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MEMORANDUM

August 22, 2022

TO: CONTRACT SUPPORT COST CLIENTS 

FROM: Joe Webster, Geoff Strommer & Steve Osborne
HOBBS, STRAUS, DEAN & WALKER, LLP

RE: ***Potential Claims Against IHS for Contract Support Costs on Health Care Services Funded by Third-Party Revenues***

We write to alert you to an upcoming deadline for filing potential claims against the Indian Health Service (IHS) for Contract Support Costs (CSC) on health care services funded by third-party revenues. As we have reported, for several years Tribes and IHS have battled over whether IHS must pay CSC only on appropriated funds IHS transfers to the Tribes, as the agency contends, or must also pay CSC on the portion of a Tribe's health care program funded by third-party revenues, such as collections from Medicare, Medicaid, and private insurance. With the litigation likely to continue for some time, Tribes should consider filing claims for FY 2016 **by September 30, 2022**, in order to meet the six-year statute of limitations in the Contract Disputes Act (CDA). In this memo, we briefly explain the claims, how to file, and the rationale for doing so.

What Is the Legal Basis of the Claims?

The basic claim is that IHS breached its funding agreement and violated the Indian Self-Determination and Education Assistance Act (ISDEAA) by failing to pay the full CSC required under the statute. In the Tribes' reading, the ISDEAA demands that CSC be paid in support of the entire "Federal program" the Tribe carries out under its contract or compact.¹ When IHS provides services directly, it funds them with a blend of appropriations and third-party revenues. Both funding sources contribute to a unified federal program. By the same token, when a Tribe provides services under the ISDEAA, it must collect third-party revenues—or "program income," as the statute calls it—and expend those revenues on additional services within the scope of the ISDEAA agreement. Collecting and expending program income creates additional overhead costs of the kind CSC is designed to cover. IHS's refusal to pay CSC for services funded by third-party

¹ See 25 U.S.C. § 5325(a)(3)(A)(i) and (ii).

revenues gives rise to breach of contract claims under the CDA, which is incorporated into the ISDEAA.²

How Have Courts Ruled on These Claims?

In 2016, in the *Sage Memorial* case, a federal court in New Mexico ruled in favor of a tribal organization on this claim, holding that “expenditures made with third-party revenues in support of programs administered under [the ISDEAA] are spent on the federal program.”³ Other courts, however, have ruled in favor of IHS on the same issue, notably the D.C. Circuit in the *Swinomish* decision.⁴ In two other cases, IHS prevailed in the district court but the Tribes have appealed: the Northern Arapaho Tribe in the Tenth Circuit, and the San Carlos Apache Tribe in the Ninth Circuit. Both appeals have been fully briefed and argued, and decisions could come any day. Should one or both of them go in favor of Tribes, it would set up a conflict with the D.C. Circuit that would increase the odds of the Supreme Court granting a petition to hear the case. So, this issue may not be settled for some time.

Why File a Claim if the Courts May Ultimately Invalidate It?

If IHS ultimately prevails on the central legal issue, these claims will be worthless. But filing a claim is a relatively easy and inexpensive process (as described below) that preserves the claim in case the tribal position prevails. For Tribes and tribal organizations that generate significant third-party revenues, these claims can be quite large, and thus worth the relatively small investment needed to preserve them.

How Do We File a Claim?

The first step is to file a request for a contracting officer’s decision under the CDA.⁵ This is simply a letter setting forth the basis and amount of the claim. To help decide whether to file, you may wish to make a rough estimate of the size of your potential claims. The approximate size of the indirect-CSC component of the third-party revenue claims can be estimated by applying the following formula: $A \times B = C$, where A is the amount of third-party revenues used to provide services under the Tribe’s funding agreement with IHS in a given year, B is the Tribe’s indirect cost rate for that year, and C is the claim for unpaid indirect CSC. This formula yields a rough estimate only, as other variables such as exclusions and pass-throughs might affect the claim. Information on third-party expenditures is often available, at least in summary form, in the annual audits.

² 41 U.S.C. § 7101 et seq.; 25 U.S.C. § 5331(d) (applying Contract Disputes Act to ISDEAA).

³ *Navajo Health Found.—Sage Mem’l Hosp., Inc. v. Burwell*, 263 F. Supp. 3d 1083, 1162 (D.N.M. 2016).

⁴ *Swinomish Indian Tribal Cmty. v. Becerra*, 993 F.3d 917 (D.D.C. 2021).

⁵ 41 U.S.C. § 7103.

If you decide to file a claim, we recommend that you consider engaging a CSC consultant to help calculate the claims. We can suggest some possible consultants. Our firm would be happy to help with legal aspects such as drafting the claim letter and following up with the agency contracting officer.

Does Filing a Claim Commit Us to Litigation?

No. The Tribe can wait to see how IHS responds and how the litigation landscape evolves. It will probably take IHS several months to issue a decision denying the claim. At that point, a second statute of limitations in the CDA gives the Tribe one year from receiving the decision to decide whether to challenge the IHS decision in federal court.⁶ If court rulings are unfavorable, the Tribe could elect to drop the claim. If the courts remain split, as seems likely, it may be possible to challenge the IHS decision in court, but seek a stay pending resolution of the issue in the appeals courts and possibly the Supreme Court.

Could the Claims Expire If Not Filed Soon?

As noted above, the CDA has a six-year statute of limitations. Claims accrue at the end of the fiscal year in question, so if you are on a federal fiscal year schedule, your oldest viable claim would be for FY 2016 and it would be due by September 30, 2022. Tribes on a calendar-year schedule could still file for 2016 through December 31, 2022. For later claims, the timing is not pressing and you could file now or wait to see how the litigation on this issue plays out over the coming year before facing the same deadlines for 2017 claims in 2023.

Conclusion

We hope this helps your Tribe or tribal organization evaluate its options with respect to these potential claims. If you have any questions about this memorandum, please do not hesitate to contact Joe Webster (at jwebster@hobbsstrauss.com or 202-822-8282), Geoff Strommer (at gstrommer@hobbsstrauss.com or 503-242-1745), or Steve Osborne (at sosborne@hobbsstrauss.com or 503-242-1745).

⁶ Alternatively, the Tribe can appeal the decision in the Civilian Board of Contract Appeals within 90 days. 41 U.S.C. § 7104(a).