PORT GAMBLE S'KLALLAM TRIBE
31912 Little Boston Road NE • Kingston, WA 98346

June 3, 2016

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

Re: Indian Affairs Contract Support Costs Policy

Dear Assistant Secretary Roberts,

We have reviewed the draft Indian Affairs Manual chapter entitled Contract Support Costs (hereinafter, the Policy) issued by Indian Affairs (IA) with your letter dated March 22, 2016. We generally support the Policy, though we do have some suggestions below for making it better.

General Comments

We commend IA for the process it followed in developing the draft Policy. After an initial round of tribal consultation, IA worked in collaboration with Tribes through the 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.

We also appreciate that IA took to heart Congress's 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—unlike the draft CSC Policy developed by the Indian Health Service (IHS). 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 IA and tribal staff in laying out, at least in broad outline, the process the agency will use to ensure full payment of CSC but not more. We note, however, that the Policy is not binding on tribes and tribal 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 Tribes. *Ramah Navajo School Bd. v. Babbitt*, 87 F.3d 1338, 1349 (D.C. Cir. 1996) (interpreting 25 U.S.C. § 450k(a)(1)).

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non-regulatory requirements, binding upon Tribes. *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 the 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).

Specific Comments and Suggestions

Direct Contract Support Costs (DCSC)

The Policy formalizes IA's practice of calculating DCSC need as 15% of "current budgeted salary cost of IA 106(a)(1) programs, excluding fringe."[1] This language is not clear—"budgeted" by whom, IA or the Tribe? In many cases, IA will not be able to point to an agency program budget at the time the program was transferred to the Tribe. And even if it could, tribes have the authority under the ISDEAA to reallocate funds, so they may well spend more of their program funding on salaries than IA would have. We recommend that "current budgeted salary cost of IA 106(a)(1) programs" be revised to read "current tribally budgeted salary costs for 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 IA awarding officials to mean that fringe costs are to be subtracted from salaries before multiplying by 15%. (In fact, at least one IA representative did read it that way during a Workgroup session.) That has never been IA's practice, and it makes no sense. Striking the phrase will make the provision more clear and concise.

We also urge IA to reconsider Tribes' proposal to raise DCSC from 15% to 18% of salaries. Like other employers, Tribes have been hit hard 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.[2] IA 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.

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[1] Policy, § 8.

[2] Policy, p. 6 (attachment listing examples of pre-award costs, startup costs, and DCSC).

We also recommend the Manual itself 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 Tribes' option to negotiate a lump sum for full DCSC funding in any given year. The ISDEAA requires full payment of DCSC, and if a tribe or tribal organization believes that 15% of salaries is not sufficient, they have the right to try 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 make sure 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 Tribes with no rate even 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, IA will not pay the tribe any indirect CSC."[3] We believe this provision violates the ISDEAA, which requires payment of CSC regardless of whether a tribe 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, IA 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 IA 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.[4]

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.[5] 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 Tribe and IA, 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 Tribe's newer

[3] Policy, § 9.

[4] 2 C.F.R. § 200.414(f).

[5] Policy, § 11.

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 to issue rate agreements. It should therefore be up to the Tribe whether to close out with the FY 2015 rate in place on September 30, 2016 or wait for the FY 2016 rate to be approved. We suggest that this tribal option be incorporated into Section 11.

Overpayment

The Policy correctly includes a process for Tribes to question overpayment determinations and show that they have not, in fact, been overpaid.[6] Once the determination is final, however, the Policy requires Tribes to repay the overage, which may often result in inefficiencies (for small overpayments) or hardships (for large overpayments). We recommend that Tribes 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 IA 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 IA apply it as an offset to the following year's CSC requirement." The offset option would save both Tribes and IA a lot of paperwork processing and responding to bills of collection—often for trifling amounts.

Handbook

To accompany the CSC Policy, IA is developing a Handbook that includes definitions, examples, templates, and other materials. We understand that IA 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.[7] But even if it were, we strongly urge IA to employ the same collaborative process with the Handbook that it did with the Policy. The Workgroup should be deeply involved in drafting and editing the Handbook. IA 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 IA operations, several of the Handbook sections are meant to be used by Tribes—for example, the templates for requesting pre-award and startup costs. Others may be useful to both IA and tribal staff, such as the templates for CSC needs calculations. Both the Policy and the Handbook should be easily accessible on the IA website and not just buried in the Indian Affairs Manual.

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[6] Policy, § 10.

[7] The Third Partial Settlement Agreement approved by the Court in the *Ramah* litigation requires that "no rescission, amendment or change in the Interior CSC Policy shall be made without prior notice to all Tribes and tribal organizations, including a comment period of no less than three months and consultation in accordance with the Bureau of Indian Affairs Government-to-Government Consultation Policy with representatives of the National Congress of American Indians ("NCAI") and the BIA CSC Workgroup established in subsection 5(B) of the Interior CSC Policy". *See Ramah v Kempthorne*, No. 1:90-cv-00957-LH-KBM Doc. 1138-2 (filed May 19, 2008).

Reporting

The new policy continues existing 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 also publish a separate CSC report for Tribes, with this separate report released to Tribes 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 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 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 Tribes to provide input on this list. As currently drafted, the list is extremely narrow and fails to provide meaningful guidance for Tribes.

Conclusion

We appreciate the opportunity to review and comment on IA's draft CSC Policy. If you or your staff have any questions about these comments, please do not hesitate to contact our Self-Governance Coordinator, Renee Veregge at (360) 297-6236.

Sincerely,

Jeromy Sullivan,
Port Gamble S'Klallam Tribe Chairman