



# LITTLE RIVER BAND OF OTTAWA INDIANS

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Washington, D.C. 20240

Re: CSC Comments

Dear Assistant Secretary Roberts,

The Little River Band of Ottawa Indians submits the following comments on the agency's proposed draft contract support costs (CSC) policy.

## Introduction

Congress has declined to delegate any authority to the agency to write regulations on contract support cost issues. *See* 25 U.S.C. § 450k(a)(1); *Ramah Navajo School Bd. v. Babbitt*, 87 F.3d 1338, 1349 (D.C. Cir. 1996) (interpreting § 450k(a)(1)). That said, we appreciate the BIA prioritizing an update to its CSC policy in order to be transparent in how the BIA intends to handle CSC issues in the post-*Ramah* era of full funding. Although the Indian Self-Determination and Education Assistance Act (ISDA) makes it clear that agency manuals and guidelines are not binding on Tribes, 25 U.S.C. § 450l(c), sec. 1(b)(11), we commend the BIA for welcoming input from Tribes on this internal agency policy. The BIA's actions reflect a genuine commitment to tribal consultation and respect for the government-to-government relationship.

We understand that there are a number of technical requirements for a proposed chapter in the Indian Affairs Manual. The BIA has explained this includes the need for brevity and to address only policy determinations, while omitting statutory citations, definitions, and additional otherwise helpful information. Given the limitations in the Manual, the CSC Workgroup also developed a Handbook that provides much greater detail on key policy provisions, and includes background documents, definitions, examples, and other useful information. It is essential that the Handbook undergo the same formal consultation underway with the Manual, including publication in the Federal Register.

Turning to the Manual itself, the Manual should clearly state that every provision of the Act and of every contract, compact and funding agreement must be construed liberally in favor of Tribes. Even though this is a requirement of every ISDA 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 ISDA] is clearly required by the statutory language.” *See Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2191 (2012).

## **Discussion**

Overall, the proposed new CSC chapter meets the intended goals of (1) explaining how the BIA plans to determine CSC requirements, and (2) providing for the accurate, timely and full payment of those requirements in a manner that is simple and understandable for all readers (including those unfamiliar with CSC issues). The draft generally aligns with long-standing tribal and agency interpretations and practices regarding how CSC should be calculated, and we salute the BIA for not letting the extensive litigation over CSC payments impact the content of the Manual. We agree with the drafters' decision to leave litigation issues to the side and to move forward with a policy that honors the spirit and letter of the ISDA.

We also applaud the BIA for seeking to comply with congressional directions to devise a long-term method that simplifies and streamlines CSC calculations. For instance, the draft Manual includes a number of provisions that reduce administrative burdens on Tribes, so that Tribes can focus more resources on providing services.

For instance, we are pleased that the BIA chose to adopt a swift year-end closeout process that allows Tribes to close the books in a timely fashion and completes the CSC calculation shortly after the close of the contract year. The Indian Health Service proposal charts an entirely different path that contemplates both an initial negotiation of a CSC estimate and a later reconciliation process that may take a year or two, and possibly more, to complete. In contrast, the BIA approach is simple and contemplates revising the CSC calculation only if warranted.

Similarly, the BIA has adopted a flat percentage calculation for DCSC, which significantly decreases the likelihood of disputes over that calculation. While we support tribal recommendations to raise that percentage to 18%, rather than the current 15% calculation, we strongly support the employment of a percentage of payroll approach to the calculation of DCSC requirements.

The BIA has also honored its historic practice of accepting indirect cost rates up to four years old. This acknowledges the fact that the rate-making process can be slow and rates may be delayed for reasons wholly outside a Tribe's control.

We also commend the BIA for adopting provisions recognizing the differences in administrative capacity between small and large Tribes, such as the simplified methodology to calculate indirect CSC for Tribes that do not meet the single audit threshold.

Despite the overall success of this draft, there is room for improvement. In addition to the general policy statement noted earlier, we offer the following specific suggestions.

### Indirect CSC

The policy states that if a Tribe does not initiate any of the options for calculating indirect CSC for a given year, then the BIA will not pay the Tribe indirect CSC for that year. This is contrary to the ISDA's mandate that the agency must pay a Tribe's full CSC need. 25 U.S.C. § 450j-1(a). The BIA's duty to add CSC to each contract is not contingent on first receiving a tribal request. Therefore, we recommend this provision be omitted or revised, so that if a Tribe

does not initiate any of the stated options, the BIA will be directed to work with that Tribe to find an acceptable means to calculate the Tribe's indirect CSC requirement. We understand the difficulty the BIA faces in this situation, but the BIA cannot abrogate its statutory duty to add full CSC to every contract simply because the Tribe did not initiate a process. At a minimum (and pending receipt of additional information), the BIA should consider either paying a Tribe based on the previous year's amount, or paying a Tribe at the 10% de minimis indirect rate described in the OMB circular at 2 CFR § 200.414(f).

Turning to the year-end closeout process, the policy should provide some flexibility by offering each Tribe the option to close out contract amounts due right at the end of the fiscal year, or to leave the calculation open until the Tribe receives a current (or more recent) rate. Often a Tribe's newer rate is imminent and the Tribe is simply waiting for updated rate documentation from the Interior Business Center (IBC). Tribes should not be forced to accept CSC payments based on older rates simply because IBC is sometimes slow at issuing rate documents.

### Direct CSC

While we commend the BIA for adopting a simple flat percent approach to direct CSC, the Manual should provide Tribes with more flexibility.

For instance, if a Tribe wishes to negotiate an amount for DCSC, the BIA should allow that Tribe to do so, especially given the mandate to fully fund CSC. Although we understand the BIA is concerned with the administrative burden associated with such negotiations, the BIA could develop a template, as IHS has done, that would make these negotiations easier.

Along these lines, the BIA Manual should include examples of direct CSC that can be negotiated. While we understand such examples may be included in an attachment, this is key information which should be in the Manual itself.

As noted earlier in passing, the BIA should also raise the flat percentage for DCSC from 15% of salaries to 18% of salaries. Tribes have advocated for this raise for years, explaining the 15% amount does not cover the full cost of additional direct program expenses necessary to prudently operate these programs. Now that the CSC appropriation has been put into a separate account and is indefinite, budget issues should not prevent the agency from providing full CSC funding.

### 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 ISDA declination procedures (as confirmed in two recent agency board decisions). But, the pre-award and startup cost provisions reference an attachment of examples that was drafted by the agency without tribal input. As we suggested in the case of

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 Tribes to provide input on this list. As currently drafted, the list is extremely narrow and fails to provide meaningful guidance for Tribes.

### Overpayments

The overpayment provision in the Manual should not demand repayment from Tribes. Instead, any FY 2016 overpayments should be accounted for as a credit in the FY 2017 payment process. This approach would better comply with the mandate to simplify CSC and reduce administrative burdens on both Tribes and the agency. It is also practical: there will be little time for BIA to enact a new policy, adopt the related Handbook, reconcile and account for any 2016 overpayments, and request repayment from Tribes, all before the end of this fiscal year.

Additionally, the BIA should improve its current CSC payment practices. Feared overpayments to some Tribes is not a sound reason to withhold or delay payments to all Tribes. We are informed that the Office of Self-Governance (OSG) is currently paying Tribes only 80% of CSC funds, due to concerns over overpayments it made in prior years. OSG's poor accounting records are no excuse for punishing Tribes that need timely CSC payments in order to maintain program delivery.

### Handbook and training

The BIA should swiftly release its Handbook and related attachments for full tribal consultation. This is not only required by controlling Secretarial policies, it is also required by the terms of the Court Order approving the Third Partial Settlement Agreement in the *Ramah* case.

Once tribal consultation has been completed for both the new chapter and the Handbook, the BIA must also provide training both for BIA negotiators and for tribal staff to ensure everyone understands how the policy will be implemented. Training will ensure a fair and consistent application across Regions and help minimize future disputes.

### Reporting

We appreciate that the new policy establishes timelines for the annual CSC report to Congress and establishes a process in which Tribes will have the opportunity to comment on that report before it is finalized. Following the new IHS proposal on this topic, we recommend that the BIA publish a separate CSC report for Tribes that will be released even if the formal report to Congress is delayed.

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Thank you for the opportunity to submit comments on this proposed draft Chapter.

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