

May 18, 2018

VIA E-MAIL
consultation@ihs.gov

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,

On behalf of the Arctic Slope Native Association, we 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").

Process and the Importance of Tribal Consultation.

Before commenting on the merits of the proposals laid out in your Dear Tribal Leader Letter of April 13, 2018, a few process comments are in order. As you mention in your 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 duplication—and was developed in accordance with the government-to-government relationship. Both sides also recognized that trust would be integral to effective implementation. Importantly, both sides also committed in the new Manual to a collaborative process for future changes.

Your actions—both in unilaterally rescinding certain policy provisions in December 2017 and in now sending out 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. It is a sad fact that these actions have deeply eroded the trust that Tribes had placed in IHS and in you as its Director.

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 your attorneys still had

concerns about the alternate language unanimously developed and approved by the Workgroup in March. The place for your 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. You not only sat in at those meetings, you 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 is 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 your 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, although they also agreed that such an outcome had actually not occurred. In any event, a few theoretical outliers simply do not justify changing the entire policy. To the contrary, only actual implementation or changes in the law and controlling court decisions should dictate when changes to the Manual are warranted.

Finally, the agency already has ample safeguards 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, included 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 has never asserted that the policy prevented the agency from applying the law as it believes it should be applied. For this reason in particular, we believe 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 you clearly plan to implement one of the three options set forth in your 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. These other 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 a Tribe of the right to choose which method to use, and instead makes it a choice both Tribes and IHS must agree on. The clear result of this rewrite are 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 or would 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 true, and truly historic, compromise between Tribes and the IHS.

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Thank you for the opportunity to submit comments on these CSC policy issues and we hope that your actions moving forward respect the government-to-government relationship and grant due consideration for the opinions of Tribes and tribal organizations.

Sincerely,



Marie Carroll
President/CEO