



DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

JUL 18 2005

Indian Health Service  
Rockville MD 20852

TO: Area Directors

FROM: Director

SUBJECT: Language Relating to Contract Support Costs in Title I and Title V Funding Agreements for FY 2005 and 2006

As you know, the Supreme Court issued its decision in *Cherokee Nation v. Leavitt* in March. In its decision, the Supreme Court held that Indian Self-Determination and Education Assistance Act (ISDEAA) agreements are binding contracts and similar in nature to procurement contracts. Since fiscal year (FY) 1998, Congress has placed a "cap" on the amount of funds within the lump-sum appropriation that the Agency could use for contract support costs (CSC). The Indian Health Service (IHS) appropriation for FY 2005 does not contain any funds for "new or expanded" program assumptions by Indian Tribes. The IHS budget request for FY 2006 does contain funds for "new or expanded" program assumptions, but it is unclear whether the budget request will be enacted in its present form or across-the-board rescissions will eliminate this CSC increase.

The Supreme Court decision requires the IHS to rethink its approach to negotiating ISDEAA contracts in the face of limited appropriations, especially for CSC. The following approaches were considered:

1. As a matter of stated Agency-wide policy, because CSC funds are not available (tantamount to a moratorium), decline all contract proposals for "new or expanded" programs.
2. Award contracts for "new or expanded" programs and decline applicable CSC funds.
3. Partially decline all contracts for "new or expanded" programs and related CSC funds.
4. Propose a special agreement clause stipulating that CSC funds are not available. The Tribe could agree to the sum certain composed of funds that are available for the existing program and its CSC, and the new or expanded program funds without any associated CSC funds.

I have decided that a combination of approaches three and four is the best approach. This will allow Tribes to continue to assume management of IHS programs and to do so without available CSC funds for new or expanded program proposals. This approach requires the use of contract language to which the Tribe agrees and that incorporates the following critical elements:

- The IHS does not have the CSC funds available to fund any CSC funding associated with the new or expanded programs, functions, services, and activities (PFSAs)/programs, services, functions, and activities (PSFAs).
- The Tribe still wishes to contract the new or expanded PFSA/PSFA knowing CSC funding is not available.
- The Tribe is able to carry out the new or expanded PFSAs/PSFAs without added CSC funding.

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- The Tribe agrees that no new need for CSC funding is created by the transfer of the new or expanded PFSAs/PSFAs.
- There is no promise by the IHS to pay for CSC associated with the new or expanded PFSAs/PSFAs.

I have attached suggested language that incorporates these critical elements. If the Tribe does not agree to the language, the proposal to contract for the new and expanded PFSA/PSFA must be declined on the basis that the funds proposed are in excess of the applicable funding level for the contract.

It is important to remind you that this approach affects only those agreements that propose to add new or expanded PFSAs/PSFAs to existing funding agreements. The IHS Circular No. 2004-03 at Section 5(B)(1) describes those instances of an expansion through the assumption of additional shares of PFSAs/PSFAs previously operated by the IHS as well as new or expanded PFSAs/PSFAs available due to new appropriations, excluding general program increases and increases for inflation, pay costs, population growth, and the Indian health care improvement fund. The policy also addresses the “conversion” of Intergovernmental Personnel Act/Memoranda of Agreements to direct-hire. These conversions must be reviewed carefully in the context of the overall transfer of the relevant PFSAs/PSFAs to determine if there is an overall change in cost (i.e., payroll benefits provided by the Federal Government versus the benefits provided by the Tribe).

I am writing you because your staff either awards Title I contracts or serves as the Agency Lead Negotiator on Title V funding agreements. While most Areas consult with the Office of the General Counsel (OGC) when negotiating contracts and funding agreements with Tribes, they do not consistently ask OGC to review renewal contracts or amendments to ongoing contracts. Given the current situation, I strongly advise you to make sure that any CSC language in Title I contracts and Title V funding agreements has been reviewed by your regional attorney or the IHS Branch of the Public Health Division of OGC.

If you have any questions, please contact Mr. Robert McSwain, Deputy Director; Ms. Mary Lou Stanton, Deputy Director for Indian Health Policy; or me at (301) 443-1083.

*Charles W. Grim, DDS*

Charles W. Grim, D.D.S., M.H.S.A.  
Assistant Surgeon General

Attachment

cc: Agency Lead Negotiators  
Area Senior Contracting Officers

**Attachment**

**PROPOSED 2005 AFA/FA LANGUAGE**

The IHS has informed the Tribe that, as a result of a Congressional earmark capping the amount of CSC funds available in the IHS FY 2005 appropriation, there are no appropriated funds available for CSC associated with the "new and/or expanded PFSAs/PSFAs" being transferred to the Tribe pursuant to this AFA/FA, including any pre-award or start-up costs. The IHS has informed the Tribe that Congress may not appropriate additional contract support cost funds in future years for these PFSAs/PSFAs.

The Tribe has informed the IHS that it still wishes to contract for the "new and/or expanded PFSAs/PSFAs," identified herein, despite the unavailability of CSC and the possibility that Congress will not appropriate additional CSC funds in future years.

The Tribe assures the IHS that it can carry out the "PFSAs/PSFAs" despite the absence of any CSC because no new need for CSC is created by the Tribe's assumption of these new and/or expanded PFSAs/PSFAs.

Based upon this understanding, the IHS agrees to transfer the "new and/or expanded PFSAs/PSFAs" identified herein to the Tribe. The parties further agree that nothing in this AFA/FA creates a promise on the part of the IHS to pay the Tribe any CSC for the "new and/or expanded PFSAs/PSFAs" identified herein.

**Proposed FY 2006 AFA/FA Language:**

The IHS has informed the Tribe that it is unlikely that appropriated funds will be available in FY 2006 to fund CSC associated with the "new and/or expanded PFSAs/PSFAs" being transferred to the Tribe pursuant to this AFA/FA, including any pre-award or start-up costs. The IHS has informed the Tribe that Congress may not appropriate additional contract support cost funds for these PFSAs/PSFAs in future years.

The Tribe has informed the IHS that it still wishes to contract for the "new and/or expanded PFSAs/PSFAs," identified herein, despite the unavailability of CSC and the possibility that Congress will not appropriate additional CSC funds in future years.

The Tribe assures the IHS that it can carry out the "PFSAs/PSFAs" despite the absence of any CSC because no new need for CSC is created by the Tribe's assumption of these new and/or expanded PFSAs/PSFAs.

Based upon this understanding, the IHS agrees to transfer the "new and/or expanded PFSAs/PSFAs" identified herein to the Tribe. The parties further agree that nothing in this AFA/FA creates a promise on the part of the IHS to pay the Tribe CSC for the "new and/or expanded PFSAs/PSFAs" identified herein.