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July 29, 2016

Transmitted via email to:
consultation@bia.gov

Lawrence S. Roberts
Acting Assistant Secretary – Indian Affairs
Department of the Interior
1849 C Street, NW
MS-3071-MIB
Washington, DC 20240

Re: Bureau of Indian Affairs Contract Support Costs Policy

Dear Assistant Secretary Roberts,

On behalf of United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we write to provide comments on the draft Indian Affairs Manual chapter entitled Contract Support Costs (hereinafter, the Policy) issued by the Bureau of Indian Affairs (BIA) with your letter dated March 22, 2016. We generally support the Policy, though we offer some suggestions below for improvement.

USET SPF is a non-profit, inter-Tribal organization representing 26 federally recognized Indian Tribes from Texas across to Florida and up to Maine.¹ USET SPF is dedicated to enhancing the development of Tribal Nations, to improving the capabilities of Tribal governments, and assisting member Tribal governments in dealing effectively with public policy issues and in serving the broad needs of Indian people.

General Comments

We commend BIA for the process it followed in developing the draft Policy. After an initial round of Tribal consultation, BIA worked in collaboration with Tribal Nations through the Contract Support Costs (CSC) Workgroup, then sought further Tribal input through a 120-day consultation period. We understand that the Workgroup functioned in a collegial and efficient manner, and we commend both the federal and Tribal representatives who worked on this important document.

¹ USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Aroostook Band of Micmac Indians (ME), Catawba Indian Nation (SC), Cayuga Nation (NY), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

We also appreciate that BIA took to heart Congress' call to simplify and streamline the process of calculating and paying full CSC. Less than five pages long, the draft Policy is easy to read and understand. The downside to this brevity, as discussed further below, is that the Policy is vague in some respects, with many of the details of CSC Policy implementation relegated to a Handbook.

Once approved, the Policy should be useful to both BIA and Tribal staff in laying out, at least in broad outline, the process the agency will use to ensure full payment of CSC, without overpayments. We note, however, that the Policy is not binding on Tribal Nations and organizations; it cannot and does not impair any rights conveyed by the Indian Self-Determination and Education Assistance Act (ISDEAA). The courts have confirmed that when it comes to contract support costs, Congress has not delegated to the agency any authority to write regulations, or to adopt non-regulatory requirements, binding upon Tribal Nations. *Ramah Navajo School Bd. v. Babbitt*, 87 F.3d 1338, 1349 (D.C. Cir. 1996) (interpreting 25 U.S.C. § 450k(a)(1)).

Before leaving the introductory sections of the Manual, we pause to note that the Manual should clearly state that every provision of the Act and of every contract, compact and funding agreement entered into under the Act, must be construed liberally in favor of Tribal Nations. Even though this is a requirement of every ISDEAA contract (see 25 U.S.C. § 450(l)(c), sec. 1(a)(2)), it is sufficiently important—indeed, critical—that it should be restated in the Manual. As the Supreme Court has held, this provision means that the Government “must demonstrate that its reading [of the ISDEAA] is clearly required by the statutory language.” See *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2191 (2012).

Finally, we urge the BIA to continue to make every effort to distribute dollars to Indian Country via ISDEAA compacts and contracts, regardless of whether funds are recurring, including in cases where BIA is passing through funding via interagency agreement. While we understand the desire, both within the Agency and as directed by Congress, to ensure CSC calculations are accurate and predictable, we note the Agency's support for expanding self-governance. USET SPF and many others in Indian Country envision a future in which all federal dollars are contractable and compactable. We urge the Agency to continue stand with us in advancing policies in support of this vision.

Specific Comments and Suggestions

Direct Contract Support Costs (DCSC)

The Policy formalizes BIA's practice of calculating DCSC need as 15% of “current budgeted salary cost of IA 106(a)(1) programs, excluding fringe.” This language is not clear—“budgeted” by whom, BIA or the Tribal government? In many cases, BIA will not be able to point to an agency program budget at the time the program was transferred to the Tribal Nation. And even if this were possible, Tribal Nations have the authority under the ISDEAA to reallocate funds, so they may well spend more of their program funding on salaries than BIA would have. We recommend that “current budgeted salary cost of [B]IA 106(a)(1) programs” be revised to read “current Tribally budgeted salary costs for [B]IA programs transferred in the 106(a)(1) amount.” We also recommend deleting the phrase “excluding fringe.” Salaries, by definition, do not include fringe benefits, so the phrase is unnecessary. More importantly, it could be read by BIA awarding officials to mean that fringe costs are to be subtracted from salaries before multiplying by 15%. We note that at least one BIA representative did read it that way during a Workgroup session. That has never been BIA's practice. Striking the phrase will make the provision more clear and concise.

We also urge BIA to reconsider the Tribal proposal to raise DCSC from 15% to 18% of salaries. Like other employers, Tribal Nations and organizations have been impacted by rising health insurance premiums, among other necessary costs. DCSC includes not only fringe benefits (in excess of fringe amounts transferred in the 106(a)(1) amount) but also significant costs like facilities support costs (rent, leases, security, maintenance), training, and communications. BIA has never articulated a rationale for rejecting the 18% proposal, other than saying it would be too expensive. But now that CSC are to be fully funded from an indefinite appropriation, that rationale is not convincing in the face of demonstrable rising costs that an increase to 18% would help cover.

We also recommend the Manual include examples of direct CSC that can be negotiated. While we understand such examples may be included in an attachment, we believe this particular information is sufficiently important to be included in the Manual itself.

Finally, the Policy should acknowledge the Tribal Nation or organization's option to negotiate a lump sum for full DCSC funding in any given year. The ISDEAA requires full payment of DCSC, and if a Tribal Nation or organization believes that 15% of salaries is not sufficient, they have the right to attempt to negotiate a higher amount. BIA's reasons for refusing to negotiate—that the agency lacks the personnel and expertise—are not convincing. If BIA can negotiate a lump sum for indirect-type costs, as the draft Policy requires, there is no reason the agency cannot also negotiate a lump sum for DCSC as well. IHS faces similar staffing constraints, and its draft CSC policy includes the right to renegotiate DCSC at any time. In light of the statutory requirement to pay full CSC, BIA must ensure it has staff trained to negotiate and determine DCSC requirements for Tribes that do not wish to rely on the default 15%-of-salaries (or 18%-of-salaries) rule.

Indirect CSC

We support the Policy's provision allowing calculation of indirect costs using the current year's rate or, if there is no current rate, the most recent rate for the previous three years. We also agree that Tribal Nations or organizations with no rate that current should negotiate lump sums for indirect-type costs. However, the Policy goes on to say that, "[i]f the tribe does not initiate any of these options, [B]IA will not pay the tribe any indirect CSC." We believe this provision violates the ISDEAA, which requires payment of CSC regardless of whether a Tribal Nation or organization initiates options set forth in an agency policy manual—and which specifically directs that the Secretary "shall add" these amounts to every contract. 25 U.S.C. 450j-1(g). We recognize that, in the absence of a viable rate or lump-sum negotiation, BIA may not be able to determine the amount to which the contractor is entitled. We therefore recommend that, in this situation, the Policy require that BIA pay indirect costs either based upon the prior year's amount or based on the de minimis rate of 10% adopted in the Office of Management and Budget Supercircular.

Adjustment

The Policy wisely seeks to avoid a lengthy reconciliation process at the end of the year. The applicable indirect cost rate at the end of the year determines the final indirect cost requirement, and no adjustments will be made if the contract year's rate is approved after the end of the year. The purpose of this provision is to facilitate timely close-out of the fiscal year, rather than keeping it open for months or even years. In most cases, this benefits both the Tribal Nation/organization and BIA, but in cases where the Tribe expects the new rate to be higher, the benefit of early close-out might be outweighed by the expected boost in indirect cost funding. Often, a newer rate is imminent and the Tribal Nation is simply waiting for updated rate documentation from the Interior Business Center (IBC). Tribal Nations should not be forced to accept CSC payments based on older rates simply because IBC is sometimes slow to issue rate agreements. Tribal Nations and ISDEAA eligible organizations should have the option to close the year end using their

current approved rate or wait to close using a pending rate they have submitted using final audited numbers. Further, once the preferred option is identified and rates have been received, we recommend the Agency commit to ensuring the application of the new rate no more than nine months after the end of the contract year closeout. We suggest that this Tribal option be incorporated into Section 11.

Overpayment

The Policy correctly includes a process for Tribal Nations and organizations to question overpayment determinations and show that they have not been overpaid. Once the determination is final, however, the Policy requires Tribal Nations and organizations to repay the overage, which may often result in inefficiencies (for small overpayments) or hardships (for large overpayments). We recommend that Tribal Nations and organizations be given the option to have the overpaid amount applied as an offset in the following year, as the draft IHS CSC policy does. The Workgroup was told that BIA lacks the authority to apply an offset, but was provided no legal analysis supporting this conclusion, which is contrary to that reached by IHS. We recommend that a sentence be added to Section 10 along these lines: "The Tribe may elect to either repay the overpaid amount or have [B]IA apply it as an offset to the following year's CSC requirement." The offset option would save both Tribal Nations/organizations and BIA a lot of paperwork processing and responding to bills of collection—often for small amounts.

Handbook

To accompany the CSC Policy, BIA is developing a Handbook that includes definitions, examples, templates, and other materials. We understand that BIA does not consider the Handbook part of the Policy, so it has not been included in the present consultation. We do not believe that view is correct, particularly in light of the Ramah litigation. Regardless, we strongly urge BIA to employ the same collaborative process with the Handbook as with the Policy. The Workgroup should be deeply involved in drafting and editing the Handbook. BIA should also seek broader Tribal review and comment, preferably through a formal consultation process.

Once the Policy and Handbook have been finalized and implemented, both documents must be readily available to Tribal leaders and staff. Although the Indian Affairs Manual primarily governs internal BIA operations, several of the Handbook sections are meant to be used by Tribal Nations—for example, the templates for requesting pre-award and startup costs. Others may be useful to both BIA and Tribal staff, such as the templates for CSC needs calculations. Both the Policy and the Handbook must be easily accessible on the BIA website and not only in the Indian Affairs Manual.

Reporting

The new policy continues existing timelines for the annual CSC report to Congress, and establishes a process in which Tribal Nations and organizations will have the opportunity to comment on the report prior to finalization. Following the new IHS proposal on this topic, we recommend that the BIA also publish a separate CSC report for Tribal Nations and organizations, with a commitment to the timely release of this separate report, even if the formal report to Congress is delayed.

Pre-award and Startup Costs

We recommend that the Manual state clearly the process for negotiating pre-award and startup costs. In the past, agreements negotiated at the regional level have been overturned in the BIA central office by individuals lacking any on-the-ground experience in such matters. The Manual should clearly delegate the negotiation of these costs to regional and field personnel.

We are pleased to see that the BIA now acknowledges that requests for pre-award and startup costs are subject to the ISDEAA declination procedures (as confirmed in two recent agency board decisions). However, the pre-award and startup cost provisions reference an attachment of examples that was drafted by the Agency without Tribal input. As suggested above in connection with DCSC costs, we suggest examples of allowable pre-award and startup costs be included in the body of the Manual. We also recommend that the BIA provide the opportunity for Tribal Nations and organizations to provide comments on this list. As currently drafted, the list is extremely narrow and fails to provide meaningful guidance for Tribal Nations and organizations.

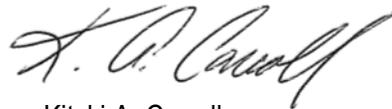
Conclusion

We appreciate the opportunity to review and comment on BIA's draft CSC Policy, and look forward to the release of a strengthened final policy. Should you have any questions or require further information, please do not hesitate to contact Ms. Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at: 202-624-3550 or Lmalerba@usetinc.org.

Sincerely,



Brian Patterson
President



Kitcki A. Carroll
Executive Director

CC: USET Executive Officers
Wanda Janes, USET Deputy Director
Doug Weaver, Eastern Region Rep. to BIA CSC Workgroup

“Because there is strength in Unity”