



JUL 28 1999

Dear Tribal Leader and Other Interested Parties:

Enclosed is the Internal Agency Procedures Handbook for Non-Construction Contracting under Title I of the Indian Self-Determination and Education Assistance Act. This Handbook sets out the procedures to guide the actions of all agencies of the Department of the Interior (DOI) and the Department of Health and Human Services (HHS) to facilitate and enhance contracting with tribes and tribal organizations.

The 1994 amendments to the Indian Self-Determination and Education Assistance Act (ISDA) directed the DOI and the HHS to develop joint regulations for implementation of the ISDA with the active participation of tribal representatives using the procedures of the Negotiated Rulemaking Act. This historic task was completed on June 24, 1996, when the two Departments published joint regulations that responded to the statutory directive. These regulations are now codified at 25 Code of Federal Regulations, Part 900.

The only major task that remained was the development of an internal procedural manual for the use and guidance of personnel from both Departments who have the direct responsibility for the implementation of self-determination contracting. The Departments agreed to use an "enhanced consultation process" to develop this manual. A 19-member DOI/HHS Internal Agency Procedures Workgroup (Workgroup) composed of tribal and Federal representatives was charged with developing, through consensus decision-making, a "user-friendly" manual that would further the objectives of Title I of the ISDA. This Workgroup began its work in December 1996 and met four times over the ensuing 10 months. Altogether, over 50 people participated in the Workgroup's deliberations.

The enclosed Handbook is the product of the Workgroup's efforts. This Handbook will supersede provisions of previous procedural instructions or manuals regarding self-determination contracting under Title I of the ISDA issued by any agency of the DOI and

the HHS, unless those provisions can be demonstrated to be consistent with this Handbook, the ISDA, or the regulations.

Sincerely yours,

/Kevin Gover/

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~~Kevin Gover~~ / 1/28/89  
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Enclosure

**INTERNAL AGENCY PROCEDURES HANDBOOK  
FOR NON-CONSTRUCTION CONTRACTING UNDER  
TITLE I OF  
THE INDIAN SELF-DETERMINATION  
AND  
EDUCATION ASSISTANCE ACT**

**Developed by  
DOI/HHS Internal Agency Procedures Workgroup**

## DECLARATION OF POLICY

Sec. 3. (a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

(c) The Congress declares that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.

**Congressional Policy**, section 3 [25 U.S.C. 450a] of the Indian Self-Determination and Education Assistance Act, as amended.

(b) *Secretarial policy.* (1) It is the policy of the Secretary to facilitate the efforts of Indian tribes and tribal organizations to plan, conduct and administer programs, functions, services and activities, or portions thereof, which the Departments are authorized to administer for the benefit of Indians because of their status as Indians. The Secretary shall make best efforts to remove any obstacles which might hinder Indian tribes and tribal organizations including obstacles that hinder tribal autonomy and flexibility in the administration of such programs.

(2) It is the policy of the Secretary to encourage Indian tribes and tribal organizations to become increasingly knowledgeable about the Departments' programs administered for the benefit of Indians by providing information on such programs, functions and activities and the opportunities Indian tribes have regarding them.

(3) It is the policy of the Secretary to provide a uniform and consistent set of rules for contracts under the Act. The rules contained herein are designed to facilitate and encourage Indian tribes to participate in the planning, conduct, and administration of those Federal programs serving Indian people. The Secretary shall afford Indian tribes and tribal organizations the flexibility, information, and discretion necessary to design contractible programs to meet the needs of their communities consistent with their diverse demographic, geographic, economic, cultural, health, social, religious and institutional needs.

(4) The Secretary recognized that contracting under the Act is an exercise by Indian tribes of the government-to-government relationship between the United States and the Indian tribes. When an Indian tribe contracts, there is a transfer of the responsibility with the associated funding. The tribal contractor is accountable for managing the day-to-day operations of the contracted Federal programs, functions, services, and activities. The contracting tribe thereby accepts the responsibility and accountability to the beneficiaries under the contract with respect to use of the funds and the satisfactory performance of the programs, functions, services and activities funded under the contract. The Secretary will continue to discharge the trust responsibilities to protect and conserve the trust resources of Indian tribes and the trust resources of individual Indians.

(5) The Secretary recognizes that tribal decisions to contract or not to contract are equal expressions of self-determination.

(6) The Secretary shall maintain consultation with tribal governments and tribal organizations in the Secretary's budget process relating to programs, functions, services and activities of the Act. In addition, on an annual basis, the Secretary shall consult with, and solicit the participation of, Indian tribes and tribal organizations in the development of the budget for Indian Health Service and the Bureau of Indian Affairs (including participation of Indian tribes and tribal organizations in formulating annual budget requests that the Secretary submits to the President for submission to Congress pursuant to section 1105 of title 31, United States Code).

**Secretarial Policy**, 25 C.F.R., Part 900, section 900.3(b) of the Indian Self-Determination and Education Assistance Act Amendments; Final Rule (regulations).

(7) The Secretary is committed to implementing and fully supporting the policy of Indian self-determination by recognizing and supporting the many positive and successful efforts and directions of tribal governments and extending the applicability of this policy to all operational components within the Department. By fully extending Indian self-determination contracting to all operational components within the Department having programs or portions of programs for the benefit of Indians under section 102(a)(1)(A) through (D) and for the benefit of Indians because of their status as Indians under section 102(a)(1)(E), it is the Secretary's intent to support and assist Indian tribes in the development of strong and stable tribal governments capable of administering quality programs that meet the tribally determined needs and directions of their respective communities. It is also the policy of the Secretary to have all other operational components within the Department work cooperatively with tribal governments on a government-to-government basis so as to expedite the transition away from Federal domination of Indian programs and make the ideals of Indian self-government and self-determination a reality.

(8) It is the policy of the Secretary that the contractibility of programs under this Act should be encouraged. In this regard, Federal laws and regulations should be interpreted in a manner that will facilitate the inclusion of those programs or portions of those programs that are for the benefit of Indians under section 102(a)(1)(A) through (D) of the Act, and that are for the benefit of Indians because of their status as Indians under section 102(a)(1)(E) of the Act.

(9) It is the Secretary's policy that no later than upon receipt of a contract proposal under the Act or written notice of an Indian tribe or tribal organization's intention to contract, the Secretary shall commence planning such administrative actions, including but not limited to transfers or reductions in force, transfers of property, and transfers of contractible functions, as may be necessary to ensure a timely transfer of responsibilities and funding to Indian tribes and tribal organizations.

(10) It is the policy of the Secretary to make available to Indian tribes and tribal organizations all administrative functions that may lawfully be contracted under the Act, employing methodologies consistent with the methodology employed with respect to such functions under titles III and IV of the Act.

(11) The Secretary's commitment to Indian self-determination requires that these regulations be liberally construed for the benefit of Indian tribes and tribal organizations to effectuate the strong Federal policy of self-determination and, further, that any ambiguities herein be construed in favor of the Indian tribe or tribal organization so as to facilitate and enable the transfer of services, programs, functions, and activities, or portions thereof, authorized by the Act.

**Secretarial Policy**, 25 C.F.R., Part 900, section 900.3(b) of the Indian Self-Determination and Education Assistance Act Amendments; Final Rule (regulations).

[Dear Tribal Leader Letter]



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## **LIST OF ACRONYMS**

The following acronyms are commonly used in this Handbook.

<b>ADR</b>	<b>Alternative Dispute Resolution</b>
<b>AFA</b>	<b>Annual Funding Agreement</b>
<b>ALJ</b>	<b>Administrative Law Judge</b>
<b>AS</b>	<b>Assistant Secretary</b>
<b>BIA</b>	<b>Bureau of Indian Affairs</b>
<b>CDA</b>	<b>Contract Disputes Act</b>
<b>CDFO*</b>	<b>Contract Designated Federal Official</b>
<b>CDTO</b>	<b>Contract Designated Tribal Official</b>
<b>CFDA</b>	<b>Catalogue of Federal Domestic Assistance</b>
<b>C.F.R.</b>	<b>Code of Federal Regulations</b>
<b>CPLO</b>	<b>Contract Proposal Liaison Officer</b>
<b>CSC</b>	<b>Contract Support Cost</b>
<b>DAE*</b>	<b>Designated Agency Employee</b>
<b>DFEE</b>	<b>Division of Facilities and Environmental Engineering</b>
<b>DMO*</b>	<b>Designated Management Official</b>
<b>DOI</b>	<b>Department of the Interior</b>
<b>FTCA</b>	<b>Federal Tort Claims Act</b>
<b>GSA</b>	<b>General Services Administration</b>
<b>HHS</b>	<b>Department of Health and Human Services</b>
<b>HQLT</b>	<b>Headquarters Leadership Team</b>
<b>IBCA</b>	<b>Interior Board of Contract Appeals</b>
<b>IBIA</b>	<b>Interior Board of Indian Appeals</b>
<b>IHS</b>	<b>Indian Health Service</b>
<b>IPA</b>	<b>Intergovernmental Personnel Act</b>
<b>ISDA</b>	<b>Indian Self-Determination Act</b>
<b>MOA</b>	<b>Memorandum of Agreement</b>
<b>NOI</b>	<b>Notice of Intent</b>
<b>OGC</b>	<b>Office of the General Counsel</b>
<b>OTP</b>	<b>Office of Tribal Programs (IHS Headquarters)</b>
<b>PFSA</b>	<b>Program, Function, Service, and Activity</b>
<b>PMO</b>	<b>Property Management Officer</b>

**DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK**

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**\*See Appendix F for designation of DMO, DAE, CDFO**

## **LIST OF ACRONYMS**

<b>SDS</b>	<b>Self-Determination Services</b>
<b>SF</b>	<b>Standard Form</b>
<b>T/TO</b>	<b>Tribe and/or Tribal Organization (as appropriate)</b>
<b>U.S.C.</b>	<b>United States Code</b>

## **CHAPTER 1**

### **BACKGROUND, DISTRIBUTION, AND REVISION**

- I. **Background.** The final joint Department of Health and Human Services (HHS) and Department of the Interior (DOI) rule implementing section 107 of the Indian Self-Determination and Education Assistance Act (ISDA), Public Law (P.L.) 93-638, as amended, was published in the Federal Register on June 24, 1996 and became effective August 23, 1996. The regulations were developed through negotiation between tribal and agency representatives pursuant to the Negotiated Rulemaking Act. The Departments declined to develop internal agency procedures through the negotiated rulemaking process, but, in the preamble to the final regulations, the Secretaries agreed to an enhanced consultation process to develop procedures related to the implementation of the ISDA that do not involve resource allocation issues. The process would generate a procedural manual (Handbook) that would promote the purposes underlying the ISDA and facilitate contracting by Indian tribes and tribal organizations (T/TO) through the establishment of uniform Federal procedures. The Handbook is intended to be fully consistent with but not reinterpret policies contained in the ISDA and regulations.

On February 4, 1997, the Departments established an Internal Agency Procedures Workgroup (IAPWG) to create the proposed Handbook for use by the DOI and the HHS to implement the ISDA, and regulations. The establishment of the IAPWG provided a non-exclusive means of tribal participation in the Handbook development. The role of the IAPWG was to provide consensus advice and to create a proposed IAP Handbook for the DOI and HHS to implement the ISDA and regulations.

The IAPWG included 11 tribal members (one representative for Phoenix and Tucson), one from each of the Bureau of Indian Affairs' (BIA) and the Indian Health Service's (IHS) 12 regional areas, eight Federal members from the DOI and HHS, and other participants. The IAPWG meetings were facilitated by facilitators from the Federal Mediation and Conciliation Service. The IAPWG and its Drafting Sub-Workgroup met a total of 10 times between December 1996 and July 1998.

The Federal and tribal IAPWG members collaboratively developed this procedures Handbook to eliminate internal Federal obstacles that could affect uniform and efficient administration of Title I of the ISDA. The Handbook sets out uniform Federal procedures to be used by, and guide the actions of, all agencies of the DOI and the HHS to facilitate and enhance contracting with T/TOs under Title I of the ISDA.



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## DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK

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The IAPWG deferred completion of Chapter 24, (Superseded Laws and Regulations), Chapter 25 (Access to Interagency Motor Pool Vehicles), and Chapter 26 (Federal Sources of Supply) until it could reconvene within six months of issuance of this Handbook. At that point in time, the IAPWG will complete work on these chapters as well as revisions to the Handbook that may be appropriate.

With regard to the leasing of tribally-owned or -leased buildings used for ISDA program operation or administration (see Chapter 8), the IHS representatives agreed to lead an effort, with participation from DOI and tribal representatives, to develop an ISDA-specific lease agreement form to facilitate leasing under §105(l) of the ISDA, and, if necessary, seek assistance from the General Services Administration (GSA). The IHS representatives will report to the IAPWG when it reconvenes within six months of issuance of this Handbook.

The Handbook was written using common terminology with which most field personnel will be familiar. The Handbook does, however, incorporate a chapter on definitions which are consistent with those contained in 25 C.F.R. §900.113 and the ISDA at §4(a)-(m). The use of the term "agency(s)" in the Handbook refers to individual operating divisions or bureaus of the HHS or the DOI (including "services," "offices," "administrations," etc.) and the use of the term "Department(s)" refers to the DOI and/or the HHS. The Handbook identifies procedures which are applicable to all the agencies, although when specific procedures are provided which would be applicable only to the DOI, HHS, BIA, IHS, etc., separate subheadings are usually provided to alert the reader to such instances.

As a matter of construction, the IAPWG affirmatively agreed that the terms "shall/must," and "should" have unique usage in this Handbook. "Shall/must" is used to denote an action based upon a statutory or regulatory provision and is mandatory. "Should" is strongly recommended because the Secretaries believe these procedures, if followed, will facilitate the contracting process.

These procedures are not regulations but are intended to provide administrative guidance to Federal personnel in carrying out their responsibilities under Title I of the ISDA. Except as specifically provided in the ISDA or the implementing regulations, the provisions of this Handbook are not intended to create an independent legal cause of action.

## **II. Distribution.**

## **DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK**

This Handbook shall be distributed to every employee of DOI and HHS responsible for award, approval, and program, fiscal, or legal review of a proposal to enter into a contract or a grant or cooperative agreement pursuant to the ISDA; to all Contract Designated Federal Officials (CDFO); and to all agency employees who may provide technical assistance to T/TOs regarding contract operations. This Handbook shall also be distributed to the Rating Official of all such employees. This Handbook shall be distributed to each federally-recognized Indian tribe and to each tribal organization that operates an ISDA contract. Handbooks should also be distributed to program staff who participate in the preparation of program documentation and resource allocation methodology for the ISDA contracting process. Handbook distribution shall occur within 60 business days of Handbook publication and shall include electronic availability. Distribution of any revised Handbook pages shall be in accordance with this section.

### **III. Revision.**

- A. **Consultation.** The DOI and HHS shall arrange for consultation with T/TOs before making any substantive changes to this Handbook, unless otherwise required by law, in which case such interim changes will be reviewed at the next scheduled "enhanced consultation" meeting. For purposes of this Handbook, this consultation shall include the tribal and Federal representatives who served on the original IAPWG to the maximum extent feasible. In order to complete consideration of unfinished work on Chapter 24 (Superseded Laws and Regulations); 25 (Access to Interagency Motor Pool Vehicles); and 26 (Federal Sources of Supply) and an ISDA-specific lease agreement form (Chapter 8); the original IAPWG will reconvene within six months of issuance of this Handbook. Subsequent consultations shall take place each two years thereafter, or sooner, or as necessary upon substantive change to the ISDA or regulations. This Chapter will serve as authority for the establishment of a subsequent IAPWG similar to the one that produced this Handbook and consistent with the original charge to the DOI/HHS IAPWG (see Appendix A), to provide a nonexclusive means of tribal participation, but it will not involve negotiated rulemaking because this Handbook is not a regulation.
- B. **Comments.** Readers who identify errors in this Handbook or who have recommendations for improvement of the Handbook are encouraged to forward their comments and recommendations, in writing, to either:

Douglas P. Black

James J. Thomas

## **DOI/HHS INTERNAL AGENCY PROCEDURES HANDBOOK**

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Director  
Office of Tribal Programs  
Indian Health Service/HHS  
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Rockville, MD 20857  
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Chief  
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Any such comments received by the above noted personnel shall be distributed to the IAPWG members in advance of any subsequent consultation.

## **CHAPTER 2**

### **GENERAL PROVISIONS (PREAMBLE)**

- I. Purpose.** Congress has declared that each provision of the Indian Self-Determination and Education Assistance Act (ISDA) and each provision of contracts entered into thereunder shall be liberally construed for the benefit of the Indian tribes or tribal organizations (T/TO) to transfer the funding and related programs, functions, services, activities (PFSAs) (or portions of programs) that are otherwise contractible under the ISDA, including all related administrative functions, from the Federal Government to the T/TOs. Such contracting under the ISDA is an exercise of the government-to-government relationship between the United States (U.S.) and federally recognized Indian tribes.

To carry out these policies, this Handbook sets out the procedures to guide the actions of all agencies of the Department of the Interior (DOI) and the Department of Health and Human Services (HHS) to facilitate and enhance contracting with T/TOs under Title I of the ISDA, as amended, 25 U.S.C. §450 *et seq.*, and the regulations promulgated thereunder, 25 C.F.R. Part 900 (published in the Federal Register June 24, 1996, and effective on August 23, 1996). The Secretaries intend that these procedures will ensure the implementation of the purposes underlying the ISDA and facilitate contracting by T/TOs through the establishment of uniform procedures.

The procedures in this Handbook do not address the methodologies for the allocation of funds appropriated to the HHS or the DOI. Allocation of funds to ISDA contracts will be determined by the agencies in accordance with the ISDA, applicable appropriations law, and agency policy under separate procedures.

Disputes regarding allocation of funds to specific tribal contracts will be resolved in accordance with the declination process in §102 and the appeals process in §110 of the ISDA [25 U.S.C. §450f and §450m-1], including the Contract Disputes Act [41 U.S.C. 601 *et seq.*], established by the ISDA and the implementing regulations.

This Handbook provides for the disclosure of the following information, within identified time frames, regarding the allocation of funds to specific tribal contracts (and Annual Funding Agreements) both initial and renewals:

- a) The amount of program and contract support cost (CSC) funding available and the schedule for the transfer of such funding upon contract award or annual funding agreement renewal (AFA);

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- b) The methodology used to identify available amounts;
- c) The process used to arrive at available amounts;
- d) The amount of funding retained by the Government;
- e) Any other information which would be useful in understanding how contract amounts were calculated in order to minimize the number of declinations based on the availability of funding; and
- f) The T/TO shall have the opportunity to review and question, during the contract or AFA renewal negotiation period, the method used to arrive at the proposed program and CSC funding amounts and any amount proposed to be retained by the Federal Government.

Construction activities are governed by the ISDA and Subpart J of the regulations [25 C.F.R. §900.110 *et seq.*]. Construction contract means a fixed-price or cost-reimbursement self-determination contract for a construction project, except that such term does not include any contract: 1) that is limited to providing planning services and construction management services (or a combination of such services); 2) for the Housing Improvement Program or roads maintenance program of the BIA administered by the Secretary of the Interior; or 3) for the health facility maintenance and improvement program administered by the Secretary of HHS. While planning services and construction/management services as defined in 25 C.F.R. §900.113 may be included in a construction contract under this subpart, they may also be contracted separately using the Model Agreement in §108 of the ISDA [25 U.S.C. §4501]. (For a complete review of construction requirements and activities, see 25 C.F.R. §900.113). This Handbook does not contain a chapter on construction.

These procedures are not regulations but are intended to provide administrative guidance to personnel in carrying out their responsibilities under the ISDA. Agencies and their personnel are expected to follow these procedures in fulfilling their responsibilities as Federal officials and shall be held accountable for their actions.

This Handbook is not legally binding on T/TOs or the Secretary except as specifically agreed to by a T/TO and the agency or otherwise required by law.

- II. Interpretation of this Handbook.** All DOI and HHS personnel involved in the operation, review, approval and maintenance of ISDA contracts should be guided in all decisions by the policies set forth in the ISDA and the regulations. Most notable of these are the Congressional Policy set forth at section 3 of the ISDA and the Secretarial Policy

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set forth at 25 C.F.R. §900.3(b). For ease of reference, these policy statements are set forth on the inside of the front cover of this Handbook.

The Secretaries intend these procedures to be consistent with the final regulations at 25 C.F.R. Part 900 and the ISDA and its 1994 amendments. In the event of any conflict between any provision or interpretation of this Handbook and any provision of the ISDA or the regulations appearing at 25 C.F.R. Part 900, the law and regulations shall govern. Any issue not addressed in this Handbook shall be administered consistently with the ISDA and regulations. The Secretaries do not intend this Handbook to reinterpret the provisions of the ISDA or its implementing regulations.

Finally, the Secretaries expect that all Federal officials administering contracts under Title I of the ISDA (see Appendix B), the regulations (see Appendix C), and these procedures will act in accordance with the letter, spirit and intent of the ISDA, the regulations, and the policy statements contained therein, as well as in accordance with their responsibilities as Federal officials, and will be accountable for their actions (see Appendix D for Delegations of Authority).

- III. Incorporation of the ISDA and Regulations.** The ISDA and the regulations promulgated thereunder are included in Appendix B and C of this Handbook. Any amendments to the ISDA that are subsequently enacted into law, and any regulations applicable to Title I contracting subsequently promulgated by the Departments shall automatically become a part of this Handbook immediately upon their effective date without the need for further action of the Departments.

The Secretaries intend that this Handbook reflect the letter, spirit and intent of the ISDA and the regulations.

This Handbook does not change and shall not be read as changing any provision of the ISDA or its regulations. In this Handbook, references to the ISDA and the regulations will only be made by citation or by verbatim recitation.

- IV. Supersession.** This Handbook supersedes provisions of previous procedural instructions or manuals regarding ISDA contracting under Title I of the ISDA issued by any agency of the DOI (including, but not limited to, applicable sections of the Bureau of Indian Affairs Manual [BIAM]) and the HHS (including, but not limited to, Indian Self-Determination Memoranda, Indian Self-Determination Advisories, Indian Health Service (IHS) circulars, IHS Interim Guidebook on P.L. 93-638 Contracting, and Contract Policy Letters), unless it can be demonstrated to be consistent with this Handbook, the ISDA, or the regulations.

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The BIAM has been superseded and is being replaced by the Indian Affairs Manual (IAM). This Handbook supersedes any conflicting provisions of the IAM. Appendix E provides a listing of the status of all IHS policies related to Title I of the ISDA; the listing indicates current status, i.e., whether superseded, rescinded, or still in effect. This list may not be all-inclusive.

- V. **Authority.** This Handbook is issued jointly under the authorities of the Secretary of the DOI and the Secretary of HHS.

## CHAPTER 3

### DEFINITIONS

- I. **Annual Funding Agreement** means a document that represents the negotiated agreement of the agency to fund, on an annual basis, the programs, functions, services, and activities (PFSA) transferred to a tribe or tribal organization (T/TO) under the Indian Self-Determination and Education Assistance Act (ISDA) [25 U.S.C. §450].
- II. **Awarding Official** means any person who by appointment or delegation in accordance with applicable regulations has the authority to enter into and administer contracts, grants, or cooperative agreements on behalf of the United States of America and make determinations and findings with respect thereto. Pursuant to the ISDA, this person can be any Federal official, including but not limited to, a Contracting Officer or Grants and Cooperative Agreement Officer.
- III. **Contract** means a self-determination contract (or grant or cooperative agreement utilized under section 9 of the ISDA) entered into under Title I of the ISDA [25 U.S.C. §450b(j)].
- IV. **Contract Designated Federal Official** means the individual designated by the Federal agency in section 1.(e)(1) of the Model Agreement [25 U.S.C. §450l(c)]. This individual is a senior official who serves as the agency representative for notices, proposed amendments to the Contract, and other purposes for the Contract. This individual may be an Awarding Official, Program Officer, or other agency representative (see Appendix F).
- V. **Contract Designated Tribal Official** means the individual designated by the T/TO in section 1.(e)(1) of the Model Agreement. This individual is a senior official who serves as the T/TO's representative for notices, proposed amendments to the contract, and other purposes for the contract (see Appendix F).
- VI. **Days** means calendar days; except where the last day of any time period specified in these procedures falls on a Saturday, Sunday, or a Federal holiday, the period shall carry over to the next business day unless otherwise provided by law.
- VII. **Designated Agency Employee** means an individual designated by an agency to coordinate and administer the process necessary to bring to final conclusion each self-determination contract proposal (see Appendix F).



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- VIII. Designated Management Official** means a senior field official identified by an agency to perform one or more actions under Title I of the ISDA (see Appendix F).
- IX. Indian Self-Determination and Education Assistance Act (ISDA)** means Public Law 93-638, as amended, codified at 25 U.S.C. 450 *et seq.*
- X. Indian Tribe** means any Indian tribe, band, nation, or other organized group, or community, including pueblos, rancherias, colonies and any Alaska Native Village, or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the U.S. to Indians because of their status as Indians [25 U.S.C. §450b(l)].
- XI. Model Agreement (Contract)** means the provisions of the Model Agreement found at §108(c) of the ISDA. **NOTE:** Citations to Model Agreement in this Handbook refer to the Agreement itself, not to the statute [25 U.S.C. §450l(c)].
- XII. Program** means a program, function, service, or activity (PFSA) or portion thereof, including projects awarded under the Department of the Interior or the Department of Health and Human Services.
- XIII. Program Official** means the individual identified by an agency who implements a program in the field.
- XIV. Reassumption** means rescission (termination), in whole or in part, of a contract and assuming or reassuming control or operation of the contracted program by the Secretary without consent of the T/TO pursuant to the notice and other procedures set forth in 25 C.F.R. Part 900. There are two types of reassumption: emergency and non-emergency [25 U.S.C. §450m and 25 C.F.R. §900.246].
- XV. Regulations** means 25 C.F.R. Part 900, Indian Self-Determination and Education Assistance Act Amendments; Final Rule, Federal Register, Vol. 61. No. 122, Monday, June 24, 1996, Rules and Regulations [25 C.F.R. §900.240].
- XVI. Retrocession** means the voluntary return to the Secretary of a contracted program, in whole or in part, for any reason, before the expiration of the term of the contract. [25 C.F.R. §900.241 and 25 U.S.C. §450j(e)].

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**XVII. Tribal Organization** means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: provided, that, in any case where a contract is let or a grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant [25 U.S.C. §450b(*l*)].

**NOTE:** Other definitions can be found at 25 U.S.C. §450b.

## CHAPTER 4

### CONTRACT PROPOSAL CONTENTS

- I. **Introduction.** Section 102(a) of the Indian Self-Determination and Education Assistance Act (ISDA) [25 U.S.C. §450f(a)] and 25 C.F.R. §900.8 describe the contract proposal contents for ISDA contracts.
  
- II. **Procedures.**
  - A. **Preparation.** The tribe or tribal organization (T/TO) is responsible for preparing and submitting the contract proposal as required in 25 C.F.R. §900.8. As stated in 25 C.F.R. §900.9, the agency **may not** require a T/TO to submit any other information beyond that identified in 25 C.F.R. §900.8. A T/TO may, if it wishes, submit a contract proposal in the format of the Model Agreement. In that event, the agency shall assure that all elements required by 25 C.F.R. §900.8 are addressed (see Appendix G, Addresses for Submitting Notices of Intent and Contract Proposals).
  
  - B. **Receipt.** Upon receipt of the initial proposal to contract, the designated agency employee(s) should immediately record the date received, make necessary copies and distribute the proposal to the appropriate program and management official(s) for review in accordance with Chapter 5, §II.A. of this Handbook. This review will address its adequacy and completeness as required in 25 C.F.R. §900.8 and should be completed to correspond with the time frames provided in 25 C.F.R. §900.15 (see Appendix H, Summary of Time Frames).
  
  - C. **Successor Annual Funding Agreement (AFA); Contract Renewal.** If the proposal is for a successor AFA or renewal of a contract, it should be processed in accordance with Chapter 5, §III. and IV. of this Handbook and 25 C.F.R. §900.12 and §900.32.

### III. **Duties Upon Receipt of Notice of Intent.**

This section of this Chapter describes what agency personnel should do when a T/TO files a Notice of Intent (NOI) to contract (also known as a Letter of Intent [LOI]). While filing of such a notice is not required by the law or regulations, it is addressed at 25 C.F.R. §900.3(b)(9). If a T/TO elects to submit such a notice, agency personnel **MUST** follow the procedures described in the cited section. Information related to contractible

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programs, functions, services, and activities (PFSAs) can be provided without the submission of such a notice.

- A. Technical Assistance. Within 30 days of receipt of a NOI to contract, the agency will provide pre-proposal technical assistance as described in 25 C.F.R. §900.7, upon the request of the T/TO and subject to the availability of appropriations. In addition, the agency shall provide the following information to the T/TO:
1. An identification of the amount of program and contract support cost (CSC) funding available and the schedule for the transfer of such funding upon contract award or annual funding agreement renewal (AFA);
  2. The methodology used to identify available amounts;
  3. The process used to arrive at available amounts;
  4. An identification of the amount of funding retained by the Government;
  5. Any other information which would be useful in understanding how contract amounts were calculated in order to minimize the number of declinations based on the availability of funding; and
  6. The T/TO shall have the opportunity to review and question, during the contract or AFA renewal negotiation period, the method used to arrive at the proposed program and CSC funding amounts and any amount proposed to be retained by the Federal Government.
- B. Alternative Technical Assistance. For DOI agencies other than the BIA or upon the request of a T/TO, as an alternative to the written response provided for in III.A. above, the agency may arrange a meeting with the T/TO. The purpose of such a meeting is to clarify the PFSAs that the T/TO is interested in contracting. For those PFSAs which meet the criteria in §102(a)(1) of the ISDA, the agency will provide information related to funding levels and sources available for the operation of the planned contract and at the request of the T/TO and subject to the availability of appropriations, the agency will provide pre-proposal technical assistance as described in 25 C.F.R. §900.7. The location and timing of such meeting shall be arranged through negotiations between the agency and the T/TO.
- C. Administrative Actions. No later than upon receipt of a contract proposal or written notice of a T/TO's intent to contract, the agency shall begin planning such administrative actions, including but not limited to transfers or reductions in force,

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transfers of property, and transfers of contractible functions, as may be necessary to ensure a timely transfer of responsibilities and funding to the T/TO as described in 25 C.F.R. §900.7.

## CHAPTER 5

# REVIEW AND APPROVAL OF CONTRACT PROPOSALS, SUCCESSOR AFAs, CONTRACT RENEWALS, AND CONTRACT AMENDMENTS

**I. Introduction.** This Chapter sets out the procedures to follow when a tribe or tribal organization (T/TO) submits any of the following four types of proposals that require review and action by the agency within 90 days. Those proposals, and citations to the relevant sections of the Indian Self-Determination and Education Assistance Act (ISDA) and the regulations, are:

- Initial contract proposal, grant, or cooperative agreement ISDA §102(a) [25 U.S.C. §450f(a)]  
25 C.F.R. Part 900.7-.13
- Successor annual funding agreement ISDA §108(c), Model Agreement Section 1(b)(4) and (f)(2);  
25 C.F.R. Part 900.12; 900.32
- Contract renewal proposal ISDA §102(a)(2) [25 U.S.C. §450f(a)(2)];  
25 C.F.R. Part 900.12;  
900.14-.19; 900-20-.33
- Contract amendment proposal ISDA §102(a)(2) [25 U.S.C. §450f(a)(2)];  
§108(c) [Model Agreement Section 1(e)(2)];  
25 C.F.R. Part 900.14-.19;  
900.20-.33.

**II. Initial Contract Proposals.**

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When a T/TO submits a proposal<sup>1</sup> for a new contract to the agency, that proposal must go through a review process. The law and regulations limit the time available to the agency to perform the review and take final action on the proposal.

This section describes the actions which must be taken at each organizational level and how these actions must be completed.

Throughout this Handbook there are numerous references to the 90 (calendar) day review period during which, or before the expiration of which, an action of the agency is taken.<sup>2</sup> For purposes of this Handbook, the 90 days refers to the period of time allowed, pursuant to §102 of the ISDA, for the agency to award or decline an initial contract proposal, a renewal proposal, a successor annual funding agreement (AFA), a contract amendment, a waiver request, or a request for program redesign. With the written consent of the T/TO, the 90-day deadline may be extended for the period of time agreed to in writing by the T/TO (see §II.E.4. of this Chapter). **Failure of agency personnel to act within the 90-day period precludes the agency from asserting a declination issue and results in the award of a contract, contract amendment, contract renewal, successor AFA and/or the grant of a waiver or program redesign request, consistent with 25 C.F.R. §900.18.**

### A. Receipt of Initial Contract Proposal

1. When a contract proposal arrives in any office, the following steps shall be followed:
  - a. Date stamp the proposal immediately upon receipt;
  - b. Immediately notify the Designated Management Official (DMO) identified in Appendix F (including Headquarters personnel for agencies of the Department of the Interior (DOI) other than the BIA); and
  - c. Immediately forward the proposal to the appropriate person designated by the agency to be in charge of agency review.

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<sup>1</sup>Appendix G provides addresses where Notices of Intent and contract proposals should be submitted.

<sup>2</sup>Appendix H provides time lines applicable to agency staff.

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2. The Designated Agency Employee (DAE) appointed by the DMO will be responsible for assuring that the proposal is reviewed and acted upon in a timely manner. The DAE will compile all documents and recommendations regarding the proposal. The DAE will also coordinate communications among agency personnel and between the agency and the T/TO.
  3. Within 2 days after receipt of the proposal by the agency, the DAE shall notify the T/TO, in writing, when the proposal was received and identify when the 90-day (90 days as defined in Chapter 3, Definitions) review period will expire. Such notification will indicate that the DAE is the contact point.
  4. If a proposal is received at an office which is not the office which has the authority to process that proposal, the proposal should be immediately forwarded to the correct office (which will complete step 3. above) by overnight mail because the 90-day time frame began upon initial receipt of the proposal.
  5. It is recommended that the DAE maintain a status log.
- B. Proposal Review Planning. In order to accomplish a timely review, within 7 days of the agency's receipt of a contract proposal, the DAE should assemble the appropriate agency personnel needed to accomplish the following tasks and shall monitor the proposal review:
1. Screen the proposal for completeness in accordance with the requirements of 25 C.F.R. §900.8. The DAE shall, within 15 days of the agency's receipt of a contract proposal, notify the T/TO in writing (certified mail, return receipt requested), of any missing items required by 25 C.F.R. §900.8 and request that the items be submitted within 15 days of receipt of the notification [25 C.F.R. §900.15(d)]. Regardless of whether such missing items have been received by the agency, the proposal should be reviewed and a decision shall be made to award or decline the proposal within the 90-day period based on the declination criteria.
  2. Screen the proposal for declination issues. If there are any obvious declination issues, the DAE shall advise the DMO and the agency legal counsel. A proposal may only be declined for one of five specific reasons: 1) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory; 2) adequate protection of trust resources is not assured; 3) the proposed project or



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function to be contracted for cannot be properly completed or maintained by the proposed contract; 4) the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under §106(a) of the ISDA [25 U.S.C. §450j-1(a)]; or 5) the PFSA (or a portion thereof) that is the subject of the proposal is beyond the scope of PFSAs covered under §102(a)(1) [25 U.S.C. §450f(a)1)] of the ISDA because the proposal includes activities that cannot lawfully be carried out by the contractor (see Chapter 6 of this Handbook for declination procedures).

3. Upon an internal agency determination that declination issues may exist, the DAE shall notify the T/TO, in writing, of the existence of possible declination issue(s) and of its right to receive technical assistance pursuant to 25 C.F.R. §900.28. One of the goals of this section is to promote dialogue between the agency and the T/TO in order to avoid declination.
4. Determine if the proposal contains a request to have the agency enter into a lease for a facility in accordance with §105(l) of the ISDA. If the proposal contains such a request, the DAE should notify the Area Realty Officer (ARO) who will be responsible for beginning the process of developing the lease in accordance with Chapter 8 of this Handbook.
5. Organize the agency's review of the proposal. This should include:
  - a. Appointment of review panel personnel;
  - b. Identification of review elements; and
  - c. Establishment of the schedule for review.
6. Identify §106(a) (of the ISDA) [25 U.S.C. §450j-1(a)] funding amount for each PFSA:
  - a. The amount of program and contract support cost (CSC) funding available and the schedule for the transfer of such funding upon contract award or annual funding agreement renewal (AFA);
  - b. The methodology used to identify available amounts;
  - c. The process used to arrive at available amounts;

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- d. The amount of funding retained by the Government; and
- e. Any other information which would be useful in understanding how contract amounts were calculated in order to minimize the number of declinations based on the availability of funding.

The T/TO shall have the opportunity to review and question, during the contract or AFA renewal negotiation period, the method used to arrive at the proposed program and CSC funding amounts and any amount proposed to be retained by the Federal Government.

- 7. Schedule an internal agency planning meeting to plan the transition from Federal operation to T/TO operation of the PFSAs included in the proposal. Identify any Federal employees who would be displaced by the contract and plan for appropriate notice, reassignment, separation, or transfer actions in accordance with Federal personnel laws.
- 8. Develop contract negotiation plans (if negotiations are needed) and inform the T/TO of these plans, which shall include:
  - a. Identification of issues for negotiation;
  - b. Appointment of negotiation team that must include the Awarding Official;
  - c. Identification of the agency official(s) on the negotiating team with authority to make binding commitments for the agency, and any limitations on that authority;
  - d. Development of a negotiation schedule in consultation with the T/TO. If possible, final negotiations should be completed within 60 days of receipt of the proposal to allow time to prepare contract award documents or to address and resolve, if possible, declination issues with the T/TO; and
  - e. Assignment of agency personnel responsible for each contract award step.
- 9. Identify the agency official who shall be the "Designated Official" for the operation of the contract as required by §(1)(e)(1) of the Model

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Agreement. For purposes of this Handbook, that individual is called the Contract Designated Federal Official (CDFO).

### C. Review of Proposal.

1. Proposal Elements. The review panel is responsible for the review of the following proposal elements:
  - a. Budget. The review panel should evaluate the proposed budget in consideration of 25 C.F.R. §900.8(h) and §106(a) [25 U.S.C. §450j-1(a)] of the ISDA for: the PFSAs included in the proposal; CSC estimates and CSC funding availability; any start-up costs requested; and any pre-award costs requested. The budget reviewer should consult with appropriate program officials to evaluate whether the proposed budget is adequate to perform the proposed scope of services.
  - b. Model Agreement and AFA. The review panel should evaluate the proposal for conformance with the provisions of §108 of the ISDA (Model Agreement and AFA), and any additional provisions proposed by the T/TO. It is helpful, particularly if the T/TO provided an electronic media version of the proposal, that additional provisions be underlined and deletions be struck through to clearly show the changes to the Model Agreement.
  - c. Reports. The review panel should review any program, data, and financial reports proposed to be produced under the contract. For each fiscal year of the contract, the ISDA requires a contractor to submit a Single Audit Act Report required by Chapter 75 of Title 31, U.S.C. Whether any other reports will be required under the contract is subject to negotiation between the parties, unless required by statute [25 C.F.R. §900.45(a)]. Disagreements over reporting requirements are subject to the declination criteria. See Chapter 6 of this Handbook; §5(f) of the ISDA [25 U.S.C. §450c(f)]; and 25 C.F.R. §900.65-900.68.
  - d. Program Standards. The review panel should review the proposal's program standards to assure that standards are established for all programs to be performed under the contract. The program standards shall be evaluated under the declination criteria [§102 of

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the ISDA, 25 U.S.C. §450f], as the declination criteria constitute the only basis for rejection.

- e. Redesign of Programs, Functions, Services, and Activities (PFSAs). Any proposed redesign of PFSAs that will be performed under the contract shall be evaluated under the declination criteria [§102 of the ISDA, 25 U.S.C. §450f], as the declination criteria constitute the only basis for rejection.
  - f. Facilities Report, Space, Equipment, Property, etc. The review panel should review the proposal for use or acquisition of Federal real and personal property under the contract, and develop a plan for implementation. The review panel should also identify and prepare any joint use agreements that will be required.
  - g. Requests to Lease a Facility. When a proposal contains a request to lease a facility in accordance with §105(l) of the ISDA, the review panel should coordinate its proposal review with the efforts of the ARO. The ARO is responsible to assure that the lease is processed expeditiously in accordance with Chapter 8 of this Handbook. Section 105(l) of the ISDA and Subpart H of the regulations at 25 C.F.R. Part 900 require the Secretary to enter into leases with T/TOs for facilities used in the administration or delivery of services under the ISDA. The processing of such leases should be done **expeditiously** so that the final execution of the lease can coincide with the award of the contract or the approval of the amendment to the contract.
  - h. Requests for Federal Personnel. The review panel should review the proposal for any requests for assignment of Federal personnel to the T/TO pursuant to the Intergovernmental Personnel Act (IPA) or a Memorandum of Agreement (MOA), and should develop a plan for implementation of such requests (see also Chapter 19 of this Handbook).
  - i. Waivers. The review panel shall evaluate and process any waivers requested in the proposal pursuant to 25 C.F.R. §900.140-148 (see Chapter 10 of this Handbook).
2. Review Panel Report. The review panel shall prepare a written report on the review of the contract proposal. The DAE shall assure that the report

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is submitted timely in accordance with the schedule developed in §II.C.3.c., above. The report should include recommendations on the following:

- a. Findings regarding the proposal;
- b. Suggested negotiation objectives;
- c. Evaluation of the proposal to determine whether the agency should take any action pursuant to §105(i) of the ISDA [25 U.S.C. §450j(i)] regarding program division;
- d. Analysis of any declination issues and recommendations for overcoming such issues; and
- e. Identification of severable portions of the contract proposal for which there are no declination issues and that must be awarded pursuant to 25 C.F.R. §900.25.

3. Responsibilities. The DAE shall be responsible for assuring that the following activities are accomplished:

- a. Finalize the negotiation objectives, consistent with the ISDA and regulations, in consultation with appropriate agency personnel, including the negotiation team;
- b. Develop transition plans for turning over operations from the agency to the T/TO;
- c. Coordinate the negotiation schedule and logistics with representatives of the T/TO; and
- d. Compile an official record of all negotiations which shall include:
  - (1) Identification of the persons present;
  - (2) Copies of any documents provided by the agency to the T/TO or by the T/TO to the agency at the negotiation;
  - (3) Recitation of all decisions made; and
  - (4) Recitation of any unresolved (declination) issues.

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- D. Contract Negotiations. The agenda for the contract negotiation session(s) shall be developed by the agency negotiation team and the representatives of the T/TO. The agency negotiation team should assure that any declination issues identified during the proposal review stage, together with any agency recommendations for overcoming these issues, are raised at the negotiation.
1. The agency official(s) on the negotiating team with authority to make binding commitments for the agency shall attend all negotiation sessions.
  2. The agency official on the negotiating team with authority to make binding commitments for the agency shall assure that a written report on the negotiation session(s) is prepared by the DAE as required by §C.3.d.(3), above.
  3. The DAE should report on the status of the processing of any lease request which had been included in the T/TO's proposal.
  4. If there are no unresolved declination issues, the parties should develop a schedule for award of the contract and implementation of transfer of authority from the agency to the T/TO.
  5. At the conclusion of the negotiation, if a decision has been made, the agency official on the negotiating team with authority to make binding commitments for the agency shall inform the T/TO if a recommendation will be made to decline any part of the contract proposal and provide technical assistance pursuant to 25 C.F.R. §900.28.
  6. The negotiating team shall submit a recommended decision to the DMO regarding approval or declination of the contract proposal.
- E. Decision on Contract Proposal.
1. The agency is required to approve a contract proposal and award a contract within 90 days after the proposal is received unless the agency provides written notification to the T/TO that contains a specific finding that clearly demonstrates that, or that is supported by a controlling legal authority that, the contract must be declined for one or more of the reasons in the declination criteria set out §102(a)(2) of the ISDA [25 U.S.C. §450f(a)(2)].

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2. The agency is required to approve any severable portion of a contract proposal that does not support a declination finding. Section 102(a)(4) of the ISDA [25 U.S.C. §450(a)(4)].
3. The agency shall make every effort to approve contract proposals, and to take such action in a timely manner. Where possible, agency personnel shall endeavor to approve contract proposals and award contracts in less than the 90 days permitted by the ISDA.
4. If the agency requires more than 90 days for review and action on a contract proposal, it may request a written extension of the review period from the T/TO before the expiration of the review period. See 25 C.F.R. §900.17. Where the T/TO's voluntary and express written consent to an extension is granted to the agency, the T/TO should expressly state the duration of the extension.
5. **Failure of agency personnel to act within the 90-day period precludes the agency from asserting a declination issue and results in the award of a contract, consistent with 25 C.F.R. §900.18.**

### F. Approval and Award of Contract.

1. The DMO shall approve the proposal and provide written notice of this action to the:
  - a. T/TO; and
  - b. Awarding Official assigned to the contract proposal.
2. At the time of approval and award, the Awarding Official shall advise the T/TO that post award claims arising from the contract should be submitted by certified mail to his/her office in order to expedite claims in accordance with Chapter 13 of this Handbook.
3. In order to facilitate award of the Model Agreement, the designated officials of the T/TO and the Federal agency must be identified. For purposes of this Handbook, those individuals are called the Contract Designated Federal Official (CDFO) and the Contract Designated Tribal Official (CDTO).

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4. The Awarding Official shall then immediately award the contract by signing the Model Agreement and AFA with the provisions agreed to by the parties. The Awarding Official shall assure that the following steps are followed to implement a contract award:
  - a. Fund Distribution
    - (1) For BIA and IHS:

Obtain appropriate advice of allotment/allowances of fund distribution documents for the following funding elements in such sums as requested in the contract proposal or as amended by agreement of the parties:

      - (a) Any Central Office/Headquarters PFSAs included in the contract;
      - (b) CSCs including any pre-award or start up costs;
      - (c) Program funds; and
      - (d) Such other funds as the parties have agreed.
    - (2) For Other Agencies:

Contract award payment procedures as set forth for each other agency in Appendix I.
  - b. Either the agency or the T/TO may prepare the Model Agreement and AFA with provisions as agreed to by the parties.
  - c. Agencies will assign an appropriate identification number to contract documents in order to track awards.
  - d. For the purpose of the Single Audit Act, provide Catalog of Federal Domestic Assistance (CFDA) number for each program which will be operated under contract/grant. The CFDA information is available on the Internet at  
<<http://www.gsa.gov/fdac>>  
or for BIA programs, it can be obtained from the Office of Audit Evaluation.



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- e. Obtain signatures on the Model Agreement and AFA from officials authorized to sign on behalf of the T/TO and the Federal agency.
- f. Unless otherwise specified in the contract or AFA, arrange for immediate availability of contract funds in the amount specified in the AFA through the appropriate agency payment system, once apportionment has occurred.
- g. Assist the T/TO, if requested, in obtaining General Services Administration (GSA) screener card(s) pursuant to section 1.(8)(F) of the Model Agreement.
- h. Assist the T/TO in accessing Federal sources of supply pursuant to §105(k) of the ISDA [25 U.S.C. §450j(k)], if requested.
- i. Complete the plan for transfer of property, etc., from the Federal agency to the T/TO in accordance with the schedule agreed to by the parties.

### 5. Annual Funding Agreement Contents

#### a. Basic Requirements.

The AFA shall set out the information required by section 1.(f)(2) of the Model Agreement and any other provisions to which the parties agree.

#### b. Discretionary Grants and Non-Recurring Funding.

Upon request of the T/TO, discretionary grants and all categories of awarded non-recurring funding, shall be included in the AFA. All particular terms and/or conditions attached to such funding must be shown in the AFA. Discretionary grant funds shall be governed by all the particular terms and conditions attached to such funds which must be shown in the AFA, and the use of such funds shall be governed by those terms and conditions and not the substantive provisions of the ISDA, as amended.

#### c. Prior Year Funding.

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Upon the request of the T/TO, funding awarded but not received prior to the term of the AFA shall be included in the subsequently executed AFA. As required by section 1.(f)(2)(A)(i) of the Model Agreement, the general budget category assigned shall reflect the fiscal year in which the funds were awarded.

**III. Successor Annual Funding Agreement (AFA).** The AFA is the means by which a T/TO receives its funds for contract operations. Therefore, it is essential that negotiation and issuance of successor AFAs occur on a timely basis so that the successor AFA is approved and signed before the expiration of the prior AFA. The AFAs are governed by section 1.(b)(14) and (f)(2) of the Model Agreement and 25 C.F.R. §900.12 and §900.32.

A. Initiating a Successor AFA.

A successor AFA can be initiated in one of the following ways:

1. The T/TO submits a proposed successor AFA to the CDFO at least 90 days before expiration of the current AFA; or
2. The Awarding Official submits a proposed successor AFA to the CDTO as provided in §III.C. below.

B. Docket System. The ISDA requires that negotiation of a successor AFA must begin no later than 120 days prior to conclusion of the preceding AFA (see section 1.(b)(14)(A) of the Model Agreement). To assure that successor AFA negotiations begin within this time frame, it is recommended that each Awarding Official maintain a docket system that alerts the DMO and the appropriate CDFOs of all AFAs that will expire --

- within the next 180 days
- within the next 150 days
- within the next 140 days
- within the next 120 days

C. CDFO Actions. Not later than 140 days prior to the expiration of an AFA, the CDFO should send a notice to the CDTO that an existing AFA will expire on (date) and identify the DAE the T/TO should contact to schedule negotiations.

D. DAE Actions.

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1. The DAE shall provide to the T/TO all information available to the agency concerning the amount of funds that may be available for the successor AFA. The CDFO shall have a continuing obligation to supply additional information to the T/TO as such information becomes available to the agency [section 1.(b)(14)(B) of the Model Agreement].
  2. The DAE shall provide any information the T/TO requests regarding funding that may be available for the AFA to the extent not already supplied.
- E. Schedule for Negotiation. If the T/TO has not responded to the CDFO's notice in §II.C. above by the 90th day prior to the expiration of the current AFA, the CDFO shall again contact the CDTO to establish a schedule for negotiation.
- F. Action on Successor AFA by BIA and HHS.
1. Successor AFA that is Substantially the Same.
    - a. As described in 25 C.F.R. §900.32, if a successor AFA proposed by a T/TO is substantially the same as the prior AFA (except for funding increases included in appropriations acts or funding reductions as provided in §106(b) of the ISDA [25 U.S.C. §450j-1(b)], the Awarding Official shall --
      - (1) Approve the proposed AFA;
      - (2) Add to the contract the full amount of funds to which the contractor is entitled in accordance with the payment provision in the AFA;
      - (3) Obtain tribal signature;
      - (4) Sign the proposed AFA; and
      - (5) Immediately supply the signed AFA to the CDTO.
    - b. **The agency may not decline any portion of a successor AFA described in §III.F.1.a. above as indicated in 25 C.F.R. §900.32.** Therefore, no agency employee may insist on the inclusion or deletion of any provision in a successor AFA as a

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condition for its approval, unless there has been a change in law or in regulations which require such amendment.

- c. **The Awarding Official shall approve and sign a successor AFA described in §III.F.1.a. above within 90 days after its receipt by the agency. If the successor AFA is not approved and signed within this time frame, it shall be deemed approved.** The DMO shall automatically become responsible to ensure that the award is made promptly and shall contact the CDTO and arrange for immediate execution of the award.

### 2. Successor AFA that is NOT Substantially the Same.

- a. A T/TO may propose a successor AFA, or a portion of a successor AFA, which is not substantially the same as the previous AFA that was funded. A successor AFA, or portion thereof, which is not substantially the same as the previous AFA might include, for example:
  - a redesign proposal;
  - a waiver proposal;
  - a different proposed funding amount (except for a funding increase described in §III.F.1.a. above); or
  - a different PFSA.
- b. A proposed successor AFA, or portion thereof, that is not substantially the same as the previous AFA is subject to the declination criteria and procedures in §102 of the ISDA [25 U.S.C. §450f], and Subpart E of the regulations [25 C.F.R. §900.20-33], which means **the 90-day deadline for action applies.**
- c. As provided in the last sentence of 25 C.F.R. §900.32, if there is a disagreement between the T/TO and the agency over the availability of appropriations, the agency may decline the proposal in part pursuant to Subpart E of the regulations [25 C.F.R. §900.20-33].
- d. If the agency proposes an amendment to a successor AFA, it must give advance notice of the desired change to the T/TO. If there is any disagreement regarding the proposed amendment, it will be subject to the declination criteria.

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### G. Action on Successor AFA by DOI Agency other than BIA.

1. A successor AFA proposed by a T/TO for a contract with an agency of the DOI other than the BIA is subject to the declination criteria in §102(a)(2) of the ISDA [25 U.S.C. §450f(a)(2)] and Subpart E of the regulations [§900.20-33], which means **the 90-day deadline for action applies.**
2. When a T/TO submits a proposed successor AFA to a DOI agency other than the BIA, that agency may either --
  - a. Approve it in accordance with §F.1. or 2. above; or
  - b. Process it in the same way as a contract proposal in §II.B. through D. above.
3. The agency's responsibilities under §III.C. of this Chapter to initiate negotiation of a successor AFA, if one is not timely submitted by a T/TO, are not altered by the fact that a contractor-proposed AFA is subject to the declination criteria.

### IV. Contract Renewal Proposal (also referred to as Recontracting). Contract renewal or recontracting refers to a T/TO's continued operation of programs under a contract when the term of that contract is due to expire. The purpose of this section is to facilitate the orderly continuation of such contracted program operations.

The T/TO's performance under the existing contract shall have no effect on the contract renewal process except as stated in 25 C.F.R. §900.33. (Any alleged grounds the agency may have for terminating the contract must be dealt with under Subpart P -- Retrocession and Reassumption Procedures. Where a contract has been retroceded or reassumed or a previous contract has expired, a T/TO that wishes to resume contract operations should be directed to file a proposal for a new contract under Subpart C of the regulations [25 C.F.R. §900.7-13] and Chapter 4 of this Handbook, rather than a contract renewal request.)

Contract renewals are covered under §102(a)(2) of the ISDA [25 U.S.C. §450f(a)(2)], and by the following regulations: 25 C.F.R. §900.12; §900.14-19; §900.20-31, and §900.33. Note in particular that renewal of term contracts with the HHS and the BIA where there are no material and substantial changes proposed will not be reviewed under the declination criteria. Renewal of contracts with other agencies of the DOI may be reviewed under the declination criteria.

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- A. DAE Responsibilities. Not later than 140 days prior to the expiration of a contract, the DAE shall:
1. Provide to the T/TO all information available to the agency as to the amount of funds that may be available for a successor AFA, including but not limited to the following information:
    - a) The amount of program and contract support cost (CSC) funding available and the schedule for the transfer of such funding upon contract award or annual funding agreement renewal (AFA);
    - b) The methodology used to identify available amounts;
    - c) The process used to arrive at available amounts;
    - d) The amount of funding retained by the Government; and
    - e) Any other information which would be useful in understanding how contract amounts were calculated in order to minimize the number of declinations based on the availability of funding.

The T/TO shall have the opportunity to review and question, during the contract or AFA renewal negotiation period, the method used to arrive at the proposed program and CSC funding amounts and any amount proposed to be retained by the Federal Government.

The DAE shall have a continuing obligation to supply additional information to the T/TO as such information becomes available to the agency [section 1.(b)(14)(B) of the Model Agreement].
  2. Provide any information requested by the T/TO regarding funding that may be available for the AFA to the extent not already supplied.
  3. Request that the T/TO notify the agency whether it intends to renew the contract or discontinue services under the contract.
- B. Renewal of Term Contracts with the HHS and BIA.
1. A T/TO should submit a proposal to renew a term contract to the CDFO at least 90 days prior to the expiration of the existing contract. The T/TOs are encouraged, however, to submit the renewal requests, at least 120 days

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prior to expiration where possible. As required by 25 C.F.R. §900.12, the renewal request shall include funding information in the same detail and format as the original contract proposal and may also identify any significant proposed changes. **Failure of agency personnel to act within the 90-day period precludes the agency from asserting a declination issue and results in the contract renewal, consistent with 25 C.F.R. §900.18.**

2. In order to accomplish a timely review, within seven days of receipt of a renewal request, the DAE should identify or determine the following:
  - a. Funding information in the same detail and format as the original contract proposal;
  - b. Whether the T/TO is continuing all of the current PFSAs or adding any new PFSAs;
  - c. Whether there are any material or substantial changes to the scope or funding of any PFSAs;
  - d. Whether there is a request to lease a facility in accordance with §105(l) of the ISDA;
  - e. The duration of the requested renewal term; and
  - f. The authorizing tribal resolution(s) or reference to such resolution(s) already on file with the agency.
3. Any redescription of activities currently being carried out under an existing scope of work of an existing contract, intended solely to clarify the scope of work for purposes of Federal Tort Claims Act (FTCA) coverage, will **not** be deemed to be a significant change requiring or even allowing review under the declination criteria.
4. If any information needed under §IV.B.2. above is not clear, the DAE shall contact the CDTO to clarify the renewal proposal.
  - a. If the renewal request contains significant changes as described in 25 C.F.R. §900.12, §900.32, or §900.33, the agency shall proceed to review the proposal in accordance with the steps outlined in

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§II.B-G. above (concerning new contract proposals) with regard to the portion(s) of the renewal request that contains significant changes.

- b. If the renewal request does not contain any significant changes, the renewal request shall be awarded in accordance with Chapter 5, §III.F.1. of this Handbook.

### C. Renewal of Term Contracts with Agencies of DOI Other than BIA.

1. A T/TO should submit a request to renew a term contract with an agency of the DOI other than the BIA in the manner described in 25 C.F.R. §900.12.
2. When a contract renewal request arrives in any office of such agency, the steps outlined in §II.A. above shall be followed.
3. The regulations at 25 C.F.R. §900.33 provide that DOI agencies other than the BIA have the option to review a proposal to renew a term contract under the declination criteria. If such agency elects to review under the declination criteria, it should follow the steps outlined in §II.B.-D. above. If, however, such agency elects to use the expedited review, it should follow §IV.B. above. **Failure of agency personnel to act within the 90-day period precludes the agency from asserting a declination issue and results in the contract renewal, consistent with 25 C.F.R. §900.18.**

- V. **Contract Amendment Proposal (Modifications).** Any contract may be amended or modified. For purposes of this section, the terms "amendment" and "modification" mean the same thing; for convenience, the term "amendment" will be used. Amendments may be initiated by the contractor or by the agency, but in most cases, both must concur before the amendment becomes effective. The only exception to this is the one set out in section 1.(e)(2)(B) of the Model Agreement regarding addition of funds to a contract or reduction of funds for one of the reasons allowed in §106(b)(2) of the ISDA [25 U.S.C. §450j-1(b)(2)]. The ISDA §102(a)(2) [25 U.S.C. §450f(a)(2)] and regulations (Subparts D and E) provide that the agency must approve a contract amendment requested by a contractor unless it is declined under the declination criteria. **Failure of agency personnel to act within the 90-day period precludes the agency from asserting a declination issue and results in the award of a contract amendment, consistent with 25 C.F.R. §900.18.**

### A. Contract Amendments Initiated by a T/TO.



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1. At any time, a T/TO may submit a proposal to amend a contract or the actual proposed amendment. Such a proposal or amendment should be directed to the Awarding Official. If the T/TO has not included an explanation of the proposed amendment and its purpose, the Awarding Official may encourage the T/TO to provide such information to help expedite review. Failure of a T/TO to supply such information shall not alter the 90-day review period. **Failure of agency personnel to act within the 90-day period precludes the agency from asserting a declination issue and results in the award of a contract amendment, consistent with 25 C.F.R. §900.18.**
2. Proposed contract modifications or amendments are distinguished from initial contract proposals because there is no specific format required for a proposed amendment.
  - a. The T/TO should be encouraged to include as much information as is necessary for the agency to act favorably on the amendment, but the agency may not require specific information.
  - b. Under section 1.(e)(2) of the Model Agreement approval of any amendment is subject to the mutual consent of the T/TO and the agency, and disagreements must be resolved in accordance with the declination procedures in 25 C.F.R. §900.22.
  - c. If necessary, when a proposed contract amendment is submitted by a T/TO, it should be evaluated by a review team composed of programmatic, management, and legal personnel to help determine whether the proposed amendment should be approved or is subject to the declination criteria.
3. The T/TO shall not be required to submit a new tribal resolution(s) unless the T/TO proposes to take over an additional PFSA not covered by the resolution(s) previously provided or is extending the contract term beyond the period authorized by such resolution(s).
4. The agency shall process a proposed contract amendment as provided in §II.B.-D. above.
5. A T/TO is not required to submit a contract amendment proposal or obtain agency approval to expend carryover funds [§8, §106(a)(4) of the ISDA] [25 U.S.C. §13a and §450j-1(a)(4), and section 1.(b)(9) of the Model

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Agreement], or to rebudget funds within an approved contract if such rebudgeting would not have an adverse effect on the performance of the contract [§106(o) of the ISDA, 25 U.S.C. §450j-1(o)].

B. Contract Amendment Initiated by the Agency.

1. The Awarding Official may initiate an amendment to a contract by sending a copy of the proposed amendment to the CDTO. The Awarding Official shall include an explanation of the proposed amendment and its purpose.
2. Except as provided in §V.B.3. below, a contract amendment proposed by the agency will only take effect if it is in written form and both the T/TO and the Awarding Official provide written consent to the amendment.
3. An agency may amend a contract without the written consent of the T/TO only if the amendment:
  - a. Adds supplemental funds for PFSAAs (or portions thereof) already included in the AFA that is incorporated into the T/TO's contract;  
or
  - b. Reduces funds for one or more of the reasons stated in §106(b)(2) of the ISDA [25 U.S.C. §450k-1(b)(2)].
4. No agency employee shall request or require a T/TO to consent to an agency-initiated contract amendment as a condition of receiving funding due under the contract.

## CHAPTER 6

### DECLINATION PROCEDURES

- I. **Introduction.** Section 102 of the Indian Self-Determination and Education Assistance Act (ISDA) [25 U.S.C. §450f] and 25 C.F.R. §900.20-33 are the basic sections covering declinations, declinations of a portion of a proposal, and declination procedures. The specific criteria under which a contract proposal can be declined are found at 25 C.F.R. §900.22. The procedures in this Chapter apply to all instances when the agency declines a proposal in whole or in part. **Failure of agency personnel to act within the 90-day period precludes the agency from asserting a declination issue and results in the award of a contract, contract amendment, contract renewal, successor annual funding agreement (AFA), and/or the grant of a waiver or program redesign request, consistent with 25 C.F.R. §900.18.**
  
- II. **Procedure Upon Identification of Possible Declination Issue.**
  - A. Notice to Agency. If, during the course of the review of a contract proposal, the agency determines that one or more declination issues may exist and that a declination may occur, the Designated Agency Employee (DAE) must **immediately** advise the program official overseeing the program involved, the Designated Management Official (DMO), and the Headquarters office that the DAE believes that a declination may occur, and consult with agency legal counsel.
  
  - B. Notice to Tribe or Tribal Organization (T/TO). If, during the course of the review of a contract proposal, the agency determines that one or more declination issues exist, and that a declination may occur, the DAE must inform the T/TO and provide the T/TO with any necessary requested technical assistance to avoid the declination [25 C.F.R. §900.28].
  
  - C. For the Department of Health and Human Services (HHS). For the HHS, if the Area Director (DMO) proposes to proceed with a declination, the Chairperson of the Headquarters Leadership Team (HQLT) must be notified by the 70th day of the proposal review period.
  
  - D. For the Department of the Interior (DOI). For the DOI, notice of an expected declination should go to the appropriate Regional or Field Solicitor's Office or, if appropriate, the Associate Solicitor for Indian Affairs at least by the 70th day of the proposal review period.

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### III. Declination.

- A. Draft Declination Letter. When the DMO determines that a declination is appropriate, the DAE should **immediately** prepare a draft declination letter that conforms with 25 C.F.R. §900.29. The letter **MUST** include the following elements:
1. Advise the T/TO of the objections, including a specific finding that clearly demonstrates that (or that is supported by a controlling legal authority that) one of the declination conditions exists;
  2. Include a detailed explanation of the reason for the decision to decline the proposal;
  3. If a partial declination, indicate what portions are being approved and initiate negotiations to comply with 25 C.F.R. §900.26; and
  4. Advise the T/TO of the appeal rights described in §900.31 and §900.152 and of available technical assistance in accordance with §102(b)(2) of the ISDA [25 U.S.C. §450f].
- B. Distribution. The DAE should take or send copies of the draft letter to the following individuals or offices for review:
1. The program official overseeing the program involved;
  2. The DMO who has responsibility for the office serving the T/TO; and
    - a. If the program is part of the HHS, the Office of Tribal Programs (OTP) and the Office of the General Counsel (OGC); or
    - b. If the program is part of the DOI, the Regional or Field Solicitor's office or if appropriate, the Associate Solicitor for Indian Affairs.
  3. Headquarters office(s), DOI agencies.
- C. Final Letter. After those offices or individuals have reviewed and offered any recommended changes to the letter, the DMO should finalize the letter, sign it, and send it to the T/TO. **The DAE must send out a declination letter postmarked, certified mail return receipt requested, within 90 days of the receipt of the**

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contract proposal, unless the agency has received a written extension of that time frame from the T/TO.

### IV. Procedure After Declination.

- A. Technical Assistance. If a declination occurs, the DAE must provide the T/TO with any necessary requested technical assistance to overcome the stated objections to the proposal.
  
- B. Documents. **Within 5 days** of the date of the declination, the DAE should collect copies of any documents relied on in making the declination decision and send them to the following individuals or offices for review:
  - 1. The program official overseeing the program involved;
  - 2. The DMO who has responsibility for the T/TO; and, if the DMO has determined that the declination may be controversial or may be appealed:
    - a. If the program is part of the HHS, the OGC; or
    - b. If the program is part of the DOI, the Regional or Field Solicitor's office.
  - 3. Headquarters office(s), DOI agencies.
  
- C. Distribution of Documents. Upon approval of those documents, and in any event **no later than 20 days from the date the declination decision is issued**, the DAE must send copies of any documents relied on in making the declination decision to the T/TO [25 C.F.R. §900.29(a)].

## CHAPTER 7

# PROGRAMMATIC REPORTS AND DATA REQUIREMENTS

- I. Introduction.** Unless otherwise required by law, there are no mandatory reporting requirements for Title I contracts (except the Single Agency Audit). Each tribe or tribal organization (T/TO) shall negotiate with the agency the type and frequency of program narrative and program data report(s) which respond to the needs of the contracting parties and that are appropriate for the purposes of the contract. In order to facilitate this discussion, the procedures in this Chapter are provided as guidelines to assist agencies in determining reporting requirements. These reporting requirements are found at §5.f of the ISDA [25 U.S.C. §450c(f), 25 C.F.R. §900.65-68].
- II. Procedures.**
- A. Proposal Review. As an element of the "Review of Proposal," (Chapter 5, §II.D.1.c.) the Designated Agency Employee (DAE) should review the proposal to determine if the T/TO has included any programmatic reports and/or data requirements in its proposal. If there are any, they should be listed and shared with the appropriate program and management officials for evaluation. In addition, the DAE should review:
1. The legislation which authorizes or establishes the program;
  2. Any program regulations;
  3. 25 C.F.R. §900.65-68; and
  4. How the proposed reports respond to the needs of the contracting parties and are appropriate for the purpose of the contract; and
  5. The resources estimated to be needed to produce the reports.
- B. Reports and Data Requirements. The DAE will develop a list of the reports and data requirements, if any, associated with the Federal operation of the program proposed to be contracted. A complete listing of these programmatic reports and data requirements should then be made available to those officials having programmatic and management authority over the program to be contracted. This

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list may be the same as or different from the list of reports provided during the pre-proposal technical assistance activity.

- C. Comparison of Programmatic Reports and Data Requirements. The DAE, in consultation with the appropriate legal, program, and management officials, should compare any T/TO recommended programmatic reports and data requirements with the list developed by the agency. As a result of this comparison, the appropriate management official should identify the programmatic reports and the data requirements, if any, which the agency will propose to include in the contract during negotiations. The DAE should provide this information, in writing, to the T/TO. The extent of available resources will be a consideration in the negotiations [25 C.F.R. §900.65].
- D. Reporting Requirement Disagreements. Any disagreements over reporting requirements are subject to the declination criteria and procedures in §102 of the Indian Self-Determination and Education Assistance Act [25 U.S.C. §450f and 25 C.F.R. §900.20-33]. If any reporting requirements of the agency are likely to result in a declination, the procedures in Chapter 6, §II. for notifying the T/TO and agency officials **MUST** be followed.

## CHAPTER 8

# LEASE OF TRIBALLY-OWNED BUILDINGS BY THE SECRETARY

- I. Introduction.** Section 105(l) [25 U.S.C. §450k(l)] of the Indian Self-Determination and Education Assistance Act (ISDA) requires the agency, at the request of a tribe or tribal organization (T/TO), to enter into a lease with the T/TO for a building owned or leased by the T/TO or to which the T/TO holds a trust interest, that is used for the administration or delivery of services under the ISDA. The 25 C.F.R. §900.69-74 also contains requirements for these leases.

The regulations provide a list of allowable costs for which a T/TO can be compensated under a lease. The leases must be funded from resources currently available under the T/TO's self-determination contract. If new resources become available, these funds may be negotiated and added to the lease.

A lease for a token sum to formalize the relationship between the facility and the contracted program(s) may also be entered into under this same authority.

## **II. Procedures.**

- A. Lease Information. A T/TO may submit a request that the agency enter into a lease at any time. No particular form is required for such a request, but the DAE responsible for processing a lease request should ask that the T/TO supply the following information:
- Identification (by building number, name, address, or other description) and location of the facility for which the lease is requested;
  - Identification of the program(s) including staff (staffing needs) to be delivered or administered in the facility;
  - Duration of the requested lease (specific term of years or other period of time);
  - Proposed rental amount expressed on a monthly, quarterly, or annual basis;



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- If the facility for which the lease is requested is leased by the T/TO from another entity, a copy of the master lease provided that the T/TO may redact the rental amount in instances wherein it is not requesting reimbursement for rental costs.

### B. For leases with the IHS.

1. Upon receipt of a request from a T/TO to enter into a lease with the IHS, the Area Office of Tribal Activities/Programs, in consultation with the IHS Division of Facilities and Environmental Engineering (DFEE) shall prepare a lease agreement as a starting point for negotiations.
2. All lease terms and provisions are subject to negotiation between the IHS and the T/TO.
3. Lease Form.
  - a. GSA Standard Form 2 -- "U.S. Government Lease for Real Property" -- appears in Appendix J and may be used as the lease form where appropriate. Appendix J also contains a list of other GSA forms related to leases of real property. Copies of these GSA forms are available in either MSWord or PDF format through the Internet at --  
<<http://www.gsa.gov/pbs/pe/standcla/standcla.htm>>  
If questions arise as to the appropriate lease form to use, the DAE should consult with the agency realty officer/realty specialist.
  - b. **NOTE:** The DOI and the IHS have agreed to initiate a process to develop an "Indian Self-Determination Lease Agreement" form with the participation of T/TOs and the GSA. The new form would be inserted in a subsequent revision of this Handbook.
4. Within 20 days of receipt of the lease request, the Area Office, in consultation with the DFEE, shall meet with the T/TO to negotiate the terms of the lease agreement.
5. Upon completion of the negotiations, the Area shall forward the entire lease package (the T/TO's request, the record of negotiations, and the final negotiated lease agreement) to the DFEE at Headquarters.

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6. The Headquarters DFEE shall review the lease package and forward it along with its recommendation to the Regional Office of Engineering Services for final approval/processing by the official with authority to sign the lease agreement.

If objections are raised at any point in the processing of the T/TO's request for the lease, the IHS staff are required to meet with the T/TO to attempt to resolve those objections. If an agreement cannot be reached, the Awarding Official shall provide the T/TO with a written notice outlining the objections raised and informing the T/TO of its rights to appeal pursuant to §110 of the ISDA.

7. In cases where the T/TO, in conjunction with a contract proposal submitted under §102(a) of the ISDA, requests that the IHS lease a facility used by the T/TO for the administration and delivery of services under §105(l) of the ISDA, the IHS will make a determination whether or not the lease can reasonably be negotiated and executed within the 90 days allowed to approve or decline the contract proposal. If the IHS determines that negotiation and execution of the lease agreement under §105(l) is expected to take longer than the 90 days, the IHS will advise the T/TO of how long it is expected to take to negotiate and execute the lease agreement under §105(l) and the reasons for that determination. The IHS will ask the T/TO for an extension of time to review the contract proposal so that negotiation and execution of the lease agreement under §105(l) will be commensurate with review of the contract proposal. If the T/TO does not grant the extension of time, then the IHS must either decline the contract proposal/amendment under 25 C.F.R. §900.22 or award the contract within the 90-day period and offer to negotiate the lease agreement separately under §105(l) as soon as practicable. If the IHS determines that the amount of funds requested for the lease are not available, the HQLT must be consulted as soon as possible but not less than 20 days before expiration of the 90-day period regarding what action should be taken.
8. Once the lease agreement has been executed between the T/TO and the IHS warranted lease contracting officer, copies of the signed lease package shall be provided to the Area Realty Officer for distribution to Area Finance (to establish payment schedules), Area Office of Tribal Activities/Programs, and to Headquarters DFEE.

- C. For leases with the Department of the Interior (DOI).

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1. Upon receipt of a request from a T/TO to enter into a lease with the DOI, the appropriate office with responsibility for awarding contracts to that T/TO shall prepare a lease agreement as a starting point for negotiations.
2. Lease Form.
  - a. GSA Standard Form 2 -- "U.S. Government Lease for Real Property" -- appears in Appendix J and may be used as the lease form where appropriate. Appendix J also contains a list of other GSA forms related to leases of real property. Copies of these GSA forms are available in either MSWord or PDF format through the Internet at --  
<http://www.gsa.gov/pbs/pe/standcla/standcla.htm>  
If questions arise as to the appropriate lease form to use, the DAE should consult with the agency realty officer/realty specialist.
  - b. **NOTE:** The DOI and the IHS have agreed to initiate a process to develop an "Indian Self-Determination Lease Agreement" form with the participation of T/TOs and the GSA. The new form would be inserted in a subsequent revision of this Handbook.
3. Within 20 days of receipt of the lease request, the DAE shall meet with the T/TO to negotiate the terms of the lease agreement.
4. Upon completion of the negotiations, the Awarding Official shall execute the lease agreement and forward the entire lease package (the T/TO's request, the record of negotiations, and the final negotiated lease agreement) to the T/TO for final execution.

If objections are raised at any point in the processing of the T/TO's request for the lease, the DOI staff are required to meet with the T/TO to attempt to negotiate an acceptable agreement concerning those objections. If an agreement cannot be reached, the Awarding Official shall provide the T/TO with a written notice outlining the objections raised and informing the T/TO of its right to appeal pursuant to §110 of the ISDA [25 U.S.C. §450m-1].

5. In cases where the lease request has been submitted as a part of an initial contract proposal or as an amendment to a contract or an AFA, the lease agreement must be approved within 90 days of receipt of the initial request. If the lease is not going to be approved within the 90 days, it must be

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declined in accordance with Chapter 6 of the Handbook and §102 of the ISDA [25 U.S.C. §450f].

D. Other Considerations for IHS and DOI.

1. Adding the appropriate square footage for the leased space into the Operations and Maintenance and the Maintenance and Improvement funding systems shall be done in accordance with agency procedures.
2. In negotiating costs for Operations and Maintenance and Maintenance and Improvement in the lease, the agency shall avoid duplication of costs as indicated in 25 C.F.R. §900.69-74.
3. Subsequent renewals of the lease shall follow the same procedures outlined above, but processing should be expedited.

## CHAPTER 9

### PROPERTY DONATION PROCEDURES

- I. Introduction.** Section 105(f) of the Indian Self-Determination and Education Assistance Act (ISDA) [25 U.S.C. §450k(f)] establishes the overall policies applicable to the use, acquisition, donation, and status of title to property used or acquired in a contracted program, or which is appropriate for use in a self-determination contract or grant agreement. Section 1.(b)(8) of the Model Agreement contains provisions regarding the use, acquisition, and record-keeping of property. In addition, 25 C.F.R. §900.51-60 sets out the Property Management System Standards applicable to Title I contractors.

The regulations at 25 C.F.R. §900.85-107 contain significant **procedural** instructions. Thus, all agency personnel should first refer to the regulations for primary instruction on the procedures to use regarding property questions. This Chapter of the Handbook will supplement, but not restate the regulations.

The regulations at 25 C.F.R. §900.85-107 also describe four categories of real and personal property referenced in §105(f) of the ISDA [25 U.S.C. §450j(f)]: "government-furnished property;" "contractor purchased property;" "BIA and IHS excess property;" and "excess and surplus government property of other agencies." (**NOTE:** "Other agencies" refers to federal agencies other than DOI and HHS). Refer to 25 C.F.R. §900.95-§990.106 for definitions of these terms. The category into which an item of property falls depends on how the property initially became connected to a tribe or tribal organization (T/TO). For example, if the item of property was purchased by the T/TO with contract funds, its category is "contractor-purchased property."

A T/TO can acquire title to property in all four categories; the regulations describe the methods to use for acquiring title to each category.

Each category of property is addressed individually in the regulations. When using the regulations, be sure to refer to the correct category of property. It is important to note that, in some cases, title to certain property automatically vests in the T/TO; in other cases, title will vest in the T/TO only if it so chooses.

- II. Decision-Making Regarding Property.** The ISDA commits some property-related decisions to Secretarial discretion; some decisions are made by the ISDA and regulations; and some decisions are made by the T/TO.

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### A. Secretarial Discretion.

1. The ISDA and regulations give the Secretary the discretion to make the following property-related decisions:
  - a. Whether to permit a T/TO to utilize existing school buildings, hospitals, and other facilities and all equipment therein or appertaining thereto and other personal property owned by the government within the agency's jurisdiction [§105(f)(1) of the ISDA, 25 U.S.C. 450j(f)(1); section 1.(b)(8)(A) of the Model Agreement];
  - b. Whether to donate Bureau of Indian Affairs (BIA) or Indian Health Service (IHS) excess property to a requesting T/TO [25 C.F.R. §900.97 and §900.99]; and
  - c. Whether to acquire excess or surplus government property of other agencies for donation to a T/TO [25 C.F.R. §900.104-105].
2. The regulations at 25 C.F.R. §900.86 direct how the Secretary will exercise discretion regarding the decisions described in §II.A.1.b. and c. above. It states:

*"The Secretary will exercise discretion in a way that gives maximum effect to the requests of Indian tribes or tribal organizations for donation of BIA or IHS excess property and excess or surplus Federal property, provided that the requesting Indian tribe or tribal organization shall state how the requested property is appropriate for use for any purpose for which a self-determination contract or grant is authorized."*
3. Secretarial discretion on personal property donation matters has been delegated to and shall be exercised by the Awarding Official. Secretarial discretion for real property donation has not been redelegated to the Awarding Official.
4. A T/TO's request for excess and surplus property must state how the requested property is appropriate for use for a purpose for which an ISDA contract or grant is authorized. The Awarding Official **MUST** determine whether the T/TO's request meets the requirement of 25 C.F.R. §900.86.

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For real property, the Awarding Official must certify the appropriateness to the Secretary or his designee, to enable subsequent donation.

5. If the request is inadequate, the T/TO should be given the opportunity to provide additional information to overcome the deficiency. Technical assistance will also be provided to assist the T/TO to overcome the deficiency.
6. Upon receipt of the T/TO's request, the Awarding official will exercise discretion to make the requested donation as provided in 25 C.F.R. §900.86 (see §II.A.2 above). If the request is deficient or the T/TO fails to overcome the deficiency, the Awarding Official shall send a written explanation to the T/TO stating why the request was denied.

B. Decisions Made by the ISDA or Regulations. The ISDA and regulations direct that title to the following property vests in the T/TO:

1. Government-furnished property made available to the T/TO on/after October 25, 1994, unless the T/TO requests that the title remain with the U.S. [25 C.F.R. §900.87(c)].
2. Contractor-purchased property purchased with funds under any self-determination contract or grant, unless the T/TO requests that title vest in the U.S. [25 C.F.R. §900.91].
3. The BIA or IHS excess property donated to a T/TO [25 C.F.R. §900.98].
4. Excess or surplus Federal property of other agencies donated to a T/TO [25 C.F.R. §900.105].

C. T/TO Choice. A T/TO is authorized to make choices regarding the following matters at any time:

1. Whether to take title to government-furnished property made available to the T/TO prior to October 25, 1994 (the date of enactment of the 1994 amendments to the ISDA) [25 C.F.R. §900.87(a), (b)].

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2. Whether the agency should retain title to government-furnished property made available to the T/TO on/after October 25, 1994 [25 C.F.R. §900.87(c)].
3. Whether the agency should take title to contractor-purchased property [25 C.F.R. §900.91].

### **III. Personal Property Donation Requests, Title Transfers, Inventories (Excluding Real Property).**

**NOTE:** There is some disagreement between the DOI and the tribes on the question whether §105(f)(2)(A) of the ISDA authorizes the automatic vesting in a T/TO of title to "contractor-purchased property" and "government-furnished property" used in the performance of an ISDA contract with DOI agencies other than the BIA. It is the tribes' view that this section provides that a T/TO automatically take title to such property, including such property obtained under contracts with non-BIA agencies of the DOI, unless the T/TO elects otherwise. It is the DOI view that §105(f)(2)(A), as well as §105(f)(2), apply only to the BIA, the IHS, and the GSA, and are therefore inapplicable to non-BIA agencies of the DOI. The DOI employees must adhere to the position of the DOI and may not negotiate this issue with T/TOs. The DAE should consult with the Central Office of the appropriate non-BIA bureau when a question about title to such property arises, or if a T/TO elects to challenge this DOI position. If challenged, this issue will likely have to be decided by a judge in an administrative or judicial proceeding.

#### **A. Government-Furnished Personal Property--Pre-October 25, 1994.**

1. The Awarding Official, in consultation with the T/TO, shall develop a list of government-furnished personal property used in the contracted program prior to October 25, 1994 (the date of enactment of the 1994 amendments to §105(f) of the ISDA), [25 U.S.C. §450j(f)] and shall ask the T/TO if there are any items of personal property on that list to which the T/TO wants the agency to retain title. [section 1.(b)(8)(A) of the Model Agreement; 25 C.F.R. §900.87].
2. The following actions shall be followed to transfer title to all items of personal property to which the T/TO elects to take title:
  - a. The Awarding Official shall inform the Property Management Officer (PMO) of items to which the T/TO will take title, and shall place a list of those items in the T/TO's contract file.
  - b. Except as provided below for Motor Vehicle transfers, the PMO shall prepare the appropriate agency form to document the transfer of title to the T/TO. The appropriate form numbers are:



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BIA: Form 4335  
Other DOI Bureaus: DI-104  
IHS: HHS-22

Copies of the forms are provided at Appendix K.

- c. The appropriate form shall be signed by the Awarding Official and by the T/TO. For DOI transfers to the T/TO, the following language shall be on the face of the DI-104: "By signature below, the undersigned duly authorized Department of the Interior official, who hereby certifies that he or she has been delegated authority under §105(f)(3) of the ISDA [25 U.S.C. §450j(f)(3)], as amended, to donate the described property to the donee on behalf of the United States of America, hereby donates all right, title and interest in and to the subject property to the donee."
  - d. A copy of the signed form shall be placed in the T/TO's contract file and a copy shall be supplied to the T/TO.
  - e. If the personal property being transferred is a motor vehicle, the following steps shall be followed:
    - (1) The PMO shall prepare a Standard Form (SF) 97 (see Appendix K) to transfer title to the vehicle. This Form also serves as the motor vehicle title.
    - (2) The PMO and/or the Awarding Official shall approve the SF-97 (see Appendix K) to transfer title to the T/TO and the T/TO shall sign it.
3. If the T/TO elects that any items of personal property remain titled in the agency, the Awarding Official shall take the following steps:
- a. Provide a list of the personal property to the PMO who shall be responsible for complying with standard property management procedures for personal property accountability, identification, reporting, and maintenance requirements.
  - b. Provide a list of the personal property to the T/TO and place a copy of the list in the T/TO's contract file.

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- c. Review the T/TO's annual inventory of personal property and reconcile the list in the contract file with the inventory. Ensure that inventories are conducted in accordance with 25 C.F.R. §900.58 and §900.59.
- d. Assure that the T/TO knows how to dispose of the agency-owned personal property as set out in 25 C.F.R. §900.60, and assist in such disposition when requested by the T/TO. The Awarding Official shall ensure that the local PMO is consulted for appropriate procedures and guidelines for disposal of property.

### **B. Government-Furnished Personal Property--Post-October 25, 1994.**

- 1. The Awarding Official, in consultation with the T/TO, shall develop a list of government-furnished personal property supplied to the contracted program on or after October 25, 1994 (the date of enactment of the 1994 amendments of the ISDA), and shall ask the T/TO if there are any items of personal property on that list to which the T/TO wants the agency to retain title [section 1.(b)(8)(A) of the Model Agreement; 25 C.F.R. §900.87].
- 2. Follow the steps set out in §III.A.2.-3., above (regarding government-furnished personal property -- pre- October 25, 1994).

### **C. Contractor-Purchased Personal Property to Which the Agency Takes Title.**

- 1. If the T/TO elects [pursuant to 25 C.F.R. §900.91(a)] to have the agency take title to personal property the T/TO has purchased with contract funds, the T/TO should inform the Awarding Official.
- 2. The Awarding Official shall take the following actions after consulting with the local PMO:
  - a. Obtain the following information from the T/TO and supply it to the PMO:
    - (1) Purchase documents showing the ISDA contract number, item, description, serial number, model and make, acquisition cost, warranty, and vendor (as applicable) of the property.
    - (2) Physical location of the personal property.

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- b. Assure that the personal property is reflected on the T/TO's annual inventory and is certified in accordance with agency regulatory requirements.
    - c. Assure that the T/TO knows how to dispose of the agency-owned personal property as set out in 25 C.F.R. §900.60, and assist in such disposition when requested by the T/TO.
  3. The PMO shall take the following actions:
    - a. Add the personal property to the inventory of agency-owned property in the T/TO's contract file, and provide an updated copy of the inventory to the T/TO.
    - b. Prepare a personal property inventory tag for the personal property and either affix it to the personal property or send it to the T/TO with instructions to affix it to the personal property.
    - c. Follow standard property management regulations/procedures for personal property accountability, inventory, certifications, reporting, and maintenance requirements.
    - d. If the agency has an equipment replacement system, include the personal property in that system. The purpose of this is to assure that the personal property is timely considered for replacement funding on the same basis as Federal property [25 C.F.R. §900.107]. At the request of a T/TO, the Awarding Official or PMO shall describe how the equipment replacement funding system operates and the T/TO's position in that system.
- D. Donation of Excess Personal Property of BIA or IHS to a T/TO.
  1. A T/TO may request donation of title to excess personal property of the BIA or the IHS by submitting a request to the Awarding Official together with a statement as to how the property requested is appropriate for use for a purpose for which an ISDA contract is authorized. If the required statement is not included or does not adequately explain how the personal property is appropriate for use for a purpose for which an ISDA contract is authorized, the T/TO should be advised by the Awarding Official of any deficiency and given the opportunity to provide additional information to

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overcome the deficiency. Technical assistance will also be provided to assist the T/TO to overcome the deficiency.

2. Upon receipt thereof, the Awarding official will exercise discretion to make the requested donation as provided in 25 C.F.R. §900.86 (see §II.A.2 above). If the request is deficient or the T/TO fails to overcome the deficiency, the Awarding Official will send a written explanation to the T/TO stating why the request was denied.
3. The Awarding Official shall transfer title to the personal property to the T/TO by following the procedures in §III.A.2., above (regarding Government-furnished personal property).

E. Acquisition and Donation of Excess and Surplus Personal Property of Other Agencies of the Federal Government (other than DOI and HHS).<sup>3</sup>

1. Initiation of a Request.
  - a. A T/TO may request acquisition of and donation of title to excess or surplus personal property of other agencies by submitting a request to the Awarding Official, together with a statement as to how the requested personal property is appropriate for a use for a purpose for which an ISDA contract or grant agreement is authorized under the ISDA [§105(f)(3) of the ISDA, 25 U.S.C. §450j(f)(3); 25 C.F.R. §900.104(a)].
  - b. The Awarding Official shall be responsible for approving the T/TO's request and for assuring that such requests are acted upon promptly, particularly if the T/TO has already identified the desired personal property. Usually, time is of the essence in acquiring desired excess and surplus personal property.
  - c. The Awarding Official shall immediately transmit the T/TO's request to the PMO who shall be responsible for acquiring the requested personal property, coordinating acquisition and donation actions with other Federal agencies, and preparing the documents

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<sup>3</sup>The "other agencies" referred to here are federal agencies other than those in the Department of the Interior and the Department of Health and Human Services.

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for transfer of title. The PMO and the T/TO should work cooperatively in this effort.

2. Property Management Officer Processing Actions; Awarding Official Approval Action.
  - a. If the T/TO has not already identified a source for the desired excess or surplus personal property, the PMO should assist the T/TO in locating the item(s) through FEDS/SCREEN or other information sources.
  - b. When personal property is identified, the PMO should place a "freeze" on the item(s) and inform the requesting T/TO of the location of the item(s) and offer the opportunity to make a personal inspection. The "freeze" period is 14 days.
  - c. The PMO should prepare the SF-122 or BIA Form 4335 or HHS-22, as appropriate, for the desired personal property, and forward it to the Awarding Official for approval. (See Appendix K for forms)
  - d. The Awarding Official shall act on the SF-122 in the manner required by 25 C.F.R. §900.86 (see §II.A.2. above).
  - e. The PMO shall send the approved SF-122 to the appropriate General Services Administration (GSA) Area Utilization Officer (AUO) for processing.
  - f. The GSA notifies the PMO and the T/TO of approval or denial. The GSA sends the approved SF-122 to the appropriate GSA or Defense Reutilization Marketing Office (DRMO) depot.
    - (1) T/TO has 14 days to arrange pick up and transportation of items;
    - (2) Within five (5) days of pick up, the T/TO sends the Awarding Official a copy of the approved SF-122 to indicate actual items acquired from the GSA or the DRMO and the name of the individual who picked up the property;
    - (3) Awarding Official transmits the SF-122 to the PMO. The PMO prepares the appropriate DOI/HHS or BIA/IHS donation form, BIA 4335, HHS-22, or DI-104, as

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appropriate. Attach a copy of approved SF-122 and the T/TO notification to donation form as supporting documentation. The PMO follows steps outlined in §III.A.2.b., c., d., and e. above;

- (4) Awarding Official and the T/TO sign and date donation form; and
- (5) PMO provides a copy to the Awarding Official for the T/TO contract file and forwards a copy to the T/TO.

### 3. Special Rules for DOI Aircraft.

- a. If the personal property requested is aircraft and the request is made to an agency of the DOI, the PMO shall send the SF-122, after approval by the Awarding Official, to the:

DOI Office of Aircraft Services  
2350 W. Robinson Road  
P.O. Box 15428  
Boise, Idaho 83715-5428

Phone: (208) 387-5750

The PMO shall inform the T/TO of the date on which the SF-122 is sent to this office.

- b. The Office of Aircraft Services, as a part of the DOI, must exercise discretion on the request in the manner set out in 25 C.F.R. §900.86 (see §II.A.2., above).
- c. The PMO shall follow the processing of the SF-122 by the Office of Aircraft Services in order to assure that action is taken, in a timely manner.
  - (1) If the SF-122 is *approved*, the PMO shall notify the T/TO, assure that the SF-122 is forwarded to the GSA AUO for processing, and perform the steps outlined in §III.E.2.g., above.

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- (2) If the SF-122 is *disapproved*, the Office of Aircraft Services shall advise the PMO of the reasons for disapproval in writing. The PMO shall supply a copy of this documentation to the requesting T/TO.
4. Special Instructions for Transfer of Title to Motor Vehicles.
  - a. When title to a motor vehicle is to be transferred to a T/TO, the PMO shall prepare, sign, and date a separate Form SF-97 for each vehicle to be transferred. The PMO shall supply the original SF-97 to the T/TO and provide a copy to the Awarding Official. The PMO shall follow the standard property management practices for personal property accountability in order to remove the vehicle from the agency's personal property inventory.
  - b. The Awarding Official should inform the T/TO that GSA is willing to approve the acquisition of excess or surplus motor vehicles within the 10-day hold period if the following conditions are met. When the BIA transfers title of the motor vehicle to a T/TO, it must include an express condition that the vehicle may not be sold by the T/TO within the first 12 months following the date of acquisition. The express condition must include a statement of a reversionary interest in the United States for the 12-months following date of acquisition, such interest to expire automatically at the end of that 12-month period without any further action on the part of the United States. The Awarding Official shall assure that these conditions appear on the SF-97 prior to transfer of the vehicle title to the T/TO.

### **IV. Real Property.**

**NOTE:** There is some disagreement between the DOI and the tribes on the question whether §105(f)(2)(A) of the ISDA authorizes the automatic vesting in a T/TO of title to "contractor-purchased property" and "government-furnished property" used in the performance of an ISDA contract with DOI agencies other than the BIA. It is the tribes' view that this section provides that a T/TO automatically take title to such property, including such property obtained under contracts with non-BIA agencies of the DOI, unless the T/TO elects otherwise. It is the DOI view that §105(f)(2)(A), as well as §105(f)(2), apply only to the BIA, the IHS, and the GSA, and are therefore inapplicable to non-BIA agencies of the DOI. The DOI employees must adhere to the position of the DOI and may not negotiate this issue with T/TOs. The DAE should consult with the Central Office of the appropriate non-BIA bureau when a question about title to such property arises, or if a T/TO elects to challenge this DOI position. If challenged, this issue will likely have to be decided by a judge in an administrative or judicial proceeding.

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The regulations set out some additional steps that must be taken by the Agency if a T/TO elects to take title to real property, or seeks to have such real property taken into trust for a tribe.

A. Government-Furnished Real Property Inspection.

Government-furnished real property to which a T/TO elects to take title **MUST** be inspected to determine whether hazardous substances are present [25 C.F.R. §900.87]. The Designated Management Official (DMO) should inform the agency Headquarters office of the T/TO's request to obtain guidance on actions necessary to comply with 25 C.F.R. §900.87 and §900.88 regarding the requirements of other applicable Federal laws and regulations. At the request of the T/TO, the Awarding Official shall be responsible for having the required inspections performed and for reporting the results thereof to the T/TO.

B. Acquisition of Fee Title to Real Property by A T/TO.

The agency is required to assist a T/TO who wants to acquire fee title to Government-furnished real property [25 C.F.R. §900.88]; BIA or IHS excess real property [25 C.F.R. §900.99]; and excess or surplus Federal real property [25 C.F.R. §900.105(c)]. The Awarding Official and Area Property Office shall be responsible for expeditiously processing the request of the T/TO in accordance with Federal law and regulations.

C. Notification of Excess IHS/BIA Real Property.

1. The agency is required to notify T/TOs of the Secretary's intent to excess Real Property before reporting the Real Property to GSA or to any other Federal agency as excess §105(f)(2) of the ISDA [25 U.S.C. §450j(f)(2)].
2. The agency should allow at least 60 days from date of notification for interested T/TOs to submit a letter of interest to the DMO.
3. The T/TO should submit, in writing, to the appropriate DMO how the excess IHS/BIA real property is appropriate for use in the performance of a contract or grant agreement pursuant to §105(f)(2)(A) [25 U.S.C. §450j(f)(2)(A) of the ISDA, 25 C.F.R. §900.97].
4. The agency must review all requests and determine if the real property is appropriate for use in the performance of a contract or grant agreement.



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The agency is responsible for notifying the T/TO of its findings within 30 days after the receipt of the T/TO's request.

5. If the T/TO is eligible to acquire the excess Real Property, the agency is responsible for ensuring expeditious transfer of title to the T/TO.

### **D. Acquisition Pursuant to a Notice of Availability of Excess Real Property (NOA).**

1. Within 25 days of the date of a NOA, the Awarding Official, in coordination with the Area Property Officer (APO), prepares a letter of interest to request the real property from the disposing agency. The request, supporting documentation, and Awarding Official's recommendation are forwarded to the Secretary of Interior or Director, IHS, for subsequent acquisition authority.
  
2. Within 35 days after the NOA date, the Awarding Official must submit the GSA-1334, Request for Excess Real and Related Personal Property (see Appendix K), to the agency's Headquarters Real Property Officer for review and coordination. Supporting documentation includes:
  - (a) Identification of the intended T/TO needs and proposed use of the building(s) and land(s), including the T/TO service population and current programs;
  - (b) A list of the buildings, structure types, square footage, acquisition year, condition of each building, estimated book value, estimated renovation costs for proposed contractor use, estimated annual operations and maintenance costs, and sources of funding;
  - (c) Description of the land (acreage), including CERCLA 120(h) compliance, existing rights of ways, easements, etc.; and
  - (d) Reportable condition of each building (assessment of asbestos, PCBs, lead-based paint, radon, seismic problems, life/safety code compliance, or any other health or safety hazards).

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3. The Secretary of Interior or Director, IHS, concurs and approves the acquisition.
4. The Director, Office of Management and Budget (OMB), approves the agency's request for a no-cost transfer.

### E. Request of T/TO to Take Real Property into Trust for a Tribe.

1. The agency is required to assist a T/TO who desires to have real property taken into trust for a tribe. The only information the T/TO is required to submit, and the actions the agency is required to take, are set out in the following regulations:
  - Government-furnished real property: 25 C.F.R. §900.88(b)
  - Contractor-purchased real property: 25 C.F.R. §900.92
  - BIA/IHS excess real property: 25 C.F.R. §900.99(b)
  - Excess and surplus government real property of other agencies: 25 C.F.R. §900.105(c)
2. Because only the Secretary of Interior has the statutory authority to take land into trust for a tribe, that Secretary has the responsibility under the regulations for expeditiously processing all such requests in accordance with applicable Federal law and regulations. General authority for the Secretary to take land into trust for a tribe is found at 25 U.S.C. §465, and to proclaim tribal trust land as a reservation is found at 25 U.S.C. §467. There are numerous other tribe-specific or program-specific statutes that authorize the Secretary to take land into trust for tribes. General regulations on the acquisition of trust land for tribes and individual Indians are found at 25 C.F.R. part 151.
3. A request to take land into trust for a tribe that is submitted to any agency of the HHS shall be referred to the Director, IHS, who shall then transmit it to the Assistant Secretary-Indian Affairs, together with all documentation

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submitted by the T/TO. The Contract Designated Tribal Official (CDTO) shall be informed of this action by the IHS.

### V. **Administrative Matters Regarding Property.**

- A. **Notification of Excess, Surplus Property.** Each agency is required to furnish to all T/TOs, no less frequently than annually, the following information:
1. A listing of excess BIA or IHS real and personal property before reporting such property to GSA as excess [25 C.F.R. §900.96].
    - a. For the BIA, information about *excess real property* is provided by Central Office to each Area Office upon receipt of GSA's Notice of Availability of Excess Real Property (NOA). Each Area Director should assure that all T/TOs within his/her jurisdiction are provided timely notification of the availability of the excess real property. The Area Office should immediately contact Central Office's Division of Property Management for further information about specific parcels of excess real property upon inquiry by a T/TO. Information about *excess personal property* is most expeditiously accessed through electronic media. See section V.B. below.
    - b. For the IHS real property, excess reports are coordinated through the Headquarters Director, DFEE. The IHS Area Offices coordinate the listings of excess personal property of the Secretary of HHS.
  2. A listing of excess and surplus Federal property of other agencies as may be made available from time-to-time by GSA or other Federal agencies [25 C.F.R. §900.103].

Upon the request of a T/TO, the Awarding Official must supply a copy of the most recent listings made available by the agency.

- B. **Information through Electronic Media.** The Awarding Official or PMO should inform each T/TO that the most up-to-date listings of excess and surplus Federal property are available through computerized sources:
1. "FEDS/SCREEN" is an inter-active computerized listing of excess and surplus Government personal property maintained by the GSA. At the request of a T/TO, the Awarding Official or PMO should obtain a

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computer access code ("password") for each T/TO from the GSA, and instruct the T/TO on how to access the information. Because this is an inter-active program, the T/TO can place a 10-day "freeze" on property found through FEDS/SCREEN. If the property is not claimed by a federal agency within the 10-day freeze period, it is eligible for acquisition by the T/TO.

2. The DRMO maintains a "read only" computerized listing of excess personal property of the Department of Defense (DOD) on the Internet. The web site address is:  

<<http://www.drms.dla.mil>>

As of early 1999 when the first edition of this Handbook was finalized, this was not an inter-active program, so no "freeze" can be placed by computer.
3. The GSA and DOD have internet sites for accessing excess and surplus Federal real property.

### C. Screeener Card.

1. The Awarding Official and the PMO shall assist the T/TO in obtaining a Screeener Card as required by section 1.(b)(8)(F) of the Model Agreement. The Awarding Official should maintain a list of all Screeener Cards issued to T/TOs for whom he/she serves as Awarding Official.
2. The PMO's assistance to the T/TO in obtaining a Screeener Card shall consist of the following actions:
  - a. The PMO shall provide the T/TO with one or more copies of GSA Form 2946, the application for a Screeener Card (see Appendix K), and shall provide assistance in completing this form, if the T/TO so requests. The T/TO shall designate which person(s) will apply for a Screeener Card on behalf of the T/TO.
  - b. The PMO shall inform the T/TO that a passport sized photograph must be provided for each person applying for a Screeener Card, and that the GSA will conduct a background check on each applicant.
  - c. The PMO shall approve a completed application on behalf of the agency, forward it to the appropriate GSA Regional Office for approval, and take follow-up action as necessary to assure timely

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issuance of a Screener Card by the GSA. The customary time for review and action on a Screener Card application is 60-90 days. If the T/TO wants screener orientation for its card holders, this should be requested from the GSA or at the holding installation.

- d. A Screener Card is valid for up to three years after issuance and may be renewed. Four months before a Screener Card is due to expire, the PMO shall notify the T/TO of the upcoming expiration date of its Screener Card(s) and shall offer assistance with renewal, if desired.
  - e. The T/TO should immediately return to the PMO the Screener Card issued to any employee whose authority to act as screener has been revoked or whose employment with the T/TO has been terminated.
3. The Awarding Official or the PMO may request authorization from the appropriate GSA Regional Office on an *ad hoc* basis for a T/TO's representative to screen or inspect excess or surplus property at a specific location, or to pick up property previously approved for transfer, without issuance of a formal Screener Card. If such a request is approved by the GSA Regional Office, that Office will usually coordinate with the holding location to arrange for the T/TO representative's visit.
- D. Confiscated Property. The Awarding Official and/or the PMO shall assist the T/TO in obtaining such confiscated or excess property as may become available to the T/TOs or other local governments [section 1.(b)(8)(E) of the Model Agreement].
- E. List of Property Used in Contract. The Awarding Official, in consultation with the T/TO, shall compile the following lists of property and provide them to the T/TO within 60 days [25 C.F.R. §900.10]:
1. The list required by section 1.(b)(8)(A) of the Model Agreement, which provides:

*"...[A]t the request of the Contractor, the Secretary may make available, or transfer to the Contractor, all reasonably divisible real property, facilities, equipment, and personal property that the Secretary has used to*

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*provide or administer the programs, services, functions, and activities covered by this Contract. A mutually agreed upon list specifying the property, facilities, and equipment so furnished shall also be prepared by the Secretary, with the concurrence of the Contractor and periodically revised by the Secretary, with the concurrence of the Contractor."*

2. The lists required by 25 C.F.R. §900.87(a)(1) and (b)(1).
- F. Recordkeeping; Inventory. The Awarding Official may only require a T/TO to maintain property records or conduct property inventories as provided in the Property Management Standards [25 C.F.R. §900.51-60 and section 1.(b)(8)(B) of the Model Agreement].
- G. Facilities Operation and Maintenance Funding. The Awarding Official shall ensure that Government-furnished real property, contractor-purchased real property, and excess BIA or IHS real property to which a T/TO has taken title, is eligible for facilities operation and maintenance funding as required by 25 C.F.R. §900.90, §900.94, and §900.101.
- H. Replacement Funding. The Awarding Official shall ensure that government-furnished property, contractor-purchased property, and excess BIA or IHS property to which a T/TO has taken title is eligible for replacement funding to the same extent as if title to that property were held by the U.S., as required by 25 C.F.R. §900.107.
- I. Disposal of Government-Owned Personal Property. A T/TO that wishes to dispose of government-owned personal property must follow the instructions in 25 C.F.R. §900.60, and should submit the notification required by that section, in writing, to the Awarding Official. The Awarding Official must provide instructions to the T/TO within 60 days of the date of the notice. If the Awarding Official does not provide instructions within that time frame, the T/TO may return the property to the Awarding Official who shall accept transfer, custody, control, and responsibility for the property (together with all associated costs).
- J. Joint Use Agreement for Real or Personal Property.

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1. At the request of a T/TO, the Awarding Official shall enter into a separate joint use agreement to address the shared use of real or personal property that is not reasonably divisible [section 1.(b)(8)(C) of the Model Agreement] by the parties.
2. In developing the joint use agreement, the Awarding Official should consult with the requesting T/TO, the PMO, the program or administrative officials of the agency, and the CDTO of each T/TO, if any, with whom the subject property will be shared.
3. A joint use agreement may, but is not required to, address such matters as whether use of shared property should be scheduled in advance; operation and maintenance funding; storage of shared property; and special credentials for operation of property; etc.
4. The Awarding Official should supply a copy of each joint use agreement to the PMO for appropriate accountability.

### **VI. Reacquisition by the Agency of Property to which T/TO has Taken Title.**

- A. **Reacquisition Requirements.** Upon retrocession, reassumption, termination, or expiration of a contracted program, the agency may elect to reacquire title to three categories of property to which a T/TO has taken title: government-furnished property, contractor-purchased property, or BIA/IHS excess property. To be eligible for reacquisition, however, an item of property must meet the following criteria:
1. The item of property must still be in use in the program; and
  2. The item of property must have a current fair market value, less the cost of improvements borne by the T/TO, in excess of \$5,000.

See 25 C.F.R. §900.89, §900.93, and §900.100.

- B. **Shared Property.** If any item of property (as described in §VI.A. above) that the agency wishes to reacquire is shared by one or more other ongoing contracts or grant agreements, the Awarding Official shall be responsible for negotiating an acceptable arrangement for continued sharing of the item, and for the retention or transfer of title [25 C.F.R. §900.89, §900.93, and §900.100].

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- C. Awarding Official Duties. The Awarding Official shall identify any items of property to which the agency wishes to reacquire title and shall provide a list of those items to the CDTO. The Awarding Official should work with the CDTO to identify the effective date of the retrocession, reassumption, termination, or expiration of the contracted program, or portion thereof, and arrange for delivery of the selected property by the T/TO to the agency.
  
- D. Reacquisition Prohibited. Excess or surplus Federal property of other agencies that has been donated to a T/TO may not be reacquired by the agency [25 C.F.R. §900.106].



## CHAPTER 10

### WAIVER PROCEDURES

- I. Introduction.** A tribe or tribal organization (T/TO) may submit to the agency a written request for a waiver identifying the provision of regulations at 25 C.F.R. Part 900 or the cost principles adopted by these regulations at 25 C.F.R. §900.45(e) sought to be waived and the basis for the request. Waiver procedures are set forth at 25 C.F.R. §900.140-148 and §107(e) of the ISDA [25 U.S.C. §450k(e)].
- II. Procedures.** **Not later than 90 days after receipt by the agency of a T/TO's written request, the agency shall either approve or deny the requested waiver in writing or the waiver shall be deemed approved [25 C.F.R. §900.144].**
- A. For requests to the HHS.
1. Only the Director, IHS, may approve or deny any waiver requests by T/TOs, whether included in a contract proposal or submitted separately.
  2. Upon receipt of a request for a waiver, the request will be date stamped and a 90-day final action date will be determined and noted on the face of the request.
  3. Area staff shall review the request to ascertain if the substance of the request is covered by 25 C.F.R. §900.140, i.e., a request to waive a provision of the regulations or a cost principle adopted by these regulations. The Area staff should also determine if the request has been submitted in accordance with 25 C.F.R. §900.141, i.e., it explains the intended effect of the waiver, the impact upon the T/TO if the waiver is not granted, and the specific contracts to which the waiver applies.
  4. If the request is for a waiver of a statutory provision that has been codified in the regulations, concerns a matter not included in the regulations at 25 C.F.R. Part 900, or the request is not accompanied by an explanation as required by 25 C.F.R. §900.141, the Area shall offer technical assistance to the T/TO to resubmit the waiver request or to overcome any stated objections to the waiver request. If the T/TO fails to provide additional information or modify its waiver request, the Area may recommend that the waiver request be denied pursuant to 25 C.F.R. §900.145.

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5. In order to facilitate the approval or denial of a waiver request within the 90-day review period, Area staff are required within 45 days of the receipt of the waiver request to forward the request and a recommended decision to:

Director  
Office of Tribal Programs  
Indian Health Service  
5600 Fishers Lane, Room 6A-05  
Rockville, MD 20857

The Office of Tribal Programs (OTP) will then take responsibility for getting a decision within the 90-day review period.

6. Within 10 days of receipt of the request from the Area, the Director, OTP shall prepare an action memorandum for the Director, Indian Health Service (IHS).
7. The Director, IHS, must approve or deny the request in accordance with 25 C.F.R. §900.145, in writing, within the 90-day review period. The Director, IHS must notify the Area Director of the decision to approve or deny the request by the 75th day of the review period so that the T/TO may be notified before the expiration of the 90 days. The Area Director will notify the T/TO if the waiver is approved.
8. If the request is denied, the Area Director shall advise the T/TO, in writing, of the appeal rights described in 25 C.F.R. §900.31, §900.147, and §900.152 and of available technical assistance in accordance with §102(b)(2) of the ISDA.

### B. For requests to the DOI.

1. The authority to grant waivers for 25 C.F.R. Part 900 regulations or cost principles adopted by the regulations at 25 C.F.R. §900.45(e) has been delegated by the Secretary of the Interior to each Assistant Secretary (AS). The Assistant Secretaries have not redelegated this waiver authority.
2. As indicated in 25 C.F.R. §900.144, if the AS makes no decision on a waiver request within 90 days of receipt, the request will be deemed approved. Since each AS has the sole responsibility to act on a waiver request, it must receive AS attention as soon as possible within the

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90-day period. Consequently, the following procedures shall be followed when processing a waiver request.

- a. When received by an agency office, the waiver request should immediately be date stamped to record the date of receipt. It should then immediately be routed to the Designated Management Official (DMO).
- b. Within 5 days of receipt, the DMO should transmit the waiver request to the Awarding Official and program official(s) responsible for the contracted program that is the subject of the waiver request with a copy to the appropriate Assistant Secretary. The written transmittal from the DMO should contain a statement that the waiver request must be reviewed for denial against the declination criteria contained in 25 C.F.R. §900.145. Also, the transmittal should require the reviewing officials to provide written recommendations for approval or denial to the DMO within 15 days of their receipt of the waiver request.
- c. Within 35 days of initial receipt of the waiver request by the DMO, he/she should consider any recommendations received as a result of the review of the Awarding and program officials and form his/her recommendations. The DMO should then submit a written recommendation for denial [25 C.F.R. §900.145] or approval [25 C.F.R. §900.140] directly to the appropriate AS, which must include a detailed statement of the reasons for the recommendation. In the event the DMO's recommendation is to deny the request, that recommendation must provide an analysis of the criteria in 25 C.F.R. §900.145 and the basis for the recommendation.
- d. The AS **MUST** approve or deny the waiver request as soon as possible within the 90-day period by writing directly to the T/TO with a copy to the DMO for inclusion in the T/TO's contract file. A notice of denial must be accompanied by a description of appeal rights, and offer of technical assistance.

## CHAPTER 11

### APPEALS

- I. **Introduction.** Sections 102 and 110 of the ISDA [25 U.S.C. §450f and §m-1] and Subpart L of the regulations are the basic sections covering appeal procedures. The 25 C.F.R. §900.150 lists the decisions a tribe or tribal organization (T/TO) can appeal under Subpart L [25 C.F.R. §900.150-169]. The procedures here apply to those appeals. The regulations at 25 C.F.R. §900.151 describe appeals that are covered under Subpart N of the regulations (see Chapter 13 of this Handbook regarding Post-Award Contract Disputes) and other appeals.

The T/TO has three options in appealing a decision under 25 C.F.R. §900.150. Within 30 days after the decision, the T/TO can request an informal conference and/or can file a formal appeal. Within 30 days from receipt of the recommended decision from an informal conference, the T/TO can file a formal appeal. If the T/TO does not file a notice of appeal within 30 days, or before the expiration of the extension it has received under 25 C.F.R. §900.159, the decision becomes final. The T/TO also has the option of going directly to Federal court at any point [§102(b)(3) and §110 of the ISDA, 25 U.S.C. §450f(b)(3) and §m-1].

II. **Informal Conference.**

- A. **Receipt of Notice of Request for Informal Conference.** A T/TO may begin the appeal process by requesting an informal conference, in writing. The request must go to the office of the person (referred to as the Designated Agency Employee [DAE] in this Chapter) whose decision is being appealed. The T/TO must file its request for an informal conference within 30 days of the agency's decision pursuant to 25 C.F.R. §900.154.

When the office of the DAE receives a request for an informal conference, but **not later than 3 days** thereafter, the DAE should:

1. **For the Department of the Interior (DOI).**
  - a. Make 4 copies of the request for informal conference.

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- b. Take or send copies of the request to the following individuals or offices:
  - (1) Program official overseeing the program involved;
  - (2) Designated Management Official (DMO) who has responsibility for the office serving the T/TO;
  - (3) Awarding Official; and
  - (4) Regional or Field Solicitor's office.

### 2. For the Department of Health and Human Services (HHS).

- a. Make 4 copies of the request for informal conference.
- b. Take or send copies of the request to the following individuals or offices:
  - (1) Area Contract Proposal Liaison Officer;
  - (2) Area Director;
  - (3) Chairman, Headquarters Leadership Team; and
  - (4) Regional Counsel.

### B. Setting Up an Informal Conference.

- 1. **The informal conference MUST be held within 30 days of the date a request is received unless the parties agree on another date.** The regulations at 25 C.F.R. §900.155(b) require the agency to pay for the T/TO's travel expenses and per diem, if the informal conference takes place more than 50 miles from the T/TO's office. Therefore, if possible, the informal conference should be held at or near the office of the T/TO. Only the designated representatives of the T/TO or the agency may make presentations at the informal conference [25 C.F.R. §900.155(d)].

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2. **Not later than 7 days after receipt** of the request for an informal conference:

a. For the DOI.

The DMO should identify and notify the appropriate official who will conduct the informal conference, and designate an individual to set up and coordinate the informal conference.

b. For the HHS.

The Area Director should select the designated representative to conduct the conference. The Area Director should also designate an individual to set up and coordinate the informal conference.

c. The appropriate individual in §II.B.2.a. or b. above shall:

- (1) Arrange a date, time, and place for the informal conference, making every effort to schedule the informal conference at or near the office of the T/TO;
- (2) Arrange to have the designated representative present, personally or telephonically, to conduct the informal conference;
- (3) Advise the T/TO that it is entitled to offer presentations by its designated representatives;
- (4) Work with the T/TO to make any necessary travel arrangements for the informal conference; and
- (5) Inform the T/TO of the agency officials who will participate in the conference and their area of responsibility/authority.

C. Recommended Decision After the Informal Conference.

**Within 10 days** after conclusion of the informal conference or after the filing of any post-conference submission that may be agreed to by the parties, the person who conducted the informal conference **MUST** prepare and mail to the T/TO a written report of what happened at the conference and a recommended decision. The specific requirements of the report, including language which must be included, are set out in 25 C.F.R. §900.156.

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### III. Appeals to Interior Board of Indian Appeals.

#### A. Receipt of Notice of Appeal.

1. A T/TO may begin the formal appeal process by filing a Notice of Appeal within 30 days after receipt of the decision. A T/TO may also file a Notice of Appeal within 30 days after receipt of a recommended decision after an informal conference if the T/TO is dissatisfied with that decision. The Notice of Appeal and any T/TO request for an extension of time [pursuant to 25 C.F.R. §900.159] must be sent to:

Interior Board of Indian Appeals  
U.S. Department of the Interior  
4015 Wilson Boulevard  
Arlington, VA 22203

2. The regulations at 25 C.F.R. §900.158(d) provide that the T/TO must also send a copy of the Notice of Appeal to the office of the person whose decision is being appealed. The T/TO must file its request for an appeal within 30 days of the agency's decision pursuant to 25 C.F.R. §900.152.
3. When the agency receives a Notice of Appeal, **within 3 days**, the person receiving the Notice should:

#### a. For the DOI.

- (1) Make 5 copies of the Notice of Appeal;
- (2) Take or send copies of the Notice to the following individuals or offices:
  - (a) Program official overseeing the program involved;
  - (b) DMO who has responsibility for the office serving the T/TO;
  - (c) Awarding Official;
  - (d) Regional or Field Solicitor's Office; and
  - (e) Associate Solicitor for Indian Affairs.

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b. For the HHS.

- (1) Make 4 copies of the Notice of Appeal;
- (2) Take or send copies of the Notice to the following individuals or offices:
  - (a) Area Director;
  - (b) Regional Counsel;
  - (c) Office of the General Counsel, Public Health Division; and
  - (d) Office of Tribal Activities/Programs.

B. Hearing Procedures. If a T/TO submits a Notice of Appeal, the Interior Board of Indian Appeals (IBIA) will decide within 5 days whether the T/TO is legally entitled to a hearing on the appeal or whether an evidentiary hearing is appropriate under 25 C.F.R. §900.160(a)(1).

1. If the IBIA decides that a T/TO is not entitled to a hearing or has waived its right to a hearing, the IBIA will request that an administrative record be prepared.

If the IBIA requests an administrative record, the person whose decision is being appealed shall prepare the administrative record. The person preparing the administrative record should immediately contact the attorney designated to work on the appeal for any necessary guidance in compiling the administrative record in accordance/compliance with the IBIA regulations [43 C.F.R. Part 4].

2. If the IBIA decides that a T/TO is entitled to a hearing on the record under 25 C.F.R. §900.160(a) or that a hearing is appropriate under 25 C.F.R. §900.160(a)(1), it will refer the case to the Hearings Division of the Office of Hearings and Appeals, to be assigned to an Administrative Law Judge (ALJ). The ALJ must hold a pre-hearing conference within 15 days of the date of the referral.
3. **Upon receiving notice** of the pre-hearing conference:



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a. For the DOI.

The DMO must designate an individual responsible for coordinating with the Office of the Solicitor and the attorney assigned to represent the agency during the appeals process.

The designated individual should immediately contact the attorney assigned to work on the appeal. After discussion with the attorney, the designated individual should prepare a brief statement of the facts of the case, including any issues that individual wishes to highlight. In addition, the designated individual should prepare a list of the names and telephone numbers of possible witnesses in the case.

b. For the HHS.

The attorney assigned to work on the appeal will coordinate with the ALJ and the program personnel as necessary.

4. At the pre-hearing conference, the ALJ will decide whether an evidentiary hearing is necessary on the appeal, or whether the matter can be decided without an evidentiary hearing.
5. If the ALJ decides that an evidentiary hearing is necessary, the DMO will designate an individual to coordinate with the T/TO for the hearing. That individual shall:
  - a. Coordinate with the ALJ's office to arrange an appropriate date, time and place for the hearing, making every effort to schedule the hearing at or near the office of the T/TO;
  - b. With the attorney assigned to the case, arrange to have the appropriate government witnesses present, personally or telephonically, to testify at the hearing;
  - c. Advise the T/TO that it is entitled to the rights set out in 25 C.F.R. §900.164; and
  - d. Work with the T/TO to make any necessary travel arrangements for the hearing and pay for T/TO travel expenses and per diem, if the

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hearing is held more than 50 miles from the T/TO's office [25 C.F.R. §900.162(c)].

## CHAPTER 12

### FEDERAL TORT CLAIMS ACT

- I. Introduction.** The Federal Tort Claims Act (FTCA) procedures and coverage are set forth in detail in Subpart M of the regulations at 25 C.F.R. §900.180-210.
- II. Procedures.**
- A. FTCA Liaison.
1. Each Area office or agency field office shall designate one official who shall be the FTCA Liaison with tribes/tribal organizations (T/TO). The regulations at 25 C.F.R. §900.188(a) require that the T/TO designate an individual to serve as the FTCA Liaison with the agency.
  2. All inquiries about the FTCA and FTCA coverage shall be referred to the Federal FTCA Liaison.
- B. FTCA Liaison Responsibilities. The Federal FTCA Liaison shall have the following responsibilities:
1. Refer coverage questions to the appropriate Regional Counsel or Solicitor;
  2. Read and be familiar with Subpart M of the regulations, including applicable provisions of 25 C.F.R. §900.180-210;
  3. Attend training that is available regarding the FTCA;
  4. Annually, provide each T/TO with copies of Standard Form 95 (Claim for Damage, Injury or Death) for distribution to any individual who has a claim;
  5. Provide each T/TO, not less than annually, with any supplemental information that may be developed on the FTCA;
  6. Coordinate all available training with T/TOs on the FTCA regulations and their responsibilities under the FTCA including those under

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25 C.F.R. §900.188;

7. Explain that the FTCA does not necessarily cover every claim that may be filed, and that the T/TO should confer with its own legal counsel in order to decide what insurance is necessary to carry;
8. Upon request of the T/TO, provide technical assistance in reviewing the scope of work in the T/TO's contract to ensure maximum FTCA coverage. All employees of the T/TO must be working within a clearly identified scope of work for the FTCA to apply and protect the T/TO [section 1.(a)(2) of the Model Agreement];
9. Receive and refine claims, notices, etc., that involve or may involve FTCA coverage as provided in section IV. below; and
10. Provide T/TOs information about the status and resolution of any pending claims related to that T/TO.

**III. Claims.** Upon receiving any claim or notice of claim or summons and complaint, the FTCA Liaison shall forward the documents or advise the T/TO to forward the documents as follows:

A. Claims Involving T/TOs Contracting With the Department of Health and Human Services (HHS).

1. If a tort claim is filed involving a T/TO with a contract from the HHS, the claim shall be forwarded to:

Chief, Claims Branch  
Program Support Center  
Room 5C-10  
Parklawn Building  
5600 Fishers Lane  
Rockville, MD 20857

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2. If a lawsuit is filed and a summons and/or complaint involving a T/TO or T/TO's employees, immediate notice should be provided to:

Chief, Litigation Branch  
Business and Administrative Law Division  
Office of the General Counsel  
Department of Health and Human Services  
330 Independence Avenue S.W., Room 5362  
Washington, D.C. 20201

- B. Claims Involving T/TOs Contracting with the Department of the Interior (DOI). Any claim, summons, or complaint, involving a T/TO contracting with the DOI, shall be forwarded to:

Assistant Solicitor  
Procurement and Patents  
Office of the Solicitor  
Department of the Interior  
Room 6511  
1849 C Street N.W.  
Washington, D.C. 20240

- C. FTCA Process for Filing Claims. Appendix L provides a brief narrative description and a flow chart for the processing of FTCA claims.

## CHAPTER 13

### POST AWARD CONTRACT DISPUTES

**I. Introduction.** This section provides agency guidance and direction on the implementation of the provisions of Subpart N of the regulations [25 C.F.R. §900.215-230] and the related provisions of the Contract Disputes Act of 1978 (CDA) [41 U.S.C. §601 *et seq.*]; the Equal Access to Justice Act [5 U.S.C. §504 and 28 U.S.C. §2412]; and the Rules and Procedures of the Interior Board of Contract Appeals (IBCA) [43 C.F.R. §4.110-126].

A. Post-Award Contract Dispute. A post-award contract dispute may arise from the operation of any Department of Health and Human Services (HHS) and Department of the Interior (DOI) Indian Self-Determination and Education Assistance Act (ISDA) contracts where a tribe/tribal organization (T/TO) seeks to challenge any and all decisions of the Awarding Official arising from or relating to the contract, except decisions of an Awarding Official that are addressed through appeals procedures provided under Subpart L of the regulations. See Chapter 11 of this Handbook for more information on those appeals.

In most instances these disputes arise over the payment or non-payment of funds, but a dispute may also arise over an adjustment or interpretation of a contract term. Either a T/TO or an agency may initiate a post-award contract dispute.

B. Definition of Claim. The CDA defines a claim as a written demand by one of the contract parties that seeks:

1. The payment of a specific amount of money pursuant to the contract; or
2. An adjustment or interpretation of a contract term; or
3. Any other dispute arising from or relating to a contract.

Undisputed invoices, vouchers, or routine requests for payment are not CDA claims unless (1) a dispute arises as to the amount or liability; or (2) they are not acted upon by the Awarding Official within a reasonable time after receiving written notice from the Contract Designated Tribal Official (CDTO) or the Contract Designated Federal Official (CDFO).

**II. Submission of a Claim.**

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- A. T/TO Submits a Claim. The T/TO submits a claim, in writing, to the Awarding Official. Upon receipt of the claim, the Awarding Official must note in the contract file the date the claim was received.
- B. Federal Agency Submits a Claim. A Federal agency shall submit a claim, in writing, to the senior official of the T/TO, provided for in the contract.

### III. Claim Requirements Based on the Amount of the Claim.

- A. Claims for more than \$100,000. For claims in excess of \$100,000 the T/TO must certify that:
  - 1. The claim is made in good faith;
  - 2. Supporting documents and data are accurate and complete to the best of the T/TO's knowledge and belief;
  - 3. The amount claimed accurately reflects the amount believed to be owed by the Federal agency; and
  - 4. The person making the certification is authorized to do so on behalf of the T/TO.
- B. Claims of \$100,000 or less. Claims of \$100,000 or less do not require a certification as noted above. If a certification is made for such a claim, it shall be processed as though no certification was made.

### IV. Agency Action upon Receipt of a Claim.

- A. Informal Discussions. Before issuing a decision, the Awarding Official should consider using informal discussions (negotiations) between the parties, assisted by individuals that have not substantially participated in the matter to aid in resolving differences.
- B. Alternative Dispute Resolution (ADR). In addition to filing a CDA claim or instead of filing a CDA claim, the parties may choose to use an ADR mechanism pursuant to provisions of the Administrative Dispute Resolution Act, P.L. 101-552, as amended 5 U.S.C. §581 *et seq.*, or the options provided in the ISDA [section 1.(b)(12) of the Model Agreement].

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- C. Written Decision. In the event no settlement is reached and no ADR mechanisms are implemented, the Awarding Official shall issue a decision on the claim. The Awarding Official's written decision must:
1. Include a description of the claim or dispute;
  2. Include reference(s) to the relevant terms of the contract (and AFA);
  3. Set forth the areas of factual agreement and/or disagreement;
  4. Set out the Awarding Official's decision, based on the facts, together with that official's reasoning that supports this decision;
  5. Include the appeal notice language found at 25 C.F.R. §900.222(e); and
  6. Be sent to the T/TO by certified mail, return receipt requested, or any other method of delivery that will include a receipt of delivery for inclusion in the administrative record.

### V. Awarding Official's Time to Decide a Claim.

- A. Claims for more than \$100,000. The Awarding Official shall issue a decision within 60 days of the receipt of the claim. If the Awarding Official cannot issue a decision within 60 days, the Awarding Official shall inform the T/TO when the decision will be issued.
- B. Claims of \$100,000 or less. If the claim is for \$100,000 or less and the T/TO wants a decision within 60 days, it must be requested in writing (at the time the claim is filed or thereafter). The Awarding Official must issue the decision within 60 days of receipt of such written request for a decision. Any such written request should be date stamped upon receipt, for inclusion in the administrative record.
- C. Decision. If the claim is for more than \$100,000 and the Awarding Official has informed the T/TO of the time a decision is due, or the claim is for \$100,000 or less without a 60-day deadline request, the Awarding Official shall issue a decision within a reasonable time based upon the size and complexity of the claim and adequacy of the supporting information received by the Awarding Official.
- D. Failure to Issue a Decision within the time frame. If the Awarding Official does not issue a decision within the above time frame, the T/TO may treat the delay as a denial of the claim and proceed with an appeal as provided by



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25 C.F.R. §900.222(e).

**VI. Payment of Claims After the Awarding Official Decided in Favor of T/TO.** Should the Awarding Official decide that the T/TO's claim should be paid, under the contract, the Awarding Official shall cause the payment due less any amount already paid, to be paid, as promptly as possible, without waiting for either party to appeal the decision. Interest shall be included in the payment and shall be calculated as provided in 25 C.F.R. §900.228 (see §VIII. below).

**VII. Changes in the Awarding Official's Decision.**

- A. Decision of the Awarding Official. The decision of the Awarding Official is final and conclusive and not subject to review by any agency or office, subject to an appeal or suit authorized by the CDA. An Awarding Official's decision may not change, except under the following circumstances:
1. By agreement of the parties;
  2. Discovery of evidence which could not have been discovered through due diligence before the Awarding Official issued the decision;
  3. If the Awarding Official learns that there has been fraud, misrepresentation, or other misconduct by a party;
  4. If the decision is beyond the scope of the Awarding Official's authority;
  5. If the claim has been satisfied, released, or discharged; or
  6. For any other reason justifying relief from the decision.
  7. If an appeal or suit is filed, the Awarding Official may modify or withdraw his/her final decision.
- B. Appeals. Nothing herein shall be interpreted to discourage settlement discussions or prevent settlement of the dispute. To the extent a decision is withdrawn and a new decision is issued, if the T/TO finds the reissued decision unacceptable, it may appeal pursuant to 25 C.F.R. §900.222(e).  
If after a decision, it is withdrawn and no new decision is issued the T/TO may proceed to appeal under 25 C.F.R. §900.224.

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- VIII. Interest Payments on Claims where the T/TO Prevails.** When a T/TO prevails on a claim, the agency shall automatically pay interest on the amount of the award without any further request by the T/TO. The period of interest shall be from the receipt of the claim by the Awarding Official until the amount awarded is paid. The rate of interest is set by the Secretary of the Treasury pursuant to 26 U.S.C. §1212 and §7447.
- IX. Awarding Official's Duties During an Appeal of His/Her Decision on a Claim.**
- A. Administrative Record. The awarding official, within 30 days of receiving a notice of appeal or learning that an appeal has been filed, shall prepare the administrative record for transmittal to the IBCA and the parties to the appeal in accordance with 43 C.F.R. Part 4. The administrative record shall include:
1. The decision and findings of fact from which the appeal is taken;
  2. The contract and all modifications, specifications, plans and drawings;
  3. All correspondence related to the appeal;
  4. Transcripts of any testimony taken during the proceedings, any statements, or affidavits submitted before the appeal was filed before the IBCA; and
  5. Any additional relevant information.
- B. Supplementation of the Record. Once a dispute is before the IBCA, either party may request the supplementation of the record, consistent with the rule of the Board. Upon the order of the ALJ, the Awarding Official may be required to provide additional information.
- X. Effect of a Pending Appeal of a Dispute on the T/TO.** The T/TO shall continue performance of the contract as though there were no dispute. The fact that a post-award dispute is pending **shall not** affect or bar negotiation or award of any subsequent contract or negotiation between the parties to the appeal.
- XI. Rules Governing Appeals of Cost Disallowances.** The 25 C.F.R. §900.226 provides special guidance for appeals before the IBCA concerning cost disallowances that provides that the Board will give due consideration to the factual situation giving rise to the disallowed costs, and shall seek to determine a fair result without rigid adherence to strict accounting principles. The determination of the allowability shall assure fair compensation

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for the work or service performed, using cost and accounting data guides, but not rigid measures, for ascertaining fair compensation.

## CHAPTER 14

# RETROCESSION, REASSUMPTION, AND CONTRACT EXPIRATION PROCEDURES

**I. Introduction.** This Chapter provides the procedures by which an agency may reacquire responsibility for operation of a contracted program, function, service or activity (PFSA) through: retrocession by the tribe or tribal organization (T/TO) to the agency; reassumption by the agency without the T/TO's consent; and expiration of a contract without renewal or replacement with another form of tribal operation.

**II. Procedures.**

A. **Retrocession.** For explanation of Retrocession, see §105(e) of the Indian Self-Determination and Education Assistance Act (ISDA) [25 U.S.C. §450m(e), and 25 C.F.R. §900.240-245].

Retrocession means the voluntary return to the agency of a contracted program, in whole or in part, for any reason, on or before the expiration of the term of the contract.

1. Upon receiving notice of a retrocession, the Contract Designated Federal Official (CDFO) shall meet with the T/TO to determine if there are any reasons for the retrocession which could be overcome with assistance from the Department of Health and Human Services (HHS) or Department of the Interior (DOI), as appropriate, in order to allow the T/TO to continue operating the program. The CDFO should offer any available technical assistance to the T/TO to assist the T/TO in continuing the program as an alternative to retrocession, subject to availability of funds.
2. If the T/TO chooses to proceed with the retrocession, the CDFO shall meet with the T/TO to attempt to determine a mutually agreeable date for the retrocession to become effective.
  - a. If no such date is agreed upon, the retrocession will be effective at the earlier of:
    - (1) One year from the date of the T/TO's request, or

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- (2) The date the contract expires.
- b. The agency shall work with the T/TO:
- (1) To minimize disruption of any services provided under the contract;
  - (2) To identify personnel, property, and financial resources used in program performance and administration and determine the needs for continuation of program performance;
  - (3) To arrange for return of government-owned property in the possession of the T/TO;
  - (4) To identify government-furnished property, contractor-purchased property and Bureau of Indian Affairs (BIA) or Indian Health Service (IHS) excess property to which the T/TO has taken title that is eligible for the agency to reacquire under 25 C.F.R. §900.89, §900.93, or §900.100 (see also Chapter 9, §VI. of this Handbook); and
  - (5) To plan a smooth transition of the program(s) and administration to agency operation.
- c. The Awarding Official shall notify the T/TO as soon as possible of all property described in §II.A.2.b.(4) above that the agency elects to reacquire under 25 C.F.R. §900.89, §900.93, or §900.100, and shall make arrangements for taking control of such property. Only if the T/TO agrees may the agency take control of such property before the date the retrocession becomes effective.
- d. The Awarding Official may survey other agency offices to develop a list of resources that may be available for use in the resumed agency operation of the program(s), to the extent such additional resources are needed.
- e. After a complete accounting of the available resources has been completed, a brief report summarizing the actions taken should be prepared for the Designated Management Official (DMO) in charge of the Bureau or Office where the retrocession has occurred.

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Additionally, this report will provide management with valuable information with which to make informed decisions on how these programs will be equipped and staffed.

Notwithstanding any other provision of this Handbook, for all DOI agencies, the procedures set forth in subsections 2.b through 2.e apply to contracts that have expired, except that these retrocession procedures do not apply to any nonrecurring project that has been completed. No notice of expiration is required by the T/TO to initiate these procedures when a contract expires.

- B. Reassumption. For explanation of Reassumption see §109 of the ISDA [25 U.S.C. §450m] and 25 C.F.R. §900.246-256.

Reassumption means rescission (or termination), in whole or in part, of a contract and assuming or resuming control or operation of the contracted program by the agency without consent of the T/TO. There are two types of reassumption: emergency and non-emergency.

1. At the earliest indication that a reassumption may be necessary, the CDFO shall contact the T/TO and provide any available and requested technical assistance which may correct the perceived problems in contract performance and prevent the need for a reassumption.
2. If such an informal resolution is not possible, the agency shall follow the standards and procedures set forth in 25 C.F.R. §900.247-256.
3. In determining whether to proceed with a reassumption, the DMO must first determine whether the circumstances set forth in 25 C.F.R. §900.247 exist and whether an emergency or non-emergency reassumption is appropriate. In making this determination, the DMO should confer with the Awarding Official, program officials, and the Solicitor's office (or the Office of the General Counsel [OGC], as appropriate).
  - a. Emergency Reassumption [25 C.F.R. §900.247 and §900.252-253].
    - (1) A reassumption is considered an emergency reassumption if a T/TO fails to fulfill the requirements of the contract and this failure poses:

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- (a) An immediate threat of imminent harm to the safety of any person; or
  - (b) Imminent substantial and irreparable harm to trust funds, trust lands, or interest in such lands.
- (2) In an emergency reassumption, the DMO, in consultation with the Awarding Official, must
- (a) Immediately rescind the contract, in whole or in part;
  - (b) Assume control or operation of all or part of the program; and
  - (c) Give written notice to the contractor and the T/TOs served, which includes:
    - (i) A detailed statement of the finding which support the agency's determination;
    - (ii) A statement of the program(s) or the part(s) of program(s) being reassumed by the agency with reference(s) to the appropriate contract or part(s) thereof;
    - (iii) A statement explaining a right to a hearing on the record under 25 C.F.R. §900.170-171<sup>4</sup> within 10 days of the emergency reassumption or such later date as the contractor may approve;
    - (iv) An explanation that the contractor may be reimbursed for actual and reasonable "wind up costs" incurred after the effective date of the rescission with instructions on where to

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<sup>4</sup>The current regulations at 25 C.F.R. incorrectly point to §900.160-161; §900.170-171 is the correct provision to follow.

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submit the claim and obtain reimbursement, when appropriate; and

- (v) A request for the return of property, if any, under 25 C.F.R. §900.89, §900.93, §900.100.

b. Non-Emergency Reassumption [25 C.F.R. §900.247-256].

- (1) A reassumption is considered a non-emergency reassumptions, if there has been:
  - (a) A violation of the rights or endangerment of the health, safety, or welfare of any person; or
  - (b) Gross negligence or mismanagement in the handling or use of
    - (i) Contract funds;
    - (ii) Trust funds;
    - (iii) Trust lands; or
    - (iv) Interests in trust lands under the contract.
- (2) Prior to proceeding with a non-emergency reassumption, the DMO, in consultation with the Awarding Official, shall follow the procedures in 25 C.F.R. §900.248 by taking the following steps:
  - (a) Notify the T/TOs served by the contract and the contractor in writing by certified mail of the details of the deficiencies in contract performance;
  - (b) Request specified corrective action to be taken within a reasonable period of time, which in no case may be less than 45 days; and
  - (c) Offer and provide, if requested, necessary technical assistance and advice to overcome the deficiencies in



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contract performance. The DMO may also make a grant for the purpose of obtaining such technical assistance as provided in §103 of the ISDA [25 U.S.C. §450h].

- (3) If the contractor fails to take the required corrective action, the DMO shall provide a second written notice by certified mail to the contractor and the T/TOs served by the contract. This second notice must include:
  - (a) A statement of the program(s) or the part(s) of program(s) being reassumed by the agency with reference(s) to the appropriate contract or part(s) thereof;
  - (b) The intended effective date of the reassumption;
  - (c) The details and facts supporting the intended reassumption;
  - (d) The right to a formal hearing pursuant to 25 C.F.R. §900.250(c) within 30 days of receipt of the notice under 25 C.F.R. §900.160-161; and
  - (e) An explanation that the contractor may be reimbursed for actual and reasonable "wind up costs" incurred after the effective date of the rescission and instructions on where to submit the claim and obtain reimbursement, when appropriate.
- (4) The program will not be reassumed until after the final decision in any administrative hearing or appeal.
- (5) If the agency determines that a program will be reassumed, the DMO shall appoint a team comprised of such personnel as he/she deems needed to plan for and implement reassumption of agency operation of the reassumed program(s). The team should include appropriate program, management, administrative, finance, and support services personnel.

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- (6) The team shall consult with appropriate officials of the T/TO to address the following matters:
  - (a) To confirm the reassumption date of the programs;
  - (b) To identify personnel, property and financial resources used in program performance and administration and determine the needs for continuation of program performance;
  - (c) To arrange for return of government-owned property in the possession of the T/TO;
  - (d) To identify government-furnished property, contractor-purchased property and BIA or IHS excess property to which the T/TO has taken title that is eligible for the agency to reacquire under 25 C.F.R. §900.89, §900.93, or §900.100 (see Chapter 9, §VI. of this Handbook);
  - (e) To plan a smooth transition of the program(s) and administration to agency operation.
- (7) The Awarding Official shall notify the T/TO as soon as possible of all property described in §II.B.3.b.(6)(d) above that the agency elects to reacquire under 25 C.F.R. §900.89, §900.93, or §900.100, and shall make arrangements for taking control of such property. Only if the T/TO agrees may the agency take control of such property before the date of reassumption.
- (8) The Awarding Official may also survey other agency offices to develop a list of resources that may be available for use in the agency operation of the reassumed program(s), to the extent such additional resources are needed.
- (9) After a complete accounting of the available resources has been completed, a brief report summarizing the actions taken should be prepared for the DMO in charge of the Bureau or Office where the reassumption has occurred. Additionally, this information will provide management with

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valuable information with which to make informed decisions on how these programs will be equipped and staffed.

- C. Contract Expiration. If a contract expires and is not replaced with another form of tribal operation (such as self-governance), the agency is obligated to resume operation of the program and to provide at least the same level of funding and shall make every effort to maintain the same level of service to the Indian beneficiaries. This section describes the procedures the agency must follow to ensure continuation of program operations upon contract expiration (see Chapter 21 on contract close out). (This part applies only to the IHS.) (These provisions on Contract Expiration apply only to the IHS; for DOI Agencies, see section II.A.2.b.-e. above.)
1. The agency may learn about a contract expiration through receipt of notice of intent to permit a contract to expire from the T/TO or authorizing tribe. The agency may also be alerted to the possibility that a contract will be permitted to expire through the T/TO's failure to submit a timely request for renewal of a contract. In the latter event, the agency should directly contact the CDTO to inquire whether the T/TO intends to permit the contract to expire.
  2. If the agency determines that a contract will expire without renewal or replacement, the DMO shall appoint a team comprised of such personnel as he/she deems needed to plan for and implement resumption of agency operation of the program(s) that are the subject of the expiring contract. The resumption team should include appropriate program, management, administrative, finance, and support services personnel.
  3. The resumption team shall consult with appropriate officials of the T/TO to address the following matters:
    - a. To confirm the expiration date of the contract;
    - b. To identify personnel, property and financial resources used in program performance and administration and determine the needs for continuation of program performance;
    - c. To arrange for return of government-owned property in the possession of the T/TO;

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- d. To identify government-furnished property, contractor-purchased property and BIA or IHS excess property to which the T/TO has taken title that is eligible for the agency to reacquire under 25 C.F.R. §900.89 and §900.93, or §900.100 (see Chapter 9, §II.C.3.d. of this Handbook);
  - e. To plan a smooth transition of the program(s) and administration to agency operation.
4. The Awarding Official shall notify the T/TO as soon as possible of all property described in 3. above that the agency elects to reacquire under 25 C.F.R. §900.89, §900.93, or §900.100, and shall make arrangements for taking control of such property. Only if the T/TO agrees may the agency take control of such property before the date of contract expiration.
5. The Awarding Official may also survey other agency offices to develop a list of resources that may be available for use in the resumed agency operation of the program(s), to the extent such additional resources are needed.
6. After a complete accounting of the available resources has been completed, a brief report summarizing the actions taken should be prepared for the DMO in charge of the Bureau or Office where the retrocession has occurred. This report will provide management with valuable information with which to make informed decisions on how these programs will be equipped and staffed.

## CHAPTER 15

### TRAINING

- I. **Introduction.** The purpose of this Chapter is to provide guidance to individual agencies concerning training for employees who have responsibilities associated with implementing Title I of the Indian Self-Determination and Education Assistance Act (ISDA) and the regulations. Headquarters will be responsible for initiating comprehensive training throughout the agency. This does not preclude local training initiatives. In developing and implementing plans to meet training needs, each agency should be guided by and follow the spirit and intent of the ISDA and the regulations as expressed by Congressional and Secretarial policy statements. Training is a necessary prerequisite to the successful implementation of the ISDA and regulations. Headquarters will be responsible for training initiatives, when appropriate.
- II. **Core Curriculum and Evaluation Tool.** A core curriculum and a tool for evaluating the curriculum and training have been developed with the participation of tribal representatives (see Appendix M). All core training provided by the Federal agencies will be consistent with the core curriculum and evaluation tools. Tribal participation as trainers shall be encouraged.
- III. **Training Objectives.** Agencies will ensure that employees receive high quality instruction to better perform their self-determination related duties. Training objectives should focus on providing appropriate training for those agency employees who will be involved in administering self-determination programs and who will be involved in developing and executing contracts or agreements with tribes and tribal organizations (T/TOs) pursuant to the ISDA.
- IV. **Training Methods.** A wide range of methods may be considered including, but not limited to, the use of commercially-available off-site courses; off-the-shelf training materials; in-house training; vendor customized courses; and home study in meeting the requirement of the core curriculum. If resources are limited, agencies should consider pooling training dollars in order to provide training opportunities for employees that would otherwise not be possible.
- V. **Training Audience.** Target personnel for training should include Headquarters, Area and field management, program, finance/fiscal, contracting, acquisition, property, and legal personnel who will have specific roles and responsibilities for implementing Title I of the

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ISDA for the agency. When training sessions are conducted, every effort will be made to include tribal representatives and other agency employees.

- VI. Training Schedule.** Training will be provided to all employees described under V. above on an ongoing basis to ensure that employees are thoroughly versed in the ISDA, the regulations, and these procedures.
- VII. Review.** The core curriculum shall be reviewed after two years as part of the Handbook review described in Chapter 1, §III.A. of this Handbook.

## CHAPTER 16

### HHS AND DOI SELF-MONITORING FOR COMPLIANCE WITH THE STATUTE ACCOUNTABILITY MECHANISMS<sup>5</sup>

#### I. Employee Performance Appraisal Rating Document.

- A. Job Rating Performance Element. Every Performance Appraisal Rating document of every employee authorized to review, approve, or award a grant, contract, successor annual funding agreement (AFA), or cooperative agreement pursuant to the terms and conditions of the Indian Self-Determination and Education Assistance Act (ISDA), as amended, shall contain the following job performance rating element:

"Self-determination contract proposals are processed in accordance with the Indian Self-Determination and Education Assistance Act and implementing regulations."

- B. Unsatisfactory Rating. The failure to approve or decline a proposal within the time lines set forth in the ISDA and implementing regulations will be considered and may result in an unsatisfactory rating for this element and/or a performance improvement plan.

#### II. Requirement to Report Non-Compliance.

All instances in which contract proposals, modifications, and successor AFAs do not result in either an award or declination decision within the 90-day period, or within the extended time period to which the tribe or tribal organization (T/TO) has consented in writing, shall be reported, in writing by the Designated Agency Employee (DAE), to the Designated Management Official (DMO) and the agency Headquarters (or equivalent governmental entity). This report should be made within five working days where such inaction occurred. Upon request of the T/TO, the DMO shall inform the T/TO of the agency Headquarters official to whom such reports are sent.

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<sup>5</sup>All Department of Interior agencies are encouraged, as appropriate, to join the Bureau of Indian Affairs and implement Chapter 16.

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The DMO shall automatically become responsible to ensure that the award is made promptly and shall contact the Contract Designated Tribal Official (CDTO) and arrange for immediate execution of the award.

### **III. Evaluation of Contracting Process.**

A. Request for Information. The DMO should annually contact each CDTO which administers an ISDA contract, grant or cooperative agreement and solicit the following information, preferably in a face-to-face meeting:

1. Is the T/TO satisfied with the way the agency personnel conducted themselves during the negotiations? If not, why not?
2. Is the T/TO satisfied with the process involved in the awarding of the contract, grant, or cooperative agreement? If not, why not?
3. Does the T/TO believe that the letter, spirit, and intent of the law were followed during negotiations? If not, why not?
4. Does the T/TO have any recommendations to improve the process or future negotiations?

This evaluation should be a part of the contracting process and should be distributed to the T/TO in a timely manner. The DMO is encouraged to meet personally with each T/TO to gather the above information and to facilitate better working relationships.

B. Evaluation Response. The DMO who solicited the T/TO's opinions under §III.A. above shall acknowledge receipt of the T/TO's response and should respond to any items raised by the T/TO within 45 days of receipt of the T/TO's response.



## CHAPTER 17

# SINGLE AUDITS OF TRIBES AND TRIBAL ORGANIZATIONS

- I. Introduction.** The purpose of this Chapter is to provide a general summary for the submission of audit reports for resolution by responsible Federal officials as required by the Single Audit Act. Section 5(f) of the ISDA [25 U.S.C. §450c(f)] requires a tribe or tribal organization (T/TO) to submit an annual "Single Audit Report" required by Chapter 75 of Title 31, U.S.C. Section 106(f) of the Indian Self-Determination and Education Assistance Act (ISDA) limits the time within which an agency must notify a T/TO of any disallowed cost.

The Single Audit Act [31 U.S.C. §7501 *et seq.*] was amended by Congress in 1996. The Office of Management and Budget (OMB) issued revised guidance in the form of OMB Circular A-133, "Audits of States, Local Governments and Non-Profit Organizations," revised June 24, 1997. The revised Circular established uniform audit requirements for non-Federal entities that administer Federal awards and implemented the Single Audit Act Amendments of 1996, which were signed into law on July 5, 1996 [Public Law 104-156].

Specific information is contained in the OMB Circulars A-128 and A-133 for fiscal years prior to June 30, 1996 and OMB Circular A-133 (revised) for fiscal years subsequent to June 30, 1996. The OMB Circular A-128 was the predecessor to the revised OMB Circular A-133 for audits of State, Local Governments and Indian tribes whereas the former OMB Circular A-133 was applicable to audits of institutions of higher education and other non-profit institutions.

The Single Audit is the primary tool for awarding officials to obtain information about the internal control structure and financial operations of the tribe. The Single Audit reports may indicate areas of non-compliance with laws, reporting requirements, the terms of the award, or identify costs charged to Federal awards which appear to be unallowable.

- II. Procedures.**

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- A. Audit Reports for Fiscal Years Beginning on or Before June 30, 1996.
1. General Guidance (Included in Appendix N).
    - a. OMB Circular A-128, Audits of State and Local Governments.
    - b. OMB Circular A-133, Audits of Institutions of Higher Education and other Non-profit Institutions.
  2. Agency Specific Guidance (Included in Appendix N).
    - a. Part 5, Indian Affairs Manual, Chapter 2, Single Audits and Single Audit Resolution Handbook.
    - b. Department of Health and Human Services (HHS) Grants Administration Manual, Chapter 1-105, Resolution of Audit findings.
  3. Audit Requirements.
    - a. Federal financial assistance includes Federal funds received directly from the Federal Government and Federal funds received as a sub-recipient.
    - b. Single Audits are required for T/TOs that receive more than \$100,000 in total Federal financial assistance in a fiscal year.
    - c. T/TOs that receive at least \$25,000, but less than \$100,000 in total Federal financial assistance in a fiscal year, may choose to have an audit in accordance with either the Circular requirements or the statute(s) and regulations governing the program(s) from which their funds are derived.
  4. Audit Report Distribution. Copies of the audit report will be submitted to each Federal department or agency that provided Federal assistance funds to the T/TO. In a sub-recipient relationship, a copy of the audit report will be sent to the prime recipient. Further, each T/TO who receives more than \$100,000 will submit one copy to the Federal Audit Clearinghouse.
  5. Submission Due Date. The T/TO is required by the above OMB Circulars to submit the Audit report to the cognizant agency and Single Audit

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Clearinghouse 13 months after the end of the fiscal year or within 30 days of receipt of the auditor's report, whichever comes first unless a longer period is agreed to by the cognizant agency.

6. Cognizant Agency. The Department of the Interior (DOI) is the cognizant agency for most Federally recognized Tribal Governments; however, cognizance has not been assigned by OMB for tribal organizations. Oversight is determined for all unassigned organizations in accordance with the provisions of OMB Circular A-128, Paragraph 11.a. and OMB Circular A-133, Paragraph 2.b.
7. Copies. The content of the reporting package is identified in Paragraph 13 of OMB Circular A-128 and Paragraph 15 of OMB Circular A-133. The T/TO will provide reports to each Federal agency that provided direct funding as follows:
  - a. Seven (7) copies to:

Office of the Inspector General  
United States Department of the Interior  
External Audits  
1849 C Street, N.W. (MS 5341 MIB)  
Washington, D.C. 20240
  - b. Seven (7) copies to:

Office of Inspector General  
Department of Health and Human Services  
National External Audit Review Center  
323 West 8th Street  
Lucas Place, Room 514  
Kansas City, MO 64105
  - c. One copy to the Office of the Inspector General (OIG) office of the Department that negotiated the indirect cost rate for the T/TO, and
  - d. One copy for archiving to:

Federal Audit Clearinghouse

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Bureau of the Census  
1201 East Tenth Street  
Jeffersonville, IN 47132

8. Review of Audit Reports. Review of the above audit reports shall be conducted in accordance with §III.B. below.

B. Audit Reports for Periods Beginning July 1, 1996 and Later.

1. General Guidance (Included in Appendix N).

The OMB Circular A-133 (Revised), Audits of States, Local Governments, and Non-Profit Organizations, revised June 24, 1997.

2. Agency Specific Guidance (Included in Appendix N).

- a. Part 5, Indian Affairs Manual, Chapter 2, Single Audits and Single Audit Resolution Handbook.
- b. HHS Grants Administration Manual, Chapter 1-105, Resolution of Audit findings.

3. Audit Requirements.

- a. Audits are required for T/TOs expending more than \$300,000 of Federal financial assistance in a fiscal year. T/TO's expending less than \$300,000 of Federal financial assistance are exempt from Federal audit requirements for that year except as noted in section \_\_\_\_\_.215(a)<sup>6</sup> of OMB Circular A-133. Their records, however, are to be available for review or audit by appropriate officials of the Federal agency, pass-through entity, and General Accounting Office (GAO).
- b. T/TO's expending less than \$300,000 of Federal financial assistance are prohibited from using Federal funds to pay for a Single Audit. Alternative audit or review processes should be included in the contract or AFA.

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<sup>6</sup>Citations relating to sections of OMB Circular A-133 are intentionally blank (i.e., Section .225). This is in keeping with the format contained in the current Circular.

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4. Audit Report Distribution. Sections \_\_\_\_.320 d. through f. of OMB Circular A-133 discusses submission of reporting packages and the data collection form to the Federal Audit Clearinghouse as well as additional submission requirements for requests from a Federal agency or a pass-through entity. The Federal Audit Clearinghouse should receive one copy of the data collection form and a reporting package for archival purposes as well as additional copies of the audit reporting package for each Federal awarding agency with audit findings related to direct Federal awards disclosed in the schedule of findings and questioned costs or the summary schedule of prior audit findings.
  
5. Reporting Package. A data collection form and the required reporting package are submitted in accordance with section \_\_\_\_.320(a) of OMB Circular A-133. A data collection form states whether the audit was completed in accordance with the OMB Circular A-133 requirements and provides information about the auditee, its Federal programs, and the results of the audit. The data collection form is discussed in detail in section \_\_\_\_.320(b) and a sample is included as Appendix A to the OMB Circular A-133.

The entire reporting package includes the following elements:

- a. Financial Statements and Schedule of Expenditures, A-133, section \_\_\_\_.310(a) & (b);
  - b. Summary Schedule of Prior Year Findings, A-133, section \_\_\_\_.315(b);
  - c. Auditor's Report(s), A-133, section \_\_\_\_.505; and
  - d. Corrective Action Plan, A-133, section \_\_\_\_.315(c), if applicable.
6. Submission Due Date. The OMB Circular A-133 phases in a shortened time frame for submitting Single Audits as follows:
    - a. For fiscal years beginning after July 1, 1996, but on or before June 30, 1998, the data collection form and the reporting package are due 13 months after the end of the fiscal year or within 30 days after the T/TO receives the auditor's report, whichever comes first.

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- b. For fiscal years beginning on or after July 1, 1998, the data collection form and the reporting package are due within 9 months after the end of the fiscal year or within 30 days after the T/TO receives the auditor's report, whichever comes first.
- c. The appropriate cognizant or oversight agency is authorized to grant an extension to the above report submission due date if requested by the T/TO and good cause for the extension is provided (\_\_\_\_.400 of OMB Circular A-133). Requests for extension should be directed by T/TOs to their appropriate cognizant or oversight agency at the addresses cited in §III.B.1.below.

7. Cognizant Agency. The DOI has been the cognizant agency for most Federally recognized Tribal Governments; however, cognizance has not been assigned by OMB for tribal organizations (see §III.B.1. and 3. below).

**\*NOTE:** The DOI and the HHS will meet to mutually determine which agency should serve as cognizant or oversight for each T/TO based on the criteria at section \_\_\_\_\_.400(a) and (b) of OMB Circular A-133. A copy of this determination will be attached as Appendix O.

8. Copies. Pursuant to OMB Circular A-133, the T/TO will:
- a. Regardless of the number and type of findings, send 1 copy of the data collection form plus 1 copy of the reporting package to the Federal Audit Clearinghouse at the following address:  

Federal Audit Clearinghouse  
Bureau of the Census  
1201 East Tenth Street  
Jeffersonville, IN 47132
  - b. Send one additional copy of the reporting package to the Federal Audit Clearinghouse for each Federal funding agency, for which findings are disclosed in the schedule of findings and questioned costs, or in the summary schedule of prior audit findings.
  - c. If the T/TO is a sub-recipient, send one copy of the reporting package directly to each State or other pass-through entity which

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provided funding for any program which had findings reported in an audited program.

- d. If the T/TO is a sub-recipient and has no findings related to a pass-through entity, the T/TO will either notify each pass-through entity that an audit has been conducted or provide each such entity with a copy of the reporting package.
- e. If an agency providing Federal funds to a T/TO requests a copy of the reporting package or a copy of the management letters issued by the T/TO's auditor, the T/TO is required, pursuant to section \_\_\_\_320(f) of OMB Circular A-133, to provide appropriate copies to the requesting agency.
- f. For Indian Health Service (IHS) contracts only:

To promote prompt and effective compliance with §5(f) of the ISDA, the Contract Designated Federal Official (CDFO) shall submit a written request to the T/TO, to provide an additional copy of the audit report package and any management letters issued by the T/TO's auditor to the Federal Audit Clearinghouse. The Clearinghouse will then forward the extra copy to the HHS Office of Inspector General, National External Audit Review Center pursuant to section \_\_\_\_320(f) of OMB Circular A-133.

### **III. Review of Audit Report.**

- A. Federal Audit Clearinghouse. The Federal Audit Clearinghouse is responsible for ensuring the completeness of the data collection form and the required reporting package prior to distribution to applicable Federal agencies. If not complete, the data collection form and the required reporting package will be returned by the Clearinghouse to the T/TO for correction and re-submission.
  - 1. The Federal Audit Clearinghouse will make an initial review of the data collection form and the required reporting package to ensure the data collection form is complete and contains no errors. If the data collection form is incomplete or contains errors, the Clearinghouse will reject the reporting package and return it to the T/TO for correction and resubmission. The Clearinghouse does not conduct a substantive review of the audit reporting package. That review is the responsibility of the cognizant or oversight agency (see §III.B.3. below).

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2. If the Clearinghouse accepts the reporting package, it will then forward copies of the reporting package to each applicable Federal awarding agency whose programs included findings disclosed in the schedule of findings and questioned costs or the summary schedule of prior audit findings. The Clearinghouse will not forward the data collection form to a Federal agency, but it is available to be viewed on the Internet at:  
<<http://harvester.census.gov/sac>>

### B. DOI and HHS Cognizant or Oversight Agency for Audit.

1. The responsibilities of Federal cognizant and oversight agencies and pass-through entities are described in section \_\_\_\_400(a) and (b) of OMB Circular A-133. The designated cognizant or oversight agency for audit has overall responsibility for:
  - a. Ensuring that audits are completed and reports are received in a timely manner and in accordance with the requirements of OMB Circular A-133;
  - b. Assessing the quality of the audit performed by non-Federal auditors;
  - c. Identifying audit recommendations for resolution;
  - d. Ensuring the timely and complete resolution of each of these management, system, and program recommendations by the appropriate Federal action official;
  - e. Providing technical assistance and coordination to the T/TO and its auditor and serving as the contact point and liaison for audit related issues; and
  - f. For purposes of compliance with section 106(f) of the ISDA, the determination to reject the audit report as insufficient due to noncompliance with Chapter 75, Title 31, U.S.C. or noncompliance with any other applicable law.

For the DOI and HHS, the appropriate addresses of these offices are:

DOI: Office of the Inspector General  
United States Department of the Interior



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External Audits  
440 Fairfax Drive, Suite 304  
Arlington, VA 22203

HHS: Office of Inspector General  
Department of Health and Human Services  
National External Audit Review Center  
323 West 8th Street  
Lucas Place, Room 514  
Kansas City, MO 64105

**NOTE:** This office can also provide technical assistance on audit issues for HHS programs. The phone number is (816) 374-6714 or 1-800-732-0679, both use extension 108. The phone is usually answered by machine. If a detailed message is left, it enables the staff there to do any necessary research before the call is returned.

2. The T/TO will have designated on the data collection form which Federal agency has cognizant or oversight for the T/TO.
3. If either DOI or HHS has cognizant or oversight responsibility, that agency will review the audit report to ensure that it complies with Chapter 75, Title 31, U.S.C. If neither agency is the cognizant or oversight agency, then the HHS will coordinate efforts with the appropriate cognizant or oversight agency for the review of the audit report to ensure that it complies with Chapter 75, Title 31, U.S.C. The 60-day clock referred to at §5(f) of the ISDA will commence running from the point in time which the appropriate Secretary (their respective OIG External Audit Evaluation Offices) receives the official audit reporting package from the Clearinghouse. Only the cognizant or oversight agency will be responsible for completing the 60-day review.
  - a. In determining whether the audit report complies with Chapter 75, Title 31, U.S.C., the cognizant or oversight agency should consider input from other Federal agencies who may be reviewing the Reporting Package.
  - b. If, within 60 days of receipt, the audit report is rejected pursuant to §III.B.3. above, it shall be returned to the T/TO for correction and resubmission, with a written notice, indicating that the report is

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rejected as insufficient due to noncompliance with Chapter 75 of Title 31, U.S.C. and shall state the reasons for the rejection.

- c. If the Agency rejects an audit for non-compliance within the first 60-day period, the T/TO is required to submit a revised audit. This submission shall trigger the commencement of a new 365-day period with a new initial 60-day period for the agency to review for compliance with Chapter 75 of Title 31, U.S.C.
4. When an audit has been determined to be acceptable, or 60 days has passed since receipt of the audit and no rejection has been asserted, it will then be issued to the appropriate Audit Resolution Office(s) and the Awarding Official(s) for resolution.
5. Section 106(f) of the ISDA states: *"Any right of action or other remedy (other than those relating to a criminal offense) relating to any disallowance of costs shall be barred unless the Secretary has given notice of any such disallowance within three hundred and sixty five days of receiving any required annual agency single audit report."* For purposes of an ISDA contract audit, the 365-day period to give notice of disallowance of costs will have deemed to have begun on the date of receipt of the official copy of the audit from the Clearinghouse, absent a rejection of the audit within the 60-day period.
6. Disagreements over resolution of audit findings or questioned costs shall be subject to the Contract Disputes section of the regulations found at 25 C.F.R. §900.215-230.
7. The Agency official(s) who review a T/TO audit should note that 25 C.F.R. §900.226 provides special guidance for appeals before the Interior Board of Contract Appeals (IBCA) concerning a cost disallowance. Such guidance provides that the IBCA will give due consideration to the factual situation giving rise to the disallowed costs, and shall seek to determine a fair result without rigid adherence to strict accounting principles. The determination of the allowability shall ensure fair compensation for the work or service performed, using cost and accounting data guides, but not rigid measures, for ascertaining fair compensation.

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8. Sanctions. Section \_\_\_\_225 of the OMB Circular A-133 provides sanctions which may be applied by the Awarding Official to T/TOs who fail to provide an audit report when they are required to do so.

These include:

- a. Withholding a percentage of Federal awards until the audit is completed satisfactorily;
- b. Withholding or disallowing overhead costs;
- c. Suspending Federal awards until the audit is conducted; or
- d. Terminating the Federal award.

Section 106(1)(l) of the ISDA provides additional guidance on the imposition of sanctions which may be imposed on the T/TO along with guidance informing the T/TO of its appeal rights.

### IV. Technical Assistance.

Federal officials that are involved in the review and resolution of audit reports:

#### A. Audit Report Review and Issuance

1. Federal Audit Clearinghouse  
Bureau of the Census  
1201 East Tenth Street  
Jeffersonville, IN 47132  
Toll Free 1-888-222-9907  
or (301) 457-1551  
FAX (301) 457-1540
  2. Office of the Inspector General  
Department of the Interior  
External Audits  
4040 Fairfax Drive, Suite 304  
Arlington, VA 22203  
(703) 235-9231  
FAX (703) 235-9246
- Additionally, DOI Audit Resolution  
Technical Assistance may be  
obtained by calling: (303) 236-9787  
FAX (202) 208-1916
3. Office of the Inspector General

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Department of Health and Human Services  
National External Audit Review Center  
323 West 8th Street  
Lucas Place, Room 514 (816) 374-6714  
Kansas City, MO 64105 FAX (816) 374-6727

### B. Audit Resolution

1. Office of Audit Resolution and Cost Policy  
Department of Health and Human Services  
HHH Building, Room 522-E  
200 Independence Avenue, S.W. (202) 401-2804  
Washington, D.C. 20201 FAX (202) 401-2814
  
2. Audit Resolution Advisory Branch  
Indian Health Service  
Twinbrook Metro Plaza, Room 450A  
12300 Twinbrook Parkway (301) 443-7301  
Rockville, MD 20852 FAX (301) 480-0682
  
3. Office of Audit and Evaluation  
Assistant Secretary - Indian Affairs  
U.S. Department of the Interior  
1849 "C" Street, N.W., MS 2559-MIB (202) 208-1916  
Washington, D.C. 20240 FAX (202) 208-4258
  
  
4. Office of Audit and Evaluation  
Assistant Secretary - Indian Affairs  
U. S. Department of the Interior  
P.O. Box 25007 (D-119) (303) 236-9787  
  
Denver, CO 80225 FAX (303) 236-9790

### C. Internet Sites for Accessing Useful Reference Materials such as OMB Circulars, Catalogue of Federal Domestic Assistance, Code of Federal Regulations, etc.

1. Office of Management and Budget

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[<http://www.whitehouse.gov/omb>](http://www.whitehouse.gov/omb)

Click on OMB Documents for:

- OMB Circulars
- Financial and Grant Management circular and related documents
- Federal Register submissions

2. IGMNET - Website with links to each Department's OIG

[<http://www.ignnet.gov>](http://www.ignnet.gov)

Click on Single Audit for:

- Single Audit Act, as amended in 1996
- Information about Single Audit Act
- Catalog of Federal Domestic Assistance
- OMB Circulars

3. Department of Health and Human Services

[<http://www.hhs.gov>](http://www.hhs.gov)

Click on HHS Research Policy and Administration for:

- Grants Net
- Code of Federal Regulations
- Catalog of Federal Domestic Assistance

## **CHAPTER 18**

### **ADDITIONAL GUIDANCE**

**I. IHS Procedures.** The IHS shall designate Indian Self-Determination and Education Assistance Act (ISDA) Teams to assist with implementing any and all aspects of the ISDA. The teams shall also be the primary contacts for the provision of assistance to staff charged with implementing the ISDA.

A. For Indian Health Service (IHS) Headquarters.

1. The Director, IHS, shall appoint a Headquarters Leadership Team (HQLT).

a. The HQLT is chaired by the Director, Self-Determination Services (SDS), Office of Tribal Programs (OTP) or designee; in addition, the regular membership consists of representatives from the following offices/organizations:

- Acquisition and Grants Management
- Facilities and Environmental Engineering
- General Counsel, Public Health Division
- Public Health
- Information Resources Management
- Human Resources
- Regulatory and Legal Affairs
- Financial Management
- Tribal Self-Governance

Additional IHS representatives will be invited to participate in HQLT meetings as appropriate.

b. HQLT Procedures

(1) Area staff will address requests for policy guidance to the Director, SDS. The Director, SDS, will refer the more complex, non-routine requests, including those that may involve legal interpretation of issues considered precedent setting or not previously decided, to the HQLT. Examples

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are: proposed reassumptions and declinations, contractibility denials, policy clarifications, and issues not addressed in policy or regulation.

Office Directors and the IHS Executive Secretariat should ensure that requests for policy guidance received directly from Area office staff are forwarded to the Director, SDS. The Director, SDS, will notify the HQLT of proposed reassumptions and declinations, HQLT meetings, and/or conference calls as appropriate.

- (2) In addition to complying with the appropriate regulatory requirements in Chapter 14, Area Directors **must** notify the Director, SDS, of any proposed reassumptions of ISDA contracts or grants immediately after such a possibility is first seriously considered. Additional notice should be provided whenever reassumption is actually decided before the contractor is formally notified. In emergency reassumption situations, Area Directors are urged to obtain advanced advice from the HQLT and/or from the Office of the General Counsel (OGC) if possible, and should notify the Director, SDS, of their actions and provide copies of all correspondence and reports upon which the emergency reassumption was based.
- (3) Area Directors must provide written notice to the Director, SDS, of a proposal with potential declination issues not later than 30 days after receipt of proposal. Area Directors **must** provide written notice to the Director, SDS, of any proposed declination or other proposed decision to disapprove a self-determination contract proposal as soon as possible but no later than 70 days after the receipt of the proposal.
- (4) The Director, SDS, will determine when other issues, i.e., appeals, should be brought before the HQLT and will determine the most appropriate means of doing so. Each team member or designee is expected to attend meetings of the HQLT.

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### B. For IHS Areas.

1. Each Area Director shall appoint an Area Indian Self-Determination Leadership Team (ISDLT) which may include representatives from the following offices:

- Area Director
- Contract Proposal Liaison Officer (CPLO)
- Contracting
- Environmental Health and Engineering
- Financial Management
- Health Programs
- Information Resource Management
- Personnel
- Planning
- Property Management
- Tribal Activities/Programs

The Area ISDLT will provide Area office leadership in the implementation of the ISDA contracting process.

- II. **Department of the Interior (DOI) Internal Departmental Assistance Network.** Each of the agencies of the DOI shall appoint a management level official to an intra-departmental panel whose purpose shall be to study the feasibility of creating a permanent ISDA Internal Departmental Assistance Network. The panel should examine how to efficiently and effectively share expertise on Title I contracting matters within the Department in order to fulfill the Secretarial and Congressional policies recited in Chapter 2 of the Handbook.

The Agencies shall convene the first meeting of the panel within 45 days from the date of Handbook publication.



## CHAPTER 19

# INTERGOVERNMENTAL PERSONNEL ACT ASSIGNMENTS AND MEMORANDA OF AGREEMENT

- I. Introduction.** Section 104 of the Indian Self-Determination and Education Assistance Act (ISDA) authorizes tribes or tribal organizations (T/TO) to utilize employees of the Department of the Interior (DOI) and the Department of Health and Human Services (HHS) under Intergovernmental Personnel Act (IPA) assignments and to utilize commissioned officers of the HHS under Memoranda of Agreement (MOA).
- II. Procedures.**
- A. For the HHS Agreements.
1. The Departmental regulations at 5 C.F.R. Part 334 for IPAs and 42 C.F.R. Part 21 for MOAs provide the requirements of all such agreements and must be followed in the negotiation and execution of any agreements. The Indian Health Service (IHS) publication called Personnel Aspects of the Indian Self-Determination and Education Assistance Act Public Law 93-638 Handbook should be consulted for practical guidance in developing, negotiating, and executing agreements. This document and more specific and up-to-date information is available from the Area Servicing Personnel Office.
  2. The IHS full-time equivalent (FTE) ceiling shall not affect the T/TO's ability to enter into a special purpose IPA or MOA for an assignment (or replacement assignment) which continues an incumbent in an IHS function at the time of initial contracting of a PFSA to perform the same duties at the same location for a T/TO. A replacement IPA is a special purpose IPA that occurs when: 1) an employee on a special purpose IPA vacates a position, 2) the T/TO is unable to fill the position with a direct hire, and 3) there is another Federal employee who is qualified for and willing to accept the position and the T/TO agrees to have that employee fill the position.

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All other regular purpose IPA and MOA assignments, including those for expanded programs, will be subject to the overall FTE ceiling of the IHS.

B. For the DOI Agreements.

The DOI Departmental Manual Release, 370 DM 334 (May 25, 1989), Temporary Assignment Under the Intergovernmental Personnel Act, provides guidance and instructions for IPA assignments. This document and more specific and up-to-date information is available from the local Personnel Offices of the DOI.

## CHAPTER 20

### CONTRACT MONITORING

- I. Introduction.** The Model Agreement at section 1.(b)(7)(C) [§108c of the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. §450l(c)] provides, with specified exceptions, that "routine monitoring visits shall be limited to not more than one performance monitoring visit for [each] contract by the head of each operating division, departmental bureau or departmental agency, or duly authorized representative of such head." The agencies recommend, however, that all contracts be negotiated to include language which would allow appropriate monitoring to include, at a minimum, one routine monitoring visit per year. A monitoring visit may extend for more than one day.

The tribe or tribal organization (T/TO) is responsible for managing the day-to-day operations conducted under the contract and for monitoring activities conducted under the contract to ensure compliance with the contract and applicable Federal requirements.

**II. Procedures.**

- A. Agency Responsibilities. Routine monitoring visits shall be limited to not more than one performance monitoring visit per contract year, unless:
1. The T/TO agrees to one or more additional visits; or
  2. The Contract Designated Federal Official (CDFO) determines that there is a reasonable cause to believe that grounds for reassumption of the contract [§109 of the ISDA, 25 U.S.C. §450(m)], suspension of contract payments [§106(l) of the ISDA, 25 U.S.C. §450j-1(l)], or other contracts performance deficiency(ies) may exist [section 1.(b)(7)(C) of the Model Agreement]. No additional visit shall be made until reasonable advance notice that includes a description of the nature of the problem that requires the additional visit has been given to the T/TO.
- B. Monitoring and the Single Agency Audit Report. To the greatest extent possible, the activities of the agency during a monitoring visit shall not duplicate the work of the T/TO's annual Single Agency Audit Report. Instead, the agency shall review the T/TO's most recent audit report and rely on its findings in the areas of financial management, property management, and procurement management. Pursuant to 25 C.F.R. §900.40, the Single Agency Audit Report is required to evaluate the

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T/TO's financial, procurement, and property management systems. To the extent the audit report adequately addresses T/TO compliance with program standards, this too shall not be evaluated by the agency during the routine monitoring visit. Prior to the submission of the final audit report from the auditor to the T/TO, Federal and tribal employees are encouraged to meet and attempt to resolve any and all issues of concern.

- C. Goal of Monitoring Review. The goal of the monitoring review shall be to assess the provision of services under the contract and to provide the T/TO with feedback which might be beneficial in its provision of services under the contract.
  
- D. Monitoring Plan. The CDFO shall identify appropriate individuals for each contract to serve on its monitoring team. The monitoring team shall develop a written monitoring plan for each contract which should address the unique needs of the programs operated by the T/TO. The T/TO should be given an opportunity to review and comment on the monitoring plan at least 30 days prior to the first scheduled monitoring visit. Federal and tribal representatives are encouraged to agree on the monitoring plan.
  
- E. Monitoring Visit. The CDFO shall contact the Contract Designated Tribal Official (CDTO) and shall coordinate an appropriate time for the monitoring visit. The review should be conducted at the program location in order to afford agency reviewers an opportunity to evaluate the adequacy of the facility and associated property to contribute toward the successful provision of services under the contract. Other areas to be reviewed during the monitoring visit may include:
  - 1. Staffing;
  - 2. Compliance with the description of services (scope of work);
  - 3. Compliance with program standard(s), to the extent the Single Agency Audit Report does not adequately address T/TO compliance;
  - 4. Adequacy of facility;
  - 5. Equipment and furnishings; and
  - 6. Other areas the CDFO believes are necessary to fulfill the agency's responsibility under section 1.(b)(7)(C) of the Model Agreement.
  
- F. Report in Lieu of a Monitoring Visit. In cases where monitoring visits have been negotiated to occur on an annual or more frequent basis, it may not always be

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necessary to visit the T/TO each year, or more frequently, if the CDFO and the T/TO conclude that the T/TO is operating the program in a satisfactory manner and a visit to the T/TO would not identify significant deficiencies. In this case, a brief report should be developed by the CDFO citing the reasons why he/she believes the monitoring visit was not needed. This report shall be supplied to the T/TO and placed in the contract file. If, however, the T/TO requests a monitoring visit(s), then the CDFO shall coordinate a routine monitoring visit as outlined in this Chapter.

- G. Cancellation/Rescheduling of a Monitoring Visit. When a scheduled monitoring visit is cancelled because necessary T/TO representatives or Federal reviewers are not available for the monitoring visit(s), the agency and the T/TOs should reschedule, for a mutually agreeable time, that portion of the review that could not be accommodated.
- H. Monitoring Report. Upon completion of the monitoring visit(s), the contract monitoring team shall prepare a written report outlining its findings and recommendations. A copy of the report shall be placed in the official contract file and a copy shall be provided to the T/TO.
- I. Deficiencies. If significant deficiencies are noted during the review that cause the monitoring team to conclude there is reasonable cause to believe that reassumption of the contract, or a portion of the contract [25 C.F.R. §900.246-256], suspension of contract payments [§106(l) of the ISDA; 25 U.S.C. §450j-1(l)], or other serious contract performance deficiencies exist, the agency CDFO shall:
1. Work with the T/TO to overcome the noted deficiencies through the provision of technical assistance or other appropriate support; and
  2. Schedule additional visit(s) with the T/TO to monitor the progress of the T/TO on addressing the deficiencies; and
  3. If reassumption is still necessary, follow the reassumption procedures outlined in Chapter 14, §II.B. of this Handbook and Subpart P, 25 C.F.R. §900.246-256.

## CHAPTER 21

### CONTRACT CLOSE OUT

- I. **Introduction.** The close out of a contract is the process by which a tribe or tribal organization (T/TO) (contractor) and the Federal agency jointly determine that all contractual requirements of both parties to the contract have been completed. Contract close outs generally shall be completed within 120 days after resolution of all audit questioned costs associated with the contract. The parties, by agreement, may extend that time.
- II. **Procedures for Term Contracts.** The following procedure is to be utilized for the close out of all term contracts awarded pursuant to Title I of the Indian Self-Determination and Education Assistance Act (ISDA).
- A. **Notification of Contract Expiration.** At least 60 days prior to the expiration of the contract term, the Awarding Official, in consultation with the Contract Designated Federal Official (CDFO), shall send notice to the contractor that the term of the contract will expire on a date certain. Such notice should include a list of any outstanding requirements that the agency believes must be submitted in order to complete a close out.
- B. **Contract Close Out.** Contract close out may occur on contracts that meet all of the following criteria:
1. The contract term has expired, even when a successor contract has been entered into by the parties.
  2. The T/TO has submitted all reports required pursuant to the terms of the negotiated reporting requirements contained in the contract, including all annual audit reports.
  3. A reconciliation of the contract and all required payments have been completed and agreed to by the agency and the T/TO.
  4. The Federal agency has made all direct payments.

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5. Identification of savings (carryover) has occurred, and said savings distributed to a successor contract between the parties and/or consistent with negotiations between the parties.
  6. All personal property and facilities used by the T/TO or acquired with contract funds have been distributed pursuant to the terms of the contract and the 25 C.F.R. Subparts F and I of the regulations and Chapters 9 and 14 of this Handbook, as appropriate.
- C. Preparation of a Release of Claims. The Awarding Official will prepare and submit a "Release of Claims" in substantially the form attached as Appendix P.

Upon receipt, the T/TO should review and prepare any exceptions to the "Release of Claims" that it believes are proper and correct and execute the same.

- D. Receipt of Release of Claims with Exceptions. Upon receipt of a "Release of Claims" with exceptions from the T/TO, and to the extent the Awarding Official disagrees with the exception(s), the Awarding Official shall treat the exceptions as a claim pursuant to Subpart N of the regulations and make a decision on that claim as required by Subpart N (Post Award Contract Disputes) of the regulations and Chapter 13 of this Handbook. To the extent exception(s) exceed \$100,000, the T/TO is required to submit a certification pursuant to 25 C.F.R. §900.220.

When the "Release of Claims" contains an exception, any further modification shall note that a claim is pending until such time as the claim(s) and any appeal(s) are settled or concluded.

- E. Receipt of a Release of Claims without Exceptions. Upon receipt of a "Release of Claims" without exceptions, the Awarding Official shall prepare a bilateral modification to decrease any savings remaining in the contract and distribute it either to a successor contract or to the Federal agency consistent with negotiations between the parties. No action will be taken on this modification prior to execution by both parties.
- F. Contract Close Out for Mature Term Contracts.

The parties shall use the above procedures to close out mature contracts for a specified term of years. Such close out shall be consistent with the term in the contract.

**III. Periodic Fiscal Close Out of Indefinite Term Mature Contracts**

A T/TO operating an indefinite term mature contract may request to close out such a contract at any time. Upon receipt of a request to close out an indefinite term mature contract, the CDFO shall ascertain whether the request is to close out the contract completely (either to enter into a new mature contract or discontinue services and have the agency resume operation of the programs, functions, services, and activities [PFSA] under the contract) or whether it is merely the T/TO's intention to close out the fiscal accounting of a single year or series of fiscal years.

- A. Complete Contract Close Out. In the case of a request to completely close out an indefinite term mature contract, the Designated Agency Employee (DAE) and the T/TO shall agree to a date upon which to close out the contract and then shall proceed to follow the procedures outlined in §II. above.
  
- B. Periodic Fiscal Close Out. In the case of a request to only close out the fiscal accounting of a single year or series of fiscal years, the CDFO and the T/TO shall agree to a date upon which to close out the fiscal accounting of the contract and then shall proceed to follow the procedures outlined in §II. above with the exception of §II.B.1. and B.5., which shall not apply.



## CHAPTER 22

### MATURE CONTRACT STATUS REQUESTS

- I. Introduction.** Section 4(h) of the Indian Self-Determination and Education Assistance Act (ISDA) permits a tribe or tribal organization (T/TO) to request and obtain mature contract status for one or more contracts, if certain conditions set out in §4(h) are met. A request for mature contract status may be submitted to the agency at any time and should be processed in the manner set out in this Chapter. Unless the request for mature contract status is included in a contract proposal or renewal request or amendment, it should be treated as a request to modify the contract and the 90-day time period shall apply (see Chapter 5, §V.).

Mature contract means an ISDA contract that has been continuously operated by a tribal organization for three or more years, and for which there are no significant and material audit exceptions in the annual financial audit of the T/TO.

The following provisions of the ISDA refer to mature contracts: section 5(a)(2) [25 U.S.C. §450c(a)(2)] (mature contract reporting requirements); §102(a)(3) [25 U.S.C. 450f(a)(3)] (combining mature contracts); §103(e)(1) [25 U.S.C. §450h(e)(1)] (grants); §105(c)(1) [25 U.S.C. §450m(a)(3)] (duration). Agency denial of mature contract status may be appealed pursuant to 25 C.F.R. §900.150(h).

**II. Procedures.**

**A. Receipt and Review of Request for Mature Contract Status.**

1. When receiving a request, the agency should date stamp the request and refer it to the Awarding Official for the contract involved. If the request for mature contract status is made as a contract amendment proposal, the 90-day time period for action shall apply.
2. The Awarding Official shall approve the request unless one or more of the following conditions is present:
  - a. The T/TO has not continuously operated the contract for three years or more.

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- b. The most recent audit required pursuant to the Single Audit Act raised one or more of the following:
    - (1) An unresolved audit exception involving amounts aggregating the greater of \$15,000 or five percent of the amount of the contract;
    - (2) Unresolved audit exceptions involving major financial reporting deficiencies, or an opinion of the auditor qualifying the audit results because of serious departure from generally accepted accounting principles in the maintenance of the contractor's accounts of financial records;
    - (3) Express findings of financial mismanagement or misappropriation of funds or assets; or
    - (4) Any other unresolved exception identified by the auditor as being significant and material.
  3. If the Awarding Official decides that the request to convert a contract to mature status should be declined, he/she shall inform the T/TO, in writing, and identify which of the conditions listed in subsection II.2. lead to the declination. The Awarding Official shall advise the T/TO of its right to appeal the denial provided in 25 C.F.R. §900.150(h) and should follow the procedures in Chapter 6 of this Handbook.
  4. The duration of a mature contract shall be for an indefinite or definite term, as requested by the T/TO, unless the tribal resolution limits the duration of the mature contract of the tribal organization.
- B. Consolidation of Contracts. At the request of a T/TO, the Awarding Official may consolidate two or more mature contracts into a single mature contract.

## CHAPTER 23

### INDIAN HEALTH SERVICE BUYBACK PROCEDURES

- I. **Introduction.** Statutory authority has been provided to authorize and facilitate the buyback process. Specifically, under the administrative provisions of Public Law 105-83 "FY 98 Interior Appropriations Act" states:

*"Provided further, That with respect to functions transferred by the Indian Health Service to tribes or tribal organizations, the Indian Health Service is authorized to provide goods and services to those entities, on a reimbursable basis, including payment in advance with subsequent adjustment, and the reimbursements received therefrom, along with the funds received from those entities pursuant to the Indian Self Determination Act, may be credited to the same or subsequent appropriation account which provided the funding, said amounts to remain available until expended; Provided further, That reimbursements for training, technical assistance, or services provided by the Indian Health Service will contain total costs, including direct, administrative, and overhead associated with the provision of goods, services, or technical assistance."  
Public Law 105-83*

This statute provides tribes and the Indian Health Service (IHS) the authority to enter into buyback agreements for programs, functions, services, and activities (PFSA) previously negotiated in a self-determination contract and addresses the authority of the IHS to retain and expend funds received from tribes or tribal organizations (T/TOs) under buyback agreements. Buybacks are initiated by T/TO's to address situations where it may be more economical or expedient for the IHS to provide a good or service that the T/TO has already contracted to provide.

II. **Definitions.**

- A. **Buyback** - An agreement between the T/TO and the IHS, subsequent to a negotiated annual funding agreement (AFA), to acquire goods or services from the IHS for any PFSAs [functions] transferred under any contract entered into under Title I of the Indian Self-Determination and Education Assistance Act (ISDA). The transfer/reimbursement of funds to the IHS can be on a periodic, ongoing, or one-time basis.

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- B. Retained Funds - Funds retained by the IHS for goods or services, by agreement with a T/TO as part of an initial negotiated AFA, that a T/TO has voluntarily elected to have the IHS perform on the T/TO's behalf. The retained funds are not transferred to tribal control as agreed to in the AFA but are available for use by the IHS only for the purpose of the performance of the PFSAs agreed upon.

**III. Administrative Guidelines and Principles.** Upon the request of a T/TO, the IHS shall negotiate the terms for the buyback of a PFSA authorized pursuant to a previously negotiated contract and AFA under the ISDA. When the request is submitted as an amendment to the contract or AFA, it should be treated as a request to modify the contract and the 90-day time period shall apply (see Chapter 5, §V.)

The following principles shall be used by the IHS staff in carrying out the buyback process:

- A. Initiation of a Request. A buyback request(s) can only be initiated by a T/TO.

- B. Buyback Process. The buyback process may be used to provide a PFSA on a periodic, ongoing, or one-time basis subsequent to agreement of a negotiated contract. This is in contrast to retained services where PFSAs to be provided by the IHS represent actions of a more permanent or continuing nature and are negotiated with the T/TO as a part of an initial contract or AFA.

Funds received for a buyback shall be deposited as a reimbursement and shall only be used to provide the PFSA being bought.

- C. Cost of Buyback. A T/TO has the right to know, in advance, how the PFSA will be performed and the full cost associated with the buyback.
- D. Negotiations. The Awarding Official has the authority to negotiate buyback agreements, including those for Area and Headquarters resources. The Office of Tribal Programs (OTP) is available to assist both the T/TO and the IHS in facilitating the request. The negotiations should address the process and provide a schedule for receipt of payment(s) for the buyback.

**IV. Implementation.** The following are IHS operating procedures to be used in carrying out buybacks.

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- A. Annual Estimate. The Division of Financial Management (DFM), Office of Management Support, will ensure that sufficient reimbursable authority exists in the IHS Appropriation to accept and use buyback funds in fulfillment of executed buyback agreements, including buyback estimates for both the Services and Facilities Appropriations. Area office estimates will be consolidated and included in the IHS apportionment submitted to the Office of Management and Budget. If an Area office plans to exceed its annual estimate by 20 percent or more, the Area Director must immediately notify the DFM to ensure that sufficient reimbursable authority exists to accommodate the total amount of expected buybacks. Funds received in the Area office shall be deposited as a reimbursement.
  
- B. Tribal PFSA Buyback Requests. When the T/TO requesting the buyback of PFSA(s) submits a request, in writing, to the IHS, the Contract Designated Federal Official (CDFO) will acknowledge receipt of the T/TO's request within 5 working days.
  
- C. IHS Response to PFSA Buyback Requests. The CDFO shall provide to the T/TO, a written estimate of costs for the PFSAs, including all non-tribal share charges within 14 working days of receipt of request. The cost estimates should be consistent with the PFSA or tribal share amount. If the proposed buyback amount is different than the original PFSA or tribal share amount, the IHS must provide sufficient cost data which justifies the difference. If the IHS cannot provide cost data that justifies the difference, the PFSA or tribal share amount will be used as the basis for the buyback amount.
  
- D. IHS Obligation Document Requirements. Specific obligation documents associated with approved buyback requests must include a notation that the obligation is being incurred under the auspices of a buyback with specific reference to the tribal request and the IHS response. For example, "This travel is being performed in accordance with the buyback request and negotiated contract of XYZ Tribe of November 22, 1996, and IHS concurrence of November 29, 1996." At the request of the T/TO, the T/TO's contract or AFA should be modified in order to document the occurrence and terms of the buyback.
  
- E. Billing. An invoice for services rendered to the T/TO under the buyback agreement will be prepared and issued with concurrence from the T/TO that the estimate provided is satisfactory. Billing will be issued on a Standard Form 1114, Bill for Collection, and shall cite all pertinent data that specifies services to be performed, goods provided, etc., and accounting data to identify the appropriate fund citation for deposit. A reconciliation of the buyback estimate to the actual

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cost of the buyback shall be submitted to the T/TO along with any final invoice or refund, as appropriate.