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MEMORANDUM

TO: TERRANCE PARKS, CHIEF, DIVISION OF SELF-
DETERMINATION, BIA

FROM: C. BRYANT ROGERS, ESQ.

DATE: OCTOBER 25, 2010

RE: CRITERIA THAT MUST BE SATISFIED IN ORDER FOR A
TRIBALLY-OPERATED SCHOOL FUNDED UNDER 25
U.S.C. § 2001 *ET SEQ.* (WITH ISEF MONEY) TO BE
ELIGIBLE TO RECEIVE INDIRECT COST UNDER THE
1992 CHOCTAW DECISION

You have requested that we provide a checklist of criteria that must be satisfied in order for a tribally-operated school funded under 25 U.S.C. § 2001 *et seq.* (with ISEF money) to be eligible to receive indirect cost under the 1992 Choctaw Decision in addition to whatever is provided under the administrative cost grant funding authorized in 25 U.S.C. § 2008. The 1992 Choctaw Decision interpreted and applied the law as originally enacted at § 5(f) of Pub. L. 101-301, initially codified at 25 U.S.C. § 2008a(d)(4) and later re-codified at 25 U.S.C. § 2008(4)(d). A copy of the 1992 Choctaw Decision is attached as Exhibit A. See, Part II of that Decision.

There are two levels to the inquiry required to determine which tribally-operated schools are eligible for add-on indirect costs under the Choctaw Decision. There is a current inquiry and a past inquiry.

I.—The Past Inquiry

The past inquiry requires a determination of whether the tribe or tribal organization was eligible to receive add-on indirect cost under the Choctaw Decision for either fiscal year 2003 or fiscal year 2004 and whether it

EXHIBIT

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actually received indirect cost add-on funds from DOI pursuant to that decision for FY 2003 or FY 2004. This requirement is set out in the Administrative Provisions for the BIA in the FY 2010 Interior Appropriations Act, P.L. 111-88, Act of October 30, 2009, 123 Stat. 2903, page 2919 (excerpt attached as Exhibit B) of the FY 2010 Interior Appropriations Act. The same language has appeared in the Interior Appropriations Act every year since fiscal year 2004. That language provides:

Notwithstanding any other provision of law, including section 113 of title I of appendix C of Public Law 106-113, if in fiscal year 2003 or 2004 a grantee received indirect and administrative costs pursuant to a distribution formula based on section 5(f) of Public Law 101-301, the Secretary shall continue to distribute indirect and administrative cost funds to such grantee using the section 5(f) distribution formula. (*Department of the Interior, Environment, and Related Agencies Appropriations Act, 2009*).

The § 5(f), P.L. 101-301 reference is to the form of the portion of ISEF statute which addressed this issue as it was codified at 25 U.S.C. § 2008(d)(4) from the early 1990s until it was amended in 2002, as now reflected at U.S.C. § 2008(h). The 2008(h) language has subsequently been superseded by the Appropriations Act language quoted above.

The quoted language basically means that if a tribe or tribal organization was eligible for and received money under the old 1992 Choctaw Decision per § 5(f) of P.L. 101-301 for FY 2003 or 2004 (based on the same four criteria as set out below for the current inquiry), then that entity will still be eligible to receive that money in any later fiscal year if it otherwise satisfies the relevant criteria for that fiscal year.

II.—The Current Inquiry

The current inquiry that is required after ascertaining whether the school in question satisfies the same test in fiscal year 2003 or fiscal year 2004 and actually received add-on indirect cost money for those years from DOI is the following:

1. The tribe or tribal organization must have an NBC approved negotiated indirect cost rate.
2. The tribe or tribal organization must simultaneously be operating an ISEF funded school program under 25 U.S.C. § 2001 *et seq.* and one or more BIA Pub. L. 93-638 (non-ISEF) contract or grant programs.

3. The negotiated indirect cost rate must, when applied to the ISEF funding base (after appropriate exclusions and pass-throughs), generate more money than is generated under the statutory Administrative Cost Grant formula. This portion of the test is captured at columns H and I of the Choctaw Decision template used by DOI to do last year's CSC shortfall report.

4. If the Administrative Cost Grant amount exceeds the amount that would be generated by the IDC rate then the Choctaw Decision does not apply and the school is not eligible for add-on indirect cost from DOI. This is true even though the DOI does not pay the full amount of Administrative Cost Grant need shown in column I. This is a peculiarity of the 1992 Choctaw Decision and results from the fact that 25 U.S.C. § 2008(j)(2)(formerly 25 U.S.C. § 2008)g)(2)) *et seq.* makes clear that the government has no contract obligation to fund any portion of a school's ISEF program need or Administrative Cost Grant need beyond the amount supported by an actual appropriation of Congress.

Thus, last year while a particular tribe or tribal organization may have shown an Administrative Cost Grant need under the current formula of \$100,000, since DOI was only paying 61.4% of that AC grant need, the schools are being short changed by almost 40%. However, the government gets credit in the Choctaw Decision formula for paying 100% of the Administrative Cost Grant need and that's why the comparison is not between the amount that would be generated by the indirect cost rate as compared to the amount of administrative cost grant money paid, but is between the 100% of the administrative cost grant need *versus* the indirect cost generated amount. The application of this rule is also addressed at Part II of the 1992 Choctaw Decision.

If the tribe or tribal organization meets the criteria set out in ¶¶ 1-4 above, and it was eligible under the past inquiry, then it will be entitled (for any fiscal year for which these criteria are satisfied) to share in the BIA's CSC (IDC) distribution and to be shown as suffering shortfalls in indirect cost to the extent the indirect cost was not fully paid. The Choctaw schools do not get DCSC in addition to the indirect cost. I think the theory for this is that the administrative cost grant is supposed to cover the kinds of things that the DCSC funding covers for non-school '638 contractors.

III.

Another point. In applying the above rules, it does not matter if the school is operating as a tribally-controlled grant school under Pub. L. 100-297 (25

U.S.C. § 2501 *et seq.*) or as a Pub. L. 93-638 contractor (under 25 U.S.C. § 450 *et seq.*) because the funding mechanism for schools does not vary with whether they operate as a grant school or a contract school. In both cases, the ISEF and Administrative Cost Grant calculation is done under 25 U.S.C. § 2001 *et seq.* and the Choctaw Decision applies equally to grant schools and contract schools.

CBR/jt

Enclosures: as indicated

Cc: BIA CSC Workgroup

S:\Rogers\Tribal Checkllst Memo 102510.doc



IN REPLY REFER TO:

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS

EASTERN AREA OFFICE

Suite 200

3701 North Fairfax Drive

Arlington, Virginia 22203



SEP 18 1992

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Phillip Martin, Chairman
Mississippi Band of Choctaw Indians
Choctaw Branch
P. O. BOX 6010
Philadelphia, Mississippi 39350

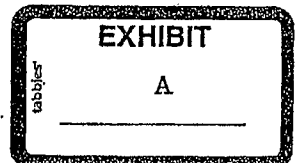
Re: Contracting Officer's Final Decision: CTS78T98001;
CTS78T98002; CTS78T98003; CTS78T98004; CTS78T98005;
CTS78T98006; CTS78T98007; CTS78T98008; CTS78T98009;
CTS78T98010; CTS78T98011; CTS78T98012; CTS78T98013;
CTS78T98014; CTS78T95022; CTS500021; CTS500219;
CTS78T98001; CTS78T98017; CTS78T98019

Dear Mr. Martin:

Reference is made to the claims filed on April 3, 1992 and April 29, 1992 under the Contract Disputes Act.

In the April 3, 1992, claim, the Mississippi Band of Choctaw Indians (MBCI) seeks from the Bureau of Indian Affairs (BIA) Indirect Costs in the amount of \$827,460.00 allegedly under-recovered by MBCI in operating U.S. Department of Labor (DOL) Jobs Training Partnership Act and the U.S. Department of Health and Human Services Head Start programs. In the April 29, 1992, claim, MBCI seeks the amount by which indirect costs theoretically recoverable for the operation of BIA funded grant schools exceed the administrative cost grant funding actually received for those programs. MBCI calculates the difference to be \$3,196,776.00.

These claims dispute action or non-action with respect to the above-referenced contract numbers, all administered by the Mississippi Band of Choctaw Indians under Indian Self-Determination and Education Assistance Act (P.L. 91-618 or "Self-Determination Act") contracts. As noted, the JTPA and Head Start programs are not BIA programs and are not included among the referenced BIA contracts. The two claims submitted by MBCI are consolidated into this Final Decision.



I. April 3, 1992 Claim: Reimbursement of Indirect Cost Shortfalls Occurring on Non-BIA Programs

This addresses the first of two claims submitted by the MCCI. By letter dated April, 1992 (Exhibit A), the MCCI has requested payment of \$827,460.00 for claimed under-recovery of indirect costs under various Jobs Training Partnership Act (JTPA) and Head Start programs administered by MCCI during fiscal years 1989 through 1992. The programs were not originated by BIA, but funded, respectively, by the Department of Labor (DOL) and the Department of Health and Human Services (HHS). While the April 3, 1992 claim letter was not properly certified under the Contract Disputes Act, it was later resubmitted with proper certification by letter of May 7, 1992 (Exhibit D) and may, therefore, be considered.

The issue for consideration is whether, under the Self-Determination Act (P.L. 93-539, as amended), the BIA is required to pay MCCI the difference between (a) the actual indirect cost dollars paid by DOL and HHS under JTPA and Head Start and (b) the indirect cost rate that MCCI negotiated with the Interior Office of the Inspector General. With its claim, MCCI has provided a table (see below) that shows (a) indirect cost dollars allegedly received under JTPA and Head Start for 1989-1992, inclusive, (b) the amounts that MCCI allegedly would have received in each year based upon the negotiated indirect cost rate, and, finally, (c) the cumulative difference between the figures.

Year/ PROGRAM	Direct Only	Indirect Received	Rate	Add'l To Rate	Difference
Fiscal '89					
JTPA	\$251,363	\$31,803	29.22	\$ 79,454	\$ 41,652
Head Start	629,202	10,000	29.22	183,853	173,853
Fiscal '90					
JTPA	224,029	24,196	27.11	60,734	36,539
Head Start	734,699	10,000	27.11	199,177	189,177
Fiscal '91					
JTPA	277,142	47,093	26.78	74,219	27,126
Head Start	662,639	10,000	26.78	177,454	167,454
Fiscal '92					
JTPA	266,095	38,400	26.78	71,260	32,960
Head Start	626,945	10,000	26.78	168,699	158,699
Total JTPA				138,277	
Total Head Start				689,183	
TOTAL				\$827,460	\$827,460

A salient portion of MBCI's claim for recovery is as follows:

This claim is based on 25 U.S.C. 450j-1, which requires the BIA to pay necessary and reasonable overhead costs, also known as indirect costs . . . associated with [P.L. 93-638] contracts, including the costs to operate ancillary or supplementary programs funded by other federal agencies to the extent these other agencies do not fully reimburse such costs.

See Exhibit A, pp. 1-2 (emphasis supplied).

In support of its claim, MBCI cites 25 U.S.C. § 450j-1 (P.L. 93-638, § 106, as added by P.L. 100-472, Title II, § 205, October 5, 1988, as amended). MBCI does not cite any specific language, but relies only generally on the "1988 amendments."

Section 450j-1(d) (2) provides that nothing in that subsection (i.e., 450j 1(d)) should be read "to authorize the Secretary to fund less than the full amount of need for indirect costs associated with a self-determination contract." That language, however, appears solely in the context of subsection 450j-1(d)(1), which states that where tribes have in the past actually received lower indirect cost recovery than permitted from federal, state, or other agencies, this shall not form the basis for adverse adjustments in future years. Thus, the statement of 450j-1(d)(2) must be taken in that limited context.

In sum, 450j-1 does not anywhere create a BIA obligation to fund a shortfall in, or created by, other non-BIA programs. Furthermore, MBCI has neither alleged nor demonstrated that JTPA and Head Start are "self-determination contract" programs. Section 450j-1(d)(2) only applies to such programs. MBCI strains the meaning of the relevant law when it argues that BIA is responsible for possible adverse effects on BIA programs caused by the actions of separate, unrelated Federal agencies. If Congress had intended BIA to indemnify every tribe in such a manner, it certainly would have so specified.

Therefore, I conclude that there is nothing in the Self-Determination Act, as amended, that creates an obligation on the part of BIA to reimburse any under-recovery resulting from the actions of other agencies with respect to non-BIA programs. I also find that BIA is not required to attempt to collect from HHS or DOL any past or prospective indirect cost shortfall. Therefore, I deny this claim in its entirety.

II. April 29, 1992 Claim: Costs Associated with the Operation of the Grant School

Regarding the second claim in the letter of April 29, 1992, for indirect costs on BIA programs, the issue for consideration is whether P.L. 101-301, which amends the administrative costs grant formula provision in 25 U.S.C. § 2008a(d), permits MBCI to receive negotiated indirect costs over and above administrative cost grant funding actually received for its school program. MBCI receives funds for administrative costs involved in the operation of a tribal grant school and also operates other P.L. 93-638 contracts.

MBCI states in its letter of April 29, 1992, (Exhibit B) that

The Tribe has for many years operated a variety of BIA-funded programs under contract with BIA and has routinely qualified for contract support funds for these programs, calculated pursuant to its negotiated indirect cost rate.

In P.L. 100-297, enacted in 1988, Congress established [Administrative Cost] Grants for schools operated by tribes ... through a P.L. 93-638 contract or a School Grant from BIA. The law (25 U.S.C. § 2008a) sets out a formula to calculate the amount of the A.C. Grant to be provided to the contractor/grantee each year. * * *

Soon thereafter, Congress became aware that tribes and tribal organizations who operate school and non-school programs could experience an unintended shortage of funds for indirect/administrative costs through application of the Administrative Cost Grant formula. * * *

Therefore, in P.L. 101-301, Congress amended the A.C. Grant provision by adding paragraph (4) to 25 U.S.C. § 2008a(d).

MBCI then specifically cites the language contained in 25 U.S.C. § 1008a(d)(4), as added by amendments contained in P.L. 101-301.

Subsection 2008a(d)(4) provides as follows:

In applying this section and section 106 of the Indian Self-Determination and Education Assistance Act [25 U.S.C. § 450j-1] with respect to an Indian tribe or tribal organization that --

(A) receives funds under this section for administrative costs incurred in operating a contract school or a school operated under the Tribally Controlled Schools Act of 1988, and

(B) operates one or more other programs under a contract or grant provided under the Indian Self-Determination and Education Assistance Act, the Secretary shall ensure that the Indian tribe or tribal organization is provided with the full amount of the administrative costs, and of the indirect costs, that are associated with operating the contract school, a school operated under the Tribally Controlled Schools Act of 1988, and all of such other programs, except that funds appropriated for implementation of this section shall be used only to supply the amount of the grant required to be provided by this section.

After citing the amended language, MRCY concludes:

This provision requires BIA to provide the full amount of indirect and administrative costs of a multi-program contractor. Appropriations for Administrative Cost Grants . . . shall be used to pay the A.C. Grant amount determined by formula only. Therefore, the Secretary must look to the other part of the BIA budget -- Contract Support Funds -- to pay the portion of the multi-program contractor's administrative and indirect costs not covered by its A.C. Grant.

A review of the accompanying Senate Report No. 101-226, page 200, (Exhibit I) provides additional explanation of the above quoted amendments. That language, set out in full, is as follows:

The amendment is necessary to clear up confusion caused by the administrative cost grant provision (25 U.S.C. 1128A) [sic] regarding multi-programs and other programs. Two tribes, Ramah-Navajo and Mississippi Choctaw has had difficulty in getting agreements with the BIA to fund all of their indirect cost needs on both their school and non-school programs. The amendment instructs the Secretary of the Interior to interpret 1128A and section 105 of the Indian Self-Determination Act to assure that the indirect costs of multi-programs are fully covered.

(Probably meant to refer to 25 U.S.C. § 1002A.)

A reading of the statutory language and its legislative history supports my finding that MBCI should receive full indirect cost funding for the operation of the grant school, but subject to availability of funds and subject to the following limitations:

The additional indirect cost amount the tribe is to receive is -

(a) the amount computed through application of the indirect cost rate applicable to MBCI's school program for the years in question.

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(b) 100% of the amount obtained through application of the administrative cost grant formula to MBCI's school program for the years in question.

That is, even for those years where less than full administrative cost grant funding was available (i.e., 1991-92 and 1992-93), it is appropriate to credit MBCI with receipt of 100% of the grant amount for purposes of this calculation. This ensures equitable treatment of all education contractors.

MBCI has received administrative cost grant funds from the Office of Indian Education Programs' (OIEP) for the fiscal years listed in the table on the next page.

See Next Page for Table

MISSISSIPPI BAND OF CHOCTAW INDIANS
 EDUCATION INDIRECT COST UNDER-RECOVERY
 FISCAL YEAR 1990/91/92

FY 1990 Education Fund Expended	\$7,971,925	
Less Funds excluded from Indirect Cost	<u>1,177,738</u>	
= Applicable Direct Costs	6,594,187	
Times FY 1990 Negotiated Provisional Rate	X 27.11	
= Applicable Direct Costs	<u>1,787,634</u>	
Less: 100% Administrative Cost Grant	<u>-828,570</u>	
= UNDER RECOVERY	929,114	
FY 1991 Education Fund Expended	\$9,122,412	
Less Funds excluded from Indirect Cost	<u>1,585,296</u>	
= Applicable Direct Costs	7,537,116	
Times FY 1991 Negotiated Provisional Rate	X 26.78	
= Applicable Direct Costs	<u>2,018,440</u>	
Less: 100% Administrative Cost Grant	<u>-1,001,596</u>	
= UNDER RECOVERY	1,016,844	
FY 1992 Education Fund Expended	\$7,414,287	
Less Funds excluded from Indirect Cost	<u>958,152</u>	
= Applicable Direct Costs	6,457,929	
Times FY 1992 Negotiated Provisional Rate	X 25.78	
= Applicable Direct Costs	<u>1,729,433</u>	
Less: 100% Administrative Cost Grant	<u>-575,646</u>	
= UNDER RECOVERY	1,153,787	
* TOTAL UNDER RECOVERY - FY 1990		\$ 929,114
** AUDITED UNDER RECOVERY - FY 1991		1,016,844
*** ESTIMATED UNDER RECOVERY - FY 1992		<u>1,153,787</u>
GRAND TOTAL		<u>\$3,099,745</u>

*Fiscal Year 1990 expenditures are final audited figures which may have been different on prior correspondence.

**Fiscal Year 1991 and 1992 are still only estimates and will not be final until after audits have been completed.

Accordingly, I hereby find that the MSCI may recover additional indirect costs in the total amount of \$2,699,745.00 for SIA programs associated with the operation of the grant school, subject to the availability of funds. This decision shall be forwarded through the Area Director, for transmission to the SIA central office for concurrence on the funding requested. When the funding becomes available to pay on the MSCI claim, the contracting officer must be notified so that the appropriate contracts affected will be amended to conform to this decision and to the final negotiated indirect cost rate agreements. In the interim the contracting officer and MSCI will share contract data, funding histories, and indirect cost related data to assist in reconciliation of the amounts claimed.

This is the final decision of the contracting office on both MSCI claims for indirect costs as individually discussed above. You may appeal these decisions to the Interior Board of Contract Appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or, otherwise, furnish written notice to the Board of Contract Appeals and provide a copy to the contracting officer from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, reference one or both of these decisions, as applicable, and identify the contract(s) by number. Instead of appealing to the Board of Contract Appeals, you may bring action in the U.S. Claims Court or the United States District Court within 12 months of the date you receive this decision.

Sincerely,

Agnes Barney

Agnes Barney
Contracting Officer
Warrant No. 1420-4171-0793

CONCUR: *[Signature]*
Chief, Contracts and Grants Administration

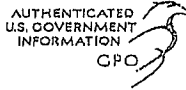
DATE: 8-18-92

CONCUR: *[Signature]*
Director, Eastern Area Office

DATE: 9-18-92

LIST OF EXHIBITS

- A. 04/03/92 - MBCI letter to BIA for claim in amount of \$827,460.00.
- B. 04/29/92 - MBCI letter to BIA for claim of \$3,196,776.
- C. 01/22/92 - MBCI letter to BIA Office of Education re claim for \$2,706,925 (see Exhibit E).
- D. 03/07/92 - MBCI letter to BIA with proper certification for 04/03/92 claim.
- E. 06/01/92 - Contracting Officer letter to MBCI regarding additional time to decide claim for \$3,196,776.
- F. 06/01/92 - Contracting Officer letter to MBCI regarding additional time to decide claim for \$827,460.
- G. 06/26/92 - MBCI request for a decision by Contracting Officer re claim for \$827,460.
- H. 07/15/92 - BIA response to MBCI.
- I. Copy of Senate Report No. 101-226, page 200.



PUBLIC LAW 111-88—OCT. 30, 2009

INTERIOR DEPARTMENT AND FURTHER
CONTINUING APPROPRIATIONS,
FISCAL YEAR 2010

