



Oneida Nation
Oneida Business Committee
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May 18, 2018

RADM Michael D. Weahkee, MBA, MHSA
Assistant Surgeon General, U.S. Public Health Service
Acting Director
Indian Health Service
5600 Fishers Lane
Mail Stop: 08E86
Rockville, MD 20857

RE: CSC "97/3 Method" Tribal Consultation

Dear RADM Weahkee,

On behalf of the Oneida Nation (Nation), we formally submit comments regarding the Indian Health Service (IHS) Indian Health Manual, Part 6 – *Services to Tribal Governments and Organizations*, Chapter 3 – *Contract Support Costs (CSC) (CSC policy)*, specifically section 6-3.2E(3) – *Alternative Methods for Calculating Indirect Costs Associated with Recurring Service Unit Shares (97/3 Method)*. The Nation is a Self-Governance Tribe and has had a compact and funding agreement with the Department of Health and Human Services since 1997.

As you are aware, IHS published the final CSC policy in January 2017 after nearly two years of negotiations. Included in the CSC policy was the 97/3 Method which is comprised of methodology agreed to by both the Tribes and IHS to account for duplication in Area and Headquarter Level shares for Service Unit Shares. The Nation received a Dear Tribal Leader Letter dated December 21, 2017, stating that IHS immediately and temporarily rescinded, without tribal consultation, section 6-3.2E(3) of the CSC policy stating that this section did not conform in all cases with the statutory authority of the Indian Self-Determination and Education Assistance Act (ISDEAA) at 25 U.S.C. § 5325(a). In March 2018, the IHS Director convened a CSC Workgroup (Workgroup) to make recommendations that address IHS's concern regarding the 97/3 Method and address IHS's stance that the 97/3 Method violates of ISDEAA.

The provisions set forth in section 6-3.2E(3) shall apply to the negotiations of indirect CSC funding in or after FY 2016 and the calculation duplication under 25 U.S.C. § 5325(a)(3), when:

- 1) The awardee assumes a new or expanded program, service, function or activity (PSFA) or added staff associated with a joint venture;

- 2) When an awardee includes new types of costs not previously included in the indirect cost pool that relate with IHS programs that result in a change of more than 5% in the value of the indirect cost pool; or
- 3) An awardee proposes and renegotiates the amount.

IHS is proposing two options. Option 1 requires the awardee and IHS to negotiate the amount of indirect costs associated with the Service Unit Shares and the remaining indirect costs that may be eligible for CSC funding, to identify duplication, if any, pursuant to 25 U.S.C. § 5325(a)(3), using one of two options listed, or any other mutually accepted approach.

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

The Workgroup is proposing that, limited to the above circumstances, the awardee shall elect the method for determining the amount of indirect costs associated with the Service Unit Shares and the remaining indirect cost that may be eligible for CSC funding, to identify duplication, if any, pursuant to 25 U.S.C. § 5325(a)(3), using the two options that IHS proposes (see above) or any other mutually acceptable approach. *When an awardee proposes and renegotiates the amount, if an earlier funding agreement reflects a prior identification of duplicated Service Unit costs, then the parties shall negotiate a new duplicate amount considering option 1, option 2, or any other mutually acceptable approach.*

The Nation outlines our concerns with IHS's decision to rescind the 97/3 Method and supports the recommendation of the Workgroup. The Nation believes that consultation is a key function to the government-to-government relationship we share with IHS and requests that these written comments be fully considered.

Nation's Concerns

Government-to-Governments Relationship

IHS has a responsibility to operate in a government-to-government relationship with Tribes, which includes, among other things, conducting Tribal consultations for policy changes pursuant to section 6-3.1D. As stated earlier, IHS and the Tribes agreed to the methodology in addressing the duplication in the Area and Headquarter Level shares for Service Unit Shares prior to the publishing of the final IHS CSC policy. IHS then unilaterally and temporarily rescinded the 97/3 Method which ultimately halted any ongoing CSC negotiations, putting the entire CSC policy at risk. IHS made this decision without Tribal consultations and when Tribes requested that IHS reinstate the 97/3 Method until Tribal consultations were conducted, IHS declined. This causes the Nation concern as the government-to-government relationship that exists with the Tribes is not being recognized. We say this because 1) IHS did not consult with Tribes before rescinding the mutually agreed upon 97/3 Method; and 2) the two options IHS proposes forces Tribes to agree with the agency or sue the government if an agreement cannot be reached. This

creates an environment that that will likely increase litigation and delay negotiations, which is beneficial to neither side. In addition, the IHS's proposed options make the CSC calculation process more complicated, contentious, and unfair.

Policy Changes Based on Hypotheticals

IHS rescinded the 97/3 Method because a few Self-Governance agreements and compacts that identify the level of Service Unit Level duplication and in some instances, the 97/3 Method may result in a lower level of duplication than was previously identified. However, these instances are limited and no one with a pre-identified duplication level has actually asked to use the policy. IHS views this as illegal because it may result in an overpayment of CSC based on the identified level, yet this has not happened. The Nation is concerned that IHS is making policy revisions, without Tribal consultations, based on hypothetical scenarios not based on actual circumstances.

Nation's Proposal

The Nation requests that IHS amend the CSC policy and incorporate the Workgroup's recommendation that requires the awardee to elect the method for determining the amount of indirect costs associated with the Service Unit Shares and the remaining indirect cost that may be eligible for CSC funding, to identify duplication, if any, pursuant to 25 U.S.C. § 5325(a)(3), using the two options that IHS proposes (see above) or any other mutually acceptable approach. *When an awardee proposes and renegotiates the amount, if an earlier funding agreement reflects a prior identification of duplicated Service Unit costs, then the parties shall negotiate a new duplicate amount considering option 1, option 2, or any other mutually acceptable approach.*

This recommendation addresses IHS's concerns regarding previously negotiated amounts, while still retaining as much of the original policy, and tribal autonomy, as possible. The two options IHS has proposed include changes that restrain Tribal authority, making CSC calculations more complicated and subjecting Tribes to the whims of the Agency rather than result in the joint collaborative process in which it was designed to be. The intent of the 97/3 Method was to expedite negotiations in an area where Tribes and IHS will have differing positions. The Agency's proposals make the 97/3 Method impossible because the Agency determines whether or not it applies.

Sincerely,

ONEIDA NATION

Chairman Tehassi Hill
Oneida Nation