



SENT VIA E-MAIL: consultation@ihs.gov

May 17, 2018

RADM Michael Weahkee, Acting Director
Indian Health Service
5600 Fishers Lane
Mail Stop: 08E86
Rockville, MD 20857

Re: CSC “97/3” Method Tribal Consultation

Dear Acting Director Weahkee,

The Alaska Native Tribal Health Consortium (ANTHC) is a statewide tribal health organization that serves all 229 Tribes and more than 166,000 Alaska Native and American Indian (AN/AI) individuals in Alaska. ANTHC and Southcentral Foundation co-manage the Alaska Native Medical Center, the tertiary care hospital for all AN/AIs in Alaska. ANTHC also provides a wide range of statewide public health, community health, environmental health and other programs and services for Alaska Native people and their communities.

On behalf of ANTHC , I submit the following comments on the agency’s proposed revisions to Section 6-3.2E(3) of the Indian Health Service (IHS) Manual addressing contract support cost (CSC) issues (the so-called “97/3 method”).

Agency Actions violate IHS Tribal Consultation Policy

Before commenting on the merits of the proposals laid out in the agency’s Dear Tribal Leader Letter of April 13, 2018, a few process comments are in order. As mentioned in the letter, the 2016 policy was developed after years of CSC Workgroup meetings and only after a period of tribal consultation in which tribal comments were not only considered, but also incorporated into the policy. The policy represented a compromise between the Tribes’ views of what the law commands and the agency’s competing views at the time. It was a collaboration. While neither the agency nor Tribes found it perfect, both recognized that it respected the differing perspectives on certain key issues—including the 97/3 method for determining indirect costs included in service unit shares—and was developed in accordance with the government-to-government relationship.

The 97/3 option is meant to avoid, or at least minimize, duplication between indirect CSC and indirect cost funding in the Secretarial or program amount. When a Tribe assumes a new or expanded program, function, service, or activity, or adds staff associated with a joint venture, the policy requires a duplication review when determining the amount of CSC associated with the

expansion. The rescinded provision gave Tribes a choice between two methods: (1) a “case-by-case detailed analysis” of indirect costs transferred in the Secretarial amount; or (2) a 97 /3 split, in which 97% of the expansion would be deemed part of the direct cost base (and thus generate indirect CSC), while 3% would be deemed indirect cost funding (and thus be excluded from the direct cost base and offset against indirect CSC otherwise due).

It is important to note that the 97/3 split was modeled on the longstanding 80/20 split for Area and Headquarters tribal shares. Like the 80/20 rule, the 97/3 split provides a reasonable approximation that saves much time and effort on both sides, by replacing hours or days of potentially contentious negotiations with a simple computation. The loss of a small amount of accuracy in using the 80/20 and the 97/3 methods, is far outweighed by the substantial benefits gained in simplicity and efficiency. Both methods comport with Congress’s command—and the IHS CSC Policy’s stated goal—to simplify the process of CSC estimation and payment.

Unfortunately, the actions of the agency—both in unilaterally rescinding certain policy provisions in December 2017 and now in sending out two additional options for tribal consultation that were never even formally proposed to, much less accepted by, the full CSC Workgroup—fail to respect this collaborative process and legal requirement for government-to-government consultation. We feel that IHS has completely ignored its Tribal Consultation Policy and that these actions have undermined the trust that Tribes nationally had placed in IHS and eroded our faith in future negotiations and consultations with IHS.

It is unacceptable to now send out for tribal consultation IHS’s preferred *post hoc* options for tribal consultation, and to flatly ignore the unanimous result reached at the March CSC Workgroup meeting. You mentioned recently in Albuquerque that the agency’s attorneys still had concerns about the alternate language that was unanimously developed and approved by the Workgroup in March. The place for the agency’s attorneys to raise those concerns was in the March Workgroup meeting itself. Indeed, several IHS attorneys did voice their concerns, and compromises to address those concerns, as well as tribal concerns, were made on both sides. A fact to which you are aware of, as you sat in at those meetings and actively participated in the substantive discussions. You did not vote “no” when the Workgroup’s final product was presented for a formal vote. Indeed, not a single Workgroup member voted “no.” To the contrary, all participants agreed that the language struck a balance that adequately responded to IHS’s stated concerns while adhering to the core of the Manual as much as possible.

To send out anything other than the agreed-upon language seems like an act of bad faith, especially given that the Indian Self-Determination and Education Assistance Act *commands* that IHS must interpret the Act’s provisions “liberally” and in favor of the Tribes. 25 U.S.C. §§ 5329(c), sec. 1(a)(2); 5392(f).

The 97/3 Method and Agency Alternatives

In the April 13 letter you explain that “the IHS became aware that section 6-3.2E(3) may not conform in all cases with the statutory authority of the [ISDEAA].” We do not agree with

that conclusion, especially as many of the “past negotiations” you speak of were based off of estimates that do not accurately reflect how tribal programs are run. But most tellingly, your agency colleagues had only encountered one situation—*one*—where the agency staff believed such an outcome might be possible and further agreed that such an outcome had not actually occurred. In any event, a few theoretical outliers simply do not justify changing the entire policy. To the contrary, only actual problems with implementation or changes in the law and controlling court decisions should dictate when changes to the Manual are warranted.

Finally, contrary to IHS’s suggestion, its existing policies do not prevent the agency from complying with the law. Rather, IHS already has ample tools to deal with any situation where it believes applying the policy would cause a violation of the law. Indeed, since the policy’s release in 2016, there have been several instances, including several leading to lawsuits, involving situations where IHS decided that applying the policy as written would result in an excessive amount of CSC owed to a Tribe. IHS in these instances never asserted that the policy prevented the agency from applying the law as it believes it should be applied. For this reason in particular, **ANTHC recommends that the 97/3 provision should remain as originally published in October 2016.** If the agency identifies outliers where it believes a Tribe would be paid more than the law permits, the agency remains free to pursue that position. After all, the Manual already makes plain that the law takes supremacy.

We understand you do not agree with this assessment since your letter proposes other options that would take away the ability of Tribes to elect the 97/3 method in any scenario requiring a duplication analysis. Since it seems clear that IHS plans to implement one of the three options set forth in the April 13 letter, we want to make clear that **the unanimous Workgroup recommendation is the only acceptable option.**

This option responds to IHS’s concern about previously negotiated amounts, while otherwise retaining as much of the original policy, and tribal autonomy, as possible. The other two IHS-proposed options contain several subtle changes that drastically curtail the authority of Tribes, while making CSC calculations subject to the whims of the agency rather than the result of the joint collaborative process it was meant to be. In practice, this would likely result in IHS running the numbers in every instance and only agreeing to 97/3 if it would result in a duplication offset greater than the “known” amount. The 97/3 method—an option meant to protect Tribes, especially smaller ones—would effectively be nullified. The result of these two options will only lead to more protracted litigation with the agency.

The two agency options are unsatisfactory for several additional reasons. First, the duplication provision was meant to apply to the negotiation of funding in or after FY 2016. But the two new IHS options would make these options available only for agreements that are entered into in or after FY 2017. This change appears to cut off the right of any Tribe or tribal organization from renegotiating a duplication amount if it was contracting before FY 2017. At the very least, it prohibits Tribes from using these options when “reconciling” or negotiating the amount of indirect CSC that was due in 2014, 2015 or 2016. Given that the majority of Tribes took over programs long before FY 2017, this language may make this provision inapplicable to most tribal contractors.

Second, the two new agency options strip Tribes of the right to choose which method to use, and instead makes it a choice on which both Tribes and IHS must agree on. The clear result of this rewrite would be far more instances where the agency will be in a position to force a Tribe into a contentious negotiation that would lead to litigation if the Tribe does not capitulate—the exact opposite of the policy’s goals. The whole point of the CSC policy was to make CSC calculations less contentious. The two new agency-drafted options are guaranteed to make the CSC calculation process far more complicated, contentious, and ultimately unfair.

Finally, the whole point of the 97/3 method was to provide an efficient compromise in cases where it was already clear IHS and Tribes could not reach agreement on duplication. The agency’s two new options make this impossible as the option to use the shortcut method would be subject to agency approval. In sum, the agency’s proposed unilateral changes nullify one of the few provisions in the policy that represented a truly negotiated compromise between Tribes and the IHS.

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We hope that the actions of IHS moving forward respect the government-to-government relationship and grant due consideration for the positions of Tribes and Tribal organizations.

Sincerely,

Gerald Moses
Senior Director of Intergovernmental Affairs