



SEP 9 2013

Dear Tribal Leader:

I am writing to provide an update on Contract Support Costs (CSC). My letter to you on June 12, 2013 provided a detailed update on CSC appropriations and resolution of past CSC claims. The IHS continues to make progress on past CSC claims with bi-monthly updates to our case management plan regarding appeals to the Civilian Board of Contract Appeals, completion of settlements and submission of settlements to the Judgment Fund for payment to Tribes, and initiation of an alternative process for claims resolution. In terms of CSC appropriations, I have received input in multiple forums on the desire for an alternative solution to the fiscal year (FY) 2014 President's Budget's proposed appropriations language and anticipate that this topic will be discussed in depth during the IHS Tribal Budget Formulation Process this fall at both the Area and the National level.

I also wanted to provide an update on IHS' work to make the CSC claims process more efficient. I have heard that some Tribal representatives are concerned that there are many pending claims and want to see more progress on settlements. We have continued to develop our process for handling the claims, and IHS has recently committed funding for additional staff and resources dedicated to settling claims under both the traditional and alternative processes. We believe that the claims settlement process will become more efficient moving forward, in the context of available resources and the current budget climate.

I have also heard that Tribes would like to see more work on technical issues related to CSC. Given our experience since the *Salazar v. Ramah Navajo Chapter (Ramah)* decision, it is clear that there is some disagreement about how to generate estimates of CSC in the pre-award context during annual contract/compact negotiations. After the *Ramah* decision, IHS and Tribal lawyers agreed on CSC language that Tribes may use at their option, which includes an estimate of both direct and indirect CSC in the first paragraph of the language while continuing to identify the amount IHS will pay the Tribe from its annual appropriation. The IHS and Tribes have been successful in negotiating this language and the corresponding estimates in many funding agreements, but some have raised questions about how to define what types of costs qualify as CSC for inclusion in those estimates.

The Indian Self-Determination and Education Assistance Act (ISDEAA) defines the costs that qualify for CSC. 25 U.S.C. § 450j-1(a)(2). Although IHS's current policy provides practical negotiation guidance based on the statutory definition, more detailed guidance could be beneficial to negotiating the estimates in a consistent manner with all Tribes. For example, some agreed-upon principles would be helpful for applying the statutory principles of reasonableness, necessity of the activity/costs to ensure contract compliance and prudent management, and eliminating duplication of costs already paid to the Tribe in the Secretarial (106(a)(1)) amount.

Differences of opinion on the application of these principles have led to differing estimates and, in the end, prolonged discussions during negotiations.

There may also be a need to clarify the difference between indirect cost rates negotiated with a Tribe's cognizant agency, which covers all indirect costs and relies upon a methodology applied to non-ISDEAA contractors as well, versus the negotiation with IHS of indirect CSC for programs, services, functions and activities (PSFAs) included in ISDEAA contracts and compacts. The indirect cost rate that a Tribe negotiates for grants and contracts is related to but not the same as CSC, since some indirect costs are also funded through the Secretarial amount and those same costs must not also be funded as indirect CSC. For example, while Tribes' indirect cost pools often include rent and utilities, IHS incurs costs for rent and utilities as well and transfers the funding for those costs as part of the Secretarial amount; it would be duplicative to include the costs again in the CSC calculation. Discussions to clarify or improve everyone's understanding of the estimate of CSC in ISDEAA negotiations would help to resolve some of this confusion. Understanding these differences up front would help the entire contracting process, as well as development of the IHS Report to Congress on funding needs for CSC.

These principles may also be helpful to reducing litigation in the future. Our experience with the CSC litigation to date shows that we can eventually agree on the amount of CSC that is owed, even though the initial damages calculations by the Tribes and the IHS are often very far apart. We can reduce the litigation and the work required to reconcile these calculations if everyone can agree on a more accurate method for calculating CSC at the beginning of the process, i.e., at the time of negotiating the contract/compact, because we have reached agreement on how to calculate CSC from the very beginning. Moreover, such agreement will also lead to a more efficient and accurate process with respect to CSC funding and estimation of need. Reaching agreement on the relevant principles at the beginning of the process will help make every other part of the process go more smoothly.

Therefore, I would like to begin discussions on this topic using the following process: first, I will schedule a 2-3 hour session at the next IHS Tribal Self-Governance Advisory Committee meeting and the next IHS Direct Service Tribes Advisory Committee meeting to begin a policy discussion on this topic with Tribal leadership; and second, I will ask for 4-6 representatives to be selected from each Committee to meet together as one group to have more in-depth discussions on the topic and develop recommendations that will then be taken back to both Committees. I anticipate that it will only take one to two meetings of the group to develop recommendations to IHS on elaborating on the statutory principles for calculating CSC estimates. Once this process is complete, the IHS will review options for engaging all Tribes in consultation on this issue. While we may not reach complete agreement on the calculation, some agreement on these general principles is likely to save everyone on both the IHS and Tribal sides a lot of work in the end. Since having this clarification as soon as possible would be helpful, this process will help us be as inclusive and efficient as possible. Please give your input to your

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respective Area Tribal representative on each of these Committees prior to their next scheduled meetings in October.

Thank you for your assistance in this important matter.

Sincerely,

/Yvette Roubideaux/

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