regional Director procurement delegations. In most cases, the Awarding Official will be a Contracting Officer (CO).

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

APPENDIX F

DESIGNATION OF DMO, DAE, CDFO, AND AWARDING OFFICIALS - IHS	
Description	Organization
	Indian Health Service
Designated Management Official (DMO)	The IHS Area Directors.
Designated Agency Employee (DAE)	The Area CPLO, Executive Officer, Administrative Officer, Contracting Officer, or other person as designated by the appropriate IHS Area Director.
Contract Designated Federal Official (CDFO)	The Area CPLO, Executive Officer, Administrative Officer, Contracting Officer, or other person as designated by the appropriate IHS Area Director. This could also be a Senior Program Official, if so designated by the Area Director.
Awarding Official (AO)	The Contracting Officer who is authorized to award and sign ISDA contracts.

ADDRESSES FOR SUBMITTING NOTICES OF INTENT AND CONTRACT PROPOSALS

Notices of Intent (NOI) and contract proposals under Title I of the Indian Self-Determination and Education Assistance Act (ISDA) should be submitted to the appropriate Department of the appropriate office as follows:

DEPARTMENT OF HEALTH AND HUMAN SERVICES

INDIAN HEALTH SERVICE

ABERDEEN

Director (605) 226-7581
Aberdeen Area IHS FAX (602) 226-7541
Federal Building
115 Fourth Avenue, SE
Aberdeen, SD 57401

ALASKA

Director (907) 729-3686
Alaska Area IHS FAX (907) 729-3689
4141 Ambassador Drive
Anchorage, AK 99508-5928

ALBUQUERQUE

Director (505) 248-4500
Albuquerque Area IHS FAX (505) 248-4624
5300 Homestead Road, NE
Albuquerque, NM 87110

BEMIDJI

Director (218) 759-3412
Bemidji Area IHS FAX (218) 759-3510
522 Minnesota Avenue, N.W.
Bemidji, MN 56601

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

**ADDRESSES FOR SUBMITTING NOTICES OF INTENT
AND CONTRACT PROPOSALS (continued)**

BILLINGS

Director (406) 247-7107
Billings Area IHS FAX (406) 247-7230
P.O. Box 2143
2900 4th Avenue North
Billings, MT 59101

CALIFORNIA

Director (916) 566-7001 x 101
California Area IHS FAX (916) 566-7053
1825 Bell Street, Suite 200
Sacramento, CA 95825-1097

NASHVILLE

Director (615) 736-2400
Nashville Area IHS FAX (615) 736-2406
711 Stewarts Ferry Pike
Nashville, TN 37214-2634

NAVAJO

Director (520) 871-5811
Navajo Area IHS FAX (520) 871-5872
P.O. Box 9020
Window Rock, AZ 86515-9020

OKLAHOMA

Director (405) 951-3768
Oklahoma City IHS FAX (405) 951-3780
Five Corporate Plaza
3625 NW 56th Street
Oklahoma City, OK 73112

**ADDRESSES FOR SUBMITTING NOTICES OF INTENT
AND CONTRACT PROPOSALS (continued)**

PHOENIX

Director (602) 364-5039
Phoenix Area IHS FAX (602) 364-5042
Two Renaissance Square
40 N. Central Avenue, Suite 600
Phoenix, AZ 85004-4424

PORTLAND

Director (503) 326-2020
Portland Area IHS FAX (503) 326-7280
1220 S.W. Third Avenue, Room 476
Portland, OR 97204-2892

TUCSON

Director (520) 295-2406
Tucson Area IHS FAX (520) 295-2602
7900 South "J" Stock Road
Tucson, AZ 85746-9352

**ADDRESSES FOR SUBMITTING NOTICES OF INTENT
AND CONTRACT PROPOSALS (continued)**

DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT

ALASKA

**State Director
Bureau of Land Management
Alaska State Office
222 West 7th Avenue #13
Anchorage, AK 99513-7599**

ARIZONA

**State Director
Bureau of Land Management
Arizona State Office
222 N. Central Avenue
P.O. Box 555
Phoenix, AZ 85001-0555**

CALIFORNIA

**State Director
Bureau of Land Management
California State Office
2135 Butano Drive
Sacramento, CA 95825-0451**

COLORADO

**State Director
Bureau of Land Management
Colorado State Office
2850 Youngfield Street
Lakewood, CO 80215-7076**

***ADDRESSES FOR SUBMITTING NOTICES OF INTENT
AND CONTRACT PROPOSALS (continued)***

***STATES EAST OF THE MISSISSIPPI RIVER, PLUS ARKANSAS, IOWA, LOUISIANA,
MINNESOTA, MISSOURI AND WISCONSIN***

**State Director
Bureau of Land Management
Eastern States Office
7450 Boston Boulevard
Springfield, VA 22153**

IDAHO

**State Director
Bureau of Land Management
Idaho State Office
1387 S. Vinnell Way
Boise, ID 83709-1657**

MONTANA, NORTH DAKOTA, AND SOUTH DAKOTA

**State Director
Bureau of Land Management
Montana State Office
Granite Tower
222 N. 32nd Street
Billings, MT 59101**

NEVADA

**State Director
Bureau of Land Management
Nevada State Office
850 Harvard Way
Reno, NV 89520-0006**

***ADDRESSES FOR SUBMITTING NOTICES OF INTENT
AND CONTRACT PROPOSALS (continued)***

NEW MEXICO, KANSAS, OKLAHOMA, AND TEXAS

**State Director
Bureau of Land Management
New Mexico State Office
1474 Rodeo Road
P.O. Box 27115
Santa Fe, NM 87502-0115**

OREGON AND WASHINGTON

**State Director
Bureau of Land Management
Oregon State Office
1515 S.W. 5th Avenue
Portland, OR 97208**

UTAH

**State Director
Bureau of Land Management
Utah State Office
324 South State Street, Suite 301
P.O. Box 45155
Salt Lake City, UT 84145-0155**

WYOMING AND NEBRASKA

**State Director
Bureau of Land Management
Wyoming State Office
5353 Yellowstone Road
P.O. Box 1828
Cheyenne, WY 82003**

***ADDRESSES FOR SUBMITTING NOTICES OF INTENT
AND CONTRACT PROPOSALS (continued)***

MINERALS MANAGEMENT SERVICE

**Minerals Management Service (800) 982-3226
Office of Indian Royalty Assistance, MS 3010 FAX (303) 231-3028
Attn: Self-Governance Coordinator
P.O. Box 25165
Denver, CO 80225**

NATIONAL PARK SERVICE

**Regional Director
Alaska Region
2525 Gambell Street, Room 107
Anchorage, AK 99503-2892
Phone: (907) 257-2690
FAX: (907) 257-2533**

*Alaska Region serves park sites in:
Alaska*

**Regional Director
Intermountain Region
P.O. Box 25287
Denver, CO 80225
Phone: (303) 969-2500
FAX: (303) 969-2785**

*Intermountain Region serves park sites
in:
Arizona, Colorado, Montana, New
Mexico, Oklahoma, Texas, Utah,
Wyoming*

**Regional Director
Midwest Region
1709 Jackson Street
Omaha, NE 68102
Phone: (401) 221-3431
FAX: (401) 341-2039**

*Midwest Region serves park sites in:
Arkansas, Illinois, Indiana, Iowa,
Kansas, Michigan, Minnesota,
Missouri, Nebraska, North Dakota,
Ohio, South Dakota, Wisconsin*

***ADDRESSES FOR SUBMITTING NOTICES OF INTENT
AND CONTRACT PROPOSALS (continued)***

**Regional Director
National Capital Region
1100 Ohio Drive, S.W.
Washington, D.C. 20242
Phone: (202) 619-7005
FAX: (202) 619-7302**

*National Capital Region serves park sites in:
District of Columbia, (and selected park sites in Maryland, Virginia, and West Virginia)*

**Regional Director
Northeast Region
U.S. Custom House
200 Chestnut Street
Philadelphia, PA 19106
Phone: (215) 597-7013
FAX: (215) 597-0815**

**Regional Director
Pacific West Region
600 Harrison Street, Suite 600
San Francisco, CA 94107-1372
Phone: (415) 427-1304
FAX: (415) 427-1485**

*Northeast Region serves park sites in:
Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia*

**Regional Director
Southeast Region
100 Alabama Street, S.W.
1924 Building
Atlanta, GA 30303
Phone: (404) 562-3100
FAX: (404) 562-3263**

*Pacific West Region serves park sites in:
American Samoa, California, Guam, Hawaii, Idaho, Nevada, Oregon, Washington*

*Southeast Region serves park sites in:
Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee*

***ADDRESSES FOR SUBMITTING NOTICES OF INTENT
AND CONTRACT PROPOSALS (continued)***

BUREAU OF INDIAN AFFAIRS

ABERDEEN

Director (605) 226-7343
Aberdeen Area Office FAX (602) 226-7446
Bureau of Indian Affairs
Federal Building
115 4th Avenue, S.E.
Aberdeen, SD 57401

ALBUQUERQUE

Director (505) 766-3171
Albuquerque Area Office FAX (505) 766-1964
Bureau of Indian Affairs
P.O. Box 26567
Albuquerque, NM 87125

ANADARKO

Director (405) 247-6673
Anadarko Area Office FAX (405) 247-5611
Bureau of Indian Affairs
WCD Office Complex
P.O. Box 368
Anadarko, OK 73005

BILLINGS

Director (406) 247-7943
Billings Area Office FAX (406) 247-7976
Bureau of Indian Affairs
316 N. 26th Street
Billings, MT 59101

ADDRESSES FOR SUBMITTING NOTICES OF INTENT AND CONTRACT PROPOSALS (continued)

EASTERN AREA

Director

(703) 235-2571

Eastern Area Office
Bureau of Indian Affairs
3701 North Fairfax Drive, Suite 260
Arlington, VA 22203

FAX (703) 235-8610

JUNEAU

Director

(907) 586-7177

Juneau Area Office
Bureau of Indian Affairs
P.O. Box 25520
Juneau, AK 99802

FAX (907) 586-7169

MINNEAPOLIS

Director

(612) 373-1000

Minneapolis Area Office
Bureau of Indian Affairs
331 South 2nd Avenue
Minneapolis, MN 55401

FAX (612) 373-1186

MUSKOGEE

Director

(918) 687-2296

Muskogee Area Office
Bureau of Indian Affairs
101 North 5th Street
Muskogee, OK 74401

FAX (918) 687-2571

NAVAJO

Director

(505) 863-8221

Navajo Area Office
Bureau of Indian Affairs
P.O. Box 1060
Gallup, NM 87305

FAX (520) 863-8324

**ADDRESSES FOR SUBMITTING NOTICES OF INTENT
AND CONTRACT PROPOSALS (continued)**

PHOENIX

Director (602) 379-6600
Phoenix Area Office FAX (602) 379-4413
Bureau of Indian Affairs
P.O. Box 10
Phoenix, AZ 85001

PORTLAND

Director (503) 231-6702
Portland Area Office FAX (503) 231-2201
Bureau of Indian Affairs
911 N.E. 11th Avenue
Portland, OR 97232

SACRAMENTO

Director (916) 979-2600
California Area Office FAX (916) 979-2569
Bureau of Indian Affairs
2800 Cottage Way
Sacramento, CA 95825

NOTE: Agency Information (including addresses and telephone numbers) within BIA Areas are available on the internet on the DOI website:

<http://www.doi.gov/bia/areas/agency.html>.

**ADDRESSES FOR SUBMITTING NOTICES OF INTENT
AND CONTRACT PROPOSALS (continued)**

FISH AND WILDLIFE SERVICE

**Native American Liaison
U.S. Fish and Wildlife Service
1849 C Street, N.W., MS-3012
Washington, D.C. 20240**

These NOAs and contract proposals will be sent to respective Regions and handled as noted in designation of P.L. 93-638 officials within Appendix F.

***ADDRESSES FOR SUBMITTING NOTICES OF INTENT
AND CONTRACT PROPOSALS (continued)***

BUREAU OF RECLAMATION

PACIFIC-NORTHWEST REGION

**Area Office Manager
Snake River Area Office
214 Broadway Avenue
Boise, ID 83702-7298
Phone: (208) 334-1460**

Pacific-Northwest Region serves:

**Burns Paiute Tribes, Nez Perce,
Northwestern Shoshoni Indian
Reservation, Shoshone-Bannock (Fort
Hall), Shoshone-Paiute (Duck Valley)**

**Power Office Manager
Grand Coulee Power Office
Grand Coulee Dam
P.O. Box 620
Grand Coulee, WA 99133-0620
Phone: (509) 633-9501**

**Confederated Colville Tribes,
Spokane Tribe**

**Area Office Manager
Lower Columbia Area Office
825 N.E. Multnomah Street
Suite 1110
Portland, OR 97232-2135
Phone: (503) 872-2795**

**Chehalis Tribe, Confederated Tribes of
Coos, Confederated Tribes of Grand
Ronde, Confederated Tribes of Lower
Umpqua, Confederated Tribes of Warm
Umpqua, Confederated Tribes of
Coquille Tribe, Cow Creek Band of
Umpqua Tribe, Hoh Tribes, Jamestown
S'Klallam, Lower Elwha s'Klallam
Tribe, Lummi Tribe, Makah Tribe,
Muckleshoot, Nisqually Indian**

Tribe, Port

**Community, Nooksack
Gamble, Puyallup, Quileute Tribe,
Quinault Tribe, Samish, Sauk-Suiattle,
Shoalwater Bay Tribe, Siletz Tribe,
Skokomish, Snoqualmie, Squaxin Island,
Stillaquamish, Suquamish Tribe of Port
Madison, Swinomish, Tulalip, Upper
Skagit**

***ADDRESSES FOR SUBMITTING NOTICES OF INTENT
AND CONTRACT PROPOSALS (continued)***

Area Office Manager
Upper Columbia Area Office
P.O. Box 1749
Yakima, WA 98907-1749
Phone: (509) 575-5848 Ext. 202

Confederated Colville Tribes,
Confederated Salish & Kootenai Tribes
(Flathead), Confederated Tribes and
Bands of the Yakama Indian Nation,
Coeur d'Alene, Kootenai Tribe of Idaho,
Kootenai Tribe of Idaho, Kalispel Tribe,
Spokane Tribe

LOWER COLORADO REGION
Area Office Manager
Southern California Area Office

Lower Colorado Region serves:
Barona Rancheria, Benton Paiute I.R.,
Big Pine Rancheria, Bishop Rancheria,

P.O. Box 849
Temecula, CA 92593-0849
Phone: (909) 695-5310

Cahuilla I.R., Campo I.R., Capitain
Grande I.R., Cuyapaipe I.R., Fort
Independence I.R., Inaja-Cosmit I.R.,
Jamul Indian Village, La Jolla

I.R.,

La Posta I.R., Lone Pine Rancheria,
Los Coyotes I.R., Manzanita I.R., Mesa
Grande I.R., Pala I.R., Pauma and
Yulma, I.R., Pechange I.R., Ramona
I.R., Rincon I.R., San Manual I.R.,
San Pascual I.R., Santa Yaabel I.R.,
Soboba I.R., Sycuan I.R., Timbisha W.
Shoshone, Twenty-nine Palms I.R.,
Viejas I.R.

Regional Director
Regional Office
P.O. Box 61470
Boulder City, NV 89006-1470
Phone: (702) 293-8411

Havasupai I.R., Aualapai I.R., Kaibab
Paiute I.R., Las Vegas Paiute I.R.,
Moapa River Paiute I.R., Shivwits
Paiute I.R., Southern Paiute I.R.,
Zuni Indian Reservation

APPENDIX G

***ADDRESSES FOR SUBMITTING NOTICES OF INTENT
AND CONTRACT PROPOSALS (continued)***

Area Office Manager
Yuma Area Office
P.O. Box D
Yuma, AZ 85366-7504
Phone: (520) 343-8155

Agua Caliente I.R., Augustina I.R.,
Cabazon I.R., Chemehuevi I.R.,
Colorado River I.C., East Cocopah I.R.,
Fort Mojave I.R., Fort Yuma I.R.,
Morongo I.R., Santa Rosa I.R., Torres
Martinez I.R., West Cocopah I.R.

Area Office Manager
Phoenix Area Office
P.O. Box 9980
Phoenix, AZ 85068-0980
Phone: (602) 395-5604

Ak Chin I.C., Camp Verde I.R., Fort
McDowell I.R., Gila River I.C., Hopi
Tribe, Navajo Nation, Pascua Yaqui
Tribe, Salt River Pima-Maricopa I.C.,
San Carlos I.R., Tohono O'odham
Nation, Tonto Apache I.R., White
Mountain Apache I.R., Yavapai-Prescott
I.R., Zuni Pueblo

GREAT PLAINS REGION

Area Office Manager
Montana Area Office
P.O. Box 30137
Billings, MT 59107-0137

Great Plains Region serves:
Blackfeet, Crow, Fort Belknap (Gros
Ventre & Assiniboine), Fort Peck
(Assiniboine & Sioux), Northern
Cheyenne, Rocky Boys

Area Office Manager
Wyoming Area Office
P.O. Box 1630
Mills, WY 82644-1630
Phone: (307) 261-5671
Phone: (406) 247-7298

Wind River

***ADDRESSES FOR SUBMITTING NOTICES OF INTENT
AND CONTRACT PROPOSALS (continued)***

**Area Office Manager
Dakotas Area Office
Federal Building (Old Post Office)
P.O. Box 1017
Bismarck, ND 58502-1017
Phone: (701) 250-4242**

**Cheyenne River, Crow Creek, Devils
Lake, Flandreau, Fort Berthold,
Lower Brule, Pine Ridge, Rosebud,
Sisseton, Standing Rock, Turtle
Mountain, Yankton**

**Area Office Manager
Oklahoma-texas Area Office
300 East 8th Street, Room 801
Austin, TX 78701-3225
Phone: (512) 916-5641**

**Absentee Shawnee, Alabama-Coushatta,
Alabama-Quassarte of Creeks, Apache,
Caddo, Cherokee, Cheyenne-Arapaho,
Chickasaw, Choctaw, Citizen Band of
Potawatomi, Comanche, Creek,
Delaware, Eastern Shawnee, Ft. Sill
Apache, Iowa, Kaw, Kialegee Creek,
Kickapoo, Kiowa, Miami, Modoc,
Osage, Otoe-Missouri, Ottawa, Pawnee,
Peoria, Ponca, Ponca Tribe of Nebraska,
Quapaw, Sac & Fox, Seminole, Seneca-
Cayuga, Texas Kickapoo, Tholpthlocco
Creek, Tonkawa, United Keetoowah
Band of Cherokee, Wichita, Wyandotte**

**Area Office Manager
Nebraska-Kansas Area Office
P.O. Box 1607
Grand Island, NE 68802-1607
Phone: (308) 389-4622 Ext. 202**

**Iowa, Kickapoo, Omaha, Ponca Tribe of
Nebraska, Potawatomi, Sac & Fox,
Santee, Winnebago**

***ADDRESSES FOR SUBMITTING NOTICES OF INTENT
AND CONTRACT PROPOSALS (continued)***

UPPER COLORADO REGION
Area Office Manager
Albuquerque Area Office
505 Marquette N.W., Suite 1313
Albuquerque, NM 87102-2162
Phone: (505) 248-5357

Upper Colorado Region serves:
Alamo Navajo Tribe of New Mexico,
Mescalero Apache Tribe, Pueblo of
Acoma, Pueblo of Cochiti, Pueblo of
Isleta, Pueblo of Jemez, Pueblo of
Laguna, Pueblo of Nambe, Pueblo of
Picuris, Pueblo of Pojoaque, Pueblo of
Sandia, Pueblo of San Felipe, Pueblo of
San Ildefonso, Pueblo of San Juan,
Pueblo of Santa Ana, Pueblo of Santa
Clara, Pueblo of Santo Domingo, Pueblo
of Taos, Pueblo of Tesuque, Pueblo of
Zia, Ramah Navajo Tribe of New
Mexico, Ysleta-Del-Sur Pueblo, Zuni
Tribe of New Mexico

Area Office Manager
Durango Area Office
P.O. Box 640
Durango, CO 81302-0640
Phone: (970) 385-6590

Jicarilla Apache Tribe, Southern Ute
Indian Tribe, Ute Mountain Ute Indian
Tribe

Office Manager
Farmington Office
300 W. Arrington, Suite 50
Farmington, NM 87401-8442
Phone: (505) 325-1794

Navajo Nation

Area Office Manager
Provo Area Office
302 East 1860 South
Provo, UT 84606-7317
Phone: (801) 379-1101

Northwestern Band of Shoshoni, Paiute
Indian Tribes of Utah, San Juan
Southern Paiute Tribe, Skull Valley
Goshute, Uintah & Ouray Ute Indian
Tribe

***ADDRESSES FOR SUBMITTING NOTICES OF INTENT
AND CONTRACT PROPOSALS (continued)***

MID-PACIFIC REGION

**Area Office Manager
Klamath Basin Area Office
6600 Washburn Way
Klamath Falls, OR 97603-9365
Phone: (541) 883-6935**

**Area Office Manager
Northern California area Office
16349 Shasta Dam Blvd.
Shasta Lake, CA 96019-8400
Phone: (916) 275-1554**

Mid-Pacific Region serves:

**Elk Valley Rancheria, Hoopa Valley
Tribe, Karuk Tribe, Klamath Tribes,
Quartz Valley Rancheria, Resighini
Rancheria, Smith River Rancheria,
Yurok Tribe**

**Alturas Rancheria, Berry Creek
Rancheria, Big Bend Rancheria, Big
Lagoon Rancheria, Big Valley
Rancheria, Blue Lake Rancheria,
Colusa Rancheria, Cortina Rancheria,
Coyote Valley Rancheria, Enterprise
Rancheria, Greenville Rancheria,
Grindstone Creek Rancheria, Hoopa
Valley Tribe, Hopland Rancheria,
Karuk Tribe, Laytonville rancheria,
Likely Rancheria, Lookout Rancheria,
Manchester Rancheria, Montgomery
Creek Rancheria, Mooretown
Rancheria, Pinoleville Rancheria, Potter
Valley Rancheria, Redding Rancheria,
Redwood Valley Rancheria, Roaring
Creek Rancheria, Robinson Rancheria,
Rohnerville Rancheria, Round Valley
Reservation, Sherwood Valley
Rancheria, Sulphur Bank Rancheria,
Table Bluff Rancheria, Trinidad
Rancheria, Upper Lake Rancheria, X-L
Ranch Rancheria, Yurok Tribe**

***ADDRESSES FOR SUBMITTING NOTICES OF INTENT
AND CONTRACT PROPOSALS (continued)***

**Area Office Manager
Lahonta Basin Area Office
P.O. Box 640
Carson City, NV 89702-0640
Phone: (702) 882-3436**

**Bridgeport Rancheria, Carson Colony,
Cedarville Rancheria, Dresslerville
Colony, Duckwater Reservation, Ely
Colony, Fallon Colony, Fort Bidwell
Reservation, Lovelock Colony, Pyramid
Lake Reservation, Reno-Sparks Colony,
Summit Lake Reservation, Susanville
Rancheria, Te-Moak, Battle Mt. Colony,
Te-Moak, Elko Colony, Te-Moak,
Odgers Ranch, Te-Moak, Ruby Valley,
Te-Moak, South Fork, Walker River
Reservation, Washoe Reservation,
Winnemucca Colony, Woodford Colony,
Yerrington Colony, Tomba Colony**

**Area Office Manager
South-Central California Area Office

2666 North Grove Industrial Drive, Suite 106
Fresno, CA 93727-1551
Phone: (209) 487-5116**

**Big Sandy Rancheria, Chicken Ranch
Rancheria, Cold Springs Rancheria,

North Fork Rancheria, Picayune
Rancheria, Santa Rosa Rancheria, Santa
Ynez Rancheria, Table Mountain
Rancheria, Tule River Indian
Reservation, Tuolumne Rancheria**

**Area Office Manager
Central California Area Office
7794 Folsom Dam Road

Folsom, CA 95630-1799
Phone: (916) 988-1707**

**Buena Vista Rancheria, Cloverdale
Rancheria, Dry Creek Rancheria,
Jackson Rancheria, Middletown

Rancheria, Rumsey Rancheria, Sheep
Ranch Rancheria, Stewarts Point
Rancheria**

SUMMARY OF TIME FRAMES

<u>CHAPTER</u>	<u>TIME FRAME</u>	<u>ACTION</u>	<u>RESPONSIBLE OFFICIAL</u>
<i>See Introduction to Chapter 5 for summary of 90-day time frame.</i>			
4 - Proposal Contents	Immediately	Record receipt of proposal/make copies/distribute for review	DAE
5 - Review/Approval	2 days	Notify T/TO of proposal receipt (identify 90-day period in receipt letter)	DAE
5 - Review/Approval	Immediately	Record receipt of proposal/make copies/distribute for review	DAE
5 - Review/Approval	7 days	Proposal review planning/assemble review panel	DAE
5 - Review/Approval	15 days	Screen proposal for completeness	DAE/Panel
5 - Review/Approval	140 days	Contract renewal information to T/TO funding, etc.	DAE

SUMMARY OF TIME FRAMES (continued)

<u>CHAPTER</u>	<u>TIME FRAME</u>	<u>ACTION</u>	<u>RESPONSIBLE OFFICIAL</u>
5 - Review/ Approval	7 days	Renewal/HHS/BIA funding/PFSAs, etc.	DAE
6 - Declination	5 days	Declination collection/distribution of documents	DAE
6 - Declination	20 days after decision	Documents to the T/TO	DAE
8 - Leases	20 days	DOI - meet with T/TO to negotiate lease	DAE
11 - Appeals	3 days	DOI - Request for informal conference/ several actions	DAE
11 - Appeals	10 days	Informal conference recommended decision	DAE
16 - Accountability	5 days	Report non-compliance (performance)	DAE
6 - Declination	70 days	HHS - DMO notification to HQLT DOI - DMO notification to Solicitor	DMO

SUMMARY OF TIME FRAMES (continued)

<u>CHAPTER</u>	<u>TIME FRAME</u>	<u>ACTION</u>	<u>RESPONSIBLE OFFICIAL</u>
9 - Property	60 days	Notification of real property	DMO
10 - Waivers	5 days	DOI - Processing request/to AO	DMO
10 - Waivers	15 days	DOI - Processing request/recommendations	DMO
10 - Waivers	35 days	DOI - Processing request/recommendations to AS	DMO
16 - Accountability	45 days	Response to tribal evaluation	DMO
11 - Appeals	7 days	DOI informal conference/several actions	DMO
14 - Retrocession	10 days	Statement regarding hearing on record	DMO/AO
5 - Review/ Approval	180, 150, 140, 120 days	AFA docket system notification	AO
9 - Property	25 days	Acquisition pursuant to NOA	AO

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

9 - Property 35 days

Submission of GSA-1334

AO

APPENDIX H

SUMMARY OF TIME FRAMES (continued)

<u>CHAPTER</u>	<u>TIME FRAME</u>	<u>ACTION</u>	<u>RESPONSIBLE OFFICIAL</u>
9 - Property	60 days	List of property to T/TO	AO
9 - Property	60 days	Disposal of Government property instructions to T/TO	AO
13 - Contract Dispute	60 days	Decision on T/TO claim	AO
13 - Contract Dispute	30 days	Preparation of administrative record	AO
14 - Retrocession	45 days	Request corrective action	AO
5 - Review/ Approval	140 days	AFA notification to	CDTO
20 - Monitoring	30 days before visit	Develop monitoring plan	CDFO

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

9 - Property 4 months

Screeners Card expiration notification

PMO

APPENDIX H

SUMMARY OF TIME FRAMES (continued)

<u>CHAPTER</u>	<u>TIME FRAME</u>	<u>ACTION</u>	<u>RESPONSIBLE OFFICIAL</u>
4 - Proposal Contents	Within 30 days of receipt of NOI	Provide technical assistance	Office
9 - Property	30 days	Review/notification of T/TO request	Office
10 - Waivers	Immediately	DOI - Processing request/date stamped	Office
11 - Appeals	30 days	Set up informal conference	Office
11 - Appeals	3 days	Notice of appeal actions	Office
10 - Waivers	75 days	IHS - Director, IHS, to notify Area Director of decision	Director
8 - Leases	20 days	IHS - meet with T/TO to negotiate lease	DFEE
10 - Waivers	45 days	IHS Area recommendations regarding	Area

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

waiver to OTP

11 - Appeals 7 days HHS informal conference/several actions Area Director

ATTACHMENT H

SUMMARY OF TIME FRAMES (continued)

<u>CHAPTER</u>	<u>TIME FRAME</u>	<u>ACTION</u>	<u>RESPONSIBLE OFFICIAL</u>
18 - Additional Guidance	30 days	Notice to Director, SDS	Area Director
10 - Waivers	10 days	IHS - OTP recommendations to Director, IHS	OTP
11 - Appeals	5 days	Hearing procedures	IBIA
11 - Appeals	15 days	Pre-hearing conference	ALJ

FEDERAL PAYMENT PROCEDURES

Step	DEPARTMENT OF THE INTERIOR	
	Bureau of Indian Affairs	Bureau of Land Management
1. Purchase Requisition	Originating program office prepares Purchase Requisition and sends to appropriate Procurement/Contracting Office for further action.	Originating program office prepares Purchase Requisition (SF-1510-18) and sends to appropriate contracting office (local for amounts up to \$100,000; Denver for amounts over \$100,00. All Alaska field survey contracts go to Denver regardless of amount.
2. Contract Awarded	Files set-up in appropriate office: Contracting Office and Finance Office. Contracting Officer (CO) sends copy to finance for obligation.	Files set-up in appropriate offices: CO, Payment/Finance Division, etc. If necessary, CO sends wire transfer form (ACH Vendor/Miscellaneous Payment Enrollment Form, SF-3881) to tribe; tribe sends completed form to Payment/Finance Division (Denver). CO sends copy of contract with funding amounts to Payments/Finance Division.
3. Funds Obligated	Information entered into Federal Financial System (FFS) by Finance personnel.	Information entered into FFS by Finance/Payment division personnel.
4. Invoice Submitted by Tribe	Tribes fill out the P638, Request for Payment Form and submit to the Contracting Officer Representative (COR).	Tribe sends Request for Advance or Reimbursement Form (SF-270) or invoice to COR.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

APPENDIX I

FEDERAL PAYMENT PROCEDURES (continued)

Step	DEPARTMENT OF THE INTERIOR	
	Bureau of Indian Affairs	Bureau of Land Management
5. Invoice Approved	COR ensures the information is complete and consistent, authorizes (signs), and faxes to the Division of Accounting Management	COR prepares Certificate for Contract Payment/Invoice (BLM Form 1510-10), and sends to CO. CO verifies with program official that work has been performed, approves form and sends original approved invoice to Payment/Finance division.
6. Payment	Division of Accounting Management encodes the payment into FSS and ultimately Treasury makes the payment via check or electronic payment.	Payment/Finance Division makes payment via electronic deposit.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

APPENDIX I

FEDERAL PAYMENT PROCEDURES (continued)

Step	DEPARTMENT OF THE INTERIOR	
	Minerals Management Service	Bureau of Reclamation
1. Purchase Requisition	Originating program office prepares purchase requisition (Form MMS-2016 or in IDEAS) and sends to appropriate contracting office.	Originating program office prepares Purchase Requisition (BOR Form 7-702) or electronic requisitioning form and send/transmits to the appropriate acquisition office.
2. Contract Awarded	Files set up in appropriate offices: Contracting Office, Financial Management Branch (MS-2310), etc. If necessary, send wire transfer form (ACH Vendors/- Miscellaneous Payment Enrollment Form, SF-3881) to tribe; tribe sends completed form to Contracting Office or Financial Management Branch. If sent to Contracting Office, contracting will forward to Financial Management Branch. Copy of contract with funding amounts sent to Financial Management Branch (MS-2300).	Files set up in appropriate office: Contracting Officer (CO) , Payment/Finance Division. CO sends wire transfer form (OMB Form No. 1510-0056) to tribe; tribe sends completed form to Payment/Finance Division (Denver). CO sends copy of contract with funding amounts to Payments/Finance Division.
3. Funds Obligated	Upon contract or purchase order awarded, funds are obligated in the ABACIS System with appropriate account number, amount, and object class.	Information entered into FFS by Finance/Payment Division personnel.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

APPENDIX I

FEDERAL PAYMENT PROCEDURES (continued)

Step	DEPARTMENT OF THE INTERIOR	
	Minerals Management Service	Bureau of Reclamation
4. Invoice Submitted by Tribe	Vendor submits invoice to CO or Financial Management Division.	Tribe sends Request for Advance or Reimbursement form (SF-270) or invoice to COR.
5. Invoice Approved	CO certifies and approves invoice for proper payment for contract. Program Official contacts the purchaser to verify that work or services have been performed. Approval is made for payment.	Receiving/program official formally acknowledges receipt of goods/services. CO sends internal Certification form to COR to certify acceptance of goods/services. COR signs form and forwards to Finance for payment.
6. Payment	Payment is made via electronic funds transfer or remit to address in accordance with the terms of agreement. Payments are made within 10 days after certify date by CO for all tribe payments.	Payment/Finance Division makes payment via check or electronic deposit.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

APPENDIX I

FEDERAL PAYMENT PROCEDURES (continued)

Step	DEPARTMENT OF THE INTERIOR	
	Fish and Wildlife Service	National Park Service
1. Purchase Requisition	Originating program office prepares financial guidance on program being contracted and sends to appropriate Procurement/Contracting Office for appropriate action.	Originating program office prepares financial guidance on program being contracted and sends to appropriate Procurement/Contracting Office for appropriate action.
2. Contract Awarded	Files set up in appropriate office: contracting Office and Finance Office. Electronic fund transfer (EFT) routing information obtained from tribe. Contracting Officer (CO) sends copy to finance for obligation.	Files set up in appropriate office: Contracting Office and Finance Office. Electronic fund transfer (EFT) routing information obtained from tribe. Contracting Officer (CO) sends copy to Finance for obligation.
3. Funds Obligated	Obligating information entered into Refuge and Hatching Operations and Maintenance by Finance personnel.	Obligating information entered into Accounting System by Finance personnel.
4. Invoice Submitted by Tribe		As appropriate.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

APPENDIX I

FEDERAL PAYMENT PROCEDURES (continued)

Step	DEPARTMENT OF THE INTERIOR	
	Fish and Wildlife Service	National Park Service
5. Invoice Approved	As appropriate.	As appropriate.
6. Payment	Contracting and General Services make payment to tribe in accordance with payment provisions negotiated in contract (e.g. lump sum payment, etc.) at the time that contract is obligated.	Accounting Operations makes EFT payment to tribe in accordance with payment provisions negotiated in contract (e.g. lump sum payment, etc.) at the time that contract is obligated.

FEDERAL PAYMENT PROCEDURES (continued)

Step	DEPARTMENT OF HEALTH AND HUMAN SERVICES	
	Indian Health Service	
1. Purchase Requisition	Originating program office prepares financial guidance on program being contracted and sends to appropriate Procurement/Contracting Office for appropriate action.	
2. Contract Awarded	Files set up in appropriate office: Contracting Office and Finance Office. Electronic fund transfer (EFT) routing information obtained from T/TO. Contracting Officer (CO) sends copy to finance for obligation.	
3. Funds Obligated	Obligating information entered into Health Accounting system (HAS) by Finance personnel.	
4. Invoice Submitted by Tribe	N/A.	

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

APPENDIX I

FEDERAL PAYMENT PROCEDURES (continued)

Step	DEPARTMENT OF HEALTH AND HUMAN SERVICES	
	Indian Health Service	
5. Invoice Approved	N/A.	
6. Payment	Division of Financial management (DFM) makes EFT payment to tribe in accordance with payment provisions negotiated in contract (e.g. lump sum payment, etc.) at the time that contract is obligated.	

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Lease Forms/Clauses

- **U.S. Government Lease for Real Property, Standard Form 2**
or
U.S. Government Lease for Real Property (Short Form), SF-2-B
Mandatory - all leases, except when SF-2-B is applicable.
Can be used in lieu of SF-2 with Expedited leasing procedures for Instant Leases, Temporary Leases, and Small Leases.

- **General Clauses GSA Form 3517***
or
General Clauses, GSA Form 3517A*
or
General Clauses, GSA Form 3517B*
Mandatory - all leases; contains clauses which are used in solicitations and contracts and apply both before and after award. General Clauses are incorporated by reference for leases of \$25,000 or less. GSA 3517 A and GSA 3517 B can be used in lieu of the GSA 3517, see below.
Leases less than \$25,000. Can be used in lieu of GSA 3517 with Expedited Leasing Procedures for Instant, Small, and Temporary Leases.
Leases greater than \$25,000 *and* less than 10,000 square feet or any lease that does not exceed 6 months.

- **Representations and Certifications, GSA Form 3518***
or
Representations and Certifications, GSA Form 3518A*
Mandatory - all leases, except for Instant, Small, and Temporary Leases when the GS-3518A is used - see below.
All leases per requirements for acquisition of Instant, Small, and Temporary Leasehold Interests in Real Property.

***GSA Forms change periodically to implement new laws and executive orders affecting real property leases. See GSA's internet site for the most current forms: <http://www.gsa.gov>**

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Laws and Executive Orders Affecting Leases

In addition to the basic premise of how the delegation of legal authority takes place, the Congress has also passed specific laws dealing with just the law of leasing. The delegated leasing authority is found in the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 471 and 490) and the Public Buildings Act (40 U.S.C. 601-615). The Procurement Acquisition Authority is found in another part of the Federal Property and Administrative Services Act (41 U.S.C. 253(c)).

Other specific laws applicable to lease formation and implemented by the GSA (31 U.S.C. 3551) and the U.S. Claims Court (28 U.S.C. 1491(a)(3) or the Federal District Courts (28 U.S.C. 1331). Federal leases are interpreted by the various agency boards of contract appeals of the U.S. Claims Court (41 U.S.C. 601 et seq.; 28 U.S.C. 1491(a)(1) and (2)).

Funding for leases (and all contracts) is subject to the Anti-Deficiency Act, 31 U.S.C. 1341(a).

- OMB Circular A-11, Budget Appendices A and B require advance budget authority for capital leases.
- Contract Award Publication A synopsis of all contract awards over \$25,000 (for the full term of the lease) must be published in the Commerce Business Daily. This does not apply to lease amendments.
- Appraisal/Rental Analysis, including GSA Form 387 Except when annual costs are less than \$2,000.
- Government Lease File Requirement Surveys (form) or narrative.
Solicitation for Offers.
Negotiation record, including negotiation objectives with supporting bases.
Completely executed copy of lease. Prior to contract clearance, lease is executed by lessor only. Agency warranted lease contracting officer executes after approval by contract clearance officials.
- Utilization of Women-Owned Business Concerns Contracts over \$25,000 annually.
- Employment of the Handicapped Contracts of \$2,500 or more.
- Equal Employment Opportunity (when applicable under the ISDA) ≥ 50 employees and \$10,000 in contracts requires certifications and representations.
- Equal Employment Opportunity Contracts $> \$1$ million; on site compliance reviews

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(when applicable under the ISDA) required prior to award.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

STANDARD FORM 2

FEBRUARY 1965 EDITION

GENERAL SERVICES
ADMINISTRATION
FPR (41 CFR) 1-16.601

**U.S. GOVERNMENT
LEASE FOR REAL PROPERTY**

DATE OF LEASE

LEASE NO.

THIS LEASE, made and entered into this date by and between

whose address is

and whose interest in the property hereinafter described is that of

hereinafter called the Lessor, and the UNITED STATES OF AMERICA, hereinafter called the Government:

WITNESSETH: The parties hereto for the consideration hereinafter mentioned, covenant and agree as follows:

1. The Lessor hereby leases to the Government the following described premises

to be used for

2. TO HAVE AND TO HOLD the said premises with their appearances for the term beginning on

through , subject to termination and

renewal rights as may be hereinafter set forth.

3. The government shall pay the Lessor annual rent of \$

at the rate of \$ per

in arrears.

Rent for a lesser period shall be prorated. Rent checks shall be made payable to:

4. The Government may terminate this lease at any time by giving at least _____ days notice in writing to the

Lessor and no rental shall accrue after the effective date of termination. Said notice shall be computed commencing with the

day after the date of mailing.

5. This lease may be renewed at the option of the Government, for the following terms and at the following rentals:

provided notice to be given in writing to the Lessor at least _____ days before the end of the original lease term or any renewal term;

all other terms and conditions of this lease shall remain the same during any renewal term.

Said notice shall be computed commencing with the day after the date of mailing.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

6. The Lessor shall furnish to the Government, as part of the rental consideration, the following:

7. The following are attached and made a part hereof:

8. The following changes were made in this lease prior to its execution:

IN WITNESS WHEREOF, the parties hereto have hereunto subscribed their names as of the date first above written. LESSOR

BY

(Signature)

(Signature)

IN PRESENCE OF

(Signature)

(Address)

UNITED STATES OF AMERICA

GENERAL SERVICES ADMINISTRATION

BY

(Signature)

Contracting Officer

(Official title)

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

APPENDIX K

REQUEST FOR TRANSFER OF EXCESS REAL AND RELATED PERSONAL PROPERTY	1. GSA CONTROL NO.	PAGE OF PAGES	THIS BLOCK FOR USE BY AGENCY RECEIVING REQUEST		
	2. DATE OF REQUEST		DATE REQUEST RECEIVED		
3. TO <i>(Name, address and ZIP Code of agency being requested to transfer the property)</i>	4. FROM <i>(Name, address and ZIP Code of agency requesting transfer of the property)</i>		HOLDING AGENCY NO. <i>(If any)</i>		
			ACQUISITION COST \$		
			APPRAISED FAIR MARKET VALUE \$		
		REIMBURSEMENT \$			
5. REQUESTING AGENCY'S REPRESENTATIVE TO BE CONTACTED FOR FURTHER INFORMATION <i>(Name, address and ZIP Code)</i>		6. PROPERTY IDENTIFICATION AND ADDRESS <i>(Include ZIP Code)</i>			
REAL PROPERTY REQUESTED					
A. STRUCTURES			B. LAND		C. UTILITIES
USE (a)	NUMBER OF BUILDINGS (b)	FLOOR AREA <i>(Sq. Ft.)</i> (c)	GOVERNMENT'S INTEREST (a)	AREA <i>(Acres or Sq. Ft.)</i> (b)	
(1) OFFICE			(1) FEE		
(2) STORAGE			(2) LEASED		
(3) OTHER <i>(Specify)</i>			(3) OTHER <i>(Specify)</i>		
(4) TOTAL			(4) TOTAL		
8. RELATED PERSONAL PROPERTY REQUESTED				9. ARE FUNDS AVAILABLE FOR REIMBURSEMENT FOR THE TRANSFER OF THIS PROPERTY? ___Yes ___No	
10. CERTIFICATION Certification is hereby made that this agency has a need for the property identified above to carry on an approved program; that the transfer thereof to this agency for the purposes indicated would be in accord with the intent of the Congress with respect to that program; that the requirement cannot be satisfied by better use of this agency's existing property; and that the proposed land use is consistent with FPMR 101-47.201-1 and 201-2. The statement of justification under block 11 below for the transfer of the property requested is complete and accurate.					
SIGNATURE		TITLE		DATE	
11. STATEMENT OF JUSTIFICATION <i>(This statement must include data with respect to all factors covered in FPMR 101-47.4904-1(c) Block 11, Instructions for Preparation of GSA Form 1334)</i>					
<i>(If required, use an additional 8x10 1/2 sheet)</i>					

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

APPENDIX K

DI-104
(Rev. 6/88)

UNITED STATES DEPARTMENT OF THE INTERIOR TRANSFER OF PROPERTY			Page _____ of _____	
			Report No. _____	
			Date _____	
Transfer From:(Organization and Complete Address)			Transfer To:(Organization and Complete Address)	
Appropriation and Accounting Data:				
ITEM NO.	QUANTITY OR PROPERTY ID NO.	ITEM DESCRIPTION <i>(Include model & serial number)</i>	ORIGINAL ACQUISITION COST (OAC)	CONDITION CODE
SHIPPING AND RECEIVING INFORMATION				
Date Shipped:		Date Received:		
Authorized Signature:		Authorized Signature:		
Official Title:		Official Title:		
Adjustment to property records (Property Official Signature):		Date Completed	Financial Official Signature (if Required):	Date Completed

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

APPENDIX K

DEPARTMENT OF HEALTH AND HUMAN SERVICES					1. DATE OF REQUEST	
REQUEST FOR PROPERTY ACTION						
2. REQUESTING OFFICE, ROOM NO. & TELEPHONE NO.			3. CUSTODIAL LOCATION		4. CAN NO. & ADMIN. CODE	
5. ACTION REQUESTED <i>(Turn-in, receipt, transfer, disposition instructions) Explain in detail.</i>						
SERIAL NO. OR DECAL NO. 6.	DESCRIPTION AND STOCK NUMBER 7.	QUANTITY 8.	UNIT 9.	CONDITION 10.	UNIT COST 11.	TOTAL COST 12.
13. NAME OF INITIATOR <i>(Type or print)</i>			SIGNATURE OF INITIATOR			DATE
14. NAME OF RECEIVING OFFICIAL <i>(Type or print)</i>				16. CUSTODIAL FILE UPDATED: INITIALS OF ACCOUNTABLE OFFICER		DATE
SIGNATURE OF RECEIVING OFFICIAL			DATE		17. CUSTODIAL FILE UPDATED: INITIALS OF ACCOUNTABLE OFFICER	
15. NAME OF ACCOUNTABLE OFFICER <i>(Type or print)</i>				DATE		
SIGNATURE OF ACCOUNTABLE OFFICER			DATE		18. VOUCHER NUMBER	

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

INSTRUCTIONS FOR COMPLETING HHS-22

Block #

1. Date of your request.
2. Identify your organization by name, location by room number, and your telephone number.
3. Your custodial area/location code.
4. Your common accounting number and your administrative code.
5. Specify what you want to have done.
6. Serial number or local decal number. If neither, leave blank. **DO NOT COMBINE MACHINES AND FURNITURE.**
7. Complete nomenclature of the item(s) stock number, model number, etc. It is necessary to adequately describe the items to insure identification.
8. Number of units.
9. Unit of issue; each, set, pkg., etc.
10. Condition code. See below.
11. and 12. From the file of best estimate. Accountable officer should verify.
13. Print/type name of Custodial Officer. Sign and date.
14. To be completed by individual receiving property. Print/type name; sign and date.
15. Signature of Accountable Officer or authorized representative.
- 16 and 17. To be initialed by the Accountable Officer when action has been posted to appropriate account.
18. To be assigned by the Accountable Officer.

.....
Condition Codes (Column 10)

Disposal Condition Code	Brief Definition	Expanded Definition
1	Unused-good.....	Unused property that is usable without repairs and identical or interchangeable with new items from normal supply sources.
2	Unused-fair.....	Unused property that is usable without repairs, but is deteriorated or damaged to the extent that utility is somewhat impaired.
3	Unused-poor.....	Unused property that is usable without repairs, but is considerably deteriorated or damaged. Enough utility remains to classify the property better than salvage.
4	Used-good.....	Used property that is usable without repairs and most of its useful life remains.
5	Used-fair.....	Used property that is usable without repairs, but is somewhat worn or deteriorated and may soon require repairs.
6	Used-poor.....	Used property that may be used without repairs, but is considerably worn or deteriorated to the degree that remaining utility is limited or that major repairs may soon be required.
7	Repairs required-good.....	Required repairs are minor and should not exceed 15 percent of original acquisition cost.
8	Repairs required-fair.....	Required repairs are considerable and are estimated to range to 16 percent to 40 percent of original acquisition cost.
9	Repairs required-poor.....	Required repairs are major because property is badly damaged, worn, or deteriorated, and are estimated to range from 41 percent to 65 percent of original acquisition cost.
X	Salvage.....	Property has some value in excess of its basic material content, but repair or rehabilitation to use for the originally intended purpose is clearly impractical.
S	Scrap.....	Material that has no value except for its basic material content.

Distribution:

- Original and 2 - To Accountable Officer
 1 Copy - To Receiving Office
 1 Copy - Hold

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

APPENDIX K

STANDARD FORM 122 June 1974 GENERAL SERVICES ADMINISTRATION FPMR (41 CFR) 101-32.306 FPMR (41 CFR) 101-43.315	TRANSFER ORDER EXCESS PERSONAL PROPERTY				1. ORDER NO.	
				2. DATE		
3. TO: GENERAL SERVICES ADMINISTRATION*			4. ORDERING AGENCY (Full name and address)*			
5. HOLDING AGENCY (Name and address)*			6. SHIP TO (Consignee and destination)*			
7. LOCATION OF PROPERTY			8. SHIPPING INSTRUCTIONS			
9. ORDERING AGENCY APPROVAL			10. APPROPRIATION SYMBOL AND TITLE			
A. SIGNATURE		B. DATE				
C. TITLE						
		11. ALLOTMENT		12. GOVERNMENT B/L NO.		
13. PROPERTY ORDERED						
GSA AND HOLDING AGENCY NOS. (a)	ITEM NO. (b)	DESCRIPTION <i>(include noun name, FSC Group and Class, Condition Code and, if available, National Stock Numbers)</i> (c)	UNIT (d)	QUANTITY (e)	ACQUISITION COST	
					UNIT (f)	TOTAL (g)
14. GSA APPROVAL		A. SIGNATURE		B. TITLE		C. DATE
FOR GSA USE ONLY	AGENCY AND LOCATION		FSC	COND ITION	SOURCE CODE	
	AGENCY STATE					

*Include ZIP Code

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

APPENDIX K

THE UNITED STATES GOVERNMENT CERTIFICATE OF RELEASE OF A MOTOR VEHICLE <i>(See instructions on reverse)</i>	CERTIFICATE NO.
--	-----------------

The undersigned DEPARTMENT or AGENCY of the UNITED STATES GOVERNMENT certifies that the motor vehicle described herein, the property of the UNITED STATES GOVERNMENT, has been transferred this _____ day of _____ 19____, to the Transferee designated herein; and that this is the first transfer of such vehicle in ordinary trade and commerce subsequent to acquisition thereof by the UNITED STATES GOVERNMENT.

TRANSFEREE (Name of dealer, individual, etc.)	ADDRESS OF TRANSFEREE (Please include ZIP code)
---	---

TRANSFEROR (Accountable office; i.e., department or agency; subunits and address, including ZIP code)

MAKE OF VEHICLE	YEAR	SERIES OR MODEL	ENGINE NO. ‡	MANUFACTURER'S SERIAL NO.	
TYPE OF VEHICLE*			KIND OF BODY+		
NUMBER OF CYLINDERS	HP. (SAE) ‡	FUEL	NUMBER OF AXLES ‡	NUMBER OF DUAL WHEELS ‡	TIRES <input type="checkbox"/> SOLID <input type="checkbox"/> PNEUMATIC
WEIGHT (Shipping)		NO. OF PASSENGERS ‡	WHEELBASE ‡	MANUFACTURER'S RATED CAPACITY	SALE PRICE

ODOMETER MILEAGE STATEMENT

Federal Regulations require you to state the odometer mileage upon transfer of ownership. An inaccurate or untruthful statement may make you liable for damages to your transferee, for attorney fees, and for civil or criminal penalties, pursuant to Sections 409, 412, and 413 of the Motor Vehicle Information and Cost Savings Act of 1972 (Public Law 92-513, as amended by Public Law 94-364). I, _____ state that to the best of my knowledge, based upon United States Government records, the odometer of the vehicle described above reads _____ miles/kilometers.

CHECK ONE BOX ONLY:

- 1. I HEREBY CERTIFY that to the best of my knowledge, the odometer reading as stated above reflects the actual mileage of the vehicle described above.
- 2. I HEREBY CERTIFY that to the best of my knowledge, the odometer reading as stated above reflects the amount of mileage in excess of designed mechanical odometer limit of 99,999 miles/kilometers of the vehicle described above, and should not be relied upon.
- 3. I HEREBY CERTIFY that to the best of my knowledge, the odometer reading as stated above is not the actual mileage of the vehicle described above, and should not be relied upon.

CHECK ONE BOX ONLY:

- 4. I HEREBY CERTIFY that to the best of my knowledge, the odometer of said vehicle was not altered, set back, or disconnected while in my possession and I have no knowledge of anyone else doing so.
- 5. I HEREBY CERTIFY that to the best of my knowledge, the odometer was altered for repair or replacement purposes while in my possession, and that the mileage registered on the repaired or replacement odometer was identical to that before such service.
- 6. I HEREBY CERTIFY that to the best of my knowledge, the repaired or replacement odometer was incapable of registering the same mileage, that it was reset to zero, and that the mileage on the original odometer or the odometer before repair was _____.

SIGNATURE OF TRANSFEROR'S (Seller's) REPRESENTATIVE	TITLE	DATE
SIGNATURE OF TRANSFEREE (Buyer)		DATE

* Automobile, station wagon, ambulance, truck-motor or tractor, trailer, semitrailer, bus, motorcycle, motor scooter, etc.
 + Automobile-coupe, two- or four-door sedan, truck-pickup, panel, van, cargo, stake, platform, trailer-pole, dolly, cable reel, bogie, tank (give capacity) etc.
 ‡ Where applicable. See instructions on reverse.

STANDARD FORM 97 (REV. 7-79)
 Prescribed by GSA FPMR (41 CFR) 101-3B-701
 Previous Edition Not Useable

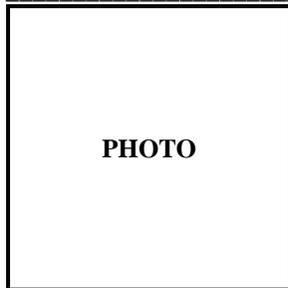
INSTRUCTIONS

- 1. This certificate of release, to include the Odometer Mileage Statement, constitutes an official transfer of the vehicle described hereon, and formally evidences its release from the custody of the United States Government to the designated transferee.**
- 2. The filing of this certificate shall be governed by the requirements of applicable local law.**
- 3. The information required on the Certificate of Release, to include the Odometer Mileage Statement, shall be furnished in all applicable spaces. An incomplete form, particularly an inadequate description, may delay the issuance of a State title.**
- 4. All certificates and copies shall be numbered consecutively by the using agency, such numbers to be typed or overprinted on all copies in the certificate number space provided.**
- 5. The completed certificate, to include the Odometer Mileage Statement, shall be available to the transferee concurrently with the release of the vehicle.**
- 6. Items of description, designated by a double dagger, are to be used only where applicable. they do not apply to all types of vehicles. Examples are as follows: number of dual wheels applies only to trucks; SAE horsepower, wheelbase, and engine number are required by some States; number of passengers applies only to motorbus capacity; etc.**

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

APPENDIX K

**GENERAL SERVICES ADMINISTRATION
SCREENER'S IDENTIFICATION**



SCREENER'S NAME

SCREENER'S ORGANIZATION

SCREENER'S SIGNATURE

SPONSORING AGENCY

**NOT VALID TO IDENTIFY
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GSA FORM 2946 (REV. 10-77)

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GSA FORM 2946 BACK (REV. 10-77)

HOW A CLAIM IS HANDLED UNDER THE FTCA (Step-by-Step Narrative, Flow Chart, and Brief Description)

Administrative and Judicial FTCA Claims Process

Administrative Stage

Tort claims under the FTCA must be presented, in writing, to the appropriate Federal agency (HHS or DOI) within two years after the claim arises. If the claim is not filed during this specified two-year period, the window of opportunity will close, and the claim can never be filed. Filed tort claims can produce three different results. The claim can be denied, the claim can remain undecided, or the claim can be settled out of court.

Once a claim has been filed, the Federal agency then has six months in which to make a decision on the claim. During this six-month time period, unless the filer of the claim (claimant) receives a final denial, the claimant cannot file suit in Federal court. If a final denial is received from the Federal agency, the claimant has only six months from the certified or registered date on the denial letter to file suit in a Federal district court.

The claimant also has the option to request that the final denial be reviewed again, as long as the request to review again or reconsider the claim is presented to the Federal agency within six months of the postmark date of the denial letter (only one request for reconsideration is allowed). If a request for reconsideration is filed within the required time period, the Federal agency has six months to reconsider the claim and make a final determination on the claim. During the six-month reconsideration period, the claimant may not file suit. If the Federal agency does not deny the claim in writing, and the claim has been undecided for more than six months, the claimant may consider the claim denied and file suit in a Federal district court.

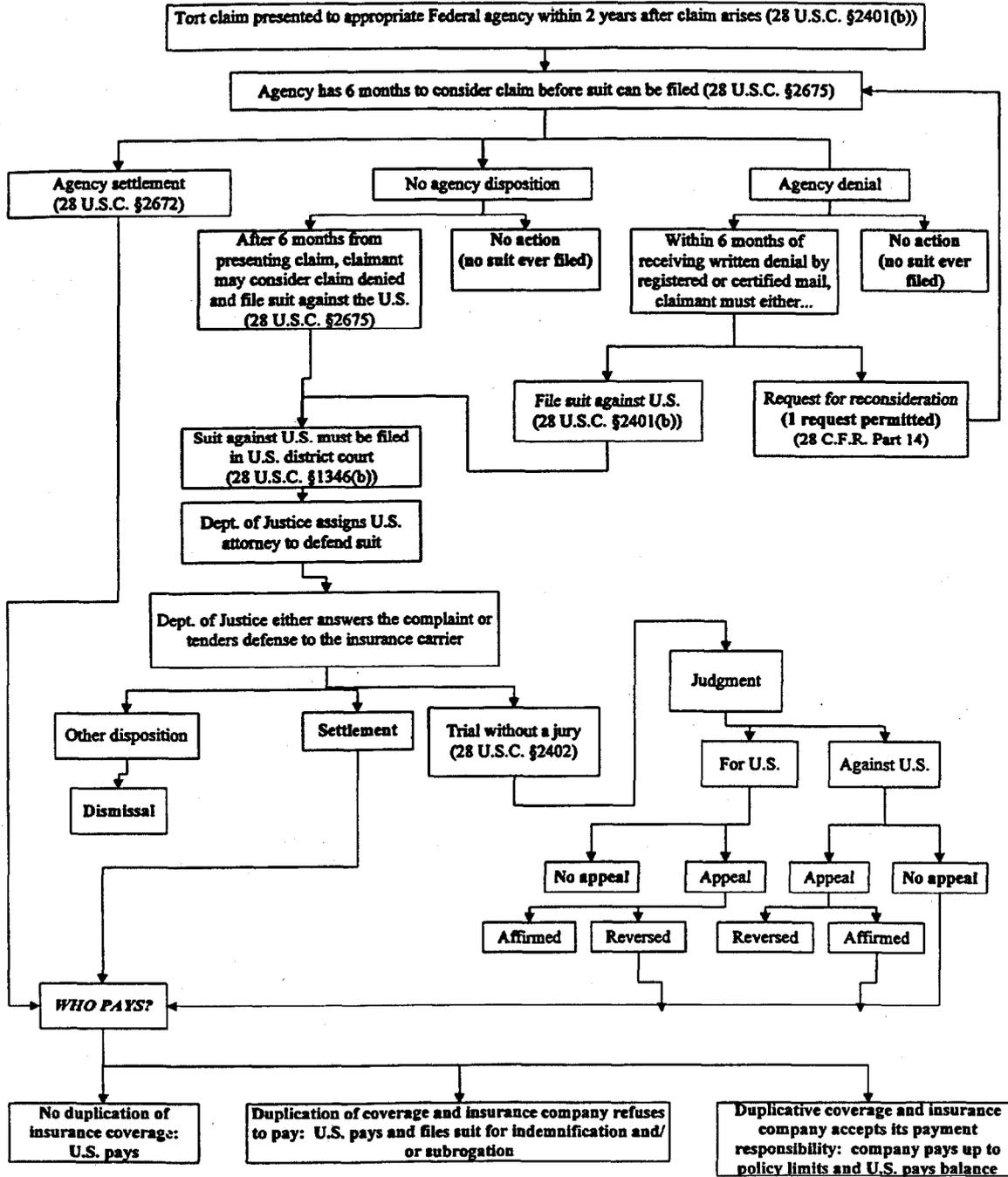
The third possible outcome for a claim is administrative settlement. If the claim is settled at an amount less than \$25,000, the Federal agency with which the claim was filed has the authority to approve the settlement. If the claim is to be settled at an amount greater than \$25,000, the Department of Justice must approve the claim.

Judicial Stage

In either the case of the denial of a claim or when no determination is made on a claim, and the claimant decides to file suit in a Federal district court, the Department of Justice assigns an attorney to defend the suit. The U.S. attorney will certify that the case is within the scope of FTCA coverage. If the case is within the scope of FTCA coverage, the trial will go forward. The outcome of the suit will either be settlement, dismissal of the suit before a judgment is given (for example, if the claim was not filed properly), or there will be a trial without a jury from which a judgment will result.

The next step in this process is to determine who will pay the judgment, the Federal Government or the private insurance company. If it is determined that there is no duplicative insurance coverage, the U.S. Government pays the judgment. If there is duplicative private insurance coverage, the insurance company will pay up to the insurance policy limit and the U. S. Government will pay the judgment and file suit against the insurance company for indemnification and/or subrogation.

ADMINISTRATIVE AND JUDICIAL FTCA CLAIMS PROCESS
FLOW CHART



ADMINISTRATIVE AND JUDICIAL FTCA CLAIMS PROCESS

Federal Tort Claims Act (FTCA) Administrative Claims Process

1. A tort claim against the United States must be presented, in writing, to the appropriate Federal agency within two (2) years after the claim arises or it is time barred (i.e., it can never be filed) 28 U.S.C. §2401(b)
2. The Federal agency has six (6) months within which to make a decision on the claim. Unless the claimant receives a final denial, the claimant cannot file suite in Federal court during the six-month period. 28 U.S.C. §2675.
3. If a final denial is received, claimant must file suit within six (6) months from the certified or registered mail date of the denial letter. 28 U.S.C. §2401(b).

Claimant also has the option to request reconsideration of the final denial, provided the request for reconsideration is presented to the Federal agency within six (6) months of the date of mailing of the final denial. 28 C.F.R. Part 14.

Upon timely filing of a request for reconsideration, the Federal agency shall have six (6) months in which to reconsider and make a final determination on the claim; claimant may not file suit during the six-month period.

4. If the Federal agency does not deny the claim, in writing, and the claim has been pending for more than six (6) months, the claimant may consider the claim to be denied and file suite in Federal district court. 28 U.S.C. §2675.

TRAINING CORE CURRICULUM

TRAINING OBJECTIVES

- To ensure that agency employees charged with duties and responsibilities under the ISDA conduct those duties and responsibilities in a manner that facilitates the contracting processes provided for in the ISDA
- To ensure that agency employees receive high quality instruction to better perform their self-determination related duties
- To provide appropriate training for those agency employees who will be involved in administering self-determination programs and who will be involved in developing and executing contracts or agreements with T/TOs to implement title I of the ISDA.

CURRICULUM

- 1. A FUNDAMENTAL OBJECTIVE OF THE ISDA IS TO INCREASE THE ABILITY OF TRIBES OR TRIBAL ORGANIZATIONS TO PLAN AND DELIVER SERVICES APPROPRIATE TO THE NEEDS OF TRIBAL MEMBERS (DISCUSSION)**
- 2. BASIC PRINCIPLES OF THE ISDA, AS ENACTED IN 1975, EXAMPLES INCLUDE:**
 - Tribal governing body as the sole authority
 - No compulsory requirements on T/TOs to contract
 - ISDA directs government to contract upon request of a T/TO - burden of proof is on the government to say no
 - Reaffirms government trust responsibility and guarantees right of retrocession
 - Describe options open to T/TOs under the ISDA
 - Describe contractible programs under the ISDA

**TRAINING CORE CURRICULUM
(continued)**

3. DISCUSSION OF MAJOR AMENDMENTS TO THE ISDA - SIGNIFICANT CHANGES INCLUDE:

- Expansion of contract opportunities
- New definition of ISDA contracts
- Mature contracts - calendar year contracts
- FTCA coverage
- Property donation
- CSCs defined
- Introduction of self-governance option
- Negotiated rulemaking - joint rule
- Model Agreement

4. PART 900 REGULATIONS TO INCLUDE:

- History of development of regulations, how? Who? Process, etc.
- Congressional and Secretarial Policy Statements
- Review and discussion of each subpart over 2-3 day period
- Discussion of technical assistance
- Declination Procedures and 90 days

**TRAINING CORE CURRICULUM
(continued)**

5. PROCEDURAL HANDBOOK

- Review and discussion of each chapter in conjunction with regulations review as appropriate to suit audience

EVALUATION

- Pre and post test consisting of approximately 60 questions on significant areas of the ISDA, the regulations, and the Handbook
- Participants will be surveyed at each training session to evaluate the course content, the training methodology, and the trainer

**EXECUTIVE OFFICE OF THE PRESIDENT
Office of Management and Budget
Washington, D.C. 20503**

April 12, 1985

Circular No. A-128

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

Subject: Audits of State and Local Governments.

- 1. Purpose. This Circular is issued pursuant to the Single Audit Act of 1984, P.L. 98-502. It establishes audit requirements for State and local governments that receive Federal aid, and defines Federal responsibilities for implementing and monitoring those requirements.**
- 2. Supersession. The Circular supersedes Attachment P, "Audit Requirements", of Circular A-102, "Uniform requirements for grants to State and local governments."**
- 3. Background. The Single Audit Act builds upon earlier efforts to improve audits of Federal aid programs. The Act requires State or local governments that receive \$100,000 or more a year in Federal funds to have an audit made for that year. Section 7505 of the Act requires the Director of the Office of Management and Budget to prescribe policies, procedures and guidelines to implement the act. It specifies that the Director shall designate "cognizant" Federal agencies, determine criteria for making appropriate charges to Federal programs for the cost of audits, and provide procedures to assure that small firms or firms owned and controlled by disadvantaged individuals have the opportunity to participate in contracts for single audits.**
- 4. Policy. The Single Audit Act requires the following:**

 - a. State or local governments that receive \$100,000 or more a year in Federal financial assistance shall have an audit made in accordance with this Circular.**
 - b. State or local governments that receive between \$25,000 and \$100,000 a year shall have an audit made in accordance with this Circular, or in accordance with Federal laws and regulations governing the programs they participate in.**
 - c. State or local governments that receive less that \$25,000 a year shall be exempt from compliance with the Act and other Federal audit requirements. These State**

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

and local governments shall be governed by audit requirements prescribed by State or local law or regulation.

d. Nothing in this paragraph exempts State or local governments from maintaining records of Federal financial assistance or from providing access to such records to Federal agencies, as provided for in Federal law or in Circular A-102, "Uniform requirements for grants to State or local governments."

5. **Definitions.** For the purposes of this Circular the following definitions from the Single Audit Act apply:

a. "Cognizant agency" means the Federal agency assigned by the Office of Management and Budget to carry out the responsibilities described in paragraph 11 of this Circular.

b. "Federal financial assistance" means assistance provided by a Federal agency in the form of grants, contracts, cooperative agreements, loans, loan guarantees, property, interest subsidies, insurance, or direct appropriations, but does not include direct Federal cash assistance to individuals. It includes awards received directly from Federal agencies, or indirectly through other units of State and local governments.

c. "Federal agency" has the same meaning as the term 'agency' in section 551(1) of title 5, United States Code.

d. "Generally accepted accounting principles" has the meaning specified in the generally accepted government auditing standards.

e. "Generally accepted government auditing standards" means the Standards for audit of government Organizations, Programs, Activities, and Functions, developed by the Comptroller General, dated February 27, 1981.

f. "Independent auditor" means:

(1) a State or local government auditor who meets the independence standards specified in generally accepted government auditing standards; or

(2) a public accountant who meets such independence standards.

g. "Internal controls" means the plan of organization and methods and procedures adopted by management to ensure that:

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

- (1) resource use is consistent with laws, regulations, and policies;**
- (2) resources are safeguarded against waste, loss, and misuse; and**
- (3) reliable data are obtained, maintained, and fairly disclosed in reports.**

h. "Indian tribe" means any Indian tribe, band, nations, or other organized group or community, including any Alaskan Native village or regional or village corporations (as defined in, or established under, the Alaskan Native Claims Settlement Act) that is recognized by the United States as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

i. "Local government" means any unit of local government within a State, including a county, a borough, municipality, city, town, township, parish, local public authority, special district, school district, intrastate district, council of governments, and any other instrumentality of local government.

j. "Major Federal Assistance program" as defined by P.L. 98-502, is described in the Attachment to this Circular.

k. "Public accountants" means those individuals who meet the qualification standards included in generally accepted government auditing standards for personnel performing government audits.

l. "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands, any instrumentality thereof, and any multi-State, regional, or interstate entity that has government functions and any Indian tribe.

m. "Subrecipient" means any person or government department, agency, or establishment that receives Federal financial assistance to carry out a program through a State or local government, but does not include an individual that is a beneficiary of such a program. A subrecipient may also be a direct recipient of Federal financial assistance.

6. Scope of audit. The Single Audit Act provides that:

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

a. The audit shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial and compliance audits.

b. The audit shall cover the entire operations of a State or local government or, at the option of that government, it may cover departments, agencies or establishments that received, expended, or otherwise administered federal financial assistance during the year. However, if a State or local government receives \$25,000 or more in General Revenue Sharing Funds in a fiscal year, it shall have an audit of its entire operations. A series of audits of individual departments, agencies, and establishments for the same fiscal year may be considered a single audit.

c. Public hospitals and public colleges and universities may be excluded from State and local audits and the requirements of this Circular. However, if such entities are excluded, audits of these entities shall be made in accordance with statutory requirements and the provisions of Circular A-110, "Uniform requirements for grants to universities, hospitals, and other nonprofit organizations."

d. The auditor shall determine whether:

(1) the financial statements of the government, department, agency or establishment present fairly its financial position and the results of its financial operations in accordance with generally accepted accounting principles;

(2) the organization has internal accounting and other control system to provide reasonable assurance that it is managing laws and regulations; and

(3) the organization has complied with laws and regulations that may have material effect on its financial statements and on each major Federal assistance program.

7. **Frequency of audit.** Audits shall be made annually unless the State or local government has, by January 1, 1987, a constitutional or statutory requirement for less frequent audits. For those governments, the cognizant agency shall permit biennial audits, covering both years, if the government so requests. It shall also honor requests for biennial audits by governments that have an administrative policy calling for audits less frequent than annual, but only for fiscal years beginning before January 1, 1987.

8. **Internal control and compliance reviews.** The Single Audit Act requires that the independent auditor determine and report on whether the organization has internal control

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

systems to provide reasonable assurance that it is managing Federal assistance programs in compliance with applicable laws and regulations.

a. **Internal control review.** In order to provide this assurance, the auditor must make a study and evaluation of internal control system used in administering Federal assistance programs. The study and evaluation must be made whether or not the auditor intends to place reliance on such systems. As part of this review, the auditor shall:

(1) Test whether these internal control systems are functioning in accordance with prescribed procedures.

(2) Examine the recipient's system for monitoring subrecipients and obtaining and acting on subrecipient audit reports.

b. **Compliance review.** The law also requires the auditor to determine whether the organization has complied with laws and regulations that may have a material effect on each major Federal assistance program.

(1) In order to determine which major programs are to be tested for compliance, State and local governments shall identify in their accounts all Federal funds received and expended and the programs under which they were received. This shall include funds received directly from Federal agencies and through other State and local governments.

(2) The review must include the selection and testing of a representative number of charges from each major Federal assistance program. The selection and testing of transactions shall be based on the auditor's professional judgment considering such factors as the amount of expenditures for the program and the individual awards; the newness of the program or changes in its conditions; prior experience with the program, particularly as revealed in audits and other evaluations (e.g., inspections, program reviews); the extent to which the program is carried out through subrecipients; the extent to which the program contracts for goods or services; the level to which the program is already subject to program reviews or other forms of independent oversight; the adequacy of the controls for ensuring compliance; the expectation of adherence or lack of adherence to the applicable laws and regulations; and the potential impact of adverse findings.

(a) In making the test of transactions, the auditor shall determine whether:

-- the amounts reported as expenditures were for allowable services, and

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

-- the amounts reported as expenditures were for allowable services, and

-- the records show that those who receive services or benefits were eligible to receive them.

(b) In addition to transaction testing, the auditor shall determine whether:

-- matching requirements, levels of effort and earmarking limitations were met,

-- Federal financial reports and claims for advances and reimbursements contain information that is supported by the books and records from which the basic financial statements have been prepared, and

-- amounts claimed or used for matching were determined in accordance with OMB Circular A-87, "Cost principles for State and local governments," and Attachment F of Circular A-102, "Uniform requirements for grants to State and local governments."

(c) The principal compliance requirements of the largest Federal aid programs may be ascertained by referring to the Compliance Supplement for Single Audits of State and Local Governments, issued by OMB and available from the Government Printing Office. For those programs not covered in the Compliance supplement, the auditor may ascertain compliance requirements by researching the statutes, regulations, and agreements governing individual programs.

(3) Transactions related to other Federal assistance programs that are selected in connection with examinations of financial statements and evaluations of internal controls shall be tested for compliance with Federal laws and regulations that apply to such transactions.

9. Subrecipients. State or local governments that receive Federal financial assistance and provide \$25,000 or more of it in a fiscal year to a subrecipient shall:

a. determine whether State or local subrecipients have met the audit requirements of this Circular and whether subrecipients covered by Circular A-110, "Uniform requirements for grants to universities, hospitals, and other nonprofit organizations," have met that requirement;

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

b. determine whether the subrecipient spent Federal assistance funds provided in accordance with applicable laws and regulations. This may be accomplished by reviewing an audit of the subrecipient made in accordance with this Circular, Circular A-110, or through other means (e.g., program reviews) if the subrecipient has not yet had such an audit;

c. ensure that appropriate corrective action is taken within six months after receipt of the audit report in instances of noncompliance with Federal laws and regulations;

d. consider whether subrecipient audits necessitate adjustment of the recipient's own records; and

e. require each subrecipient to permit independent auditors to have access to the records and financial statements as necessary to comply with this Circular.

10. Relation to other audit requirements. The single Audit act provides that an audit made in accordance with this Circular shall be in lieu of any financial or financial compliance audit required under individual Federal assistance programs. To the extent that a single audit provides Federal agencies with information and assurances they need to carry out their overall responsibilities, they shall rely upon and use such information. However, a Federal agency shall make any additional audits which are necessary to carry out its responsibilities under Federal law and regulation. Any additional Federal audit effort shall be planned and carried out in such a way as to avoid duplication.

a. The provisions of this Circular do not limit the authority of Federal agencies to make, or contract for audits and evaluations of Federal financial assistance programs, nor do they limit the authority of any Federal agency Inspector General or other Federal audit official.

b. The provisions of this Circular do not authorize any State or local government or subrecipient thereof to constrain Federal agencies, in any manner, from carrying out additional audits.

c. A Federal agency that makes or contracts for audits in addition to the audits made by recipients pursuant to this Circular shall, consistent with other applicable laws and regulations, arrange for funding the cost of such additional audits. Such additional audits include economy and efficiency audits, program results audits, and program evaluations.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

11. Cognizant agency responsibilities. The Single Audit Act provides for cognizant Federal agencies to oversee the implementation of this Circular.

a. The Office of Management and Budget will assign cognizant agencies for States and their subdivisions and larger local government and their subdivisions. Other Federal agencies may participate with an assigned cognizant agency, in order to fulfill the cognizance responsibilities. Smaller governments not assigned a cognizant agency will be under the general oversight of the Federal agency that provides them the most funds whether directly or indirectly.

b. A cognizant agency shall have the following responsibilities:

(1) Ensure that audits are made and reports are received in a timely manner and in accordance with the requirements of this Circular.

(2) Provide technical advice and liaison to State and local governments and independent auditors.

(3) Obtain or make quality control reviews of selected audits made by non-federal audit organizations, and provide the results, when appropriate, to other interested organizations.

(4) Promptly inform other affected federal agencies and appropriate Federal law enforcement officials of any reported illegal acts or irregularities. They should also inform State of local law enforcement and prosecuting authorities, if not advised by the recipient, of any violation of law within their jurisdiction.

(5) Advise the recipient of audits that have been found not to have met the requirements set forth in this Circular. In such instances, the recipient will be expected to work with the auditor to take corrective action. If corrective action is not taken, the cognizant agency shall notify the recipient and Federal awarding agencies of the facts and make recommendations for followup action. Major inadequacies or repetitive substandard performance of independent auditors shall be referred to appropriate professional bodies for disciplinary action.

(6) Coordinate, to the extent practicable, audits made by or for Federal agencies that are in addition to the audits made pursuant to this Circular; so that the additional audits build upon such audits.

(7) Oversee the resolution of audit findings that affect the programs of more than one agency.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

12. Illegal act or irregularities. If the auditor becomes aware of illegal acts or other irregularities, prompt notice shall be given to recipient management officials above the level of involvement. (See also paragraph 12(a)(3) below for the auditor's reporting responsibilities.) The recipient in turn, shall promptly notify the cognizant agency of the illegal acts or irregularities and of proposed and actual actions, if any. Illegal acts and irregularities include such matters as conflicts of interest, falsification of records or reports, and misappropriations of funds or other assets.

13. Audit Reports. Audit reports must be prepared at the completion of the audit. Reports serve many needs of State and local governments as well as meeting the requirements of the Single Audit Act.

a. The audit report shall state that the audit was made in accordance with the provisions of this Circular. The report shall be made up of at least:

(1) The auditor's report on financial statements and on a schedule of Federal assistance; the financial statements; and a schedule of Federal assistance, showing the total expenditures for each Federal assistance program as identified in the Catalog of Federal Domestic Assistance. Federal programs or grants that have not been assigned a catalog number shall be identified under the caption "other Federal assistance."

(2) The auditor's report on the study and evaluation of internal control systems must identify the organization's significant internal accounting control, and those controls designed to provide reasonable assurance that Federal programs are being managed in compliance with laws and regulations. It must also identify the controls that were evaluated, the controls that were not evaluated, and the material weaknesses identified as a result of the evaluation.

(3) the auditor's report on compliance containing:

-- a statement of positive assurance with respect to those items tested for compliance, including compliance with law and regulations pertaining to financial reports and claims for advances and reimbursements;

-- negative assurance on those items not tested;

-- a summary of all instances of noncompliance; and

-- an identification of total amounts questioned, if any, for each Federal assistance award, as a result of noncompliance.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

b. the three parts of the audit report may be found into a single report, or presented at the same time as separate documents.

c. all fraud, abuse, or illegal acts or indications of such acts, including all questioned costs found as the result of these acts that auditors become award of, should normally be covered in a separate written report submitted in accordance with paragraph 13f.

d. In addition to the audit report, the recipient shall provide comments on the findings and recommendations in the report, including a plan for corrective action taken or planned and comments on the status of corrective action taken on prior findings. If corrective action is not necessary, a statement describing the reason it is not should accompany the audit report.

e. The reports shall be made available by the State or local government for public inspection within 30 days after the completion of the audit.

f. In accordance with generally accepted government audit standards, reports shall be submitted by the auditor to the organization audited and to those requiring or arranging for the audit. In addition, the recipient shall submit copies of the reports to each Federal department or agency that provided Federal assistance funds to the recipient. Subrecipients shall submit copies to recipients that provided them Federal assistance funds. The reports shall be sent within 30 days after the completion of the audit, but no later than one year after the end of the audit period unless a longer period is agreed to with the cognizant agency.

g. recipients of more than \$100,000 in Federal funds shall submit one copy of the audit report within 30 days after issuance to a central clearinghouse to be designated by the Office of Management and Budget. The clearinghouse will keep completed audits on file and follow up with State and local governments that have not submitted required audit reports.

h. Recipients shall keep audit reports on file for three years from their issuance.

14. **Audit Resolution.** As provided in paragraph 11, the cognizant agency shall be responsible for monitoring the resolution of audit findings that affect the programs of more than one Federal agency. Resolution of findings that relate to the programs of a single Federal agency will be the responsibility of the recipient and that agency. Alternate arrangements may be made on a case-by-case basis by agreement among the agencies concerned.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Resolution shall be made within six months after receipt of the report by the Federal departments and agencies. Corrective action should proceed as rapidly as possible.

15. **Audit workpapers and reports.** Workpapers and reports shall be retained for a minimum of three years from the date of the audit report, unless the auditor is notified in writing by the cognizant agency to extend the retention period. Audit workpapers shall be made available upon request to the cognizant agency or its designee or the General Accounting office, at the completion of the audit.

16. **Audit Costs.** The cost of audits made in accordance with the provisions of this Circular are allowable charges to Federal assistance programs.

a. The charges may be considered a direct cost or an allocated indirect cost, determined in accordance with the provision of Circular A-87, "Cost principles for State and local governments.

b. Generally, the percentage of costs charged to Federal assistance programs for a single audit shall not exceed the percentage that Federal funds expended represent of total funds expended by the recipient during the fiscal year. The percentage may be exceed, however, if appropriate documentation demonstrates higher actual cost.

17. **Sanctions.** The Single Audit Act provides that no cost may be charged to Federal assistance programs for audits required by the Act that are not made in accordance with this Circular. In cases of continued inability or unwillingness to have a proper audit, Federal agencies must consider other appropriate sanctions including:

--withholding a percentage of assistance payments until the audit is completed satisfactorily,

--withholding or disallowing overhead costs, and

--suspending the Federal assistance agreement until the audit is made.

18. **Auditor Selection.** In arranging for audit services State and local governments shall follow the procurement standards prescribed by attachment O of Circular A-102, "Uniform requirements for grants to State and local governments." the standards provide that while recipients are encouraged to enter into intergovernmental agreements for audit and other services, analysis should be made to determine whether it would be more economical to purchase the services from private firms. In instances where use of such intergovernmental agreements are required by State statutes (e.g., audit services) these statutes will take precedence.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

19. Small and Minority Audit Firms. Small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in contracts awarded to fulfill the requirements of this Circular. Recipients of Federal assistance shall take the following steps to further this goal:

a. Assure that small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals are used to the fullest extent practicable.

b. Make information on forthcoming opportunities available and arrange timeframes for the audit so as to encourage and facilitate participation by small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals.

c. Consider in the contract process whether firms competing for larger audits intend to subcontract with small audit firms owned and controlled by socially and economically disadvantaged individuals.

d. Encourage contracting with small audit firms or audit firms owned and controlled by socially and economically disadvantaged individuals which have traditionally audited government programs and, in such cases where this is not possible, assure that these firms are given consideration for audit subcontracting opportunities.

e. Encourage contracting with consortiums of small audit firms as described in paragraph (a) above when a contract is too large for an individual small audit firm or audit firm owned and controlled by socially and economically disadvantaged individuals.

f. Use the services and assistance, as appropriate, of such organizations as the Small Business Administration in the solicitation and utilization of small audit firms or audit firms owned and controlled by socially and economically disadvantaged individuals.

20. Reporting. Each Federal agency will report to the Director of OMB on or before March 1, 1987, and annually thereafter on the effectiveness of State and local governments in carrying out the provisions of this Circular. The report must identify each State or local government or Indian tribe that, in the opinion of the agency, is failing to comply with the Circular.

21. Regulations. Each Federal agency shall include the provisions of this Circular in its regulations implementing the Single Audit Act.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

22. **Effective Date.** This Circular is effective upon publication and shall apply to fiscal years of State and local governments that begin after December 31, 1984. Earlier implementation is encouraged. However, until it is implemented the audit provisions of Attachment P to Circular A-102 shall continue to be observed.
23. **Inquiries.** All questions or inquiries should be addressed to Financial Management Division, Office of Management and Budget, telephone number 202/395-3993.
24. **Sunset review date.** This Circular shall have an independent policy review to ascertain its effectiveness three years from the date of issuance.

[Signed]
David A. Stockman
Director

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

**Circular A-128
Attachment**

**Definition of Major Program as Provided
in P.L. 98-502**

"Major Federal Assistance Program," for State and local governments having Federal assistance expenditures between \$100,000 and \$100,000,000, means any program for which Federal expenditures during the applicable year exceed the larger of \$300,000 or 3 percent of such total expenditures.

Where total expenditures of Federal assistance exceed \$100,000,000, the following criteria apply:

Total Expenditures of Federal Financial Assistance for ALL Programs		Major Federal Assistance Program Means any Program That EXCEEDS
<u>More Than</u>	<u>But Less Than</u>	
\$100 million	\$ 1 billion	\$ 3 million
\$ 1 billion	\$ 2 billion	\$ 4 million
\$ 2 billion	\$ 3 billion	\$ 7 million
\$ 3 billion	\$ 4 billion	\$10 million
\$ 4 billion	\$ 5 billion	\$13 million
\$ 5 billion	\$ 6 billion	\$16 million
\$ 6 billion	\$ 7 billion	\$19 million
OVER	\$ 7 billion	\$20 million

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

OMB CIRCULAR A-128

AUDITS OF STATE AND LOCAL GOVERNMENTS

This Circular is issued pursuant to the Single Audit Act of 1984, P.L. 98-502. It establishes audit requirements for State and local governments and Indian tribes that receive Federal aid, and defines Federal responsibilities for implementing and monitoring those requirements.

Provided by:

**Office of Audit and Evaluation
P.O. Box 25007, D-119
Denver, CO 80225-0007**

**Phone: (303) 231-5650
Telefax: (303) 231-5655**

**EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET**

March 8, 1990

OMB CIRCULAR NO. A-133

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

**SUBJECT: Audits of Institutions of Higher Education and Other Nonprofit
Organizations**

- 1. Purpose.** Circular A-133 establishes audit requirements and defines Federal responsibilities for implementing and monitoring such requirements for institutions of higher education and other nonprofit institutions receiving Federal awards.
- 2. Authority.** Circular A-133 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; Reorganization Plan No. 2 of 1970; and Executive Order No. 11541.
- 3. Supersession.** Circular A-133 supersedes Attachment F, subparagraph 2h, of Circular A-110, "Uniform Administrative Requirements for Grants and other Agreements with Institutions of Higher Education, Hospitals, and other Nonprofit Organizations."
- 4. Applicability.** The provisions of Circular A-133 apply to:
 - a.** Federal departments and agencies responsible for administering programs that involve grants, cost-type contracts and other agreements with institutions of higher education and other nonprofit recipients.
 - b.** Nonprofit institutions, whether they are recipients, receiving awards directly from Federal agencies, or are sub-recipients, receiving awards directly through other recipients.

These principles, to the extent permitted by law, constitute guidance to be applied by agencies consistent with and within the discretion, conferred by the statutes governing agency action.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

- 5. Requirements and Responsibilities.** The specific requirements and responsibilities of Federal departments and agencies and institutions of higher education and other nonprofit institutions are set forth in the attachment.

- 6. Effective Date.** The provisions of Circular A-133 are effective upon publication and shall apply to audits of nonprofit institutions for fiscal years that begin on or after January 1, 1990. Earlier implementation is encouraged. However, until this Circular is implemented, the audit provisions of Attachment F to Circular A- 110 shall continue to be observed.

- 7. Policy Review (Sunset) Date.** Circular A-133 will have a policy review three years from the date of issuance.

- 8. Inquiries.** Further information concerning Circular A-133 may be obtained by contacting the Financial Management Division, Office of Management and Budget, Washington D.C. 20503, telephone (202) 395-3993.

**Richard G. Darman
Director**

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

**OMB CIRCULAR NO. A-133
AUDITS OF INSTITUTIONS OF HIGHER EDUCATION
AND OTHER NONPROFIT ORGANIZATIONS**

ATTACHMENT

1. Definitions. For the purposes of this Circular, the following definitions apply:

a. "Award" means financial assistance, and Federal cost-type contracts used to buy services or goods for the use of the Federal Government. It includes awards received directly from the Federal agencies or indirectly through recipients. It does not include procurement contracts to vendors under grants or contracts, used to buy goods or services. Audits of such vendors shall be covered by the terms and conditions of the contract.

b. "Cognizant agency" means the Federal agency assigned by the Office of Management and Budget to carry out the responsibilities described in paragraph 3 of this Attachment.

c. "Coordinated audit approach" means an audit wherein the independent auditor, and other Federal and non-federal auditors consider each other's work, in determining the nature, timing, and extent of his or her own auditing procedures. A coordinated audit must be conducted in accordance with Government Auditing Standards and meet the objectives and reporting requirements set forth in paragraph 12(b) and 15, respectively, of this Attachment. The objective of the coordinated audit approach is to minimize duplication of audit effort, but not to limit the scope of the audit work so as to preclude the independent auditor from meeting the objectives set forth in paragraph 12(b) or issuing the reports required in paragraph 15 in a timely, manner.

d. "Federal agency" has the same meaning as the term "agency" in Section 551(l) of Title 5, United States Code.

e. "Federal Financial Assistance."

(1) "Federal financial assistance" means assistance provided by a Federal agency to a recipient or sub-recipient to carry out a program. Such assistance may be in the form of:

- grants;**
- contracts;**
- cooperative agreements;**
- loans;**

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

- loan guarantees;
- property;
- interest subsidies;
- insurance;
- direct appropriations;
- other non-cash assistance.

(2) Such assistance does not include direct Federal cash assistance to individuals.

(3) Such assistance includes awards received directly from Federal agencies, or indirectly when sub-recipients receive funds identified as Federal funds by recipients.

(4) The granting agency is responsible for identifying the source of funds awarded to recipients; the recipient is responsible for identifying the source of funds awarded to sub-recipients.

f. "Generally accepted accounting principles" has the meaning specified in the Government Auditing Standards.

g. "Independent auditor" means:

(1) A Federal, State, or local government auditor who meets the standards specified in the Government Auditing Standards; or

(2) A public accountant who meets such standards.

h. "Internal control structure" means the policies and procedures established to provide reasonable assurance that:

(1) Resource use is consistent with laws, regulations, and award terms;

(2) Resources are safeguarded against waste, loss, and misuse; and

(3) Reliable data are obtained, maintained, and fairly disclosed in reports.

i. "Major program" means an individual award or a number of awards in a category of Federal assistance or support for which total expenditures are the larger of three percent of total Federal funds expended or \$100,000, on which the auditor will be

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

required to express an opinion as to whether the major program is being administered in compliance with laws and regulations.

Each of the following categories of Federal awards shall constitute a major program where total expenditures are the larger of three percent of total Federal funds expended or \$100,000:

- **Research and Development.**
- **Student Financial Aid.**
- **Individual awards not in the student aid or research and development category.**

j. "Management decision" means the evaluation by the management of an establishment of the findings and recommendations included in an audit report and the issuance of a final decision by management concerning its response to such findings and recommendations, including actions concluded to be necessary.

k. "Nonprofit institution" means any corporation, trust, association, cooperative or other organization which (1) is operated primarily for scientific, educational, service, charitable, or similar purposes in the public interest; (2) is not organized primarily for profit; and (3) uses its net proceeds to maintain, improve, and/or expand its operations. The term "nonprofit institutions" includes institutions of higher education, except those institutions that are audited as part of single audits in accordance with Circular A- 128 "Audits of State and Local Governments." The term does not include hospitals which are not affiliated with an institution of higher education, or State and local governments and Indian tribes covered by Circular A-128 "Audits of State and Local Governments."

l. "Oversight" agency means the Federal agency that provides the predominant amount of direct funding to a recipient not assigned a cognizant agency, unless no direct funding is received. Where there is no direct funding, the Federal agency with the predominant indirect funding will assume the general oversight responsibilities. The duties of the oversight agency are described in paragraph 4 of this Attachment.

m. "Recipient" means an organization receiving financial assistance to carry out a program directly from Federal agencies.

n. "Research and development" includes all research activities, both basic and applied, and all development activities that are supported at universities, colleges, and other nonprofit institutions. "Research" is defined as a systematic study directed toward fuller scientific knowledge or understanding of the subject studied. "Development" is the

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

systematic use of knowledge and understanding gained from research directed toward the production of useful materials, devices, systems, or methods, including design and development of prototypes and processes.

o. "Student Financial Aid" includes those programs of general student assistance in which institutions participate, such as those authorized by Title IV of the Higher Education Act of 1965 which is administered by the U.S. Department of Education and similar programs provided by other Federal agencies. It does not include programs which provide fellowships of similar awards to students on a competitive basis, or for specified studies or research.

p. "Sub-recipient" means any person or government department, agency, establishment, or nonprofit organization that receives financial assistance to carry out a program through a primary recipient or other sub-recipient, but does not include an individual that is a beneficiary of such a program. A sub-recipient may also be a direct recipient of Federal awards under other agreements.

q. "Vendor" means an organization providing a recipient or sub-recipient with generally required goods or services that are related to the administrative support of the Federal assistance program.

2. Audit of Nonprofit Institutions.

a. Requirements Based on Awards Received.

(1) Nonprofit institutions that receive \$100,000 or more a year in Federal awards shall have an audit made in accordance with the provisions of this Circular. However, nonprofit institutions receiving \$100,000 or more but receiving awards under only one program have the option of having an audit of their institution prepared in accordance with the provisions of the Circular or having an audit made of the one program. For prior or subsequent years, when an institution has only loan guarantees or outstanding loans that were made previously, the institution may be required to conduct audits for those programs, in accordance with regulations of the Federal agencies providing those guarantees or loans.

(2) Nonprofit institutions that receive at least \$25,000 but less than \$100,000 a year in Federal awards shall have an audit made in accordance with this Circular or have an audit made of each Federal award, in accordance with Federal laws and regulations governing the programs in which they participate.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(3) Nonprofit institutions receiving less than \$25,000 a year in Federal awards are exempt from Federal audit requirements, but records must be available for review by appropriate officials of the Federal grantor agency or subgranting entity.

b. Oversight by Federal Agencies.

(1) To each of the larger nonprofit institutions the Office of Management and Budget (OMB) will assign a Federal agency as the cognizant agency for monitoring audits and ensuring the resolution of audit findings that affect the programs of more than one agency.

(2) Smaller institutions not assigned a cognizant agency will be under the general oversight of the Federal agency that provides them with the most funds.

(3) Assignments to Federal cognizant agencies for carrying out responsibilities in this section are set forth in a separate supplement to this Circular.

(4) Federal Government-owned, contractor-operated facilities at institutions or laboratories operated primarily for the Government are not included in the cognizance assignments. These will remain the responsibility of the contracting agencies. The listed assignments cover all of the functions in this Circular unless otherwise indicated. The Office of Management and Budget will coordinate changes in agency assignments.

3. Cognizant Agency Responsibilities. A cognizant agency shall:

a. Ensure that audits are made and reports are received in a timely manner and in accordance with the requirements of this Circular.

b. Provide technical advice and liaison to institutions and independent auditors.

c. Obtain or make quality control reviews of selected audits made by non-Federal audit organizations, and provide the results, when appropriate, to other interested organizations.

d. Promptly inform other affected Federal agencies and appropriate Federal law enforcement officials of any reported illegal acts or irregularities. A cognizant agency should also inform State or local law enforcement and prosecuting authorities, if not advised by the recipient, of any violation of law within their jurisdiction.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

e. Advise the recipient of audits that have been found not to have met the requirements set forth in this Circular. In such instances, the recipient will work with the auditor to take corrective action. If corrective action is not taken, the cognizant agency shall notify the recipient and Federal awarding agencies of the facts and make recommendations for follow-up action. Major inadequacies or repetitive substandard performance of independent auditors shall be referred to appropriate professional bodies for disciplinary action.

f. Coordinate, to the extent practicable, audits or reviews made for Federal agencies that are in addition to the audits made pursuant to this Circular, so that the additional audits or reviews build upon audits performed in accordance with the Circular.

g. Ensure the resolution of audit findings that affect the programs of more than one agency.

h. Seek the views of other interested agencies before completing a coordinated program.

i. Help coordinate the audit work and reporting responsibilities among independent public accountants, State auditors, and both resident and non-resident Federal auditors to achieve the most cost-effective audit.

4. Oversight Agency Responsibilities. An oversight agency shall provide technical advice and counsel to institutions and independent auditors when requested by the recipient. The oversight agency may assume all or some of the responsibilities normally performed by a cognizant agency.

5. Recipient Responsibilities. A recipient that receives a Federal award and provides \$25,000 or more of it during its fiscal year to a sub-recipient shall:

a. Ensure that the nonprofit institution sub-recipients that receive \$25,000 or more have met the audit requirements of this Circular, and that sub-recipients subject to OMB Circular A-128 have met the audit requirements of that Circular;

b. Ensure that appropriate corrective action is taken within six months after receipt of the sub-recipient audit report in instances of noncompliance with Federal laws and regulations;

c. Consider whether sub-recipient audits necessitate adjustment of the recipient's own records; and

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

d. Require each sub-recipient to permit independent auditors to have access to the records and financial statements as necessary for the recipient to comply with this Circular.

6. Relation to Other Audit Requirements.

a. An audit made in accordance with this Circular shall be in lieu of any financial audit required under individual Federal awards. To the extent that an audit made in accordance with this Circular provides Federal agencies with the information and assurances they need to carry out their overall responsibilities, they shall rely upon and use such information. However, a Federal agency shall make any additional audits or reviews necessary to carry out responsibilities under Federal law and regulation. Any additional Federal audits or reviews shall be planned and carried out in such a way as to build upon work performed by the independent auditor.

b. Audit planning by Federal audit agencies should consider the extent to which reliance can be placed upon work performed by other auditors. Such auditors include State, local, Federal, and other independent auditors, and a recipient's internal auditors. Reliance placed upon the work of other auditors should be documented and in accordance with Government Auditing Standards.

c. The provisions of this Circular do not limit the authority of Federal agencies to make or contract for audits and evaluations of Federal awards, nor do they limit the authority of any Federal agency Inspector General or other Federal official.

d. The provisions of this Circular do not authorize any institution or sub-recipient thereof to constrain Federal agencies, in any manner, from carrying out additional audits, evaluations or reviews.

e. A Federal agency that makes or contracts for audits, in addition to the audits made by recipients pursuant to this Circular, shall, consistent with other applicable laws and regulations, arrange for funding the cost of such additional audits. Such additional audits or reviews include financial, performance audits and program evaluations.

7. Frequency of Audit. Audits shall usually be performed annually but not less frequently than every two years.

8. Sanctions. No audit costs may be charged to Federal awards when audits required by this Circular have not been made or have been made but not in accordance with this Circular. In cases of continued inability or unwillingness to have a proper audit in

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

accordance with the Circular, Federal agencies must consider appropriate sanctions including:

- withholding a percentage of awards until the audit is completed satisfactorily;
- withholding or disallowing overhead costs; or
- suspending Federal awards until the audit is made.

9. Audit Costs. The cost of audits made in accordance with the provisions of this Circular are allowable charges to Federal awards. The charges may be considered a direct cost or an allocated indirect cost, determined in accordance with the provisions of Circular A-21, "Cost Principles for Universities" or Circular A-122, "Cost Principles for Nonprofit Organizations," FAR Subpart 31, or other applicable cost principles or regulations.

10. Auditor Selection. In arranging for audit services institutions shall follow the procurement standards prescribed by Circular A-110, "Uniform Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals and other Nonprofit Organizations."

11. Small and Minority Audit Firms.

a. Small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in contracts awarded to fulfill the requirements of this Circular.

b. Recipients of Federal awards shall take the following steps to further this goal:

(1) Ensure that small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals are used to the fullest extent practicable;

(2) Make information on forthcoming opportunities available and arrange time frames for the audit to encourage and facilitate participation by small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals;

(3) Consider in the contract process whether firms competing for larger audits intend to subcontract with small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals;

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(4) Encourage contracting with small audit firms or audit firms owned and controlled by socially and economically disadvantaged individuals which have traditionally audited government programs, and in cases where this is not possible, assure that these firms are given consideration for audit subcontracting opportunities;

(5) Encourage contracting with consortiums of small audit firms as described in section (1), above, when a contract is too large for an individual small audit firm or audit firm owned and controlled by socially and economically disadvantaged individuals; and

(6) Use the services and assistance, as appropriate, of such organizations as the Small Business Administration in the solicitation and utilization of small audit firms or audit firms owned and controlled by socially and economically disadvantaged individuals.

12. Scope of Audit and Audit Objectives.

a. The audit shall be made by an independent auditor in accordance with Government Auditing Standards developed by the Comptroller General of the United States covering financial audits. An audit under this Circular should be an organization-wide audit of the institution. However, there may be instances where Federal auditors are performing audits or are planning to perform audits at nonprofit institutions. In these cases, to minimize duplication of audit work, a coordinated audit approach may be agreed upon between the independent auditor, the recipient and the cognizant agency or the overnight agency. Those auditors who assume responsibility for any or all of the reports called for by paragraph 15 should follow guidance set forth in Government Auditing Standards in using work performed by others.

b. The auditor shall determine whether:

(1) The financial statements of the institution present fairly its financial position and the results of its operations in accordance with generally accepted accounting principles;

(2) The institution has an internal control structure to provide reasonable assurance that the institution is managing Federal awards in compliance with applicable

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

laws and regulations, and controls that ensure compliance with the laws and regulations that could have a material impact on the financial statements; and

(3) The institution has complied with laws and regulations that may have a direct and material effect on its financial statement amounts and on each major Federal program.

13. Internal Controls Over Federal Awards Compliance Reviews.

a. **General.** The independent auditor shall determine and report on whether the recipient has an internal control structure to provide reasonable assurance that it is managing Federal awards in compliance with applicable laws, regulations, and contract terms, and that it safeguards Federal funds. In performing these reviews, independent auditors should rely upon work performed by a recipient's internal auditors to the maximum extent possible. The extent of such reliance should be based upon the Government Auditing Standards.

b. **Internal Control Review.**

(1) In order to provide this assurance on internal controls, the auditor must obtain an understanding of the internal control structure and assess levels of internal control risk. After obtaining an understanding of the controls, the assessment must be made whether or not the auditor intends to place reliance on the internal control structure.

(2) As part of this review, the auditor shall:

(a) Perform tests of controls to evaluate the effectiveness of the design and operation of the policies and procedures in preventing or detecting material noncompliance. Tests of controls will not be required for those areas where the internal control structure policies and procedures are likely to be ineffective in preventing or detecting noncompliance, in which case a reportable condition or a material weakness should be reported in accordance with paragraph 15 c(2) of this Circular.

(b) Review the recipients system for monitoring sub-recipients and obtaining and acting on sub-recipient audit reports.

(c) Determine whether controls are in effect to ensure direct and indirect costs were computed and billed in accordance with the guidance provided in the general requirements section of the compliance supplement to this Circular.

c. **Compliance Review.**

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(1) The auditor shall determine whether the recipient has complied with laws and regulations that may have a direct and material effect on any of its major Federal programs. In addition, transactions selected for non-major programs shall be tested for compliance with Federal laws and regulations that apply to such transactions.

(2) In order to determine which major programs are to be tested for compliance, recipients shall identify, in their accounts, all Federal funds received and expended and the programs under which they were received. This shall include funds received directly from Federal agencies, through other State and local governments or other recipients. To assist recipients in identifying Federal awards, Federal agencies and primary recipients shall provide the Catalog of Federal Domestic Assistance (CFDA) numbers to the recipients when making the awards.

(3) The review must include the selection of an adequate number of transactions from each major Federal financial assistance program so that the auditor obtains sufficient evidence to support the opinion on compliance required by paragraph 15c(3) of this Attachment. The selection and testing of transactions shall be based on the auditors' professional judgment considering such factors as the amount of expenditures for the program; the newness of the program or changes in its conditions; prior experience with the program particularly as revealed in audits and other evaluations (e.g., inspections, program reviews, or system reviews required by Federal Acquisition Regulations); the extent to which the program is carried out through sub-recipients; the extent to which the program contracts for goods or services; the level to which the program is already subject to program reviews or other forms of independent oversight; the adequacy of the controls for ensuring compliance; the expectation of adherence or lack of adherence to the applicable laws and regulations; and the potential impact of adverse findings.

(4) In making the test of transactions, the auditor shall determine whether:

-- the amounts reported as expenditures were for allowable services, and

-- the records show that those who received services or benefits were eligible to receive them.

(5) In addition to transaction testing, the auditor shall determine whether:

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

-- matching requirements, levels of effort and earmarking limitations were met,

-- Federal financial reports and claims for advances and reimbursement contain information that is supported by books and records from which the basic financial statements have been prepared, and

-- amounts claimed or used for matching were determined in accordance with (1) OMB Circular A-21, "Cost Principles for Educational Institutions"; (2) matching or cost sharing requirements in Circular A-110, "Uniform Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals and Other Nonprofit Organizations"; (3) Circular A-122, "Cost Principles for Nonprofit Organizations"; (4) FAR subpart 31 cost principles; and (5) other applicable cost principles or regulations.

(6) The principal compliance requirements of the largest Federal programs may be ascertained by referring to the "Compliance Supplement for Single Audits of Educational Institutions and Other Nonprofit Organizations," and the "Compliance Supplement for Single Audits of State and Local Governments," issued by OMB and available from the Government Printing Office. For those programs not covered in the Compliance Supplements, the auditor should ascertain compliance requirements by reviewing the statutes, regulations, and agreements governing individual programs.

(7) Transactions related to other awards that are selected in connection with examinations of financial statements and evaluations of internal controls shall be tested for compliance with Federal laws and regulations that apply to such transactions.

14. **Illegal Acts.** If, during or in connection with the audit of a nonprofit institution, the auditor becomes aware of illegal acts, such acts shall be reported in accordance with the provisions of the Government Auditing Standards.

15. **Audit Reports.**

- a. Audit reports must be prepared at the completion of the audit.
- b. The audit report shall state that the audit was made in accordance with the provisions of this Circular.
- c. The report shall be made up of at least the following three parts:

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(1) The financial statements and a schedule of Federal awards and the auditor's report on the statements and the schedule. The schedule of Federal awards should identify major programs and show the total expenditures for each program. Individual major programs other than Research and Development and Student Aid should be listed by catalog number as identified in the Catalog of Federal Domestic Assistance. Expenditures for Federal programs other than major programs shall be shown under the caption "other Federal assistance." Also, the value of non-cash assistance such as loan guarantees, food commodities or donated surplus properties or the outstanding balance of loans should be disclosed in the schedule.

(2) A written report of the independent auditor's understanding of the internal control structure and the assessment of control risk. The auditor's report should include as a minimum: (1) the scope of the work in obtaining understanding of the internal control structure and in assessing the control risk, (2) the nonprofit institution's significant internal controls or control structure including the controls established to ensure compliance with laws and regulations that have a material impact on the financial statements and those that provide reasonable assurance that Federal awards are being managed in compliance with applicable laws and regulations, and (3) the reportable conditions, including the identification of material weaknesses, identified as a result of the auditor's work in understanding and assessing the control risk. If the auditor limits his/her the internal control structure for any reason, the circumstances should be disclosed in the report.

(3) The auditor's report on compliance containing:

-- An opinion as to whether each major Federal program was being administered in compliance with laws and regulations applicable to the matters described in paragraph 13(c) (3) of this Attachment, including compliance with laws and regulations pertaining to financial reports and claims for advances and reimbursements;

-- A statement of positive assurance on those items that were tested for compliance and negative assurance on those items not tested;

-- Material findings of noncompliance presented in their proper perspective:

- The size of the universe in number of items and dollars,
- The number and dollar amount of transactions tested by the auditors,

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

- **The number and corresponding dollar amount of instances of noncompliance;**

-- **Where findings are specific to a particular Federal award, an identification of total amounts questioned, if any, for each Federal award, as a result of noncompliance and the auditor's recommendations for necessary corrective action.**

c. The three parts of the audit report may be bound into a single document, or presented at the same time as separate documents.

d. Nonmaterial findings need not be disclosed with the compliance report but should be reported in writing to the recipient in a separate communication. The recipient, in turn, should forward the findings to the Federal grantor agencies or subgrantor sources.

e. All fraud or illegal acts or indications of such acts, including all questioned costs found as the result of these acts that auditors become aware of, may be covered in a separate written report submitted in accordance with the Government Auditing Standards.

f. The auditor's report should disclose the status of known but uncorrected significant material findings and recommendations from prior audits that affect the current audit objective as specified in the Government Auditing Standards.

g. In addition to the audit report, the recipient shall provide a report of its comments on the findings and recommendations in the report, including a plan for corrective action taken or planned and comments on the status of corrective action taken on prior findings. If corrective action is not necessary, a statement describing the reason it is not should accompany the audit report.

h. Copies of the audit report shall be submitted in accordance with the reporting standards for financial audits contained in the Auditing Standards. Sub-recipient auditors shall submit copies to recipients that provided Federal awards. The report shall be due within 30 days after the completion of the audit, but the audit should be completed and the report submitted not later than 13 months after the end of the recipient's fiscal year unless a longer period is agreed to with the cognizant or oversight agency.

i. Recipients of more than \$100,000 in Federal awards shall submit one copy of the audit report within 30 days after issuance to a central clearinghouse to be designated by the Office of Management and Budget. The clearinghouse will keep completed audit reports on file.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

j. Recipients shall keep audit reports, including sub-recipient reports, on file for three years from their issuance.

16. Audit Resolution.

a. As provided in paragraph 3, the cognizant agency shall be responsible for ensuring the resolution of audit findings that affect the programs of more than one Federal agency. Resolution of findings that relate to the programs of a single Federal agency will be the responsibility of the recipient and the agency. Alternate arrangements may be made on case-by-case basis by agreement among the agencies concerned.

b. A management decision shall be made within six months after receipt of the report by the Federal agencies responsible for audit resolution. Corrective action should proceed as rapidly as possible.

17. Audit Workpapers and Reports. Workpapers and reports shall be retained for a minimum of three years from the date of the audit report, unless the auditor is notified in writing by the cognizant agency to extend the retention period. Audit workpapers shall be made available upon request to the cognizant agency or its designee or the General Accounting Office at the completion of the audit.

Circular No. A-133 - Revised June 24, 1997
Audits of States, Local Governments, and Non-Profit Organizations

(Accompanying Federal Register Materials -- Audits of States, Local Governments, and Non-Profit Organizations June 30, 1997)

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Audits of States, Local Governments, and Non-Profit Organizations

1. Purpose. This Circular is issued pursuant to the Single Audit Act of 1984, P.L. 98-502, and the Single Audit Act Amendments of 1996, P.L. 104-156. It sets forth standards for obtaining consistency and uniformity among Federal agencies for the audit of States, local governments, and non-profit organizations expending Federal awards.

2. Authority. Circular A-133 is issued under the authority of sections 503, 1111, and 7501 et seq. of title 31, United States Code, and Executive Orders 8248 and 11541.

3. Rescission and Supersession. This Circular rescinds Circular A-128, "Audits of State and Local Governments," issued April 12, 1985, and supersedes the prior Circular A-133, "Audits of Institutions of Higher Education and Other Non-Profit Institutions," issued April 22, 1996. For effective dates, see paragraph 10.

4. Policy. Except as provided herein, the standards set forth in this Circular shall be applied by all Federal agencies. If any statute specifically prescribes policies or specific requirements that differ from the standards provided herein, the provisions of the subsequent statute shall govern.

Federal agencies shall apply the provisions of the sections of this Circular to non-Federal entities, whether they are recipients expending Federal awards received directly from Federal awarding agencies, or are subrecipients expending Federal awards received from a pass-through entity (a recipient or another subrecipient).

This Circular does not apply to non-U.S. based entities expending Federal awards received either directly as a recipient or indirectly as a subrecipient.

5. Definitions. The definitions of key terms used in this Circular are contained in §___.105 in the Attachment to this Circular.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

6. Required Action. The specific requirements and responsibilities of Federal agencies and non-Federal entities are set forth in the Attachment to this Circular. Federal agencies making awards to non-Federal entities, either directly or indirectly, shall adopt the language in the Circular in codified regulations as provided in Section 10 (below), unless different provisions are required by Federal statute or are approved by the Office of Management and Budget (OMB).

7. OMB Responsibilities. OMB will review Federal agency regulations and implementation of this Circular, and will provide interpretations of policy requirements and assistance to ensure uniform, effective and efficient implementation.

8. Information Contact. Further information concerning Circular A-133 may be obtained by contacting the Financial Standards and Reporting Branch, Office of Federal Financial Management, Office of Management and Budget, Washington, DC 20503, telephone (202) 395-3993.

9. Review Date. This Circular will have a policy review three years from the date of issuance.

10. Effective Dates. The standards set forth in §__.400 of the Attachment to this Circular, which apply directly to Federal agencies, shall be effective July 1, 1996, and shall apply to audits of fiscal years beginning after June 30, 1996, except as otherwise specified in §__.400(a).

The standards set forth in this Circular that Federal agencies shall apply to non-Federal entities shall be adopted by Federal agencies in codified regulations not later than 60 days after publication of this final revision in the Federal Register, so that they will apply to audits of fiscal years beginning after June 30, 1996, with the exception that §__.305(b) of the Attachment applies to audits of fiscal years beginning after June 30, 1998. The requirements of Circular A-128, although the Circular is rescinded, and the 1990 version of Circular A-133 remain in effect for audits of fiscal years beginning on or before June 30, 1996.

Franklin D. Raines
Director

Attachment

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DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

PART__ --AUDITS OF STATES, LOCAL GOVERNMENTS, AND NON-PROFIT ORGANIZATIONS

Subpart A--General

Sec.

___.100 Purpose.

___.105 Definitions.

Subpart B--Audits

___.200 Audit requirements.

___.205 Basis for determining Federal awards expended.

___.210 Subrecipient and vendor determinations.

___.215 Relation to other audit requirements.

___.220 Frequency of audits.

___.225 Sanctions.

___.230 Audit costs.

___.235 Program-specific audits.

Subpart C--Auditees

___.300 Auditee responsibilities.

___.305 Auditor selection.

___.310 Financial statements.

___.315 Audit findings follow-up.

___.320 Report submission.

Subpart D--Federal Agencies and Pass-Through Entities

___.400 Responsibilities.

___.405 Management decision.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Subpart E--Auditors

- ___.500 Scope of audit.
- ___.505 Audit reporting.
- ___.510 Audit findings.
- ___.515 Audit working papers.
- ___.520 Major program determination.
- ___.525 Criteria for Federal program risk.
- ___.530 Criteria for a low-risk auditee.

Appendix A to Part __ - Data Collection Form (Form SF-SAC).

Appendix B to Part __ - Circular A-133 Compliance Supplement.

Subpart A--General

§___.100 Purpose.

This part sets forth standards for obtaining consistency and uniformity among Federal agencies for the audit of non-Federal entities expending Federal awards.

§___.105 Definitions.

Auditee means any non-Federal entity that expends Federal awards which must be audited under this part.

Auditor means an auditor, that is a public accountant or a Federal, State or local government audit organization, which meets the general standards specified in generally accepted government auditing standards (GAGAS). The term auditor does not include internal auditors of non-profit organizations.

Audit finding means deficiencies which the auditor is required by §___.510(a) to report in the schedule of findings and questioned costs.

CFDA number means the number assigned to a Federal program in the Catalog of Federal Domestic Assistance (CFDA).

Cluster of programs means a grouping of closely related programs that share common compliance requirements. The types of clusters of programs are research and development (R&D), student financial aid (SFA), and other clusters. "Other clusters" are as defined by the Office of Management and Budget (OMB) in the compliance supplement or as

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

designated by a State for Federal awards the State provides to its subrecipients that meet the definition of a cluster of programs. When designating an "other cluster," a State shall identify the Federal awards included in the cluster and advise the subrecipients of compliance requirements applicable to the cluster, consistent with § ____.400(d)(1) and § ____.400(d)(2), respectively. A cluster of programs shall be considered as one program for determining major programs, as described in § ____.520, and, with the exception of R&D as described in § ____.200(c), whether a program-specific audit may be elected.

Cognizant agency for audit means the Federal agency designated to carry out the responsibilities described in § ____.400(a).

Compliance supplement refers to the **Circular A-133 Compliance Supplement**, included as Appendix B to Circular A-133, or such documents as OMB or its designee may issue to replace it. This document is available from the Government Printing Office, Superintendent of Documents, Washington, DC 20402-9325.

Corrective action means action taken by the auditee that:

- (1) Corrects identified deficiencies;
- (2) Produces recommended improvements; or
- (3) Demonstrates that audit findings are either invalid or do not warrant auditee action.

Federal agency has the same meaning as the term **agency** in Section 551(1) of title 5, United States Code.

Federal award means Federal financial assistance and Federal cost-reimbursement contracts that non-Federal entities receive directly from Federal awarding agencies or indirectly from pass-through entities. It does not include procurement contracts, under grants or contracts, used to buy goods or services from vendors. Any audits of such vendors shall be covered by the terms and conditions of the contract. Contracts to operate Federal Government owned, contractor operated facilities (GOCOs) are excluded from the requirements of this part.

Federal awarding agency means the Federal agency that provides an award directly to the recipient.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Federal financial assistance means assistance that non-Federal entities receive or administer in the form of grants, loans, loan guarantees, property (including donated surplus property), cooperative agreements, interest subsidies, insurance, food commodities, direct appropriations, and other assistance, but does not include amounts received as reimbursement for services rendered to individuals as described in § __.205(h) and § __.205(i).

Federal program means:

(1) All Federal awards to a non-Federal entity assigned a single number in the CFDA.

(2) When no CFDA number is assigned, all Federal awards from the same agency made for the same purpose should be combined and considered one program.

(3) Notwithstanding paragraphs (1) and (2) of this definition, a cluster of programs. The types of clusters of programs are:

(i) Research and development (R&D);

(ii) Student financial aid (SFA); and

(iii) "Other clusters," as described in the definition of cluster of programs in this section.

GAGAS means generally accepted government auditing standards issued by the Comptroller General of the United States, which are applicable to financial audits.

Generally accepted accounting principles has the meaning specified in generally accepted auditing standards issued by the American Institute of Certified Public Accountants (AICPA).

Indian tribe means any Indian tribe, band, nation, or other organized group or community, including any Alaskan Native village or regional or village corporation (as defined in, or established under, the Alaskan Native Claims Settlement Act) that is recognized by the United States as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Internal control means a process, effected by an entity's management and other personnel, designed to provide reasonable assurance regarding the achievement of objectives in the following categories:

(1) Effectiveness and efficiency of operations;

(2) Reliability of financial reporting; and

(3) Compliance with applicable laws and regulations.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Internal control pertaining to the compliance requirements for Federal programs (Internal control over Federal programs) means a process--effected by an entity's management and other personnel--designed to provide reasonable assurance regarding the achievement of the following objectives for Federal programs:

- (1) Transactions are properly recorded and accounted for to:
 - (i) Permit the preparation of reliable financial statements and Federal reports;
 - (ii) Maintain accountability over assets; and
 - (iii) Demonstrate compliance with laws, regulations, and other compliance requirements;
- (2) Transactions are executed in compliance with:
 - (i) Laws, regulations, and the provisions of contracts or grant agreements that could have a direct and material effect on a Federal program; and
 - (ii) Any other laws and regulations that are identified in the compliance supplement; and
- (3) Funds, property, and other assets are safeguarded against loss from unauthorized use or disposition.

Loan means a Federal loan or loan guarantee received or administered by a non-Federal entity.

Local government means any unit of local government within a State, including a county, borough, municipality, city, town, township, parish, local public authority, special district, school district, intrastate district, council of governments, and any other instrumentality of local government.

Major program means a Federal program determined by the auditor to be a major program in accordance with § __.520 or a program identified as a major program by a Federal agency or pass-through entity in accordance with § __.215(c).

Management decision means the evaluation by the Federal awarding agency or pass-through entity of the audit findings and corrective action plan and the issuance of a written decision as to what corrective action is necessary.

Non-Federal entity means a State, local government, or non-profit organization.

Non-profit organization means:

- (1) any corporation, trust, association, cooperative, or other organization that:
 - (i) Is operated primarily for scientific, educational, service, charitable, or similar purposes in the public interest;
 - (ii) Is not organized primarily for profit; and

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(iii) Uses its net proceeds to maintain, improve, or expand its operations; and
(2) The term **non-profit organization** includes non-profit institutions of higher education and hospitals.

OMB means the Executive Office of the President, Office of Management and Budget.

Oversight agency for audit means the Federal awarding agency that provides the predominant amount of direct funding to a recipient not assigned a cognizant agency for audit. When there is no direct funding, the Federal agency with the predominant indirect funding shall assume the oversight responsibilities. The duties of the oversight agency for audit are described in § ____.400(b).

Pass-through entity means a non-Federal entity that provides a Federal award to a subrecipient to carry out a Federal program.

Program-specific audit means an audit of one Federal program as provided for in § ____.200(c) and § ____.235.

Questioned cost means a cost that is questioned by the auditor because of an audit finding:

(1) Which resulted from a violation or possible violation of a provision of a law, regulation, contract, grant, cooperative agreement, or other agreement or document governing the use of Federal funds, including funds used to match Federal funds;

(2) Where the costs, at the time of the audit, are not supported by adequate documentation; or

(3) Where the costs incurred appear unreasonable and do not reflect the actions a prudent person would take in the circumstances.

Recipient means a non-Federal entity that expends Federal awards received directly from a Federal awarding agency to carry out a Federal program.

Research and development (R&D) means all research activities, both basic and applied, and all development activities that are performed by a non-Federal entity. **Research** is defined as a systematic study directed toward fuller scientific knowledge or understanding of the subject studied. The term research also includes activities involving the training of individuals in research techniques where such activities utilize the same facilities as other research and development activities and where such activities are not included in the instruction function. **Development** is the systematic use of knowledge and understanding gained from research directed toward the production of useful materials, devices, systems, or methods, including design and development of prototypes and processes.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Single audit means an audit which includes both the entity's financial statements and the Federal awards as described in §____.500.

State means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands, any instrumentality thereof, any multi-State, regional, or interstate entity which has governmental functions, and any Indian tribe as defined in this section.

Student Financial Aid (SFA) includes those programs of general student assistance, such as those authorized by Title IV of the Higher Education Act of 1965, as amended, (20 U.S.C. 1070 *et seq.*) which is administered by the U.S. Department of Education, and similar programs provided by other Federal agencies. It does not include programs which provide fellowships or similar Federal awards to students on a competitive basis, or for specified studies or research.

Subrecipient means a non-Federal entity that expends Federal awards received from a pass-through entity to carry out a Federal program, but does not include an individual that is a beneficiary of such a program. A subrecipient may also be a recipient of other Federal awards directly from a Federal awarding agency. Guidance on distinguishing between a subrecipient and a vendor is provided in §____.210.

Types of compliance requirements refers to the types of compliance requirements listed in the compliance supplement. Examples include: activities allowed or unallowed; allowable costs/cost principles; cash management; eligibility; matching, level of effort, earmarking; and, reporting.

Vendor means a dealer, distributor, merchant, or other seller providing goods or services that are required for the conduct of a Federal program. These goods or services may be for an organization's own use or for the use of beneficiaries of the Federal program. Additional guidance on distinguishing between a subrecipient and a vendor is provided in §____.210.

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Subpart B--Audits

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

§ ____.200 Audit requirements.

(a) **Audit required.** Non-Federal entities that expend \$300,000 or more in a year in Federal awards shall have a single or program-specific audit conducted for that year in accordance with the provisions of this part. Guidance on determining Federal awards expended is provided in § ____.205.

(b) **Single audit.** Non-Federal entities that expend \$300,000 or more in a year in Federal awards shall have a single audit conducted in accordance with § ____.500 except when they elect to have a program-specific audit conducted in accordance with paragraph (c) of this section.

(c) **Program-specific audit election.** When an auditee expends Federal awards under only one Federal program (excluding R&D) and the Federal program's laws, regulations, or grant agreements do not require a financial statement audit of the auditee, the auditee may elect to have a program-specific audit conducted in accordance with § ____.235. A program-specific audit may not be elected for R&D unless all of the Federal awards expended were received from the same Federal agency, or the same Federal agency and the same pass-through entity, and that Federal agency, or pass-through entity in the case of a subrecipient, approves in advance a program-specific audit.

(d) **Exemption when Federal awards expended are less than \$300,000.** Non-Federal entities that expend less than \$300,000 a year in Federal awards are exempt from Federal audit requirements for that year, except as noted in § ____.215(a), but records must be available for review or audit by appropriate officials of the Federal agency, pass-through entity, and General Accounting Office (GAO).

(e) **Federally Funded Research and Development Centers (FFRDC).** Management of an auditee that owns or operates a FFRDC may elect to treat the FFRDC as a separate entity for purposes of this part.

§ ____.205 Basis for determining Federal awards expended.

(a) **Determining Federal awards expended.** The determination of when an award is expended should be based on when the activity related to the award occurs. Generally, the activity pertains to events that require the non-Federal entity to comply with laws, regulations, and the provisions of contracts or grant agreements, such as: expenditure/expense transactions associated with grants, cost-reimbursement contracts, cooperative agreements, and direct appropriations; the disbursement of funds passed through to subrecipients; the use of loan proceeds under loan and loan guarantee programs; the receipt of property; the receipt of surplus property; the receipt or use of

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

program income; the distribution or consumption of food commodities; the disbursement of amounts entitling the non-Federal entity to an interest subsidy; and, the period when insurance is in force.

(b) Loan and loan guarantees (loans). Since the Federal Government is at risk for loans until the debt is repaid, the following guidelines shall be used to calculate the value of Federal awards expended under loan programs, except as noted in paragraphs (c) and (d) of this section:

- (1) Value of new loans made or received during the fiscal year; plus**
- (2) Balance of loans from previous years for which the Federal Government imposes continuing compliance requirements; plus**
- (3) Any interest subsidy, cash, or administrative cost allowance received.**

(c) Loan and loan guarantees (loans) at institutions of higher education. When loans are made to students of an institution of higher education but the institution does not make the loans, then only the value of loans made during the year shall be considered Federal awards expended in that year. The balance of loans for previous years is not included as Federal awards expended because the lender accounts for the prior balances.

(d) Prior loan and loan guarantees (loans). Loans, the proceeds of which were received and expended in prior-years, are not considered Federal awards expended under this part when the laws, regulations, and the provisions of contracts or grant agreements pertaining to such loans impose no continuing compliance requirements other than to repay the loans.

(e) Endowment funds. The cumulative balance of Federal awards for endowment funds which are federally restricted are considered awards expended in each year in which the funds are still restricted.

(f) Free rent. Free rent received by itself is not considered a Federal award expended under this part. However, free rent received as part of an award to carry out a Federal program shall be included in determining Federal awards expended and subject to audit under this part.

(g) Valuing non-cash assistance. Federal non-cash assistance, such as free rent, food stamps, food commodities, donated property, or donated surplus property, shall be valued at fair market value at the time of receipt or the assessed value provided by the Federal agency.

(h) Medicare. Medicare payments to a non-Federal entity for providing patient care services to Medicare eligible individuals are not considered Federal awards expended under this part.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(i) **Medicaid.** Medicaid payments to a subrecipient for providing patient care services to Medicaid eligible individuals are not considered Federal awards expended under this part unless a State requires the funds to be treated as Federal awards expended because reimbursement is on a cost-reimbursement basis.

(j) **Certain loans provided by the National Credit Union Administration.** For purposes of this part, loans made from the National Credit Union Share Insurance Fund and the Central Liquidity Facility that are funded by contributions from insured institutions are not considered Federal awards expended.

§ __.210 Subrecipient and vendor determinations.

(a) **General.** An auditee may be a recipient, a subrecipient, and a vendor. Federal awards expended as a recipient or a subrecipient would be subject to audit under this part. The payments received for goods or services provided as a vendor would not be considered Federal awards. The guidance in paragraphs (b) and (c) of this section should be considered in determining whether payments constitute a Federal award or a payment for goods and services.

(b) **Federal award.** Characteristics indicative of a Federal award received by a subrecipient are when the organization:

- (1) Determines who is eligible to receive what Federal financial assistance;
- (2) Has its performance measured against whether the objectives of the Federal program are met;
- (3) Has responsibility for programmatic decision making;
- (4) Has responsibility for adherence to applicable Federal program compliance requirements; and
- (5) Uses the Federal funds to carry out a program of the organization as compared to providing goods or services for a program of the pass-through entity.

(c) **Payment for goods and services.** Characteristics indicative of a payment for goods and services received by a vendor are when the organization:

- (1) Provides the goods and services within normal business operations;
- (2) Provides similar goods or services to many different purchasers;
- (3) Operates in a competitive environment;
- (4) Provides goods or services that are ancillary to the operation of the Federal program; and
- (5) Is not subject to compliance requirements of the Federal program.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(d) **Use of judgment in making determination.** There may be unusual circumstances or exceptions to the listed characteristics. In making the determination of whether a subrecipient or vendor relationship exists, the substance of the relationship is more important than the form of the agreement. It is not expected that all of the characteristics will be present and judgment should be used in determining whether an entity is a subrecipient or vendor.

(e) **For-profit subrecipient.** Since this part does not apply to for-profit subrecipients, the pass-through entity is responsible for establishing requirements, as necessary, to ensure compliance by for-profit subrecipients. The contract with the for-profit subrecipient should describe applicable compliance requirements and the for-profit subrecipient's compliance responsibility.

Methods to ensure compliance for Federal awards made to for-profit subrecipients may include pre-award audits, monitoring during the contract, and post-award audits.

(f) **Compliance responsibility for vendors.** In most cases, the auditee's compliance responsibility for vendors is only to ensure that the procurement, receipt, and payment for goods and services comply with laws, regulations, and the provisions of contracts or grant agreements. Program compliance requirements normally do not pass through to vendors. However, the auditee is responsible for ensuring compliance for vendor transactions which are structured such that the vendor is responsible for program compliance or the vendor's records must be reviewed to determine program compliance. Also, when these vendor transactions relate to a major program, the scope of the audit shall include determining whether these transactions are in compliance with laws, regulations, and the provisions of contracts or grant agreements.

§ __.215 Relation to other audit requirements.

(a) **Audit under this part in lieu of other audits.** An audit made in accordance with this part shall be in lieu of any financial audit required under individual Federal awards. To the extent this audit meets a Federal agency's needs, it shall rely upon and use such audits. The provisions of this part neither limit the authority of Federal agencies, including their Inspectors General, or GAO to conduct or arrange for additional audits (e.g., financial audits, performance audits, evaluations, inspections, or reviews) nor authorize any auditee to constrain Federal agencies from carrying out additional audits. Any additional audits shall be planned and performed in such a way as to build upon work performed by other auditors.

(b) **Federal agency to pay for additional audits.** A Federal agency that conducts or contracts for additional audits shall, consistent with other applicable laws and regulations, arrange for funding the full cost of such additional audits.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(c) Request for a program to be audited as a major program. A Federal agency may request an auditee to have a particular Federal program audited as a major program in lieu of the Federal agency conducting or arranging for the additional audits. To allow for planning, such requests should be made at least 180 days prior to the end of the fiscal year to be audited. The auditee, after consultation with its auditor, should promptly respond to such request by informing the Federal agency whether the program would otherwise be audited as a major program using the risk-based audit approach described in § ____.520 and, if not, the estimated incremental cost. The Federal agency shall then promptly confirm to the auditee whether it wants the program audited as a major program. If the program is to be audited as a major program based upon this Federal agency request, and the Federal agency agrees to pay the full incremental costs, then the auditee shall have the program audited as a major program. A pass-through entity may use the provisions of this paragraph for a subrecipient.

§ ____.220 Frequency of audits.

Except for the provisions for biennial audits provided in paragraphs (a) and (b) of this section, audits required by this part shall be performed annually. Any biennial audit shall cover both years within the biennial period.

(a) A State or local government that is required by constitution or statute, in effect on January 1, 1987, to undergo its audits less frequently than annually, is permitted to undergo its audits pursuant to this part biennially. This requirement must still be in effect for the biennial period under audit.

(b) Any non-profit organization that had biennial audits for all biennial periods ending between July 1, 1992, and January 1, 1995, is permitted to undergo its audits pursuant to this part biennially.

§ ____.225 Sanctions.

No audit costs may be charged to Federal awards when audits required by this part have not been made or have been made but not in accordance with this part. In cases of continued inability or unwillingness to have an audit conducted in accordance with this part, Federal agencies and pass-through entities shall take appropriate action using sanctions such as:

- (a)** Withholding a percentage of Federal awards until the audit is completed satisfactorily;
- (b)** Withholding or disallowing overhead costs;
- (c)** Suspending Federal awards until the audit is conducted; or
- (d)** Terminating the Federal award.

§ ____.230 Audit costs.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(a) **Allowable costs.** Unless prohibited by law, the cost of audits made in accordance with the provisions of this part are allowable charges to Federal awards. The charges may be considered a direct cost or an allocated indirect cost, as determined in accordance with the provisions of applicable OMB cost principles circulars, the Federal Acquisition Regulation (FAR) (48 CFR parts 30 and 31), or other applicable cost principles or regulations.

(b) **Unallowable costs.** A non-Federal entity shall not charge the following to a Federal award:

(1) The cost of any audit under the Single Audit Act Amendments of 1996 (31 U.S.C. 7501 et seq.) not conducted in accordance with this part.

(2) The cost of auditing a non-Federal entity which has Federal awards expended of less than \$300,000 per year and is thereby exempted under § ___.200(d) from having an audit conducted under this part. However, this does not prohibit a pass-through entity from charging Federal awards for the cost of limited scope audits to monitor its subrecipients in accordance with § ___.400(d)(3), provided the subrecipient does not have a single audit. For purposes of this part, limited scope audits only include agreed-upon procedures engagements conducted in accordance with either the AICPA's generally accepted auditing standards or attestation standards, that are paid for and arranged by a pass-through entity and address only one or more of the following types of compliance requirements: activities allowed or unallowed; allowable costs/cost principles; eligibility; matching, level of effort, earmarking; and, reporting.

§ ___.235 Program-specific audits.

(a) **Program-specific audit guide available.** In many cases, a program-specific audit guide will be available to provide specific guidance to the auditor with respect to internal control, compliance requirements, suggested audit procedures, and audit reporting requirements. The auditor should contact the Office of Inspector General of the Federal agency to determine whether such a guide is available. When a current program-specific audit guide is available, the auditor shall follow GAGAS and the guide when performing a program-specific audit.

(b) **Program-specific audit guide not available.**

(1) When a program-specific audit guide is not available, the auditee and auditor shall have basically the same responsibilities for the Federal program as they would have for an audit of a major program in a single audit.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(2) The auditee shall prepare the financial statement(s) for the Federal program that includes, at a minimum, a schedule of expenditures of Federal awards for the program and notes that describe the significant accounting policies used in preparing the schedule, a summary schedule of prior audit findings consistent with the requirements of § __.315(b), and a corrective action plan consistent with the requirements of § __.315(c).

(3) The auditor shall:

(i) Perform an audit of the financial statement(s) for the Federal program in accordance with GAGAS;

(ii) Obtain an understanding of internal control and perform tests of internal control over the Federal program consistent with the requirements of § __.500(c) for a major program;

(iii) Perform procedures to determine whether the auditee has complied with laws, regulations, and the provisions of contracts or grant agreements that could have a direct and material effect on the Federal program consistent with the requirements of § __.500(d) for a major program; and

(iv) Follow up on prior audit findings, perform procedures to assess the reasonableness of the summary schedule of prior audit findings prepared by the auditee, and report, as a current year audit finding, when the auditor concludes that the summary schedule of prior audit findings materially misrepresents the status of any prior audit finding in accordance with the requirements of § __.500(e).

(4) The auditor's report(s) may be in the form of either combined or separate reports and may be organized differently from the manner presented in this section. The auditor's report(s) shall state that the audit was conducted in accordance with this part and include the following:

(i) An opinion (or disclaimer of opinion) as to whether the financial statement(s) of the Federal program is presented fairly in all material respects in conformity with the stated accounting policies;

(ii) A report on internal control related to the Federal program, which shall describe the scope of testing of internal control and the results of the tests;

(iii) A report on compliance which includes an opinion (or disclaimer of opinion) as to whether the auditee complied with laws, regulations, and the provisions of contracts or grant agreements which could have a direct and material effect on the Federal program; and

(iv) A schedule of findings and questioned costs for the Federal program that includes a summary of the auditor's results relative to the Federal program in a format consistent with § __.505(d)(1) and findings and questioned costs consistent with the requirements of § __.505(d)(3).

(c) Report submission for program-specific audits.

(1) The audit shall be completed and the reporting required by paragraph (c)(2) or (c)(3) of this section submitted within the earlier of 30 days after receipt of the auditor's

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

report(s), or nine months after the end of the audit period, unless a longer period is agreed to in advance by the Federal agency that provided the funding or a different period is specified in a program-specific audit guide. (However, for fiscal years beginning on or before June 30, 1998, the audit shall be completed and the required reporting shall be submitted within the earlier of 30 days after receipt of the auditor's report(s), or 13 months after the end of the audit period, unless a different period is specified in a program-specific audit guide.) Unless restricted by law or regulation, the auditee shall make report copies available for public inspection.

(2) When a program-specific audit guide is available, the auditee shall submit to the Federal clearinghouse designated by OMB the data collection form prepared in accordance with § __.320(b), as applicable to a program-specific audit, and the reporting required by the program-specific audit guide to be retained as an archival copy. Also, the auditee shall submit to the Federal awarding agency or pass-through entity the reporting required by the program-specific audit guide.

(3) When a program-specific audit guide is not available, the reporting package for a program-specific audit shall consist of the financial statement(s) of the Federal program, a summary schedule of prior audit findings, and a corrective action plan as described in paragraph (b)(2) of this section, and the auditor's report(s) described in paragraph (b)(4) of this section. The data collection form prepared in accordance with § __.320(b), as applicable to a program-specific audit, and one copy of this reporting package shall be submitted to the Federal clearinghouse designated by OMB to be retained as an archival copy. Also, when the schedule of findings and questioned costs disclosed audit findings or the summary schedule of prior audit findings reported the status of any audit findings, the auditee shall submit one copy of the reporting package to the Federal clearinghouse on behalf of the Federal awarding agency, or directly to the pass-through entity in the case of a subrecipient. Instead of submitting the reporting package to the pass-through entity, when a subrecipient is not required to submit a reporting package to the pass-through entity, the subrecipient shall provide written notification to the pass-through entity, consistent with the requirements of § __.320(e)(2). A subrecipient may submit a copy of the reporting package to the pass-through entity to comply with this notification requirement.

(d) Other sections of this part may apply. Program-specific audits are subject to § __.100 through § __.215(b), § __.220 through § __.230, § __.300 through § __.305, § __.315, § __.320(f) through § __.320(j), § __.400 through § __.405, § __.510 through § __.515, and other referenced provisions of this part unless contrary to the provisions of this section, a program-specific audit guide, or program laws and regulations.

Subpart C--Auditees

§ __.300 Auditee responsibilities.

The auditee shall:

(a) Identify, in its accounts, all Federal awards received and expended and the Federal programs under which they were received. Federal program and award identification shall include, as applicable, the CFDA title and number, award number and year, name of the Federal agency, and name of the pass-through entity.

(b) Maintain internal control over Federal programs that provides reasonable assurance that the auditee is managing Federal awards in compliance with laws, regulations, and the provisions of contracts or grant agreements that could have a material effect on each of its Federal programs.

(c) Comply with laws, regulations, and the provisions of contracts or grant agreements related to each of its Federal programs.

(d) Prepare appropriate financial statements, including the schedule of expenditures of Federal awards in accordance with § __.310.

(e) Ensure that the audits required by this part are properly performed and submitted when due. When extensions to the report submission due date required by § __.320(a) are granted by the cognizant or oversight agency for audit, promptly notify the Federal clearinghouse designated by OMB and each pass-through entity providing Federal awards of the extension.

(f) Follow up and take corrective action on audit findings, including preparation of a summary schedule of prior audit findings and a corrective action plan in accordance with § __.315(b) and § __.315(c), respectively.

§ __.305 Auditor selection.

(a) Auditor procurement. In procuring audit services, auditees shall follow the procurement standards prescribed by the Grants Management Common Rule (hereinafter referred to as the "A-102 Common Rule") published March 11, 1988 and amended April 19, 1995 [insert appropriate CFR citation], Circular A-110, "Uniform Administrative Requirements for

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Grants and Agreements with Institutions of Higher Education, Hospitals and Other Non-Profit Organizations," or the FAR (48 CFR part 42), as applicable (OMB Circulars are available from the Office of Administration, Publications Office, room 2200, New Executive Office Building, Washington, DC 20503). Whenever possible, auditees shall make positive efforts to utilize small businesses, minority-owned firms, and women's business enterprises, in procuring audit services as stated in the A-102 Common Rule, OMB Circular A-110, or the FAR (48 CFR part 42), as applicable. In requesting proposals for audit services, the objectives and scope of the audit should be made clear. Factors to be considered in evaluating each proposal for audit services include the responsiveness to the request for proposal, relevant experience, availability of staff with professional qualifications and technical abilities, the results of external quality control reviews, and price.

(b) **Restriction on auditor preparing indirect cost proposals.** An auditor who prepares the indirect cost proposal or cost allocation plan may not also be selected to perform the audit required by this part when the indirect costs recovered by the auditee during the prior year exceeded \$1 million. This restriction applies to the base year used in the preparation of the indirect cost proposal or cost allocation plan and any subsequent years in which the resulting indirect cost agreement or cost allocation plan is used to recover costs. To minimize any disruption in existing contracts for audit services, this paragraph applies to audits of fiscal years beginning after June 30, 1998.

(c) **Use of Federal auditors.** Federal auditors may perform all or part of the work required under this part if they comply fully with the requirements of this part.

§ __.310 Financial statements.

(a) **Financial statements.** The auditee shall prepare financial statements that reflect its financial position, results of operations or changes in net assets, and, where appropriate, cash flows for the fiscal year audited. The financial statements shall be for the same organizational unit and fiscal year that is chosen to meet the requirements of this part. However, organization-wide financial statements may also include departments, agencies, and other organizational units that have separate audits in accordance with § __.500(a) and prepare separate financial statements.

(b) **Schedule of expenditures of Federal awards.** The auditee shall also prepare a schedule of expenditures of Federal awards for the period covered by the auditee's financial statements. While not required, the auditee may choose to provide information requested by Federal awarding agencies and pass-through entities to make the schedule easier to use. For example, when a Federal program has multiple award years, the auditee

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

may list the amount of Federal awards expended for each award year separately. At a minimum, the schedule shall:

(1) List individual Federal programs by Federal agency. For Federal programs included in a cluster of programs, list individual Federal programs within a cluster of programs. For R&D, total Federal awards expended shall be shown either by individual award or by Federal agency and major subdivision within the Federal agency. For example, the National Institutes of Health is a major subdivision in the Department of Health and Human Services.

(2) For Federal awards received as a subrecipient, the name of the pass-through entity and identifying number assigned by the pass-through entity shall be included.

(3) Provide total Federal awards expended for each individual Federal program and the CFDA number or other identifying number when the CFDA information is not available.

(4) Include notes that describe the significant accounting policies used in preparing the schedule.

(5) To the extent practical, pass-through entities should identify in the schedule the total amount provided to subrecipients from each Federal program.

(6) Include, in either the schedule or a note to the schedule, the value of the Federal awards expended in the form of non-cash assistance, the amount of insurance in effect during the year, and loans or loan guarantees outstanding at year end. While not required, it is preferable to present this information in the schedule.

§ __.315 Audit findings follow-up.

(a) **General.** The auditee is responsible for follow-up and corrective action on all audit findings. As part of this responsibility, the auditee shall prepare a summary schedule of prior audit findings. The auditee shall also prepare a corrective action plan for current year audit findings. The summary schedule of prior audit findings and the corrective action plan shall include the reference numbers the auditor assigns to audit findings under § __.510(c). Since the summary schedule may include audit findings from multiple years, it shall include the fiscal year in which the finding initially occurred.

(b) **Summary schedule of prior audit findings.** The summary schedule of prior audit findings shall report the status of all audit findings included in the prior audit's schedule of findings and questioned costs relative to Federal awards. The summary schedule shall also include audit findings reported in the prior audit's summary schedule of prior audit findings except audit findings listed as corrected in accordance with paragraph (b)(1) of this section, or no longer valid or not warranting further action in accordance with paragraph (b)(4) of this section.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(1) When audit findings were fully corrected, the summary schedule need only list the audit findings and state that corrective action was taken.

(2) When audit findings were not corrected or were only partially corrected, the summary schedule shall describe the planned corrective action as well as any partial corrective action taken.

(3) When corrective action taken is significantly different from corrective action previously reported in a corrective action plan or in the Federal agency's or pass-through entity's management decision, the summary schedule shall provide an explanation.

(4) When the auditee believes the audit findings are no longer valid or do not warrant further action, the reasons for this position shall be described in the summary schedule. A valid reason for considering an audit finding as not warranting further action is that all of the following have occurred:

(i) Two years have passed since the audit report in which the finding occurred was submitted to the Federal clearinghouse;

(ii) The Federal agency or pass-through entity is not currently following up with the auditee on the audit finding; and

(iii) A management decision was not issued.

(c) **Corrective action plan.** At the completion of the audit, the auditee shall prepare a corrective action plan to address each audit finding included in the current year auditor's reports. The corrective action plan shall provide the name(s) of the contact person(s) responsible for corrective action, the corrective action planned, and the anticipated completion date. If the auditee does not agree with the audit findings or believes corrective action is not required, then the corrective action plan shall include an explanation and specific reasons.

§ __.320 Report submission.

(a) **General.** The audit shall be completed and the data collection form described in paragraph (b) of this section and reporting package described in paragraph (c) of this section shall be submitted within the earlier of 30 days after receipt of the auditor's report(s), or nine months after the end of the audit period, unless a longer period is agreed to in advance by the cognizant or oversight agency for audit. (However, for fiscal years beginning on or before June 30, 1998, the audit shall be completed and the data collection form and reporting package shall be submitted within the earlier of 30 days after receipt of the auditor's report(s), or 13 months after the end of the audit period.) Unless restricted by law or regulation, the auditee shall make copies available for public inspection.

(b) **Data Collection.**

(1) The auditee shall submit a data collection form which states whether the audit was completed in accordance with this part and provides information about the auditee, its

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Federal programs, and the results of the audit. The form shall be approved by OMB, available from the Federal clearinghouse designated by OMB, and include data elements similar to those presented in this paragraph. A senior level representative of the auditee (e.g., State controller, director of finance, chief executive officer, or chief financial officer) shall sign a statement to be included as part of the form certifying that: the auditee complied with the requirements of this part, the form was prepared in accordance with this part (and the instructions accompanying the form), and the information included in the form, in its entirety, are accurate and complete.

(2) The data collection form shall include the following data elements:

(i) The type of report the auditor issued on the financial statements of the auditee (i.e., unqualified opinion, qualified opinion, adverse opinion, or disclaimer of opinion).

(ii) Where applicable, a statement that reportable conditions in internal control were disclosed by the audit of the financial statements and whether any such conditions were material weaknesses.

(iii) A statement as to whether the audit disclosed any noncompliance which is material to the financial statements of the auditee.

(iv) Where applicable, a statement that reportable conditions in internal control over major programs were disclosed by the audit and whether any such conditions were material weaknesses.

(v) The type of report the auditor issued on compliance for major programs (i.e., unqualified opinion, qualified opinion, adverse opinion, or disclaimer of opinion).

(vi) A list of the Federal awarding agencies which will receive a copy of the reporting package pursuant to § __.320(d)(2) of OMB Circular A-133.

(vii) A yes or no statement as to whether the auditee qualified as a low-risk auditee under § __.530 of OMB Circular A-133.

(viii) The dollar threshold used to distinguish between Type A and Type B programs as defined in § __.520(b) of OMB Circular A-133.

(ix) The Catalog of Federal Domestic Assistance (CFDA) number for each Federal program, as applicable.

(x) The name of each Federal program and identification of each major program. Individual programs within a cluster of programs should be listed in the same level of detail as they are listed in the schedule of expenditures of Federal awards.

(xi) The amount of expenditures in the schedule of expenditures of Federal awards associated with each Federal program.

(xii) For each Federal program, a yes or no statement as to whether there are audit findings in each of the following types of compliance requirements and the total amount of any questioned costs:

- (A) Activities allowed or unallowed.
- (B) Allowable costs/cost principles.
- (C) Cash management.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

- (D) Davis-Bacon Act.
- (E) Eligibility.
- (F) Equipment and real property management.
- (G) Matching, level of effort, earmarking.
- (H) Period of availability of Federal funds.
- (I) Procurement and suspension and debarment.
- (J) Program income.
- (K) Real property acquisition and relocation assistance.
- (L) Reporting.
- (M) Subrecipient monitoring.
- (N) Special tests and provisions.

(xiii) Auditee Name, Employer Identification Number(s), Name and Title of Certifying Official, Telephone Number, Signature, and Date.

(xiv) Auditor Name, Name and Title of Contact Person, Auditor Address, Auditor Telephone Number, Signature, and Date.

(xv) Whether the auditee has either a cognizant or oversight agency for audit.

(xvi) The name of the cognizant or oversight agency for audit determined in accordance with § ____.400(a) and § ____.400(b), respectively.

(3) Using the information included in the reporting package described in paragraph (c) of this section, the auditor shall complete the applicable sections of the form. The auditor shall sign a statement to be included as part of the data collection form that indicates, at a minimum, the source of the information included in the form, the auditor's responsibility for the information, that the form is not a substitute for the reporting package described in paragraph (c) of this section, and that the content of the form is limited to the data elements prescribed by OMB.

(c) **Reporting package.** The reporting package shall include the:

(1) Financial statements and schedule of expenditures of Federal awards discussed in § ____.310(a) and § ____.310(b), respectively;

(2) Summary schedule of prior audit findings discussed in § ____.315(b);

(3) Auditor's report(s) discussed in § ____.505; and

(4) Corrective action plan discussed in § ____.315(c).

(d) **Submission to clearinghouse.** All auditees shall submit to the Federal clearinghouse designated by OMB the data collection form described in paragraph (b) of this section and one copy of the reporting package described in paragraph (c) of this section for:

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

- (1) The Federal clearinghouse to retain as an archival copy; and
- (2) Each Federal awarding agency when the schedule of findings and questioned costs disclosed audit findings relating to Federal awards that the Federal awarding agency provided directly or the summary schedule of prior audit findings reported the status of any audit findings relating to Federal awards that the Federal awarding agency provided directly.

(e) Additional submission by subrecipients.

(1) In addition to the requirements discussed in paragraph (d) of this section, auditees that are also subrecipients shall submit to each pass-through entity one copy of the reporting package described in paragraph (c) of this section for each pass-through entity when the schedule of findings and questioned costs disclosed audit findings relating to Federal awards that the pass-through entity provided or the summary schedule of prior audit findings reported the status of any audit findings relating to Federal awards that the pass-through entity provided.

(2) Instead of submitting the reporting package to a pass-through entity, when a subrecipient is not required to submit a reporting package to a pass-through entity pursuant to paragraph (e)(1) of this section, the subrecipient shall provide written notification to the pass-through entity that: an audit of the subrecipient was conducted in accordance with this part (including the period covered by the audit and the name, amount, and CFDA number of the Federal award(s) provided by the pass-through entity); the schedule of findings and questioned costs disclosed no audit findings relating to the Federal award(s) that the pass-through entity provided; and, the summary schedule of prior audit findings did not report on the status of any audit findings relating to the Federal award(s) that the pass-through entity provided. A subrecipient may submit a copy of the reporting package described in paragraph (c) of this section to a pass-through entity to comply with this notification requirement.

(f) Requests for report copies. In response to requests by a Federal agency or pass-through entity, auditees shall submit the appropriate copies of the reporting package described in paragraph (c) of this section and, if requested, a copy of any management letters issued by the auditor.

(g) Report retention requirements. Auditees shall keep one copy of the data collection form described in paragraph (b) of this section and one copy of the reporting package described in paragraph (c) of this section on file for three years from the date of submission to the Federal clearinghouse designated by OMB. Pass-through entities shall keep subrecipients' submissions on file for three years from date of receipt.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(h) **Clearinghouse responsibilities.** The Federal clearinghouse designated by OMB shall distribute the reporting packages received in accordance with paragraph (d)(2) of this section and § ___.235(c)(3) to applicable Federal awarding agencies, maintain a data base of completed audits, provide appropriate information to Federal agencies, and follow up with known auditees which have not submitted the required data collection forms and reporting packages.

(i) **Clearinghouse address.** The address of the Federal clearinghouse currently designated by OMB is Federal Audit Clearinghouse, Bureau of the Census, 1201 E. 10th Street, Jeffersonville, IN 47132.

(j) **Electronic filing.** Nothing in this part shall preclude electronic submissions to the Federal clearinghouse in such manner as may be approved by OMB. With OMB approval, the Federal clearinghouse may pilot test methods of electronic submissions.

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Subpart D--Federal Agencies and Pass-Through Entities

§ ___.400 Responsibilities.

(a) **Cognizant agency for audit responsibilities.** Recipients expending more than \$25 million a year in Federal awards shall have a cognizant agency for audit. The designated cognizant agency for audit shall be the Federal awarding agency that provides the predominant amount of direct funding to a recipient unless OMB makes a specific cognizant agency for audit assignment. To provide for continuity of cognizance, the determination of the predominant amount of direct funding shall be based upon direct Federal awards expended in the recipient's fiscal years ending in 1995, 2000, 2005, and every fifth year thereafter. For example, audit cognizance for periods ending in 1997 through 2000 will be determined based on Federal awards expended in 1995. (However, for States and local governments that expend more than \$25 million a year in Federal awards and have previously assigned cognizant agencies for audit, the requirements of this paragraph are not effective until fiscal years beginning after June 30, 2000.) Notwithstanding the manner in which audit cognizance is determined, a Federal awarding agency with cognizance for an auditee may reassign cognizance to another Federal awarding agency which provides substantial direct funding and agrees to be the cognizant agency for audit. Within 30 days after any reassignment, both the old and the new cognizant agency for audit shall notify the auditee, and, if known, the auditor of the reassignment. The cognizant agency for audit shall:

- (1) Provide technical audit advice and liaison to auditees and auditors.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(2) Consider auditee requests for extensions to the report submission due date required by § ____.320(a). The cognizant agency for audit may grant extensions for good cause.

(3) Obtain or conduct quality control reviews of selected audits made by non-Federal auditors, and provide the results, when appropriate, to other interested organizations.

(4) Promptly inform other affected Federal agencies and appropriate Federal law enforcement officials of any direct reporting by the auditee or its auditor of irregularities or illegal acts, as required by GAGAS or laws and regulations.

(5) Advise the auditor and, where appropriate, the auditee of any deficiencies found in the audits when the deficiencies require corrective action by the auditor. When advised of deficiencies, the auditee shall work with the auditor to take corrective action. If corrective action is not taken, the cognizant agency for audit shall notify the auditor, the auditee, and applicable Federal awarding agencies and pass-through entities of the facts and make recommendations for follow-up action. Major inadequacies or repetitive substandard performance by auditors shall be referred to appropriate State licensing agencies and professional bodies for disciplinary action.

(6) Coordinate, to the extent practical, audits or reviews made by or for Federal agencies that are in addition to the audits made pursuant to this part, so that the additional audits or reviews build upon audits performed in accordance with this part.

(7) Coordinate a management decision for audit findings that affect the Federal programs of more than one agency.

(8) Coordinate the audit work and reporting responsibilities among auditors to achieve the most cost-effective audit.

(9) For biennial audits permitted under § ____.220, consider auditee requests to qualify as a low-risk auditee under § ____.530(a).

(b) **Oversight agency for audit responsibilities.** An auditee which does not have a designated cognizant agency for audit will be under the general oversight of the Federal agency determined in accordance with § ____.105. The oversight agency for audit:

(1) Shall provide technical advice to auditees and auditors as requested.

(2) May assume all or some of the responsibilities normally performed by a cognizant agency for audit.

(c) **Federal awarding agency responsibilities.** The Federal awarding agency shall perform the following for the Federal awards it makes:

(1) Identify Federal awards made by informing each recipient of the CFDA title and number, award name and number, award year, and if the award is for R&D. When some of this information is not available, the Federal agency shall provide information necessary to clearly describe the Federal award.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(2) Advise recipients of requirements imposed on them by Federal laws, regulations, and the provisions of contracts or grant agreements.

(3) Ensure that audits are completed and reports are received in a timely manner and in accordance with the requirements of this part.

(4) Provide technical advice and counsel to auditees and auditors as requested.

(5) Issue a management decision on audit findings within six months after receipt of the audit report and ensure that the recipient takes appropriate and timely corrective action.

(6) Assign a person responsible for providing annual updates of the compliance supplement to OMB.

(d) Pass-through entity responsibilities. A pass-through entity shall perform the following for the Federal awards it makes:

(1) Identify Federal awards made by informing each subrecipient of CFDA title and number, award name and number, award year, if the award is R&D, and name of Federal agency. When some of this information is not available, the pass-through entity shall provide the best information available to describe the Federal award.

(2) Advise subrecipients of requirements imposed on them by Federal laws, regulations, and the provisions of contracts or grant agreements as well as any supplemental requirements imposed by the pass-through entity.

(3) Monitor the activities of subrecipients as necessary to ensure that Federal awards are used for authorized purposes in compliance with laws, regulations, and the provisions of contracts or grant agreements and that performance goals are achieved.

(4) Ensure that subrecipients expending \$300,000 or more in Federal awards during the subrecipient's fiscal year have met the audit requirements of this part for that fiscal year.

(5) Issue a management decision on audit findings within six months after receipt of the subrecipient's audit report and ensure that the subrecipient takes appropriate and timely corrective action.

(6) Consider whether subrecipient audits necessitate adjustment of the pass-through entity's own records.

(7) Require each subrecipient to permit the pass-through entity and auditors to have access to the records and financial statements as necessary for the pass-through entity to comply with this part.

§ __.405 Management decision.

(a) General. The management decision shall clearly state whether or not the audit finding is sustained, the reasons for the decision, and the expected auditee action to repay disallowed costs, make financial adjustments, or take other action. If the

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

auditee has not completed corrective action, a timetable for follow-up should be given. Prior to issuing the management decision, the Federal agency or pass-through entity may request additional information or documentation from the auditee, including a request for auditor assurance related to the documentation, as a way of mitigating disallowed costs. The management decision should describe any appeal process available to the auditee.

(b) **Federal agency.** As provided in § ____.400(a)(7), the cognizant agency for audit shall be responsible for coordinating a management decision for audit findings that affect the programs of more than one Federal agency. As provided in § ____.400(c)(5), a Federal awarding agency is responsible for issuing a management decision for findings that relate to Federal awards it makes to recipients. Alternate arrangements may be made on a case-by-case basis by agreement among the Federal agencies concerned.

(c) **Pass-through entity.** As provided in § ____.400(d)(5), the pass-through entity shall be responsible for making the management decision for audit findings that relate to Federal awards it makes to subrecipients.

(d) **Time requirements.** The entity responsible for making the management decision shall do so within six months of receipt of the audit report. Corrective action should be initiated within six months after receipt of the audit report and proceed as rapidly as possible.

(e) **Reference numbers.** Management decisions shall include the reference numbers the auditor assigned to each audit finding in accordance with § ____.510(c).

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Subpart E--Auditors

§ ____.500 Scope of audit.

(a) **General.** The audit shall be conducted in accordance with GAGAS. The audit shall cover the entire operations of the auditee; or, at the option of the auditee, such audit shall include a series of audits that cover departments, agencies, and other organizational units which expended or otherwise administered Federal awards during such fiscal year, provided that each such audit shall encompass the financial statements and schedule of expenditures of Federal awards for each such department, agency, and other organizational unit, which shall be considered to be a non-Federal entity. The financial statements and schedule of expenditures of Federal awards shall be for the same fiscal year.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(b) **Financial statements.** The auditor shall determine whether the financial statements of the auditee are presented fairly in all material respects in conformity with generally accepted accounting principles. The auditor shall also determine whether the schedule of expenditures of Federal awards is presented fairly in all material respects in relation to the auditee's financial statements taken as a whole.

(c) **Internal control.**

(1) In addition to the requirements of GAGAS, the auditor shall perform procedures to obtain an understanding of internal control over Federal programs sufficient to plan the audit to support a low assessed level of control risk for major programs.

(2) Except as provided in paragraph (c)(3) of this section, the auditor shall:

(i) Plan the testing of internal control over major programs to support a low assessed level of control risk for the assertions relevant to the compliance requirements for each major program; and

(ii) Perform testing of internal control as planned in paragraph (c)(2)(i) of this section.

(3) When internal control over some or all of the compliance requirements for a major program are likely to be ineffective in preventing or detecting noncompliance, the planning and performing of testing described in paragraph (c)(2) of this section are not required for those compliance requirements. However, the auditor shall report a reportable condition (including whether any such condition is a material weakness) in accordance with § ____.510, assess the related control risk at the maximum, and consider whether additional compliance tests are required because of ineffective internal control.

(d) **Compliance.**

(1) In addition to the requirements of GAGAS, the auditor shall determine whether the auditee has complied with laws, regulations, and the provisions of contracts or grant agreements that may have a direct and material effect on each of its major programs.

(2) The principal compliance requirements applicable to most Federal programs and the compliance requirements of the largest Federal programs are included in the compliance supplement.

(3) For the compliance requirements related to Federal programs contained in the compliance supplement, an audit of these compliance requirements will meet the requirements of this part. Where there have been changes to the compliance requirements and the changes are not reflected in the compliance supplement, the auditor shall determine the current compliance requirements and modify the audit procedures accordingly. For those Federal programs not covered in the compliance

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

supplement, the auditor should use the types of compliance requirements contained in the compliance supplement as guidance for identifying the types of compliance requirements to test, and determine the requirements governing the Federal program by reviewing the provisions of contracts and grant agreements and the laws and regulations referred to in such contracts and grant agreements.

(4) The compliance testing shall include tests of transactions and such other auditing procedures necessary to provide the auditor sufficient evidence to support an opinion on compliance.

(e) **Audit follow-up.** The auditor shall follow-up on prior audit findings, perform procedures to assess the reasonableness of the summary schedule of prior audit findings prepared by the auditee in accordance with § __.315(b), and report, as a current year audit finding, when the auditor concludes that the summary schedule of prior audit findings materially misrepresents the status of any prior audit finding. The auditor shall perform audit follow-up procedures regardless of whether a prior audit finding relates to a major program in the current year.

(f) **Data Collection Form.** As required in § __.320(b)(3), the auditor shall complete and sign specified sections of the data collection form.

§ __.505 Audit reporting.

The auditor's report(s) may be in the form of either combined or separate reports and may be organized differently from the manner presented in this section. The auditor's report(s) shall state that the audit was conducted in accordance with this part and include the following:

(a) An opinion (or disclaimer of opinion) as to whether the financial statements are presented fairly in all material respects in conformity with generally accepted accounting principles and an opinion (or disclaimer of opinion) as to whether the schedule of expenditures of Federal awards is presented fairly in all material respects in relation to the financial statements taken as a whole.

(b) A report on internal control related to the financial statements and major programs. This report shall describe the scope of testing of internal control and the results of the tests, and, where applicable, refer to the separate schedule of findings and questioned costs described in paragraph (d) of this section.

(c) A report on compliance with laws, regulations, and the provisions of contracts or grant agreements, noncompliance with which could have a material effect on the financial statements. This report shall also include an opinion (or disclaimer of opinion)

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

as to whether the auditee complied with laws, regulations, and the provisions of contracts or grant agreements which could have a direct and material effect on each major program, and, where applicable, refer to the separate schedule of findings and questioned costs described in paragraph (d) of this section.

(d) A schedule of findings and questioned costs which shall include the following three components:

(1) A summary of the auditor's results which shall include:

(i) The type of report the auditor issued on the financial statements of the auditee (i.e., unqualified opinion, qualified opinion, adverse opinion, or disclaimer of opinion);

(ii) Where applicable, a statement that reportable conditions in internal control were disclosed by the audit of the financial statements and whether any such conditions were material weaknesses;

(iii) A statement as to whether the audit disclosed any noncompliance which is material to the financial statements of the auditee;

(iv) Where applicable, a statement that reportable conditions in internal control over major programs were disclosed by the audit and whether any such conditions were material weaknesses;

(v) The type of report the auditor issued on compliance for major programs (i.e., unqualified opinion, qualified opinion, adverse opinion, or disclaimer of opinion);

(vi) A statement as to whether the audit disclosed any audit findings which the auditor is required to report under § __.510(a);

(vii) An identification of major programs;

(viii) The dollar threshold used to distinguish between Type A and Type B programs, as described in § __.520(b); and

(ix) A statement as to whether the auditee qualified as a low-risk auditee under § __.530.

(2) Findings relating to the financial statements which are required to be reported in accordance with GAGAS.

(3) Findings and questioned costs for Federal awards which shall include audit findings as defined in § __.510(a).

(i) Audit findings (e.g., internal control findings, compliance findings, questioned costs, or fraud) which relate to the same issue should be presented as a single audit finding. Where practical, audit findings should be organized by Federal agency or pass-through entity.

(ii) Audit findings which relate to both the financial statements and Federal awards, as reported under paragraphs (d)(2) and (d)(3) of this section, respectively, should be reported in both sections of the schedule. However, the reporting in one section of the schedule may be in summary form with a reference to a detailed reporting in the other section of the schedule.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

§ __.510 Audit findings.

(a) Audit findings reported. The auditor shall report the following as audit findings in a schedule of findings and questioned costs:

(1) Reportable conditions in internal control over major programs. The auditor's determination of whether a deficiency in internal control is a reportable condition for the purpose of reporting an audit finding is in relation to a type of compliance requirement for a major program or an audit objective identified in the compliance supplement. The auditor shall identify reportable conditions which are individually or cumulatively material weaknesses.

(2) Material noncompliance with the provisions of laws, regulations, contracts, or grant agreements related to a major program. The auditor's determination of whether a noncompliance with the provisions of laws, regulations, contracts, or grant agreements is material for the purpose of reporting an audit finding is in relation to a type of compliance requirement for a major program or an audit objective identified in the compliance supplement.

(3) Known questioned costs which are greater than \$10,000 for a type of compliance requirement for a major program. Known questioned costs are those specifically identified by the auditor. In evaluating the effect of questioned costs on the opinion on compliance, the auditor considers the best estimate of total costs questioned (likely questioned costs), not just the questioned costs specifically identified (known questioned costs). The auditor shall also report known questioned costs when likely questioned costs are greater than \$10,000 for a type of compliance requirement for a major program. In reporting questioned costs, the auditor shall include information to provide proper perspective for judging the prevalence and consequences of the questioned costs.

(4) Known questioned costs which are greater than \$10,000 for a Federal program which is not audited as a major program. Except for audit follow-up, the auditor is not required under this part to perform audit procedures for such a Federal program; therefore, the auditor will normally not find questioned costs for a program which is not audited as a major program. However, if the auditor does become aware of questioned costs for a Federal program which is not audited as a major program (e.g., as part of audit follow-up or other audit procedures) and the known questioned costs are greater than \$10,000, then the auditor shall report this as an audit finding.

(5) The circumstances concerning why the auditor's report on compliance for major programs is other than an unqualified opinion, unless such circumstances are otherwise reported as audit findings in the schedule of findings and questioned costs for Federal awards.

(6) Known fraud affecting a Federal award, unless such fraud is otherwise reported as an audit finding in the schedule of findings and questioned costs for Federal awards. This paragraph does not require the auditor to make an additional reporting when the

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

auditor confirms that the fraud was reported outside of the auditor's reports under the direct reporting requirements of GAGAS.

(7) Instances where the results of audit follow-up procedures disclosed that the summary schedule of prior audit findings prepared by the auditee in accordance with § __.315(b) materially misrepresents the status of any prior audit finding.

(b) **Audit finding detail.** Audit findings shall be presented in sufficient detail for the auditee to prepare a corrective action plan and take corrective action and for Federal agencies and pass-through entities to arrive at a management decision. The following specific information shall be included, as applicable, in audit findings:

(1) Federal program and specific Federal award identification including the CFDA title and number, Federal award number and year, name of Federal agency, and name of the applicable pass-through entity. When information, such as the CFDA title and number or Federal award number, is not available, the auditor shall provide the best information available to describe the Federal award.

(2) The criteria or specific requirement upon which the audit finding is based, including statutory, regulatory, or other citation.

(3) The condition found, including facts that support the deficiency identified in the audit finding.

(4) Identification of questioned costs and how they were computed.

(5) Information to provide proper perspective for judging the prevalence and consequences of the audit findings, such as whether the audit findings represent an isolated instance or a systemic problem. Where appropriate, instances identified shall be related to the universe and the number of cases examined and be quantified in terms of dollar value.

(6) The possible asserted effect to provide sufficient information to the auditee and Federal agency, or pass-through entity in the case of a subrecipient, to permit them to determine the cause and effect to facilitate prompt and proper corrective action.

(7) Recommendations to prevent future occurrences of the deficiency identified in the audit finding.

(8) Views of responsible officials of the auditee when there is disagreement with the audit findings, to the extent practical.

(c) **Reference numbers.** Each audit finding in the schedule of findings and questioned costs shall include a reference number to allow for easy referencing of the audit findings during follow-up.

§ __.515 Audit working papers.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(a) **Retention of working papers.** The auditor shall retain working papers and reports for a minimum of three years after the date of issuance of the auditor's report(s) to the auditee, unless the auditor is notified in writing by the cognizant agency for audit, oversight agency for audit, or pass-through entity to extend the retention period. When the auditor is aware that the Federal awarding agency, pass-through entity, or auditee is contesting an audit finding, the auditor shall contact the parties contesting the audit finding for guidance prior to destruction of the working papers and reports.

(b) **Access to working papers.** Audit working papers shall be made available upon request to the cognizant or oversight agency for audit or its designee, a Federal agency providing direct or indirect funding, or GAO at the completion of the audit, as part of a quality review, to resolve audit findings, or to carry out oversight responsibilities consistent with the purposes of this part. Access to working papers includes the right of Federal agencies to obtain copies of working papers, as is reasonable and necessary.

§ __.520 Major program determination.

(a) **General.** The auditor shall use a risk-based approach to determine which Federal programs are major programs. This risk-based approach shall include consideration of: Current and prior audit experience, oversight by Federal agencies and pass-through entities, and the inherent risk of the Federal program. The process in paragraphs (b) through (i) of this section shall be followed.

(b) **Step 1.**

(1) The auditor shall identify the larger Federal programs, which shall be labeled Type A programs. Type A programs are defined as Federal programs with Federal awards expended during the audit period exceeding the larger of:

(i) \$300,000 or three percent (.03) of total Federal awards expended in the case of an auditee for which total Federal awards expended equal or exceed \$300,000 but are less than or equal to \$100 million.

(ii) \$3 million or three-tenths of one percent (.003) of total Federal awards expended in the case of an auditee for which total Federal awards expended exceed \$100 million but are less than or equal to \$10 billion.

(iii) \$30 million or 15 hundredths of one percent (.0015) of total Federal awards expended in the case of an auditee for which total Federal awards expended exceed \$10 billion.

(2) Federal programs not labeled Type A under paragraph (b)(1) of this section shall be labeled Type B programs.

(3) The inclusion of large loan and loan guarantees (loans) should not result in the exclusion of other programs as Type A programs. When a Federal program providing loans significantly affects the number or size of Type A programs, the auditor

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

shall consider this Federal program as a Type A program and exclude its values in determining other Type A programs.

(4) For biennial audits permitted under § __.220, the determination of Type A and Type B programs shall be based upon the Federal awards expended during the two-year period.

(c) Step 2.

(1) The auditor shall identify Type A programs which are low-risk. For a Type A program to be considered low-risk, it shall have been audited as a major program in at least one of the two most recent audit periods (in the most recent audit period in the case of a biennial audit), and, in the most recent audit period, it shall have had no audit findings under § __.510(a). However, the auditor may use judgment and consider that audit findings from questioned costs under § __.510(a)(3) and § __.510(a)(4), fraud under § __.510(a)(6), and audit follow-up for the summary schedule of prior audit findings under § __.510(a)(7) do not preclude the Type A program from being low-risk. The auditor shall consider: the criteria in § __.525(c), § __.525(d)(1), § __.525(d)(2), and § __.525(d)(3); the results of audit follow-up; whether any changes in personnel or systems affecting a Type A program have significantly increased risk; and apply professional judgment in determining whether a Type A program is low-risk.

(2) Notwithstanding paragraph (c)(1) of this section, OMB may approve a Federal awarding agency's request that a Type A program at certain recipients may not be considered low-risk. For example, it may be necessary for a large Type A program to be audited as major each year at particular recipients to allow the Federal agency to comply with the Government Management Reform Act of 1994 (31 U.S.C. 3515). The Federal agency shall notify the recipient and, if known, the auditor at least 180 days prior to the end of the fiscal year to be audited of OMB's approval.

(d) Step 3.

(1) The auditor shall identify Type B programs which are high-risk using professional judgment and the criteria in § __.525. However, should the auditor select Option 2 under Step 4 (paragraph (e)(2)(i)(B) of this section), the auditor is not required to identify more high-risk Type B programs than the number of low-risk Type A programs. Except for known reportable conditions in internal control or compliance problems as discussed in § __.525(b)(1), § __.525(b)(2), and § __.525(c)(1), a single criteria in § __.525 would seldom cause a Type B program to be considered high-risk.

(2) The auditor is not expected to perform risk assessments on relatively small Federal programs. Therefore, the auditor is only required to perform risk assessments on Type B programs that exceed the larger of:

(i) \$100,000 or three-tenths of one percent (.003) of total Federal awards expended when the auditee has less than or equal to \$100 million in total Federal awards expended.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(ii) \$300,000 or three-hundredths of one percent (.0003) of total Federal awards expended when the auditee has more than \$100 million in total Federal awards expended.

(e) **Step 4.** At a minimum, the auditor shall audit all of the following as major programs:

(1) All Type A programs, except the auditor may exclude any Type A programs identified as low-risk under Step 2 (paragraph (c)(1) of this section).

(2) (i) High-risk Type B programs as identified under either of the following two options:

(A) **Option 1.** At least one half of the Type B programs identified as high-risk under Step 3 (paragraph (d) of this section), except this paragraph (e)(2)(i)(A) does not require the auditor to audit more high-risk Type B programs than the number of low-risk Type A programs identified as low-risk under Step 2.

(B) **Option 2.** One high-risk Type B program for each Type A program identified as low-risk under Step 2.

(ii) When identifying which high-risk Type B programs to audit as major under either Option 1 or 2 in paragraph (e)(2)(i)(A) or (B), the auditor is encouraged to use an approach which provides an opportunity for different high-risk Type B programs to be audited as major over a period of time.

(3) Such additional programs as may be necessary to comply with the percentage of coverage rule discussed in paragraph (f) of this section. This paragraph (e)(3) may require the auditor to audit more programs as major than the number of Type A programs.

(f) **Percentage of coverage rule.** The auditor shall audit as major programs Federal programs with Federal awards expended that, in the aggregate, encompass at least 50 percent of total Federal awards expended. If the auditee meets the criteria in § ____.530 for a low-risk auditee, the auditor need only audit as major programs Federal programs with Federal awards expended that, in the aggregate, encompass at least 25 percent of total Federal awards expended.

(g) **Documentation of risk.** The auditor shall document in the working papers the risk analysis process used in determining major programs.

(h) **Auditor's judgment.** When the major program determination was performed and documented in accordance with this part, the auditor's judgment in applying the risk-based approach to determine major programs shall be presumed correct. Challenges by Federal agencies and pass-through entities shall only be for clearly improper use of the guidance in this part. However, Federal agencies and pass-through entities may provide auditors guidance about the risk of a particular Federal program and the auditor shall consider this guidance in determining major programs in audits not yet completed.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(i) **Deviation from use of risk criteria.** For first-year audits, the auditor may elect to determine major programs as all Type A programs plus any Type B programs as necessary to meet the percentage of coverage rule discussed in paragraph (f) of this section. Under this option, the auditor would not be required to perform the procedures discussed in paragraphs (c), (d), and (e) of this section.

(1) A first-year audit is the first year the entity is audited under this part or the first year of a change of auditors.

(2) To ensure that a frequent change of auditors would not preclude audit of high-risk Type B programs, this election for first-year audits may not be used by an auditee more than once in every three years.

§ __.525 Criteria for Federal program risk.

(a) **General.** The auditor's determination should be based on an overall evaluation of the risk of noncompliance occurring which could be material to the Federal program. The auditor shall use auditor judgment and consider criteria, such as described in paragraphs (b), (c), and (d) of this section, to identify risk in Federal programs. Also, as part of the risk analysis, the auditor may wish to discuss a particular Federal program with auditee management and the Federal agency or pass-through entity.

(b) **Current and prior audit experience.**

(1) Weaknesses in internal control over Federal programs would indicate higher risk. Consideration should be given to the control environment over Federal programs and such factors as the expectation of management's adherence to applicable laws and regulations and the provisions of contracts and grant agreements and the competence and experience of personnel who administer the Federal programs.

(i) A Federal program administered under multiple internal control structures may have higher risk. When assessing risk in a large single audit, the auditor shall consider whether weaknesses are isolated in a single operating unit (e.g., one college campus) or pervasive throughout the entity.

(ii) When significant parts of a Federal program are passed through to subrecipients, a weak system for monitoring subrecipients would indicate higher risk.

(iii) The extent to which computer processing is used to administer Federal programs, as well as the complexity of that processing, should be considered by the auditor in assessing risk. New and recently modified computer systems may also indicate risk.

(2) Prior audit findings would indicate higher risk, particularly when the situations identified in the audit findings could have a significant impact on a Federal program or have not been corrected.

(3) Federal programs not recently audited as major programs may be of higher risk than Federal programs recently audited as major programs without audit findings.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(c) Oversight exercised by Federal agencies and pass-through entities.

(1) Oversight exercised by Federal agencies or pass-through entities could indicate risk. For example, recent monitoring or other reviews performed by an oversight entity which disclosed no significant problems would indicate lower risk. However, monitoring which disclosed significant problems would indicate higher risk.

(2) Federal agencies, with the concurrence of OMB, may identify Federal programs which are higher risk. OMB plans to provide this identification in the compliance supplement.

(d) Inherent risk of the Federal program.

(1) The nature of a Federal program may indicate risk. Consideration should be given to the complexity of the program and the extent to which the Federal program contracts for goods and services. For example, Federal programs that disburse funds through third party contracts or have eligibility criteria may be of higher risk. Federal programs primarily involving staff payroll costs may have a high-risk for time and effort reporting, but otherwise be at low-risk.

(2) The phase of a Federal program in its life cycle at the Federal agency may indicate risk. For example, a new Federal program with new or interim regulations may have higher risk than an established program with time-tested regulations. Also, significant changes in Federal programs, laws, regulations, or the provisions of contracts or grant agreements may increase risk.

(3) The phase of a Federal program in its life cycle at the auditee may indicate risk. For example, during the first and last years that an auditee participates in a Federal program, the risk may be higher due to start-up or closeout of program activities and staff.

(4) Type B programs with larger Federal awards expended would be of higher risk than programs with substantially smaller Federal awards expended.

§ __.530 Criteria for a low-risk auditee.

An auditee which meets all of the following conditions for each of the preceding two years (or, in the case of biennial audits, preceding two audit periods) shall qualify as a low-risk auditee and be eligible for reduced audit coverage in accordance with § __.520:

(a) Single audits were performed on an annual basis in accordance with the provisions of this part. A non-Federal entity that has biennial audits does not qualify as a low-risk auditee, unless agreed to in advance by the cognizant or oversight agency for audit.

(b) The auditor's opinions on the financial statements and the schedule of expenditures of Federal awards were unqualified.

However, the cognizant or oversight agency for audit may judge that an opinion qualification does not affect the management of Federal awards and provide a waiver.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(c) There were no deficiencies in internal control which were identified as material weaknesses under the requirements of GAGAS. However, the cognizant or oversight agency for audit may judge that any identified material weaknesses do not affect the management of Federal awards and provide a waiver.

(d) None of the Federal programs had audit findings from any of the following in either of the preceding two years (or, in the case of biennial audits, preceding two audit periods) in which they were classified as Type A programs:

- (1) Internal control deficiencies which were identified as material weaknesses;**
- (2) Noncompliance with the provisions of laws, regulations, contracts, or grant agreements which have a material effect on the Type A program; or**
- (3) Known or likely questioned costs that exceed five percent of the total Federal awards expended for a Type A program during the year.**

Appendix A to Part __ - Data Collection Form (Form SF-SAC) [PDF]

Appendix B to Part __ - Circular A-133 Compliance Supplement

Note: Provisional OMB Circular A-133 Compliance Supplement is available from the Office of Administration, Publications Office, room 2200, New Executive Office Building, Washington, DC 20503.

Billing Code 3110-01-P

[Text from Indian Affairs Manual, Part 5, Chapter 2, Management Accountability Single Audits, issued 08/29/97, IAM Release #97-03; Replaces 14 BIAM]

2.1 Purpose. The purpose of this chapter is to provide policies and procedures to be followed for resolution and close out of single audits.

2.2 Authority.

- A. Title 5 U.S.C., Appendix, Inspector General Act (P.L. 95-452), as amended;**
- B. Title 25 U.S.C. §450 et seq., Indian Self-Determination and Education Assistance Act (P.L. 93-638), as amended;**
- C. Title 25 U.S.C. §2501 et seq., Tribally Controlled School Grants;**
- D. Title 31 U.S.C., Chapter 75, Requirements for Single Audits;**
- E. Title 25 CFR, Part 900, Contracts under the Indian Self-Determination and Education Assistance Act; and**
- F. Title 43 CFR, Part 12, Administrative and Audit Requirements and Cost Principles for Assistance Programs.**

2.3 Guidance.

- A. Office of Management and Budget (OMB) Circulars:**
 - (1) A-50, Audit followup;**
 - (2) A-102, Grants and Cooperative Agreements with State and Local Governments;**
 - (3) A-110, Uniform Administrative Requirements for Grants and Other Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations;**
 - (4) A-128, Audits of State and Local Governments (applies to audits for fiscal periods beginning on or before June 30, 1996); and**

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(5) **A-133, Audits of States, Local governments, and Non-Profit Organizations (applies to audits for fiscal periods beginning after June 30, 1996, and for prior periods for some tribal organizations which are organized as nonprofit organizations).**

B. Departmental Manual:

(1) **Part 360, Departmental Audits; and**

(2) **Part 361, Audit Followup.**

C. Catalog of federal Domestic Assistance

2.4 Policy. It is the policy of Indian Affairs to provide timely resolution of single audit reports; to provide technical assistance to grantees; and to report, as required, to other Departmental offices.

2.5 Handbook. The "single audit Resolution Handbook" is available from:

**Office of Audit and Evaluation
1849 C Street NW, Mail Stop 2559 MIB
Washington, D.C. 20240
(202) 208-1916**

**or Office of Audit and Evaluation
P.O. Box 25007, D-119
Denver, CO 80225-0007
(303) 236-9787**

2.6 Training. The Office of audit and Evaluation provides training for Federal, tribal, and school employees on the single Audit process. Contact either of the offices above for additional information.

2.7 Definitions.

A. Awarding Officials include contracting Officers; Education Line Officers; and others who have been delegated authority to award Self-Determination contracts, Self-Governance compacts, or other grant assistance on behalf of the Secretary.

B. Grantee, as used in this chapter, includes tribes, tribal organizations, tribal consortia, and school boards which receive funding from Indian Affairs under a Self-determination contract or grant, a Self-Governance compact, or any other authorized grant program, such as the Indian Child Welfare Act or the Tribally Controlled community Colleges Act.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

- C. Disallowed cost means a questioned cost identified by the auditor that the awarding official determines should not have been charged to the Federal financial assistance program.**
- D. Federal Financial Assistance includes assistance that grantees receive or administer in the form of grants, loans, loan guarantees, property (including donated surplus property), cooperative agreements, interest subsidies, insurance, direct appropriations, and other assistance.**
- E. Findings and Determination (F&D) means an awarding official's written decision as to whether the audit findings have been addressed satisfactorily and whether questioned costs have been reinstated or disallowed.**
- F. Management Decision means the determination by an Indian Affairs official that actions taken, or proposed to be taken, by the grantee will correct the deficiencies cited in the audit.**
- G. Questioned Cost means a cost that is questioned by the auditor because of an alleged violation of a provision of a law, regulation, contract, grant, cooperative agreement, or other agreement or document governing the expenditure of funds; a finding that, at the time of the audit, such cost is not supported by adequate documentation; or a finding that the expenditure of funds for the intended purpose is unnecessary or unreasonable.**
- H. Reinstated Cost means a questioned cost that an Indian Affairs official has determined is an allowable charge to a Federal financial assistance program.**
- I. Resolved Audit means that the Office of Inspector General (OIG) has accepted the management decision concerning the audit findings.**
- J. Single audit means an audit of the grantee's financial statements and the Federal awards which is conducted by an independent audit organization pursuant to the single audit Act.**
- K. Sustained cost is another term for a disallowed cost.**

2.8 Responsibilities.

- A. Audit Liaison Officer (ALO):**
 - (1) Provides required reports to designated Departmental officials on the status of unresolved audits and uncollected audit debt;**

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

- (2) Provides assistance to awarding officials in resolving and closing single audits;**
- (3) Ensures that the Catalog of Federal Domestic Assistance contains current, accurate information for all Indian Affairs Federal financial assistance programs**
- (4) Provides training and other technical assistance to grantees and to Federal employees as required or requested; and**
- (5) Established and maintains an automated tracking system to provide management information on the status of all single audits.**

B. Director, Office of Self-governance, Director, Office of Indian Education programs, and Area Directors:

- (1) Ensure timely resolution of single audits referred by the OIG; and**
- (2) Take appropriate action when audit findings indicate significant management problems or material weaknesses which put Federal resources in jeopardy, when disallowed costs have not been repaid, or when an audit has not been performed within the prescribed time;**

C. Awarding Officials:

- (1) Resolve single audit reports and prepare management decisions within 90 days of the date the audit was issued by the OIG;**
- (2) Determine allowability of questioned costs;**
- (3) Request that the Division of Accounting Management issue a bill for collection, if applicable;**
- (4) Offer to assist grantees in developing corrective action plans if there are findings of non-compliance or internal control weaknesses; and**
- (5) Identify issues requiring technical assistance and request such assistance.**

D. Chief, Division of Accounting Management:

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

- (1) Issues bills for collection and performs other required debt collection activities, as necessary, for audit related debt; and
- (2) Submits monthly report on audit-related debts to the ALO.

2.9 Audits Referred to Indian Affairs For Resolution.

A. Awarding Officials are to:

- (1) Review available information provided in the grantee's response to the audit, or in contract or grant files, or in reports of on-site Indian Affairs' reviews, or any other relevant data to determine if the audit can be resolved with the information at hand. In some cases, the awarding official may be able to make determinations about questioned costs based on the grantee's response contained in the audit report.
- (2) Request additional information if the audit lacks a response from the grantee or if the awarding official determines that other supporting material is required. the awarding official is to contact the grantee within fourteen (14) calendar days of receipt of the audit. The letter should request a response from the grantee within thirty (30) calendar days.
- (3) Make a Management Decision. Failure of the grantee to provide documents supporting the expenditure of Federal funds for questioned items does not relieve the awarding official of the responsibility for issuing a management decision on the allowability of such questioned costs.
 - (a) If all questioned costs are reinstated and all findings are resolved, the awarding official will notify the OIG by memorandum, with copy to the grantee, and recommend that the audit be closed. If an F&D is issued, a copy should be provided to the OIG. As shown in Illustration 1, however, it is not necessary to prepare F&D if there are no unresolved findings or disallowed costs.
 - (b) If some or all of the questioned costs are disallowed, the awarding official will issue a formal notice to the grantee, by certified mail, of the finds and determination and of the grantee's appeal rights under 25 CFR 2, 25 CFR 900, and 43 CFR 4 (Illustration 2). The OIG will be notified of the management decision by memorandum, attaching a copy of the F&D (Illustration 3). At the same time, a request to issue a Bill for Collection should be sent to the Division of Accounting Management.

- B. The ALO, with the concurrence of the awarding official, may make a management decision on behalf of Indian Affairs when no costs are disallowed and when all**

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

findings have been satisfactorily addressed by the grantee. Copies of the ALO;s memorandum to the OIG will be provided to the awarding official and to the grantee.

2.10 Collection of Disallowed Costs. Once the awarding official has determined that certain costs are disallowed, these amounts are debts owed by the grantee. the audit cannot be closed until final disposition of the debt. Depending upon the circumstances and the decision of the awarding official, audit related debt may be resolved.

A. By a payment from the grantee's general fund to the grantee's Federal funds of the disallowed amount if the underlying award agreement is still open. In this case, no funds are remitted to the Bureau of Indian Affairs. The awarding official is to provide documentation of the financial transfer to the ALO.

B. By payment from the grantee to the Bureau of Indian Affairs. The check or money order will be immediately forwarded to the Division of Accounting Management with a field receipt identifying the amount as repayment of disallowed costs related to the specific audit, citing the contract or grant number, and identifying the fiscal year and program to which the funds should be credited.

2.11 Reinstatement of previously Disallowed Costs. Subsequent to the awarding official's decision to disallow costs, the grantee may provide additional information which is sufficient for the awarding official to determine that some or all of the previously disallowed costs should be reinstated. In situations such as this, the awarding official should issue a revised F&D, provide a copy to the ALO, and request that the Division of Accounting Management revise or cancel the Bill for Collection as appropriate.

2.12 Compromise of Audit Related Debt.

A. The Assistant Secretary - Indian affairs may reduce, forgive, or authorize the writeoff of audit related debt when the total amount owed by the grantee is less than \$5,000. Note: The \$5,000 limit includes all debt owed by the grantee to Indian Affairs, not just the amount owed under one audit. A request to the Assistant Secretary should be submitted through the cognizant area director, Director, Office of Indian Education Programs, or director, Office of Self-governance. The request should include sufficient information concerning the financial resources of the grantee for the Assistant secretary to render an informed decision. If the debt is reduced or forgiven, a copy of the decision memorandum should be provided immediately to the division of Accounting Management.

B. The solicitor and Regional Solicitors may reduce or forgive audit related debts when the total indebtedness of the grantee does not exceed \$100,000.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

C. The Department of Justice has sole jurisdiction to compromise debts in excess of \$100,000.

2.13 Time Limitation. Disallowed costs may not be billed or collected if the F&D is issued more than 365 calendar days following receipt of the single audit by the OIG.

A. Audits With No Outstanding Disallowed Costs. Management decisions on single audits are reviewed by the OIG. If the response is acceptable, the OIG provides notification to the official who made the management decision.

(1) If the ALO made the management decision, the OIG provides the awarding official with a copy of the memorandum to the ALO. The awarding official is to provide a copy to the grantee.

(2) If the awarding official made the management decision, the OIG provides the ALO with a copy of the memorandum to the awarding official. The awarding official is to provide a copy of the OIG memorandum to the grantee.

B. Audits With Disallowed Costs. Resolved audits with outstanding disallowed costs are referred by the OIG to the Assistant Secretary - Policy, Management and Budget (PMB) for tracking of collection efforts.

(1) Documentation of collection, compromise, or reinstatement of disallowed costs must be provided to PMB through the ALO.

(2) PMB provides notification to the ALO that the audit has been closed and the ALO will forward that information to the awarding official.

C. Audits Lacking a Timely Management Decision. Single audits for which the awarding official has not made a management decision within 120 calendar days of issuance by the OIG are referred to PMB for resolution. The management decision memorandum for these audits must be sent through the ALO to PMB. If PMB determines the management decision to be acceptable, notification is provided to the ALO who will forward the information to the awarding official. If there are outstanding disallowed costs, the audit is tracked for collection as described above.

2.15 Unresolved Single Audits. While the responsibility for a determination regarding questioned costs rests with the awarding official, the resolution of compliance or internal control findings requires positive action on the part of the grantee. In a situation where the grantee fails to take action necessary to resolve material audit

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

findings, the audit remains unresolved and the awarding official will offer technical assistance to the grantee. In serious situations, the awarding official may also consider the options of limiting drawdowns, contract declination, or contract reassumption as authorized in statute and regulations.

**HHS Chapter 1-105
Grants Administration Manual
HHS Transmittal 83.01 (3/25/83)**

Subject: Resolution of Audit Findings

1-105-00 Background and Purpose

- 10 Applicability**
- 20 Responsibilities for Audit Resolution**
- 30 General Audit Resolution Standards**
- 40 Procedures Applicable to All Findings**
- 50 Resolution of Management and System Deficiencies**
- 60 Resolution of Monetary Findings**
- 70 Preaward Audits**
- 80 Coordination of Cross-Cutting Issues**
- 90 Prerelease Audit Reports**
- 100 Audit Clearance Process**
- 110 Collection of and Accounting for Disallowances and Recoveries (Including Interest Charges)**
- 120 Internal Monitoring and Reporting**
- 130 Management Uses of Audit Information**

1-105-00 Background and Purpose

- A. The audit process is one of the Government's major controls over the propriety of expenditures under grants, contracts and cooperative agreements. These audits may be performed by Federal, State or local auditors, or independent public accountants, under audit standards established by the Comptroller General of the United States.**

- B. While the very existence of an audit program is important, it is equally important that timely and effective actions be taken to resolve the auditors findings. This Chapter prescribes Departmental policies and procedures for resolving these findings on grants, contracts, and cooperative agreements, and for controlling the audit resolution process.**

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

1-105-10 Applicability

This Chapter applies to the resolution of all audit findings on grants, contracts, and cooperative agreements, including those contained in preaward reviews of proposed contracts.

1-105-20 Responsibilities for Audit Resolution

A. Assistant Secretary for Management and Budget

The Assistant Secretary for Management and Budget (ASMB) is designated as the HHS official responsible for ensuring that audit recommendations are resolved in a timely manner. In addition, the ASMB is responsible for ensuring that agency determinations made on audit recommendations are actually accomplished.

B. Audit Resolution Council

1. The Departmental Audit Resolution Council is responsible for exercising executive level oversight of, and advising the Under Secretary on, the Department's audit resolution activities. The Council is chaired by the Under Secretary and includes the Assistant Secretary for Management and Budget, the General Counsel, the Inspector General, the Deputy Under Secretary for Intergovernmental Affairs, and such other officials as appointed by the Under Secretary. Staff support for the Council is provided by the Office of the Assistant Secretary for Management and Budget and the Office of the Inspector General.

2. The Council will:

a. Review and make recommendations to the Under Secretary on the resolution of audit reports containing total exceptions of \$250,000 or more which the Operating Divisions (OPDIVs) have not resolved within six months;

b. Monitor ongoing OPDIV audit resolution performance; and

c. Consider and, when necessary as a last resort, make recommendations to the Under Secretary concerning Departmentwide safeguards that should be established where organizations refuse to adequately correct deficiencies within a reasonable period of time or fail to comply with agreements on corrective actions.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

C. Office of Procurement, Assistance and Logistics

1. The Office of Procurement, Assistance and Logistics (OPAL), Office of the Assistant Secretary for Management and Budget, is responsible for resolving all audit findings (management and system deficiencies as well as monetary findings) which affect the programs of more than one OPDIV or Federal department; except those assigned to the Divisions of Cost Allocation or the Deputy Assistant Secretary, Finance as described in Subsections E and F of this Section. OPAL is also responsible for monitoring the completion of resolution action by OPDIVs on program specific findings unique to each OPDIV which are contained in audit reports affecting more than one OPDIV or Federal department. At its discretion in unusual cases, OPAL may resolve such findings.
2. OPAL, in cooperation with the Office of the Inspector General, is also responsible for (a) formulating Department-wide policies and procedures on the resolution of audit findings, (b) approving procedures developed by the OPDIVs to implement these Department-wide policies and procedures, and (c) providing advice and assistance to OPDIVs on audit resolution matters.

D. Operating Divisions

1. The Department's OPDIVs (and, in some cases, STAFFDIVs) are responsible for resolving all audit findings, except those covered in Subsections C, E and F of this Section.
2. Each OPDIV shall designate specify action officials to carry out its audit resolution responsibilities and shall establish internal procedures to implement this Chapter. Each OPDIV shall also designate other officials to carry out the audit liaison, approval, and monitoring functions described in this Chapter.

E. Divisions of Cost Allocation, Regional Administrative Support Centers

1. The Divisions of Cost Allocation (DCAs) are responsible for resolving audit findings related to the negotiation of the following rates and plans for all organizations except commercial (for-profit) concerns:*
- a. Indirect cost rates;
 - b. Research patient care rates and amounts;
 - c. State and local government cost allocation plans;

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

- d. **Cost allocation plans for Public Assistance Programs;**
 - e. **Fringe benefit, computer, and other special rates; and**
 - f. **Deficiencies in policies and costing procedures related to the determination of fringe benefit costs, computer costs, and the costs of other specialized service operations.**
2. **The DCAs are also responsible for (a) resolving problems (whether disclosed by audit or by other reviews) related to a State's failure to comply with its approved Public Assistance cost allocation plan, where the problems affect the programs of more than one OPDIV or Federal department; and (b) assisting OPAL in conducting follow-up reviews of the implementation of corrective actions on management and system deficiencies.**

F. Deputy Assistant Secretary, Finance

The Deputy Assistant Secretary, Finance (DASF), Office of the Assistant Secretary for Management and Budget, is responsible for resolving findings which require action only by the Departmental Federal Assistance Financing System. DASF is also responsible for (1) establishing Department-wide policies and procedures for controlling, collecting and accounting for P monetary audit disallowances; (2) monitoring the collection status of these disallowances; and (3) controlling, accounting for, and collecting disallowances determined by OPAL (except as otherwise provided in Paragraph 1-105-80B.9).

1-105-30 General Audit Resolution Standards

A. Scope of Resolutions

- 1. **The audit resolution process shall include all actions required to fully resolve all issues. Depending on the nature of the problems involved, each resolution shall include:**
 - a. **Timely correction of management, system and program deficiencies;**
 - b. **Monitoring the organization to ensure that the corrective actions on significant deficiencies have been adequately implemented and that the system is operating effectively;**
 - c. **Establishing safeguards when necessary to protect the Department's interests where organizations are unwilling or unable to institute timely corrective actions, or subsequently fail to comply with previous agreements on corrective actions; and**

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

d. Recovery (or other settlement in accordance with the claims collection procedures cited in Paragraph 1-105-6OA.2) of any amounts paid but not properly allowable as charges to Federal awards.

***The resolution of audit findings related to the negotiation of these rates for commercial concerns shall be assigned to the appropriate OPDIV (or, in cases where the rates are used by more than one OPDIV, to the OPDIV having the largest monetary interest in the rates).**

2. An Action Official's responsibility with respect to an individual audit report is generally limited to the findings contained in the report. However, issues which are not specifically cited as findings per se should be pursued under the following circumstances:

a. The report contains information which indicates that a serious problem may exist even though it is not cited as a finding;

b. Experience in dealing with a given type of organization indicates that the findings contained in the audit report are frequently indicative of other problems not covered in the report; or

c. The Action Official has specific knowledge of serious problems from other sources.

Where these additional problems appear to exist, the Action Official, prior to raising them with the audited organization, should discuss them with the auditor and, if necessary, ask the auditor for additional information or audit coverage to determine whether the problems do, in fact, exist. Although it may occasionally be necessary to raise the problems described in Subparagraphs b and e after an audit report is issued, these problems should be brought to the attention of the Office of Audit as soon as they are discovered.

B. Timeliness of Resolution

1. Action Officials shall resolve audit findings within six months of the end of the month of issuance or release of the audit report by the Office of Audit. For this purpose, resolution is normally deemed to occur when a final decision on the amount of any monetary recovery has been reached; a

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

satisfactory plan of corrective action, including time schedules, to correct all deficiencies has been established; and the report has been cleared from the Department's tracking system by submission and acceptance of an Audit Clearance Document(s) (see Section 1-105-100). * Reports containing total exceptions of \$250,000 or more which are not resolved by OPDIVs within six months are subject to review by the Audit Resolution Council. These reports will be identified through the Office of Audit tracking system.

2. However, it is recognized that in a small number of non-monetary cases, a satisfactory plan of corrective action cannot be obtained from the auditee within the six month period despite the conscientious efforts of Action Officials . In those cases, the finding may be cleared based upon issuance of a final determination on the finding and the corrective action required. Action officials must vigorously continue their efforts to reach agreement with the organization on a satisfactory plan of corrective action, including time schedules, and, if they are unable to reach an agreement within a reasonable period of time, must initiate the safeguard process discussed in Subsection 1-105-50D. Accomplishment of these agreements or placement of appropriate safeguards must be tracked by OPDIV Audit Liaison Offices and for certain audit reports, will be tracked by the Office of Management and Systems, ASMB.

*It should be noted that the definition of "resolution" for the purpose of applying the six month time standard is different than the definition of this term for purposes of Subsections A and C of this Section. For the purpose of applying the six month standard, "resolution" does not include monitoring the implementation of corrective actions on significant deficiencies or the collection of disallowances. These actions, however, are considered part of the "resolution" process under Subsections A and C.

C. Documentation

Action Officials shall maintain an audit resolution file(s) or other appropriate records to fully document and justify all actions taken to resolve the findings. This documentation must describe the action taken on each finding and explain the basis for each non-concurrence with any finding or recommendation. The documentation must also identify the target dates for implementation of corrective actions on

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

management and system deficiencies, and identify the procedures followed on, and results of, follow-up reviews on the implementation of the actions. This information must be in sufficient detail to satisfy a reviewer (e.g., an OPDIV official, the Office of Audit, OPAL, GAO) that the findings have been fully, effectively, and appropriately resolved.

1-105-40 Procedures Applicable to all Fundings

A. Review of Audit Reports

- 1. Upon receipt of an audit report, the Action Official will review both the current and previous reports on the organization as well as the actions taken on prior findings. This review should identify:**
 - a. The findings and recommendations, including amounts recommended for disallowance, in the report;**
 - b. Whether the report includes full and sufficient information needed to proceed with the resolution with the audited organization;**
 - c. Whether previous agreements on corrective action have been properly implemented;**
 - d. Whether action responsibility has been properly assigned; and**
 - e. Whether the reported information may be indicative of additional areas requiring attention.**
- 2. Any questions raised during this review or at any other stage of the audit resolution process shall be discussed with the auditor. If the review of the report and discussions with the auditor indicate that additional information is needed to make a determination, the Action Official should ask the auditor to provide the information or perform additional audit work. Requests for information or clarification should be directed to the audit offices likely to have the answers. However, any requests requiring a significant amount of additional audit work should be directed to the Office of Audit's Division of Audit Coordination.**
- 3. If action responsibility is believed to have been improperly assigned, the correct action office (OPDIV Audit Liaison Office, OPAL, DASF or DCA) must be contacted by telephone before the Office of Audit is requested to**

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

reassign the report. Disagreements on the assignment of action responsibility will be resolved by the Office of Audit.

B. Review of Organization's Response

- 1. The auditor's letter transmitting the report to the audited organization will either advise the organization to respond to the Action Official within 30 days on the findings in the report or advise the organization that it will be contacted by the Action Official. In either case, the Action Official shall promptly contact the organization and, as appropriate, remind it to respond, request any needed information, or offer the organization an opportunity to provide any further information it might wish to provide on the report. All of the following information is needed:**

 - a. Its specific occurrence or non-concurrence with each finding and recommendation;**
 - b. If it agrees with a finding or recommendation, a description of the specific actions taken or planned, including time schedules, to settle the finding or implement the recommendation; and**
 - c. If it disagrees with a finding or recommendation, its specific reason(s) for the position.**
- 2. Action Official maintain control records indicating the due date for submission of the organization's response and will immediately contact the organization if the date is not met. This contact will emphasize the importance of timely responses to audit reports and will be noted in the control records or the audit report file. Where justified, an extension period for the submission of the response may be granted.**
- 3. If the Action Official determines that the comments are incomplete or otherwise deficient, the organization will be requested to provide the needed information within a reasonable time.**
- 4. The contacts described in Paragraphs 2 and 3 will be confirmed in a letter to the responsible official of the organization. This letter will specify a reasonable due date for submission of the information and will advise the organization that a unilateral determination will be made if the information an acceptable justification for an extension, is not submitted by. date. If the information or an acceptable justification for extension is not submitted by**

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

this date, the Action Official will make a unilateral determination on the findings and advise the organization of its right to appeal. If appropriate, the Action Official will initiate the "safeguard" procedures described in Subsection 1-ID and/or the actions described in Subsection 1-105-60D.

5. Audited organizations are entitled to full and fair consideration of any arguments and information submitted in support of their positions. However, Action Officials must exercise caution in evaluating information which conflicts with information contained in the audit report or documentation which was not provided to the auditor. When such information is significant, it should be discussed with the auditor and, where needed, referred to the auditor for review and comments.

1-105-50 Resolution Management and System Deficiencies

A. Determinations

The resolution of management or system deficiencies should be directed at determining whether a deficiency exists, the nature and effect of the deficiency, and the specific actions required to correct it. In order to make these determinations, the Action Official must have a clear understanding of the applicable regulations, the findings, the organization's system, and the organization's proposed corrective actions (if any). In some cases this may be accomplished by a review of the audit report and the organization's response, coupled, to the extent necessary, with a desk review of additional information submitted by the organization, dissuasions with the organization and auditor, etc. In other cases, however, particularly where the deficiencies are serious or complex, it may be necessary to make a site visit to the organization to gain a fuller understanding of its system, the findings, and the proposed corrective actions. In evaluating the proposed corrective actions, the Action Official should obtain and review copies of any new or revised policies, procedures and forms that will be used to implement the corrective actions.

B. Negotiations

If the Action Official concludes that a deficiency exists, he/she should attempt to reach agreement with the organization on the required corrective actions and timetable. If a formal conference is held, the auditor should be asked to attend the conference, in an advisory capacity, if the Action Official feels that the auditor's attendance would be beneficial.

C. Agreements

- 1. When an agreement on the corrective actions is reached, the agreement must be confirmed in a letter to the responsible official of the organization, and the official should sign and return a copy of the letter. If an agreement is reached on corrective actions for some, but not all, of the deficiencies, the agreement should cover the agreed upon actions, and the unresolved deficiencies should be handled in accordance with paragraph 2 of this Subsection. All agreements on corrective actions must, at a minimum, include the information described in Subparagraphs a. through d. below. The additional information described in Subparagraphs e. through L should also be included in the agreement, as necessary, if the deficiencies are serious or complex or if the corrective actions will take a significant amount of time to implement.**
 - a. The specific actions taken or planned to correct each deficiency. These actions should be described in sufficient detail to permit a subsequent determination of the organization's compliance with the agreement.**
 - b. The date(s) the actions have been, or will be, implemented.**
 - c. Reference to any implementing policies, procedures and forms; or a requirement that they be submitted by a specified date.**
 - d. A requirement that the organization obtain the Action Official's advance approval of any modifications to the agreement.**
 - e. A statement indicating that a follow-up review will be made.**
 - f. A description of any staff training needed to operate the system.**
 - g. A requirement that the organization conduct (or arrange for) periodic independent reviews to determine whether the system is operating effectively**
 - h. A time-phased implementation plan, including a description of each implementation phase and target dates.**
 - i. A requirement that progress reports be submitted at specified intervals to coincide with the implementation plan.**

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

2. **Whenever, despite conscientious efforts, the Action Official cannot obtain an organization's agreement to the existence of a deficiency and/or an effective plan of corrective action within the six-month resolution period, the Action Official can satisfy the six-month requirement by issuing a formal determination on the issue. This determination should, as appropriate, assert the validity of the finding and/or the corrective measures required and set a specific date for submission of a specific proposal by the organization on the corrective measures to be taken. The Action Official must vigorously continue his/her efforts to negotiate an acceptable agreement and, when one is reached, shall formalize that agreement as provided in Paragraph 1. above. If this cannot be accomplished within a reasonable period of time, the "safeguard" procedures of Subsection D of this Section must be applied.**

D. Safeguards

1. **If the organization is unwilling or unable either to agree to correct, or to adequately correct, the deficiencies within a reasonable period of time, the Action Official must immediately initiate a process leading to the establishment of safeguards to protect the Department's interests. Depending on the nature and seriousness of the deficiencies, these safeguards may include (but are not limited to) special restrictions, limitations, or controls; a change from advance funding to after-the-fact reimbursement; more frequent and detailed financial reporting; a requirement for submission of documentation to support reimbursement claims prior to payment; and in extreme cases, termination of current awards or denial of future awards (Also see Chapter 1-05 of this Manual and 45 CFR 74.7 for additional guidance concerning "high risk" grantees.)**
2. **When safeguards are considered necessary, the Action Official shall attempt to reach an agreement with the organization on the safeguards that are to be applied and shall arrange for the application of those safeguards. This agreement shall be confirmed in a letter to the responsible official of the organization, and the official shall be required to sign and return a copy of the letter.**
3. **If the Action Official is unable to reach an agreement with the organization on appropriate safeguards, he/she shall recommend the safeguards to the appropriate official designated to review and decide on the recommendations.**

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

- a. Where action responsibility is assigned to OPAL, the recommendations will be submitted to the Audit Resolution Council, and, if approved by the Under Secretary, will generally apply to all HHS programs.**
 - b. Where action responsibility is assigned to an OPDIV, the recommendations will be submitted to the OPDIV head or the OPDIV's chief administrative officer, and will apply only to programs administered by that OPDIV. However, if an OPDIV finds a situation that warrants a Department-wide safeguard, it should recommend the safeguard to OPAL. If OPAL agrees that a Department-wide safeguard is needed, it will recommend the safeguard to the Audit Resolution Council.**
 - c. Decisions of reviewing officials shall be final except that (1) decisions to suspend or debar an organization from receiving future awards are subject to further review in accordance with 45 CFR part 76 and Subpart 3-1.6 of the HHS Procurement Regulations; and (2) decisions to terminate awards are subject to appeal under applicable appeals procedures.**
 - d. Final decisions of the reviewing official will be communicated to the organization by registered mail, return receipt requested, with a copy to the Action Official. The Action Official will arrange for implementation of these decisions (or decisions by higher authorities in the case of suspensions, debarments, or terminations).**
 - e. The approval requirements described above do not apply to (1) safeguards established by the Deputy Assistant Secretary, Finance in connection with the Departmental Federal Assistance Financing System; (2) safeguards established by the DCAs related to the rates and plans described in Subsection 1-105-20E; or (3) safeguards established by awarding agencies which relate only to a single program or award.**
- 4. When a safeguard is established it must be applied consistently to all programs to which it applies, unless a deviation is approved by the head of the OPDIV or his/her designee. Deviations from Department-wide safeguards must also be approved by the Assistant Secretary for Management and Budget.**

E. Follow-Up Corrective Actions

- 1. Action Officials will monitor the organization's implementation of actions to correct deficiencies until the deficiencies have been corrected. Resolution of significant deficiencies will not be considered complete until the Action**

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Official has determined, based on a follow-up review, that the actions have, in fact, been taken and have resulted in correction of the deficiencies.

- 2. The Action Official may conduct the follow-up review personally or may request that it be conducted by the Office of Audit or others who possess the capability to perform the review. In either case, however, the Action Official is ultimately responsible for assuring that the review is conducted and for determining whether the deficiencies have been adequately corrected. The review must be initiated as soon as possible after the implementation date of the corrective actions, and except as provided in Paragraph S of this Subsection, no later than six months after that date. In addition, if the corrective actions will take a significant amount of time to implement, the Action Official should monitor the organization's progress by review of progress reports and, where necessary, interim site visits.**
- 3. If the follow-up review shows that the organization has not completed all actions needed to fully correct the deficiencies, the Action Official will negotiate the further actions needed and completion dates. The Action Official will continue to follow-up until he/she is satisfied that the organization has fully and effectively corrected the deficiencies.**
- 4. If at any time the Action Official finds, through review of progress reports, follow-up review or other means, that the organization is not complying with the resolution agreement to a significant degree, he/she will immediately initiate the "safeguard" procedures described in Subsection D of this Section.**
- 5. The six-month period for initiating follow-up reviews may be extended for a reasonable period of time where:**
 - a. A follow-up review by the Office of Audit or the next regularly scheduled Federal or non-Federal "A-102/110" audit, which will include a review of the implementation of the corrective actions, will commence soon after the six-month period;**
 - b. The nature of the corrective measures are such that six months is not sufficient for the approved system to have run enough of its cycle to allow a meaningful review.**

1-105-60 Resolution of Monetary Findings

A. General Rules on Cost Allowability

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

- 1. Except as otherwise provided in Subsection B of this Section, all decisions to allow or disallow costs must be based solely on whether they are allowable or unallowable under the applicable cost principles and other provisions of the awards. Action Officials and Approving Officials (see subparagraph 1-105-120A.1.b) have responsibility and authority (subject to appeal) for determining whether costs are allowable or unallowable, and for determining the dollar amount of any unallowable costs. In making these determinations, Action and Approving Officials have some discretion on matters of interpretation. However, such discretion does not include the authority to ignore applicable laws, regulations or policies; or authoritative interpretations issued by the courts, GAO, the Office of General Counsel responsible policy offices or other appropriate authorities.**
- 2. In the resolution of the findings, a clear distinction must be made between the determination of whether a cost is allowable or unallowable and the actual collection of a disallowance. As noted above, Action and Approving Officials have the authority to determine whether a cost is allowable or unallowable and have some discretion in making this determination. However, if a determination is made that a cost is unallowable, the Action and Approving Officials do not have the authority to "waive" (forgive) collection of the disallowance. These disallowances constitute claims by the Government, and may be waived or reduced only under the limited conditions prescribed in the Federal Claims Collection Act (Public Law 89-508) and implementing procedures (see General Administration Manual Chapters 4-50, 4-60 and 4-70).**
- 3. In determining whether a cost is allowable or unallowable, factors such as the good faith of the organization, its successful accomplishment of program objectives or its ignorance of the provisions of the awards, although important for other purposes, shall not be used as a basis for allowing costs which are unallowable under the provisions of the awards. The organization's ability to make restitution also has no bearing on the allowability of a cost, but should be considered, where necessary, in establishing recovery periods and in determining whether there is justification for reducing or waiving collection of a claim under the Federal Claims Collection Act and implementing procedures.**

B. Exceptions

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

As stated in Subsection A of this Section, the decision to allow or disallow a cost must be based on whether it is allowable under the provisions of the award. There are two situations, however, where an exception to this rule may be permitted.

1. If a transaction requiring prior approval under the provisions of an award is questioned because the approval was not requested, the transaction may be approved retroactively. Retroactive approvals may be granted, however, only where:
 - a. The transaction would have been approved had the organization requested approval in advance;
 - b. The transaction is approved by an official who has the authority to grant such approvals (usually the grants officer or the contracting officer); and
 - c. The organization agrees to institute controls to ensure that prior approval requirements are met in the future.
2. In truly exceptional cases, where strict adherence to an original provision of an award would result in a clear inequity to the organization, the provision may be waived. These waivers may be granted only in highly unusual situations and only where all of the following conditions are met:
 - a. The provision is not mandated by law;
 - b. The waiver is granted by the official who has authority over the provision (usually the grants officer or the contracting officer) and is approved by a higher level official (unless the original official is the head of the OPDIV);
 - c. If the waiver constitutes a deviation from an established regulation or policy (e.g., 45 CFR Part 74, the Grants Administration Manual), it is approved under applicable deviation control procedures; and
 - d. The Office of General Counsel has concurred that the waiver is legal.

C. Determinations and Computation of Dollar Amounts

1. General

As indicated in Subsection A of this Section, the Action Official is responsible for determining whether costs are allowable or unallowable, and for determining the

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

dollar amount of any unallowable costs. To make these determinations, the Action Official must have a clear understanding of the applicable regulations, the auditor's findings and the organization's position on the findings; and should obtain whatever additional information he/she feels is necessary to reach an informed conclusion on the issues.

2. Use of Estimates

a. In some cases, the audit report may indicate that it was not possible or feasible to attempt to identify the precise amount of unallowable costs on each award, and that an aggregate amount of the costs for all affected awards was estimated based on an analysis of a representative sample of transactions. These estimates may be based on a statistical sample of the transactions, or, if the use of statistical sampling was clearly impractical under the circumstances, other reasonable and supportable estimating techniques (such as projections based on an analysis of transactions during a representative period of time).

b. The auditor is responsible for developing estimates of any unallowable costs. The Office of Audit's policy on this subject is outlined below; (1) It is the responsibility of the auditor to use any and all extended audit procedures as are feasible, practical, and possible to determine to the maximum extent those claimed costs which are clearly allowable and/or unallowable. Since it is the basic responsibility of the contractor/grantee to maintain adequate records, Audit staff shall insist on full cooperation and assistance from contractor/grantee officials during this work.

(2) Audit staff shall continue such additional work until, in their judgment, it is no longer feasible or practical to do so.

(3) The resultant audit report shall very clearly state the existence of this condition (why the records were unauditably); a detailed description of the additional audit work done to determine allowable or unallowable costs; the amounts of the grant(s) the amounts of the costs found allowable, those found not allowable or the amount on which we would not render an opinion; and lastly, very definitive recommendations detailing precisely what must be done by the contractor/grantee to bring their records up to a satisfactory standard."

If an audit report does not contain the appropriate estimates and other information, the auditor should be contacted and asked to provide the information.

c. If the organization disagrees with the use of an estimate or disagrees with the procedures used by the auditor to develop the estimate, it should be offered the

option of performing an alternative analysis within a reasonable period of time to develop more precise results. This procedure should also be followed in situations where the auditor indicates that an estimate cannot be developed, but the organization contends that it can be developed and wishes to perform an analysis to develop the estimate. If the organization elects to perform an analysis, there should be an advance agreement on the due date for submission of the analysis and the procedures to be followed in conducting the analysis; and results of the analysis must be carefully reviewed by the Action Official and the auditor.

d. The analyses described in Subparagraph a and/or c will cover the period prescribed in Paragraph C.3 of this Section (or the results of the analysis will be projected to cover this period) and this amount will be used as the basis for a dollar settlement with the organization. If the parties are unable to reach an agreement, the Action Official will make a unilateral determination, notify the organization of the amount that he/she has determined to be unallowable, and advise the organization of its right to appeal the determination in accordance with applicable appeals procedures (see Subsection E of this Section for additional information concerning the handling of agreements and disagreements).

e. If an estimate of the unallowable costs cannot be developed, the Action Official will follow the procedures described in Subsection D of this Section.

3. Time Period for Computing Disallowances

a. If the Action Official determines that certain costs should be disallowed, the computation of the disallowance will cover the following periods.

(1) If the costs can be identified to specific awards, the computation will cover the period the organization is required to retain records under applicable records retention requirements.

(2) If an overall organization-wide estimate is used, the computation will cover (a) the organization's three fiscal immediately preceding the year in which the audit started, and (b) any subsequent periods up to the date the organization changes its procedures to discontinue the unallowable charges.

b. The time periods described in Subparagraph a will be modified under the following circumstances.

(1) The period will be extended as far back-as possible situations involving fraud or deliberate misrepresentation by an organization.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(2) The period will be appropriately reduced if part of the period was covered by an earlier settlement of the same issue.

(3) The period may be appropriately extended in cases where an organization has submitted a retroactive claim for reimbursement of costs incurred in an earlier period, or has failed to carry out a prior commitment to take corrective action which would have prevented the problem.

D. Inability to Determine Dollar Amounts

1. As indicated in Paragraph C.2 of this Section, every effort will be made by the auditors to identify or estimate the amount of any unallowable costs. However, in some cases, the deficiencies may be so serious that costs charged to the awards cannot be supported and it is not possible for the auditor to develop a reasonable and supportable estimate of the amount of unallowable costs. In these situations, the Action Official shall advise the organization in writing that it has not adequately demonstrated the allowability of the costs and shall offer the Organization the opportunity to support the costs by alternative means or to develop a reasonable estimate of any unallowable costs. If the organization submits this information, it should be evaluated by the Action Official and, if necessary, the auditor to determine whether it provides a sufficient basis for allowing the costs or for reaching a dollar settlement with the organization.
2. If the organization does not submit the information, or if the information is inadequate or inconclusive, the Action Official will notify the organization that the costs have not been supported as required by Federal regulations and are therefore disallowed; and that it may appeal this determination in accordance with applicable appeals procedures. If the amounts involved or other circumstances are such that this approach is impractical or inequitable, the following steps shall be taken.
 - a. The Action Official will notify the grant and contract officials of the affected agencies that the costs have not been supported and will request these officials to arrange for a programmatic evaluation to determine whether the charges to the projects or programs appear reasonable in relation to the work performed. If there are a large number of projects or programs involved, these evaluations may be performed on a sampling basis and projected to the total amount of the charges.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

b. Responsible program officials shall perform an evaluation to determine whether the charges appear reasonable, and, if they do not appear reasonable, to determine the amount of the excessive charges. To the maximum extent possible, program officials shall complete the evaluations within 30 days. After the evaluations are completed, the results of the evaluations will be transmitted to the Action Official.

c. If the evaluations indicate that the costs appear reasonable in relation to the work performed, the costs will be allowed. If the evaluations indicate that the costs are unreasonable, the excessive amount will be disallowed. In either case, the Action Official will also ensure that the deficiencies which caused the problem are adequately and promptly corrected, and, if necessary, shall institute the "safeguard" procedures described in Subsection 1-105-50D.

E. Agreements and Disagreements

- 1. If the Action Official determines that unallowable costs have been charged to Federal awards and the organization agrees with the determination, the agreement will be confirmed in a letter to a responsible official of the organization and the official will be required to sign and return a copy of the letter. This letter will:**
 - a. Stipulate the amount of the disallowance;**
 - b. State the basis for the disallowance (e.g., statute, regulation, which was violated);**
 - c. Set the due date for settlement of the disallowance and request payment for the amount of the disallowance or notify the organization of the appropriate procedure for recovery of the disallowance;***
 - d. Advise the organization that interest will be charged in accordance with the Federal Claims Collection Standards issued by the General Accounting Office and the Department of Justice, and the Fiscal Requirements Manual issued by the Department of Treasury;***
 - e. Advise the organization of other consequences (if any) of the failure to cooperate and pay the debt;**
 - f. Advise the organization, if necessary, of the official authorized to negotiate extended payment plans;* and**

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

***See Section 1-105-110 for procedures governing collecting and accounting for disallowances and recoveries.**

- g. Contain any other information required by applicable OPDIV regulations and/or collection procedures.**

This letter shall constitute the initial notification to debtors of the United States as required by the Federal Claims Collection Standards (4 CFR 102.2).

- 2. If the organization disagrees with the Action Officials determination, the Action Official shall make a unilateral determination, notify the organization by registered mail, return receipt requested, of the amount that he/she determined to be unallowable, and advise the organization of its right to appeal the determination. This notification must include the information described in Paragraph 1 above, plus any additional information required by applicable regulations concerning appeals, such as:**
 - a. The reasons for the determination in sufficient detail to enable the organization to understand the issues and position of the Department;**
 - b. A statement identifying the letter as the final decision of the appropriate responsible official;**
 - c. The regulations under which the appeal is to be made;**
 - d. The board or official to whom the appeal must be submitted; and**
 - e. The period within which the appeal must be submitted.**

F. Significant Reports Not Resolved in Six Months

Audit reports containing total exceptions of \$250,000 or more which are not resolved by OPDIVs within six months are subject to review by the Audit Resolution Council These reports will be identified for the Council by the Office of Audit. OPDIV audit resolution activity shall continue while the review is being conducted.

1-105-70 Preaward Audits

- A. OMB Circular A-50 requires audit reports involving recommendations on contractor estimates of future costs to be subject to most of the provisions affecting**

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

other audits. Therefore, in addition to the requirements of the Federal Procurement Regulations (FPR), resolutions of preaward audits are also subject to the provisions of this policy except that:

1. The six-month resolution period does not apply;
 2. The provisions dealing with prerelease reports and billing and accounting for disallowances and recoveries are inappropriate;
 3. The contract or the nonissuance of a contract shall satisfy the agreement/determination letter requirements for monetary resolutions.) Appropriate provisions concerning resolution of non-monetary issues can be included in the contract or separate correspondence as deemed appropriate by the Contracting Office; and
 4. Requirements, other than those noted below, for reporting to the Department on audit resolution matters as discussed in this Chapter do not apply.
- B.** Accordingly, resolution decisions must (1) be made in accordance with the appropriate standards of the FPR and this Chapter, (2) be fully documented in the Contract files along with all appropriate information concerning status of the resolution actions and correction of any non-monetary findings, and (3) be reported to the Office of Audit on an Audit Clearance Document prepared when a contract has been either awarded or not awarded. The Office of Audit will process ACDs just as it does for all other reports and will track and report preaward audit findings as a separate category of findings in its Audit Information System.

105-80 Coordination of Cross-Cutting Issues

A. General

1. Audit findings affecting the programs of more than one OPDIV or Federal department (referred to as "cross-cutting issues") are assigned to a single Action Official (referred to as the "Cognizant Action Official") who is responsible for resolving the findings on behalf of the Department and, in some cases, on behalf of the entire Federal Government. (In HHS, the Cognizant Action Official is usually OPAL or the Regional Division of Cost Allocation.) Specific responsibilities for Government-wide resolution of these issues in connection with audits of educational institutions, including designation of "cognizant agencies", are prescribed in OMB Circular A-88. In addition, even where a formal cognizance arrangement has not been

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

established, OMB Circular A-50 requires that Federal agencies coordinate the resolution of audit findings involving cross-cutting issues.

2. Where the scope of an audit report is limited to a single program (e.g., a contract closing audit) or to a group of programs administered by a single OPDIV, responsibility for resolving the findings in the report will be assigned by the Office of Audit to the awarding OPDIV. However, in some cases, these reports may also include or refer to cross-cutting issues (e.g., a contract closing audit which qualifies salary charges because of an organization-wide payroll distribution problem). In these situations the cross-cutting issues will be resolved by the Cognizant Action Official, unless responsibility for resolving the issue is delegated by the Cognizant Action Official to the awarding OPDIV. If the cross cutting issue has been, or will be, assigned to the Cognizant Action Official through the issuance of another report, the report assigned to the awarding OPDIV will indicate this fact so that the actions taken by the OPDIV will not conflict with or duplicate the actions of the Cognizant Action Official. If the cross-cutting issue is not to be included in another report, the Office of Audit (or the OPDIV if not done by the Office of Audit) will assign the issue to the Cognizant Action Official. The procedures described in this Paragraph also apply on an inter-department basis in connection with audits of colleges and universities under OMB Circular A-88.

3. Within HHS, OPAL is assigned overall responsibility for most of the audit reports which affect more than one OPDIV, including reports containing cross-cutting findings, those containing single program findings affecting different OPDIVs or a combination thereof. However, individual OPDIVs are usually assigned resolution responsibility for OPDIV-unique findings contained in these reports. Thus, with respect to OPDIV-unique findings, OPAL's role is one of overall monitoring rather than resolution. On these findings, OPAL will inform each OPDIV of its resolution responsibilities, make initial contact with the audited organization, disseminate the organization's initial response to the OPDIVs, monitor the progress of OPDIV resolution actions and receive and forward OPDIV prepared ACDs to the Office of Audit. OPDIVs are responsible for all other resolution activity on these findings including issuance of agreement/determination letters and preparation of ACDs; however, these ACDs are to be submitted to OPAL rather than directly to the Office of Audit.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

4. If a multi-agency report also includes a finding which relates exclusively to a program(s) of another Federal agency, responsibility for resolving the finding will normally be assigned to that agency.

B. Coordination Procedures

The resolution of cross-cutting issues will be coordinated in accordance with the procedures described below. These procedures apply to internal coordination within HHS for all cross-cutting issues assigned to OPAL and for issues related to Public Assistance cost allocation plans assigned to the Regional Divisions of Cost Allocation. They also apply to inter-departmental coordination of cross-cutting issues related to colleges and universities under OMB Circular A-88 (excluding indirect cost audits). Inter-departmental coordination of cross-cutting issues not covered by Circular A-88 will be handled on a case-by-case basis and, at a minimum, should include informal consultations with the Federal departments and, in the case of sub-recipients under Federal awards or subawards, those State and local government agencies that have a major financial interest in the issues; and, where possible, distribution of agreements, determination letters, appeals decisions, etc., to all affected parties.

1. The Office of Audit will distribute copies of the audit report to all affected HHS Action Officials and Audit Liaison Offices and to the audit liaison offices of all other affected Federal departments.
2. Each OPDIV and Federal department shall designate an office within the OPDIV or department to serve as a focal point for the purpose of coordinating audit resolution matters.
3. Except as provided in Paragraphs A.3 and A.4 of this Section, all communications with the audited organization concerning resolution of the issues will be made by the Cognizant Action Official.
4. If a collateral agency wishes to participate actively in the resolution of the issues, it must so advise the Cognizant Action Official within 30 days of the issuance of the audit report. This notification must also include any comments the agency wishes to make on the issues. The Cognizant Action Official may permit extensions of the 30-day period, where Justified, on a case-by-case basis. Comments on the issues may also be provided by collateral agencies not wishing to actively participate in the resolution.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

5. **If a collateral agency does not wish to participate in the resolution, it is not required to do so unless its participation is specifically requested by the Cognizant Action Official. However, all affected agencies are responsible for providing any information that comes to their attention which would have a significant bearing on the resolution, and for assisting in the resolution when such assistance is requested.**
6. **The collateral agencies that express a desire to participate (or are asked to participate) will be invited to a meeting, or will be contacted by telephone, to discuss the issues. This meeting will be scheduled as soon as possible after receipt of the organization's response to the audit report. If a formal conference with the organization is held, the agencies that attended the meeting (or were contacted by telephone) may be invited to the conference. Additional consultations may also be made with these agencies during the course of the resolution process, to the extent necessary; and they will be advised of the proposed resolution.**
7. **Throughout this process every effort should be made to reach a unified position on the issues. If the parties are unable to reach a unified position and a collateral agency strongly disagrees with the Cognizant Action Official's position, it may appeal the matter in accordance with the following procedures.**

- a. **Disagreements Within HHS**

OPDIVs which disagree with a proposed determination by OPAL/ASMB may appeal to the Audit Resolution Council. In the case of cost allocation issues related to Public Assistance Programs, OPDIVs may appeal proposed determinations by the DCAs to the Assistant Secretary for Management and Budget and, if they disagree with ASMB's decision, to the Audit Resolution Council.

- b. **Disagreements Between Federal Departments**

Disagreements between Federal departments will be resolved by the Office of Management and Budget. If a collateral agency wishes to appeal a proposed determination, it must so advise the Cognizant Action Official within 10 days, and must submit the appeal within 30 days, after being informed of the Cognizant Action Official's position. If a collateral agency disagrees with the Cognizant Action Official's position but does not choose to appeal the matter, the Cognizant Action Official's position will prevail

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

- 8. When major resolution actions are completed, the Cognizant Action Official will distribute copies of the ADC (to HHS offices), the agreement/determination letter, appeals decisions, and other significant documents to all parties on the audit report distribution schedule (except the audited organization). The Cognizant Action Official will also consult with the affected agencies when safeguards are being considered, will notify them of any safeguards established, and will advise them of any serious problems disclosed during follow-up reviews of the implementation of corrective actions.**

- 9. Generally, the Cognizant Agency will account for and collect all monetary disallowances and the funds collected will be deposited as Miscellaneous Receipts. Exceptions to this rule are as follows.**
 - a. Disallowances under Public Assistance Programs and Social Security Trust Fund Programs will be identified to each program and the awarding agencies will account for and recover the disallowances for and recover to program accounts.**

 - b. If disallowances applicable to programs of more than one Federal department cannot be collected by check and must be collected by offset against funds due to the organization, the total amount of the disallowance will normally be distributed among the affected departments on some reasonable basis and each department will assure that the offset is effected against its awards.**

 - c. Collections may be returned to the awarding agencies for and recover to program accounts by agreement of the cognizant and collateral agencies.**

 - d. Where resolution responsibility for a finding described in Paragraph 1-105-80A.3 or 4 is assigned to a collateral agency, collections shall be made by that agency unless a different procedure is established by the Cognizant Action Official.**

1-105-90 Prerelease Audit Reports

- A. When the Office of Audit determines that a final audit report will probably contain significant findings, a "proposed final report" (commonly referred to as a "prerelease report") is sent to the Action Official with a request that he/she submit written comments on the proposed report. The report is normally accompanied by the audited organization's comments on the report.**

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

- B. Under the "Prerelease Procedure", the Action Official's comments on the proposed final report must be submitted within 30 days after issuance of the report using a form called a "Prerelease Notification Document". The Action Official must state on this document whether he/she concurs or does not concur with each finding and recommendation in the report; and, if the Action Official does not concur in a finding or recommendation, must provide the reason for the non-concurrence. When completed and signed by the Action Official the Prerelease Notification Document must be reviewed and countersigned by the designated Approving Official described in Subparagraph 1-105-120A.l.b and transmitted to the appropriate Office of Audit official. Copies of the Document must be sent to all HHS parties shown on the report distribution schedule. At the option of the OPDIV, the Prerelease Notification Document may be routed through the Audit Liaison Office described in Subparagraph 1-105-120A.l.a, or may be transmitted directly to the Office of Audit (after approval by the Approving Official), with a copy to the Audit Liaison Office.**
- C. Other affected parties who wish to do so may submit comments to the Action Official for consideration and inclusion as appropriate in the Prerelease Notification Document.**
- D. Any subsequent intention to deviate from a position stated on the Prerelease Notification Document must be communicated to the issuing Audit Office prior to making a final decision on the issue.**
- E. Further details about the Prerelease Procedure can be found in Chapter 7 of the Office of Audit's Procedures Handbook.**

1-105-100 Audit Clearance Process

A. General

As discussed in Section 1-105-120, there shall be several systems which monitor the progress of the resolution of each audit report: departmental systems maintained by the Office of Audit and several offices of the ASMB; and an OPDIV system maintained by the OPDIV Audit Liaison Office. The Action Official's audit resolution responsibility continues until the report is formally cleared from all systems.

B. Clearance from Office of Audit's System

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Reports formally issued or processed by the Office of Audit are given an audit control number and entered into its monitoring system. These audit reports are cleared in the Office of Audit's system by submission and acceptance of Audit Clearance Documents (ACDs).

1. Preparation of Audit Clearance Documents

a. After the Action Official has negotiated or determined a resolution of a finding(s), including any monetary recoveries to be made, he/she prepares the ACD in accordance with Chapter 4 of the Office of Audit's Procedures Handbook.

b. Even though the Action Official's determination may be appealed, the ACD should be prepared and submitted when the original determination is made. If an appeal results in changes to the information on the original ACD, an amended ACD for the items that are changed must be prepared and submitted. The amended ACD must clearly state the nature of the change and how it affects the original ACD. The amended ACD must be processed in the same manner as the original ACD except that General Counsel clearance is not required for changes caused by Appeals Board decisions.

c. As described more fully in the Office of Audit's Procedures Handbook, the Audit Clearance Document must include, as appropriate:

(1) The resolution of each monetary finding;

(2) A brief but informative description of the action taken or planned to correct each deficiency;

(3) Milestones and target dates where several steps need to be taken to correct deficiencies;

(4) A concise explanation of the basis for any nonconcurrence with a finding in the audit report as well as any deviation from a position previously taken on a Prerelease Notification Document;

(5) Office of General Counsel clearance whenever a disagreement with an audit finding is based on an interpretation of a law, rule or regulation which is different than the interpretation used by the auditor to support the finding; and

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(6) Identification of the official who approved the agreement/determination letter (if different than the Approving Official who signs the ACD) and the date such approval was made.

d. As discussed in Section 1-105-110, ACDs also serve as the source documents for entering audit disallowances into the OPDIVs' accounting systems. Accordingly, ACDs, where possible, must identify the appropriation number, the common accounting number, and the grant, contract or cooperative agreement number to which the disallowance applies.

2. Processing Audit Clearance Documents

After the Audit Clearance Document is completed and signed by the Action Official, it must be reviewed and countersigned by the designated Approving Official: cleared, if necessary, by the Office of General Counsel by indication of "concurrence" or "nonconcurrence" and signature; and transmitted to the Audit Liaison Office. The original and two copies of satisfactory ACDs must be submitted by the Audit Liaison Office to the Office of Audit's Division of Audit Coordination, with copies to all HHS parties shown on the audit report distribution schedule. When applicable, a copy must also be provided to the appropriate finance office(s).

C. Clearance from OPDIV Systems

As discussed in Section 1-105-120, the Office of Audit's monitoring system tracks audit findings up to the point that decisions are reached on the amount of any funds to be recovered and agreements are reached on action to correct deficiencies and an ASMB system tracks completion of corrective actions on selected audit reports. However, OPDIV monitoring systems must track all findings until implementation of corrective actions has been confirmed. Accordingly, Action Officials must notify the Audit Liaison Office when such verification has been made.

1-105-110 Collection of and Accounting For Disallowances and Recoveries and (Including Interest Charges)

A. All audit disallowances must be accounted for, collected and controlled in accordance with the policies and procedures issued by the Office of the Deputy Assistant Secretary, Finance (DASF). These policies and procedures are summarized

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

below, but readers are cautioned to refer to the actual DASF policies and procedures for authoritative information.

- B. All disallowances must be entered into the OPDIV's, STAFFDIV's and Region's formal accounting records based on information contained in the Audit Clearance Documents submitted to the Office of Audit and/or the agreement/determination letter. Accounting control must be maintained thereafter. Consequently, Audit Liaison Offices (or OPAL) must provide timely notice to appropriate finance offices whenever events occur which affect the status of the disallowances. Examples of the documents that should be submitted and events that should be reported are as follows:**
- 1. A copy of the ACD and the agreement/determination letter;**
 - 2. Any non-acceptance of an Audit Clearance Document by the Office of Audit;**
 - 3. The filing of an appeal;**
 - 4. The expiration of the appeal period without appeal; and**
 - 5. Details of the final results of an appeal.**
- C. Checks for the amount of the disallowances, together with interest computed in accordance with Subsection F of this Section (if payment is not made within 30 days of the agreement/determination letter) should be sent directly to the appropriate OPDIV, ASMB or Regional finance office. If permitted by DASF procedures, the Action Official may obtain the repayment check. In these cases, the check must be immediately transmitted to the appropriate finance office.**
- D. Follow-up notices and billings will be sent to the debtor organization by the appropriate finance office (or offsets-by negative grant awards-will be made under the Public Assistance Programs where this action is mandated by statute) within 30 days of the issuance of the Action Official's agreement/determination letter described in Subsection 1-10540E. Reminder notices will confirm the due date for payment as being 30 days from the date of that letter. If the organization is unable to pay the full amount by the due date, an extended payment plan may be negotiated. Extended payment plans must be developed by, or in conjunction with, the appropriate finance office and confirmed in a written agreement.**
- E. If the organization appeals the Action Official's determination, collection actions will be suspended pending a final decision on the appeal, unless otherwise requested**

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

by the organization. However, the organization should be notified that if the disallowance is sustained (fully or partially), interest will be charged for the full period stated in Subsection F.

F.

1. As required by the Federal Claims Collection Standards (4 CFR Parts 101-105) and OMB Circular A-50, interest will be charged on the amount of a disallowance which is unpaid as of the "due date". The "due date" shall be 30 days from the date of the Action Official's agreement/determination letter. (It should be noted that the "due date" for repayment of a disallowance relates to the Action Official's agreement/determination letter; it is not extended by the filing of any form of appeal.)*
2. Interest charges on late payments will be computed at the prevailing rate prescribed under Part 6 (Paragraph 8020.20) of the Department of Treasury Fiscal Requirements Manual** for each 30-day period or portion thereof that the payment is late. If the disallowances will be paid in installments (under an extended payment plan), the interest charges will be based on the Department of Treasury's monthly "Schedule of Certified Interest Rates with Range of Maturities".*

*In some cases statutory or other provisions may apply. For example, Section 103(d)(5) of the Social Security Act provides for interest in State disputes over Medicaid disallowances to begin at the date of the disallowance determination and to be computed at a rate based on the average of the bond equivalent of the weekly 0-day Treasury bill auction rates during the dispute resolution period.

**The interest rate is transmitted quarterly by the Department of Treasury in a Treasury Fiscal Requirements Manual bulletin issued prior to the start of each quarter.

1-105-120 Internal Monitoring and Reporting

The audit resolution process shall be managed and controlled by the OPDIVs and monitored by the Department to assure that resolutions and collection of disallowances are appropriate, timely, comprehensive, and consistent.

A. OPDIV Monitoring and Reporting

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

1. Designation of Audit Liaison Offices and Approving Officials

a. Each OPDIV shall formally designate an Audit Liaison Office which must be located within its central administrative office. These Audit Liaison Offices shall be responsible for:

(1) Maintaining a system which tracks each audit finding from the date an audit report is received through final verification of adequate implementation of corrective actions on deficiencies;

(2) Monitoring the timeliness and adequacy of the OPDIV's audit resolution activities;

(3) Distributing all Audit Clearance Documents; and operating a quality control system over the adequacy of the documents as well as Prerelease Notification Documents; and

(4) Preparing or providing information for quarterly reports to ASMFS, the Office of Audit and the DASF on audit resolution and collection activities and such other reports as may be required by the Department.

b. Each OPDIV shall also formally designate Approving Officials for Prerelease Notification Documents, agreement/determination letters, and Audit Clearance Documents. Approving Officials for Prerelease Notification Documents and Audit Clearance Documents shall be at least one level higher than the Action Official. Approving Officials for agreement/determination letters must satisfy the following minimum standards.

(1) If an audit exception exceeds 5100,000, any proposed resolution of that exception which is less than ~5% of the amount recommended by the auditor must be approved by the OPDIV Head or his/her first line Deputy for operations.

(2) All other proposed resolutions must be approved by officials no lower than the OPDIV bureau chief or senior program manager (who can be the OPDIV's top regional commissioner or administrator) ultimately accountable to the Secretary and the Congress for the operational management of the program to which the audit applies.

(3) These approvals must take place before any formal notification of agreements or determination actions are transmitted to audited organizations.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

(4) If this official is not also the Approving Official on the ACD, the ACD must identify the official who approved the agreement/determination and the date of that approval.

2. Adequacy of Individual Resolution Actions

Audit Liaison Offices and Approving Officials shall perform meaningful reviews of Prerelease Notification Documents, Audit Clearance Documents, and agreement/determination letters, to assure that they are complete and that the actions or positions taken are appropriate, effective and consistent.

3. Reporting

a. At a minimum, each Action Official shall submit quarterly reports to the Audit Liaison Office and senior OPDIV management on the actions taken to resolve significant findings and the status of each open finding. These reports must be adequately reviewed and appropriate steps taken to improve performance where warranted.

b. Audit Liaison Offices shall submit quarterly reports to the Office of Audit on the resolution status of significant open findings designated by the Office of Audit and to ASMB on the status of implementation of corrective actions, and shall submit such other reports as the Department may require.

c. Agency Finance Offices and/or Audit Liaison Offices shall submit quarterly reports to the Deputy Assistant Secretary, Finance on the collection status of audit disallowances, as required by Departmental policies and procedures.

B. Departmental Monitoring and Reporting

1. Audit Resolution Council

The Departmental Audit Resolution Council is responsible for exercising executive level oversight of the Department's audit resolution activities. The composition and specific functions of the Council are described in Subsection 1-105-20B.

2. Office of Audit, Office of Inspector General

The Office of Audit monitors the overall audit resolution performance of the Department by:

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

- a. Maintaining a Department-wide management information system which tracks all audit findings until final decisions are made on the amount of funds to be recovered and the actions to be taken by recipient organizations to correct deficiencies;**
- b. Evaluating the adequacy of Audit Clearance Documents and obtaining General Counsel review of resolutions which appear inappropriate;**
- c. Performing follow-up audits on selected audit reports to determine if recipient organizations have adequately implemented corrective measures and if Action Officials have performed adequately;**
- d. Obtaining and reviewing quarterly reports on the resolution status of certain significant audit reports; and**
- e. Performing internal audits of OPDIV audit resolution activities.**

3. Deputy Assistant Secretary, Finance

The DASF monitors the collection status of all monetary audit disallowances by means of the Quarterly Reports discussed in Subparagraph A.3.c of this Section.

4. Office of Procurement, Assistance and Logistics

OPAL assists the Audit Resolution Council and the Office of Audit in obtaining corrections of deficiencies in the audit resolution activities of the OPDIVs and assists the ASMB in monitoring the Department's audit resolution performance.

5. Office of Management Analysis and Systems

The Office of Management Analysis and Systems monitors the status of implementation of corrective actions and OPDIV performance against various audit resolution goals through the Operations Management System.

6. Reporting

The Inspector General and the Assistant Secretary for Management and Budget submit periodic reports to the Secretary and the Audit Resolution Council on Departmental and OPDIV audit resolution and collection performance.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

Audit findings, either individually or collectively, may contain information of value beyond the assessment of recipient organization performance. Trends in these findings, in addition to disclosing problems in the operations of recipient organizations, may also be indicative of deficiencies in the operations or policies of the Government. Accordingly, responsible officials shall be cognizant of these trends, and, where they disclose deficiencies in the Government's operations or policies, shall recommend or initiate prompt corrective actions. Depending on the nature and extent of the deficiencies, these actions may include changes in legislation, regulations, or policies; increased monitoring; improvements in internal procedures and staff training; etc.

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

APPENDIX O

[RESERVED]

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

APPENDIX P

**UNITED STATES
DEPARTMENT OF THE INTERIOR**

Contract Number

(Bureau or Office)

Contract Date

RELEASE OF CLAIMS

of the above-identified contract for

WHEREAS, by the terms

entered into by the United States of America, hereinafter also referred to as the United States, and the contractor whose name appears on the contract as

It is provided that after completion of all work, and prior to final payment, the contractor will furnish the United States with a release of all claims:

NOW, THEREFORE, in consideration of the above premises and the payment by the United States to the contractor of the amount now due under the contract, to wit, the sum of

dollars

(\$ _____), the contractor hereby remises, releases, and forever discharges the United States, its officers, agents, and employees, of and from all manner of debts, dues liabilities, obligations, accounts, claims, and demands whatsoever, in law and equity, under or by virtue of the said contract except:

IN WITNESS WHEREOF, the contractor has executed this release this _____ day of _____, 19____

(Contractor)

(Street Number or R.F.D.)

(City) (State) (Zip Code)
By _____
(Signature)

(Name - Type or Print)

(Title)

COMPLETE ONLY IF CONTRACTOR IS A CORPORATION

I, _____ CERTIFY That I am the _____, who
of the corporation named as contractor herein; that _____, who
signed this release on behalf of the corporation, was then _____ of said corporation; and that said release
was duly signed for an on behalf of said corporation by authority of its governing body.

[SEAL]

(Signature)

DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

PHS 3576 (Rev. 2-76)

CONTRACTOR'S RELEASE FOR ALL CONTRACTS

INSTRUCTIONS TO CONTRACTOR: *Submit Original and 4 copies. All submitted copies must have original handwritten signature.*

Pursuant to the terms of Contract No. _____ and in consideration of the sum of _____ Dollars (\$ _____)

Total of amounts payed and payable
which has been or is to be paid under the said contract to _____
Contractor's name and address

hereinafter called the contractor or to its assignees, if any, the Contractor, upon payment of the said sum by the UNITED STATES OF AMERICA hereinafter called the Government, does remise, release, and discharge the Government, its officers, agents, and employees, of and from all liabilities, obligations, claims, and demands whatsoever under or arising from the said contract, except:

1. Specified claims in stated amounts or in estimated amounts where the amounts are not susceptible of exact statement by the Contractor, as follows: _____
If none so state

2. Claims, together with reasonable expenses incidental thereto, based upon the liabilities of the Contractor to third parties arising out of the performance of the said contract, which are not known to the Contractor on the date of the execution of this release and of which the contractor gives notice in writing to the Contracting Officer within the period specified in the said contract.

3. Claims for reimbursement of costs (other than expenses of the Contractor by reason of its indemnification of the Government against patent liability), including reasonable expenses incidental thereto, incurred by the Contractor under the provisions of the said contract relating to patents.

(The contract sum stipulated above includes unaudited costs in the amount of \$ _____ The contractor agrees, pursuant to the clause in this contract entitled Allowable Cost (for cost reimbursement contracts) or Allowable Cost and Fixed Fee (for CPFF contracts), that the amount of any sustained audit exceptions resulting from any subsequent audit made after final payment will be refunded to the Government.)*

The Contractor further agrees, in connection with patent matters and with claims which are not released as set forth above, that it will comply with all of the provisions of the said contract, including without limitation those provisions relating to notification to the Contracting Officer and related to the defense or prosecution of litigation.

IN WITNESS WHEREOF, this release has been executed this _____ day of _____ 19_____.

WITNESSES _____
Contractor or Corporate name

BY _____
TITLE _____

NOTE: In the case of a corporation, witnesses, are not required, but the certificate below must be completed.

CERTIFICATE

I, _____, certify that I am the _____
Official Title

_____ of the corporation named as contractor in the foregoing release; that _____ who signed said release on behalf of the Contractor was then _____ of said corporation; that said release was duly signed
Official Title

for an in behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

(CORPORATE SEAL)

*Applicable to contracts where unaudited costs claimed by the contractor are less than \$100,000.