



United States Department of the Interior

OFFICE OF THE SECRETARY

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National Policy Memorandum

**Deputy Assistant Secretary – Management
Office of Facilities, Property, and Safety Management**

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Expires: 9/11/2021

Title: Lease of Facilities under the Authority of the Indian Self-Determination Education and Assistance Act, 25 U.S.C. § 5324(l)

1. Purpose

This memorandum establishes the process for executing a facility lease under the authority of the Indian Self-Determination Education and Assistance Act (ISDEAA), 25 U.S.C. § 5324(l).

2. Scope

This policy applies to all Indian Affairs (IA) headquarters, field, and program offices under the authority of the Office of the Assistant Secretary – Indian Affairs (AS-IA), including the Bureau of Indian Affairs (BIA), and the Bureau of Indian Education (BIE).

3. Policy

Section 105(l) of ISDEAA, 25 U.S.C. § 5324(l), requires the Secretary, at the request of an Indian Tribe or Tribal organization (T/TO), to enter into a lease with the T/TO for a facility in which the T/TO holds title, has a leasehold interest, or has a trust interest for administration or delivery of services under an approved ISDEAA Title I contract, Title IV self-governance funding agreement (collectively “ISDEAA agreement”), or Public Law (P.L.) 100-297 grant (297 grant). The lease must include compensation as provided in Section 105(l)(2) and such other reasonable expenses that the Secretary determines, by regulation, to be allowable. The applicable regulations are located at 25 CFR 900.69-900.74 and contain lease requirements and compensation elements. Lease terms and provisions are subject to negotiation between IA and the T/TO. Lease compensation must be reasonable and may not be duplicative with other federal funding the T/TO may be receiving, e.g., indirect or direct costs or facilities operation and maintenance funding.

4. Procedures

A. Request of an Indian Tribe or Tribal Organization. The Office of Facilities, Property, and Safety Management (OFPSM) – Real Property Leasing (RPL) Central Office receives T/TO requests and supporting documentation for review and approval of the proposed lease components and timely notifies the relevant managers of the request. When a Region or Central Office directorate receives the T/TO request, those offices will immediately notify RPL and forward the T/TO submitted requests for RPL to administer. RPL will work with the relevant offices throughout review of the request and negotiations. These offices include: Office of Self-Governance (OSG), Deputy Assistant Secretary – Management (DASM) Offices, BIA, and BIE.

Section 5 of the memorandum covers IA participants and their roles in the review of a lease.

B. Information RPL will Review in Negotiating a 105(l) Lease. RPL should review the following information when negotiating a T/TO request for an ISDEAA lease:

- 1) **The Funding Agreement Vehicle on Which to Base a Lease:** A copy of the approved funding agreement which the lease will support and identify the programs, function, service, or activity (PFSA) to be delivered or administered in the facility.
- 2) **Method for Calculation of Lease Compensation:** The basis for lease compensation must be one of the following:
 - a) Fair market rental;
 - b) A combination of fair market rental and paragraphs (a) through (h) of 25 CFR 900.70, provided that no element of expense is duplicated in the fair market rental; or
 - c) Paragraphs (a) through (h) of 25 CFR 900.70 only.

If a T/TO elects compensation based on the cost elements in 25 CFR 900.70, the T/TO must provide evidence of such costs and a certification from its authorized Tribal representation (RPL must have a copy of the Tribal Resolution designating this official to act on behalf of the T/TO in this instance).

Documentation in support of a fair market rental proposal must include the prevailing rental prices in the geographic area with a comparison of similar structures or similarly located structures if the facility is unique to the location. For a list of cost elements see Attachment 2.

The T/TO must identify any federal funds it received previously and any federal funds it is currently receiving for the requested facility, including Secretarial Amount funding (a.k.a. “106(a)” funding), Contract Support Costs (CSC), CSC startup costs, operations and maintenance, and indirect cost pool. The T/TO must also provide documentation supporting any federal funding (including grants, loans, or any other funds provided by the federal government) received to fund construction of the facility.

3) Facility Description: The following information about the proposed leased facility:

- a) Location and address;
- b) An architectural floorplan showing gross square footage for all floors;
- c) In service date of the facility (i.e. certificate of occupancy date);
- d) Identification of all programs/departments on the floor plan, and if more than one tenant occupies the facility, identification of square footage used in performance of the ISDEAA agreement, or 297 grant;
- e) A certified copy of the loan agreement and principal and interest (P&I) payment schedule for the duration of the loan if requesting: (1) depreciation, and/or (2) P&I.
- f) Recent photos of facility interior and exterior;
- g) A recent inspection report of the condition of the facility;
- h) Tribal information regarding CSC considerations for the building identified in the lease to ensure no duplicative costs are claimed.

4) Proof of Ownership: Proof of T/TO ownership status:

- a) Proof of mortgage, title, or loan;
- b) Quitclaim or warranty deed; or
- c) Lease agreement if sub-leasing to IA.

5) Guidance on Lease Cost Components: IA will rely on 25 CFR 900.69-70 in assessing and reviewing the compensation components proposed by T/TO's for ISDEAA leases.

Attachment 1 provides guidance about factors to take into account when reviewing costs related to operations and maintenance, depreciation, and P&I.

C. Review of Information.

- 1) Scope and Purpose of Lease.** Based on the information above, RPL will work with the IA office or program being contracted/compacted and the appropriate Awarding Official (AO) to ensure the leased facility meets necessary program requirements, dimensions, square footage, and the purpose indicated in the Tribal request for the space.
- 2) Availability of Appropriations, Existing Funding and PFSAs.** In absence of a specific appropriation for this purpose, financing of 105(*l*) leases is unique because 105(*l*) leases must be funded by IA at the request of Tribes, subject to appropriations law and congressional reprogramming requirements. OFPSM will request a copy of the existing ISDEAA agreement Title I, Title IV, or 297 grant and verify with the

BIA Regional Director, BIA Deputy Bureau Director, Indian Services, BIE Deputy Director for Operations, or OSG Director that the PSFA(s) administered or to be administered in the facility are contained in the approved ISDEAA agreement.

3) **Legal Sufficiency Review.** The Office of the Solicitor, Division of Indian Affairs Headquarters Office shall conduct a legal sufficiency review prior to execution.

D. Lease Agreement Execution. The lease will be reviewed and signed by the authorized Tribal representative, the AS-IA or designated Approving Official, and the Director, OFPSM. Copies of the executed lease will be shared with the affected program, IA Office of Budget and Performance Management (OBPM), and Awarding Official within three (3) days of execution.

1) **Initial Lease Cost.** The Awarding Official responsible for the funding agreement shall be responsible for transferring the funding to the T/TO to address the lease costs pursuant to the signed agreement in place. The RPL will provide all necessary documentation required by the Awarding Official within three (3) days of execution.

E. Reassumption or Retrocession of PFSAs.

In the event that a PFSA is reassumed or retroceded in accordance with such applicable reassumption or retrocession provisions of ISDEAA and a lease or a portion of a lease is based upon that PFSA, the lease or the portion of the lease terminates contemporaneously with the reassumption or retrocession of the PFSA. Each lease shall be negotiated in a manner which clearly attributes lease compensation to the PFSA upon which it is based and each lease document shall contain a provision which terminates a lease or a portion thereof upon reassumption or retrocession of the associated PFSA.

5. Roles and Responsibilities

A. Office of Facilities, Property and Safety Management (OFPSM) - Real Property Leasing (RPL) will oversee the review of the ISDEAA lease proposals from T/TOs and serve as the primary point-of-contact for questions about ISDEAA lease compensation. RPL will coordinate with the BIA, Division of Self-Determination, OSG or BIE on finalizing ISDEAA lease proposals in conjunction with ISDEAA compacts, contracts, or 297 grants, and ensuring reasonable and non-duplicative lease compensation. OFPSM-RPL is the primary point of contact for the Tribe in negotiation the 105(l) lease.

Information Provided During Consideration of a Lease:

- Operation and Maintenance funding that the requesting Tribe is currently receiving for the facility, as to ensure no duplication of costs.
- Certificate of Occupancy which may have been provided to requesting Tribe to ensure facility conforms to OFPSM safety standards.

B. Office of Self-Governance (OSG) confirms proposed ISDEAA leases support PSFAs which are operated under approved self-governance funding agreements. OSG works

with RPL and the compacted IA office or program in reviewing lease proposals and supporting documentation. The OSG Awarding Official works with OFPSM-RPL on finalizing ISDEAA leases for facilities used to administer PFSA's administered under Title IV self-governance funding agreements.

- C. **Respective BIA Regional Office Awarding Official(s)** reviews Title I proposals upon receipt to determine whether the request includes 105(l) compensation and immediately forwards any such proposals to OFPSM-RPL for review and consideration. The Regional Awarding Official will work with RPL to address the 105(l) portion of the proposal but will continue to process the remainder of the Title I request in accordance with 25 CFR 900 in order to promote consistency. All offices will provide timely responses to the Awarding Official such that the Awarding Official may respond to the Title I request within the timeline set forth in ISDEAA.
- D. **BIE – Tribally Controlled Schools** confirms proposed ISDEAA agreement supports the operation of a Tribally controlled school under P.L. 100-297 grant. BIE works with RPL in reviewing Tribal lease submissions. The BIE Associate Deputy Director for Tribally Controlled Schools or designee works with OFPSM-RPL on finalizing the ISDEAA lease and signing the 297 grant to include the lease funds.
- E. **Respective IA Program Office(s)** work with RPL to determine whether the lease request serves to carry out PSFAs included in an approved ISDEAA agreement, or 297 grant and whether any funding requested for the lease is duplicative. The IA OBPM will be responsible for transferring the associated funds to the appropriate Awarding Official to be awarded for the lease. The designated Awarding Official will work with OFPSM-RPL on finalizing the ISDEAA lease.

Information Provided During Consideration of a Lease:

- Approved Self Determination/Self Governance Annual funding agreements with the requesting tribe to which the lease will be attached.

- F. **Compacted or Contracted IA Office, Programs or Regional office** will work with RPL and OSG/Regional Office/OIS/Office of Justice Services on determining whether the lease request serves to carry out a compacted/contracted function and whether any funding requested for the lease is duplicative. The lease is funded by the authority provided by the Congress.
- G. **Office of the Solicitor, Division of Indian Affairs (SOL-DIA)** assists OFPSM in determining whether the proposed lease expenses are allowable pursuant to 25 CFR 900.69-70. SOL-DIA will conduct a review for legal sufficiency prior to providing a recommendation to the respective IA office on its decision pertaining to the execution of an ISDEAA lease.

H. AS-IA, or the designated Approving Official will execute (sign) the lease agreement. The Awarding Official will incorporate the lease agreement by amendment in the ISDEAA agreement, or 297 grant as an attachment.

6. Approval

JASON FREIHAGE Digitally signed by JASON
FREIHAGE
Date: 2020.09.11 16:41:27 -04'00'

9/11/20

Jason Freihage
Deputy Assistant Secretary – Management

Date

Attachment 1

105(l) Leases: Guidance for reviewing Estimates of Depreciation, Reserve, and P&I

Purpose: The 105(l) lease proposals may include requests for depreciation, creating a reserve account, and for principal & interest (P&I). This assessment will discuss the difference and applicability of each of the requested compensation areas. The discussion is intended to identify fair and reasonable amounts of the leases while ensuring duplication or payments are not included.

Background: Attachment 2 includes an excerpt from Public Law 93-638 Indian Self-Determination and Education Assistance Act (ISDEAA), as Amended, 25 CFR Part 900, Subpart H, Section 900.70, includes the allowable O&M areas (Section 900.70 (e)) that may be considered for 105(l) leases. This assessment will review the Sections 900.70 (b)-(d) and (f) as identified in Attachment 2.

- (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;
- (f) Repairs to buildings and equipment;

Discussion: Each of the costs categories listed in Attachment 2 are allowable under the act as applicable. While the cost categories are allowable, they must be applicable to the specific situation and not be duplicative. The act requires requests to be “fair and reasonable” and that there be no duplication of cost.

Depreciation and Principal & Interest:

- (b) Depreciation and use allowance based on the useful life of the facility based on acquisition costs not financed with Federal funds;
- (d) Principal and interest paid or accrued;

Depreciation and use allowance based on the useful life of the facility based on acquisition costs not financed with Federal funds is an allowance for the wear and tear, deterioration, or obsolescence of an allowable asset, such as a building[1]. Compensation for depreciation is based on the original construction cost of the facility only. Capital improvements to the facility may be included as part of the depreciable base if there is documentation to support the cost, the improvement is required for the program being supported, and it adds to the capital value of the

asset. For a building, a straight-line 39 year depreciation is typical using the General Depreciation System (GDS)[2]. The IRS does identify an accelerated depreciation time frame of 22 years under specific conditions[3]. Only the portion of the construction funded by the Tribe may be considered for depreciation. Construction funded with federal appropriated funds, whole or in part, may not be depreciated. Principal paid or reimbursed with federal appropriated funds may not be included in the depreciation cost basis. This will result in a decreasing cost basis year after year when principal and interest is part of the 105(l) lease compensation. Any down payment or uncompensated principal paid by the Tribe prior to the 105(l) lease agreement may be considered as part of the permanent cost basis for depreciation.

Example 1: A building is constructed for \$10 million with a 50% cost share with a federal organization. Only the \$5 million provided by the Tribe can be depreciated within the 105(l) lease. The depreciation under GDS is \$5 million over 39 years, or \$128,205 per year.

Example 2: A building is constructed for \$10 million and 100% funded by the Tribe. The full amount of construction can be depreciated. The depreciation under GDS is \$10 million over 39 years, or \$256,410 per year.

Example 3: A building is constructed for \$10 million and the Tribe financed \$9.5 million with a 15-year loan and provided \$500 thousand as down payment. The 105(l) lease agreement is requested to initiate at the beginning of the 6th year. During the first 5 years the tribe would have paid \$2.6 million in principal which would result in a permanent cost basis for depreciation of \$3.1 million (principal paid to date and down payment). The remaining principal would be \$6.9 million at the beginning of year one of the 105(l) lease and the beginning of the 6th year of depreciation. At the beginning of the 1st year the federal government has not yet paid any principal so the tribe would be able to calculate the depreciation for the first year based on their permanent depreciation cost basis and the outstanding balance of the loan principal (\$3.1 million + 6.9 million = \$10 million). The depreciation under GDS would be \$10 million over 39 years, or \$256,410 (year one). During year one of the 105(l) lease the principal paid by the federal government is \$600 thousand. In year two of the 105(l) lease the \$600 thousand paid by the federal government as principal in year one will be deducted from the total cost basis for depreciation, resulting in an adjusted cost basis of \$9.4 million. The depreciation under GDS would be \$9.4 million over 39 years, or \$241,026 (year two). The cumulative total of federal payment of principal will continue to be deducted from the cost basis for depreciation until the full loan is paid in the 10th year of the lease agreements. Beginning in year 11 of the lease agreement, the depreciation will be calculated on the permanent cost basis of \$3.1 million. The depreciation under GDS would be \$3.1 million over 39 years, or \$79,487 (lease year 11-34 (the building was in service for 5 years prior to the initial lease agreement)).

Principal and Interest (P&I) paid of accrued is the applicable when a loan is secured to construct a facility or provide an allowable capital improvement. The 105(l) lease may request compensation for P&I for the period covered in the lease. Principal and interest paid prior to the term of the 105(l) lease agreement is not reimbursable. Construction or allowable capital improvements paid for with a loan with P&I funded with appropriated funds are considered financed with federal funds and therefore that portion of the construction, whole or in part, cannot also be claimed for depreciation.

Example 4: A building is constructed for \$10 million and financed through a loan by the Tribe. The 105(l) lease may request P&I based on the terms of the loan for the lease period. P&I paid prior to the term of the lease agreement are not reimbursable.

Reserve Fund and Repairs to Buildings and Equipment:

(c) Contributions to a reserve for replacement of facilities;

(f) Repairs to buildings and equipment;

Contributions to a reserve for replacement of facilities is intended to fund major system renovations or replacements and does not apply to the replacement construction cost of the facility. Major systems have a useful life that requires long-term maintenance planning to overhaul or renovate, and eventually replace them periodically. These planned major system maintenance actions are generally high cost. The purpose of the reserve account is to provide funding for these long-term planned maintenance actions over time so the outlay is not all in one funded year. It also provides risk mitigation in the event that a system expires prematurely.

The amount of funding included in a 105(l) lease should include a description of the systems that are to be funded, the action required (renovate or replace) for each, the expected remaining life of the system, the cost basis and year for the action (today or previous year cost), the estimated cost at time of action showing the inflation factor used to calculate the future cost, and the cost per year needed to have the funds at time of planned action.

Example 5: A new building has a long-term plan for roof maintenance which will likely require a full roof system replacement in 25 years predicted to cost \$5 million at that time, and also requires a roof resurfacing at the mid-life point of 12 years predicted to cost \$2 million at that time. Note: example assumes the inflation rate has already been applied to a cost basis amount.

- Full Roof System Replacement:
 - \$5 million over 25 years = \$200,000/year
- Roof resurfacing:
 - \$2 million over 12 years = \$166,667/year

For just these two long-term planned maintenance actions the 105(l) lease would include \$366,667/year for the first 12 years (planning for both actions), then \$200,000/year for years 13-25 since the resurfacing would no longer be a part of this planning cycle.

Note: This is a simple example, in practice it is likely that beginning in year 13 a planned maintenance action for an expected resurfacing after the replacement (year 37) would be added to the plan, but it would be over a 25 year period rather than the initial 12.

Repairs to buildings and equipment – Unlike facilities maintenance costs that are provided for under the operations and maintenance (O&M) section or provided for with the reserve account, these funds are necessary to conduct short-term maintenance planning for repairs to buildings and fixed equipment. Fixed equipment includes assets that are permanently affixed to the building structure and are not subject to movement, but have shorter useful lives than that of the building. 105(l) leases requesting funding under this cost category should provide a description of the short-term planned maintenance action and provide a reasonable cost estimate to support the request. Items requested under this cost category cannot be included in the long-term maintenance planning in the reserve account.

Example 6: Over the last year or two the maintenance staff have noticed an increased rate of leaks within the plumbing of one building. No major breaks, but the plumbing system is getting worn out. An assessment is done to determine the corrective action required and it is determined that several portions of the plumbing system should be replaced. The estimated cost is \$250,000. The 105(l) lease for the coming year would include this short-term maintenance action under this cost category with the estimate as supporting documentation.

Attachment 2

List of Allowable Cost elements per Public Law 93-638 Indian Self-Determination and Education Assistance Act (ISDEAA), as Amended, 25 CFR Part 900, Subpart H:

Section 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;
- (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.

[1] IRS Publication 946, Introduction page 3.

[2] IBID, page 31

[3] 26 U.S. Code 168 Accelerated Cost Recover System, (j) Property on Indian Reservations

[4] The in-service date is the date the property is ready and available for a specific use. IRS Publication 946, page 30.