



**THE  
MUSCOGEE (CREEK) NATION**

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May 18, 2018

RADM Michael Weahkee, Acting Director  
Indian Health Service  
5600 Fishers Lane  
Mail Stop: 08E86  
Rockville, MD 20857

Re: CSC "97/3" Method Tribal Consultation

Dear Acting Director Weahkee,

On behalf of the Muscogee (Creek) Nation (MCN), I am writing to provide recommendations on the Indian Health Service's (IHS) proposed revisions to Section 6-3.2E(3) (provisions related to "97/3 method") of the IHS Manual "Contract Support Costs" (CSC). However, before MCN weighs in on the most recent round of proposed changes, I would like to comment on MCN's experience to date.

In August 2017, MCN attended the IHS CSC Workgroup Meeting in Tulsa, OK. During that meeting, it seemed as if IHS was satisfied with the policy's implementation process and, collectively, the Workgroup agreed to continue considering a very narrow set of changes to the Chapter at the Tribes' request. In other IHS meetings, including the Tribal Self-Governance Advisory Committee, Tribes continued to follow up on outstanding issues from that meeting. Then, abruptly in December 2017, MCN received notification that IHS was temporarily rescinding a provision of the CSC Policy without notification or consideration of the full Workgroup – overturning several years of progress by the Workgroup.

In our view, the published 2016 Policy was not perfect, but it was reflective of a respectfully collaborative and collective process which appropriately weighed Tribal recommendations and input. On the other hand, the process to rescind and change the Policy has fallen short of the government-to-government relationship MCN expects when working with the Federal government.

MCN finds it disconcerting that IHS has offered option which were not vetted by the CSC Workgroup or responsive to the narrow issue of pre-determined duplication that IHS employees identified in during the March 2018 Workgroup meeting. To send out anything other than the agreed-upon language is an act of bad faith, especially given that the Indian Self-Determination and Education Assistance Act *requires* that IHS interpret the Act's provisions "liberally" and in favor of the Tribes. 25 U.S.C. §§ 5329(c), sec. 1(a)(2); 5392(f).

Given IHS's statutory requirement, MCN's primary recommendation is to maintain the current Policy as written. MCN understands that IHS has responsibility to oversee and properly manage the disbursement of CSC funds. However, the Nation asserts that under the current Policy, IHS has the latitude to negotiate CSC funds. IHS employees should feel empowered to take known information and make reasonable suggestions when a duplication amount is already identified.

To say that the policy does not currently allow the IHS to negotiate based on available, previously identified, and agreed upon amounts falls short of the active negotiations MCN and other Self-Governance Tribes regularly participate in with IHS officials.

Despite our preference to retain the current policy, MCN is sensitive to the fact that the Agency feels compelled to alter the policy. As such, MCN recommends that IHS **adopt the Workgroup recommendation**. This option responds to IHS's concern about previously negotiated amounts, while otherwise retaining as much of the original policy, and tribal autonomy, as possible. The other two IHS-proposed options contain several subtle changes that drastically curtail the authority of Tribes, while making CSC calculations subject to the whims of the Agency rather than the result of the joint collaborative process it was meant to be. These other two options will only lead to more protracted litigation with the agency.

The two agency options are unsatisfactory for several additional reasons. First, the duplication provision was meant to apply to the negotiation of funding in or after FY 2016. But the two new IHS options would make these options available only for agreements that are entered into in or after FY 2017. This change appears to cut off the right of any Tribe or tribal organization from renegotiating a duplication amount if it was contracting before FY 2017. At the very least, it prohibits Tribes from using these options when "reconciling" or negotiating the amount of indirect CSC that was due in 2014, 2015 or 2016. Given that the majority of Tribes took over programs long before FY 2017, this language may make this provision inapplicable to most tribal contractors.

Second, the two new agency options strip a Tribe of the right to choose which method to use, and instead makes it a choice both Tribes and IHS must agree on. The clear result of this rewrite are far more instances where the agency will be in a position to force a Tribe into a contentious negotiation that would lead to litigation if the Tribe does not capitulate—the exact opposite of the policy's goals. The whole point of the CSC policy was to make CSC calculations less contentious. The two new agency-drafted options are guaranteed to make the CSC calculation process far more complicated, contentious and ultimately unfair.

Finally, the objective of the 97/3 method was to provide an efficient compromise in cases where it was already clear IHS and Tribes could not or would not reach agreement on duplication. The agency's two new options make this impossible as the option to use the shortcut method would be subject to agency approval. In sum, the agency's proposed unilateral changes nullify one of the few provisions in the policy that represented a true, and truly historic, compromise between Tribes and the IHS.

MCN appreciates the opportunity to comment on the proposed changes. We hope moving forward the Agency will engage in more responsible and respectful processes that have impact on Tribal Nations.

Sincerely,



Shawn Terry  
Secretary of Health  
Muscogee (Creek) Nation