

Federal Register

Wednesday
January 24, 1996

Part III

**Department of the
Interior**

Bureau of Indian Affairs

**Department of
Health and Human
Services**

Indian Health Service

25 CFR Chapter V and Part 900
Indian Self-Determination and Education
Assistance Act Amendments; Proposed
Rule

DEPARTMENT OF THE INTERIOR**Bureau of Indian Affairs****DEPARTMENT OF HEALTH AND HUMAN SERVICES****Indian Health Service****25 CFR Chapter V and Part 900**

RINs 1076-AC20; 0905-AC98

Indian Self-Determination and Education Assistance Act Amendments

AGENCIES: Bureau of Indian Affairs, Indian Health Service, Departments of the Interior and Health and Human Services.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretaries of the Department of Interior (DOI) and the Department of Health and Human Services (DHHS) propose a joint rule to implement section 107 of the Indian Self-Determination Act, as amended, including Title I, Public Law 103-413, the Indian Self-Determination Contract Reform Act of 1994. A joint rule, as required by section 107(a)(2)(A)(ii) of the Act, will permit the Departments to award contracts and grants to Indian tribes without the unnecessary burden or confusion associated with having two sets of rules for single program legislation. In section 107(a)(1) of the Act Congress delegated to the Departments limited legislative rulemaking authority in certain specified subject matter areas, and the joint rule addresses only those specific areas. As required by section 107(d) of the Act, the Departments have developed this proposed rule with active tribal participation, using the guidance of the Negotiated Rulemaking Act.

DATES: Comments must be submitted on or before March 25, 1996. We will send copies of this notice of proposed rulemaking (NPRM) to each tribe. We especially invite comments from individual tribes, tribal members and tribal organizations.

ADDRESSES: Written comments to these rules may be sent to Betty J. Penn, Indian Self-Determination Amendments Regulations Comments, Indian Health Service, Room 6-34, 5600 Fishers Lane, Parklawn Building, Rockville, MD 20857. Comments will be made available for public inspection at this address from 8:30 a.m. to 5:00 p.m., Monday through Friday beginning approximately 2 weeks after publication. Comments will also be available for public inspection at the

Department of the Interior, Room 4627, Main Interior Building, 1849 C Street NW, Washington, DC 20240. These comments will be available at the same time as in Rockville.

FOR FURTHER INFORMATION CONTACT:

James Thomas, Division of Self-Determination Services, Bureau of Indian Affairs, Department of the Interior, Room 4627, 1849 C Street N.W., Washington, DC 20240, Telephone (202) 208-3708 or Merry Elrod, Division of Self-Determination Services, Office of Tribal Activities, Indian Health Service, Room 6A-19, 5600 Fishers Lane, Parklawn Building, Rockville, MD 20857, Telephone (301) 443-6840/1104/1044.

SUPPLEMENTARY INFORMATION: The 1975 Indian Self-Determination and Education Assistance Act gave tribes the authority to contract with the Federal government to operate programs serving their tribal members and other eligible persons. The Act was further amended by the Technical Assistance Act and other Acts, Public Law 98-250; Public Law 100-202; Interior Appropriations Act for Fiscal Year 1988, Public Law 100-446; Indian Self-Determination and Education Assistance Act Amendments of 1988, Public Law 100-472; Indian Reorganization Act Amendments of 1988, Public Law 100-581; miscellaneous Indian Law Amendments, Public Law 101-301; Public Law 101-512; Indian Self-Determination and Education Assistance Act Amendments of 1990, Public Law 101-644; Public Law 102-184; Public Law 103-138; Indian Self-Determination Act Amendments of 1994, Public Law 103-413; and Public Law 103-435. Of these, the most significant were Public Law 100-472 (the 1988 Amendments) and Public Law 103-413 (the 1994 Amendments).

The 1988 Amendments substantially revised the Act in order "to increase tribal participation in the management of Federal Indian programs and to help ensure long-term financial stability for tribally-run programs." Senate Report 100-274 at 2. The 1988 Amendments were also "intended to remove many of the administrative and practical barriers that seem to persist under the Indian Self-Determination Act." *Id.* at 2. In fashioning the amendments, Congress directed that the two Departments develop implementing regulations over a 10-month period with the active participation of tribes and tribal organizations. In this regard, Congress delegated to the Departments broad legislative rulemaking authority.

Initially the two Departments worked closely with tribes and tribal

organizations to develop new implementing regulations, culminating in a joint compromise September 1990 draft regulation reflecting substantial tribal input. Thereafter, however, the two Departments continued work on the draft regulation without any further tribal input. The revised proposed regulation was completed under the previous administration, and the current administration published the proposed regulation (NPRM) for public comment on January 20, 1994, at 59 FR 3166. In so doing, the current administration expressed its concern over the absence of tribal participation in the regulation drafting process in the years following August 1990, and invited tribes to closely review the NPRM for possible revisions.

Tribal reaction to the January 1994 proposed regulation was extremely critical. Tribes, tribal organizations, and national Indian organizations criticized both the content of the NPRM and its length, running over 80 pages in the Federal Register. To address tribal concerns in revising the proposed regulations into final form, the Departments committed to establish a Federal advisory committee that would include at least 48 tribal representatives from throughout the country, and be jointly funded by the two Departments.

In the meantime, Congress renewed its examination into the regulation drafting process, and the extent to which events since the 1988 amendments, including the lengthy and controversial regulation development process, justified revisiting the Act anew. This Congressional review eventually led to the October 1994 amendments. (Similar efforts by tribal representatives to secure amendments to the Act in response to the developing regulations had been considered by Congress in 1990 and 1992.)

The 1994 amendments comprehensively revisit almost every section of the original Act, including amending the Act to override certain provisions in the January 1994 NPRM. Most importantly for this new NPRM, the 1994 amendments also remove Congress' prior delegation to the Departments of general legislative rulemaking authority. Instead, the Departments' authority is strictly limited to certain areas, a change explained in the Senate report that accompanied the final version of the bill:

Section 105 of the bill addresses the Secretaries' authority to promulgate interpretative regulations in carrying out the mandates of the Act. It amends section 107 (a) and (b) of the Act by limiting the delegated authorization of the Secretaries to

promulgate regulations. This action is a direct result of the failure of the Secretaries to respond promptly and appropriately to the comprehensive amendments developed by this committee six years ago.

* * * * *

Section 105(l) amends § 107(a) by delegating to the Secretary the authority only to promulgate implementing regulations in certain limited subject matter areas. By and large these areas correspond to the areas of concern identified by the Departments in testimony and in discussions. Beyond the areas specified in subsection (a) * * * no further delegated authority is conferred.

Sen. Rep. No. 103-374 at 14. For this reason, the new NPRM covers substantially fewer topics than the January 1994 NPRM. As specified by Congress, the new NPRM is limited to regulations relating to chapter 171 of title 28 of the United States Code, commonly known as the "Federal Tort Claims Act;" the Contract Disputes Act of 1978 (41 U.S.C. 601 *et seq.*); declination and waiver procedures; appeal procedures; reassumption procedures; discretionary grant procedures for grants awarded under section 103 of the Act; property donation procedures arising under section 105(f) of the Act; internal agency procedures relating to the implementation of this Act; retrocession and tribal organization relinquishment procedures; contract proposal contents; conflicts of interest; construction; programmatic reports and data requirements; procurement standards; property management standards; and financial management standards. All but two of these permitted regulatory topics—discretionary grant procedures and tribal organization relinquishment procedures—are addressed in this NPRM.

The 1994 amendments also require that, if the Departments elect to promulgate regulations, the Departments must use the notice and comment procedures of the Administrative Procedure Act, and must promulgate the regulations as a single set of regulations in title 25 of the Code of Federal Regulations. Section 107(a)(2). Finally, the 1994 amendments require that any regulations must be developed with the direct participation of tribal representatives using as a guide the Negotiated Rulemaking Act of 1990. This latter requirement is also explained in the accompanying Senate Report:

To remain consistent with the original intent of the Act and to ensure that the input received from the tribes and tribal organizations in the regulation drafting process is not disregarded as has previously been the case, section 107 also has been amended by adding a new subsection (d),

requiring the Secretaries to employ the negotiated rulemaking process.

Sen. Rep. No. 103-374 at 14. As a result of the October 1994 amendments and earlier initiatives previously discussed, the Departments chartered a negotiated rulemaking committee under the Federal Advisory Committee Act. The committee's purpose is to develop regulations that implement amendments to the Act.

The committee has 63 members. Forty-eight of these members represent Tribes—two tribal members from each BIA area and two from each IHS area. Nine members are from the Department of the Interior and six members are from the Department of Health and Human Services. Additionally, four individuals from the Federal Mediation and Conciliation Service served as facilitators. The committee is co-chaired by four tribal representatives and two Federal representatives. While the committee is much larger than usually chartered under the Negotiated Rulemaking Act, its larger size was justified due to the diversity of tribal interests and programs available for contracting under the Act.

The committee agreed to operate based on consensus decisionmaking. The Departments committed to publish all consensus decisions as the proposed rule. The committee further agreed that any committee member or his/her constituents could comment on this proposed rule.

In order to complete the regulations within the statutory timeframe, the committee divided the areas subject to regulation among six working groups. The workgroups made recommendations to the committee on whether regulations in a particular area were desirable. If the committee agreed that regulations were desirable, the workgroups developed options for draft regulations. The workgroups presented their options to the full committee, where the committee discussed them and eventually developed the proposed regulations.

The first meeting of the committee was in April of 1995. At that meeting, the committee established six workgroups, a meeting schedule, and a protocol for deliberations. Between April and September of 1995, the committee met five times to discuss draft regulations produced by the workgroups. Each of these meetings generally lasted three days. Additionally, the workgroups met several more times between April and September to develop recommendations for the committee to consider.

The policy of the Departments is, whenever possible, to afford the public

an opportunity to participate in the rulemaking process. All of the sessions of the committee were announced in the Federal Register and were open to the public.

The Departments commend the ability of the committee to cooperate and develop a proposal that addresses the interests of the tribes and the Federal agencies. This negotiated rulemaking process is a model for developing successful Federal and tribal partnerships in other endeavors. The consensus process allowed for true bilateral negotiations between the Federal government and the tribes in the best spirit of the government-to-government relationship.

In developing regulatory language, full committee consensus was reached on the regulations which follow under subparts "A" through "P." In addition, at the request of tribal and Federal representatives, the Secretaries have agreed to propose and publish additional introductory materials under subpart "A." Where the full committee could not reach consensus as defined in its protocol, this preamble includes a brief description of the issue, along with the Federal and tribal positions when available. The public is invited to comment on these issues as well as on the proposed regulations.

Where the tribal position is stated it reflects dissatisfaction with proposed resolution of the issues by the Federal representatives and preference for alternative language as put forth by the tribes. Where the Federal position is stated, it represents the official views of the Departments, as expressed by the designated Federal officials. The paragraphs below address five areas of disagreement within the committee. The five areas are: internal agency procedures, confidentiality, conflicts of interest, and two areas of Secretarial policy.

Key Areas of Disagreement

Internal Agency Procedures

The tribal representatives of the negotiated rulemaking committee believe the Act requires that provisions concerning the internal procedures of the Departments of the Interior and Health and Human Services must be drafted by the negotiated rulemaking committee and should be included in the final regulation.

The tribal representatives' goal is to have uniform procedures among the Federal agencies for the implementation and interpretation of the Act and these regulations. Further, tribal representatives believe that, unless the internal agency procedures subpart is

included in these regulations, the Federal agencies may use internal agency procedures to limit the effect of the 1994 amendments of the Act.

Previously, in the House and Senate Reports that accompanied the final version of the 1994 bill each committee observed:

The recently promulgated proposed regulations severely undercut Congress' intent in the original Act and those amendments to liberalize the contracting process and to put these programs firmly in the hands of the tribes. The proposed January 1994 regulations erect a myriad of new barriers and restrictions upon contractors rather than simplifying the contracting process and freeing tribes from the yoke of excess Federal oversight and control.

Sen. Rep. No. 103-374 at 14; Cong. Rec. at H-11145 (daily ed. Oct. 6, 1994). Tribal representatives believe that internal agency procedures may be used in this same way again if allowed to be created outside the negotiated rulemaking process.

For purposes of soliciting comments the tribal representatives recommend the following regulation provision to address the issue of internal agency procedures:

Internal Agency Procedures

A. No internal agency procedure, policy, or other issuance which interprets the meaning or application of any provision of the Act or these regulations shall be binding upon an Indian tribe or tribal organization. Any such issuance shall instead:

(1) Fall within the specific area of delegated rulemaking authority specified in section 107(a) of the Act; and

(2) Be promulgated pursuant to the negotiated rulemaking and notice and comment procedures of the Act.

B. No issuance which fails to meet these criteria shall have any force or effect, or be binding on any tribe or tribal organization.

C. No internal agency procedure and no Departmental official or employee shall impose any requirements, limitation, or condition on any tribe or tribal organization relating to any matter arising under the Act. All such matters shall be governed exclusively by the Act and these regulations.

The Federal position is that a comprehensive manual for the internal management of self-determination contracts should not be developed through the formal rulemaking process. Internal agency procedures are more appropriately developed outside the negotiated rulemaking process, to allow flexibility in addressing practical considerations which arise in the field, and to allow maximum participation from those agency officials who bear much of the responsibility for implementing the Act to its fullest capability. The Federal position supports a joint tribal and Federal

commitment to work together to generate a procedural manual which will promote the purposes underlying the Act and facilitate contracting by Indian tribes and tribal organizations.

One goal of the full committee is to have uniform procedures for the implementation and interpretation of the act and these regulations which apply to all Federal agencies which administer contracted programs. The Federal members of the committee propose that the parties formally agree to work together to develop a manual which guides all contracting agencies through the contracting process. This is consistent with the position taken by the work group charged with making recommendations regarding internal agency procedures.

To that end, Federal committee members would commit to a firm time line within which to produce a manual. In addition, the Federal government would seek meaningful consultation throughout the development process from representatives of Indian tribes and tribal organizations.

Conflicts of Interest

The Federal negotiators feel strongly that regulatory provisions concerning conflicts of interest are needed, especially for the protection of allottees. The Federal proposal would address two types of conflicts: Conflicts of the tribe or tribal organization itself (an "organizational conflict") and conflicts of individual employees involved in trust resource management. The Secretary of the Interior owes a fiduciary duty to trust beneficiaries that cannot be compromised by contracting to rely on the recommendations and reports of persons with financial interests adverse to those of the trust beneficiary (the individual allotted Indian), whether the conflict be that of the tribe or that of an individual tribal employee.

With respect to organizational conflicts that become known after contract negotiation, the proposal would require the tribe to disclose the conflict and negotiate a means of avoiding, mitigating, or neutralizing the conflict. The conflict would be one between the tribe and individual Indians, one between the tribe and the United States, or one between the tribe and others relying on the work to be performed under the contract. The only conflicts that would be regulated would be those arising from the tribe/tribal organization's interests associated with land, resources, trust property, or rights of use, that could impair the objectivity of the tribe/tribal organization in performing the contract. The proposal

does not address organizational conflicts known to the Secretary at the time of contract approval. Those can and should be addressed in negotiation of the contract.

With respect to contracts for trust resource management, the proposal would require the tribe/tribal organization to adopt and enforce standards of conduct to prohibit officers, employees or agents (including subcontractors) from participating in the review of trust transactions with those nontribal entities in which they have a financial interest, employment, or competitive relationship. The standards would also prohibit acceptance of gratuities.

Contract provisions may be negotiated to take the place of the proposed regulation. The regulation is proposed to ensure that some provision will be made to avoid or mitigate conflicts, whether by rule or contract terms. Such provisions will permit the Secretary of the Interior to contract for work supportive of his trust management functions, and avoid the potential for breach of trust liability or the need to decline on grounds that "adequate protection of trust resources is not assured."

The Federal proposal is as follows:

A. *What is an organizational conflict?* An organizational conflict exists when your legal, financial, or resource use interests (arising from land, interests in land or resources, trust property, or rights of use) conflict with those of the United States or any person reliant on the work to be performed under the contract (including an Indian allottee). An organizational conflict only arises, however, when your interest is such that it may impair your objectivity in performing work under the contract.

B. *What must a tribe or tribal organization do if an organizational conflict arises under a contract?* You must disclose the conflict to the Secretary and propose a means of avoiding, mitigating, or neutralizing the conflict, if the conflict had not been known to the Secretary when the contract was negotiated. You must propose a means of avoiding, mitigating, or neutralizing the conflict (such as review of your work by a third party,) that is acceptable to the Secretary.

C. *What kinds of organizational conflicts must be addressed?* You must address conflicts between the tribe and the United States, such as when the tribe has a contract for realty services and a contaminant survey must be undertaken in connection with its request that the United States take land into trust. A conflict would exist because it would be in the tribe's interest for the United States to take the land into trust, despite the presence of contaminants, because liability for cleanup would be transferred to the United States as holder of legal title.

You must address conflicts between a tribe and individual trust beneficiaries. For

example, a tribe may hold a contract for real estate services, including appraisals. If the tribe seeks to buy or lease lands from an allottee, its performance of the appraisal of such allotted lands would present such a conflict. To fulfill its trust responsibility to the individual Indian landowner, the United States would expect the tribe to hire an independent appraiser to perform (or review) the appraisal.

The tribe may have conflicting interests with other persons who rely on its performance under the contract. For example, a cadastral survey may determine the boundaries between tribal lands and those of individual Indians, State governments, or private landowners. In that case, the survey should be reviewed by an independent third party to assure its objectivity.

D. When must the tribe or tribal organization regulate its employees or subcontractors to avoid a conflict of interest? You must maintain written standards of conduct to govern officers, employees, and agents (including subcontractors) engaged in functions related to the management of trust assets.

E. What must the Standards of Conduct prohibit or mitigate? The Standards must prohibit an officer, employee, or agent (including a subcontractor) from participating in the review, analysis, or inspection of trust transactions with a party in which such persons have a financial interest or an employment relationship, or those in direct competition with such a party. It must also prohibit such officers, employees, or agents from accepting any gratuity, favor, or anything of more than nominal value, from a party (other than the tribe) with an interest in the trust transactions under review. Such standards must also provide for sanctions or remedies of the violation of the standards.

F. What types of conflicts involving tribal employees or contractors would have to be regulated by the tribe? The tribe would need a tribally-adopted mechanism to ensure that no officer or employee reviews a trust transaction in which that person has a personal, financial, or employment interest that conflicts with that of the trust beneficiary, the tribe or allottee. For example, a tribal employee who works part-time for an oil company should not be assigned to inspect an oil and gas lease held by that oil company to assure absolute loyalty to the Indian beneficiary. For similar reasons, such an employee should not inspect the leases held by the oil company's competitors.

Similarly, a tribe which intends to subcontract the performance of trust-related functions should avoid awarding a contract for oil and gas royalty audits to an accounting firm that also derives revenue from the oil and gas companies being audited.

G. May a tribe elect to negotiate the contract provisions on conflict of interest to take the place of this regulation? Yes. A tribe and the Secretary may agree to contract provisions that address the conflict of interest issues specific to the program and activities contracted. Agreed-upon contract provisions shall be followed, rather than this regulation.

The tribal representatives of the negotiated rulemaking committee oppose the regulatory provisions presented by the Federal officials in the area of "conflict of interest," except those contained in § 900.48(6) (Procurement Management).

Throughout the meetings two other forms of "conflict of interest" regulations have been proposed: organizational conflicts of interest and personal conflicts of interest. The tribal position on each of these proposals is discussed below.

Organizational Conflicts of Interest

Tribal members are of the view that, while this issue has been discussed throughout the meetings, a clear and concise federal proposal has not been set forth.

The tribal representatives believe the effect of the Federal proposal is to shift Secretarial trust responsibilities to tribes through regulation without financial support for the undertaking. Further, for the nearly 20 years that self-determination contracting has occurred under the Act, no similar regulation has been needed.

Another concern of tribal representatives is that the Interior Department has no such provisions controlling its own activities and that examples of similar conflicts frequently occur within Federal operation of programs.

For these reasons, tribal representatives strongly believe that no regulation is necessary in this area of so-called organizational conflicts of interest.

Personal Conflicts of Interest

In this area, the Federal representatives seek to require that tribes and tribal organizations adopt internal procedures as a regulatory scheme to address conflicts of interest by their employees, agents, and officials when conducting transactions related to trust resources.

Tribal representatives are highly offended by the nature of the Federal proposal to dictate internal tribal operations through these regulations. Further, the Federal officials appear to presume that the procedures currently employed by tribes and tribal organizations are insufficient.

To the extent some form of regulation is needed in the area of personal conflicts of interest involving trust resource transactions, a revised version of § 900.48(b) might be explored and commented upon. Alternatively, tribal representatives propose that these conflicts of interest be subject to

negotiation of the parties in each contract.

Confidentiality

The Federal position is that a provision relating to the confidentiality of information obtained by Indian tribes and tribal organizations relating to trust resources needs to be included in this subpart, consistent with the Federal government's trust obligation to individual Indians to keep such information confidential. The following paragraph is proposed to address this issue:

A contractor shall hold confidential all information obtained from any person relating to the financial affairs of individual Indians, lessees, or permittees, and shall not release this information without the individual's consent or as otherwise required by law.

Tribal committee members note that tribes have long maintained their own confidentiality procedures. Tribal committee members believe the proposed Federal language is offensive, and an unnecessary issue to be regulated.

Secretarial Policy

The committee has not reached a consensus in two Secretarial policy areas.

First, the provision regarding Federal program guidelines, manuals, or policy directives is drawn largely from paragraph 1(b)(11) of the model contract in section 108(c) of the Act. Tribal committee members are of the view that the statutory provision is a non-exclusive list of the types of Federal documents or issuances that may not be imposed upon tribes, and point to the statement in the Senate and House reports that other "unpublished requirements" may not be imposed upon tribes. They therefore seek the addition of other similar documents such as "advisories, notices, letters, correspondence and reporting requirements." Federal representatives oppose adding any other items to the statutory list.

The Regulation does not include a provision advanced by tribal committee members that would adopt, as a Secretarial policy, the policy that Federal laws and regulations will be interpreted in a manner that will facilitate the inclusion of programs in contracts authorized by the Act. Tribal committee members view such a policy as within the Secretary's legal authority and consistent with the strong policy of the Act promoting tribal contracting activities.

Federal committee members are of the view such a policy may be contrary to

law and beyond the Secretary's authority, since the laws being interpreted may not necessarily be for the benefit of Indians, and since specific authority for such a provision is included in Titles III and IV (self-governance) of the Act, but not Title I.

Other areas of disagreement are noted in the summary of regulations below.

Summary of Regulations

The narrative below is keyed to specific subparts of the proposed rule.

Subpart A—Policy

This subpart contains key congressional policies contained in the Act and adds several Secretarial policies that will guide the Secretaries' implementation of the Act.

Subpart B—Definitions

Subpart B sets forth definitions for key terms used in the balance of the regulations. Terms unique to one subpart are generally defined in that subpart, rather than in subpart B.

Subpart C—Contract Proposal Contents

Subpart C contains provisions relating to initial contract proposal contents. In this area, the committee opted to have minimal regulations. The proposed regulation governing initial contract proposal contents essentially consists of a checklist of 13 items that must be addressed in a proposal. In addition, the proposed regulation contains a provision relating to the availability of technical assistance to assist Indian tribes and tribal organizations in preparing a contract proposal, and a provision relating to the identification of Federal property that the tribe or tribal organization intends to use during contract performance.

Subpart D—Review and Approval of Contract Proposals

Although this topic is part of the declination process, it has been pulled out for separate treatment to facilitate a clearer understanding of the entire contracting process. In this area, the committee opted to have minimal regulations. The proposed regulation governing review and approval of contract proposals details what the Secretary must do upon receiving a contract proposal, the time frames applicable to Secretarial review, how the 90-day review period can be extended, and what happens if a proposal is not declined within the 90-day period.

Subpart E—Declination Procedures

The proposed regulation governing declination procedures implements

Section 102 (a)(2), (a)(4), (b) and (d) of the Act. The proposed regulation restates the statutory grounds for declining a contract proposal, clarifies that a proposal cannot be declined based on any objection that will be overcome through the contract, and details procedures applicable for partial declinations. The proposed regulation also informs Indian tribes and tribal organizations of the requirements applicable to the Secretary when a declination finding is made, contains provisions for technical assistance to Indian tribes and tribal organizations to avoid a declination finding, and to overcome stated declination grounds after a declination finding is made.

The advisory committee did not reach consensus on how to address contract renewal proposals. Tribal representatives on the advisory committee proposed to exempt an Indian tribe's or tribal organization's contract renewal proposal from being subjected to declination if the renewal proposal is substantially similar to the Indian tribe's or tribal organization's prior contract. Tribal representatives are of the view that if the Secretary wishes to take back control of a program, the Secretary should follow the Act's "reassumption" procedures set forth in section 109 of the Act.

It is the Federal position that section 102(a)(2) of the Act was amended in 1994 to specifically subject contract renewal proposals to the declination criteria, and that nowhere in the Act, as amended, is there a specific declination exemption for contract renewal proposals that are substantially similar to an expiring contract.

With respect to the declination document disclosure provisions of § 900.27(c), tribal committee members are of the view the disclosure obligation should extend to documents that do not support the decision, in addition to documents that do. Federal committee members oppose such an expansion and note that, if an appeal is taken, such documents will eventually be produced in the discovery process.

Nothing in this regulation is intended to change the IHS's current practice of not reviewing the renewal of a term contract for declination issues where no material or significant changes to the scope or funding of a program, service, activity, or function has been proposed by the tribe or tribal organization.

Subpart F—Standards for Tribal or Tribal Organization Management Systems

Subpart F contains provisions relating to the following management standards: (1) Financial Management; (2)

Procurement Management and (3) Property Management. In all of these areas the advisory committee designed minimal regulations that focus on the minimum standards for the performance of the three management systems used by Indian tribes and tribal organizations when carrying out self-determination contracts.

In drafting subpart F, the committee reviewed OMB Circular A-102 and the Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments (the "common rule"). Following this review and analysis, the attached regulations were developed to implement the Act and best meet the needs of Indian tribes and tribal organizations. Central to the proposed regulation is a distinction between the standards that are the subject of this regulatory process, and the management system operations that implement those standards. The standards contained in this subpart are designed to be the targets which the Indian tribe's and tribal organization's management systems should be designed and implemented to meet. The management systems themselves are to be designed by the Indian tribe or tribal organization.

Section 900.36 contains general provisions which apply to all management system standards contained in this subpart. The proposed regulations include provisions that: (1) Identify the management systems that are addressed; (2) set forth the requirements imposed; (3) limit the applicability of OMB circulars; (4) provide that the Indian tribe or tribal organization has the option to impose these standards upon sub-contractors; (5) identify the difference between a standard and a system; and (6) specify when the management standards and management systems are evaluated.

Section 900.41 contains the minimum standards for financial management systems. The proposed regulations establish the minimum requirements for seven elements including: (1) Financial reports; (2) accounting records; (3) internal control; (4) budget control; (5) allowable costs; (6) source documentation and (7) cash management.

Section 900.47 contains the minimum standards for procurement management systems. The proposed regulations establish the minimum requirements for seven elements: (1) To ensure that vendors and sub-contractors perform in accordance with the terms of purchase orders or contracts; (2) to require the Indian tribe or tribal organization to maintain standards of conduct for employees award contracts to avoid any

conflict of interest; (3) to review proposed procurements to avoid buying unnecessary or duplicative items; (4) to provide full and open competition, to the extent feasible in the local area, subject to the Indian preference and tribal preference provisions of the Act; (5) to ensure that procurement awards are made only to entities that have the ability to perform consistent with the terms of the award; (6) to maintain records on significant history of all major procurements; and (7) to establish that the Indian tribe or tribal organization is solely responsible for processing and settling all contractual and administrative issues arising out of a procurement. In addition, the proposed regulation provides that each Indian tribe or tribal organization must establish its own small purchase threshold and definition of "major procurement transactions"; establish minimum requirements for sub-contract terms, and include a provision in its subcontracts that addresses the application of Federal laws, regulations and Executive Orders to subcontractors.

Section 900.52 contains the minimum requirements for property management systems. The proposed regulations address the standards for both Federally-titled property and property titled to an Indian tribe or tribal organization, with differences based upon who possesses title to the property. As a general rule the requirements for property where the Federal agency retains title are higher than requirements for property where the Indian tribe or tribal organization holds the title. The proposed regulation addresses elements including: (1) Property inventories; (2) maintenance of property; (3) differences in inventory and control requirements for property where the Federal agency retains title to the property; and (4) the disposal requirements for Federal property.

Subpart G—Programmatic Reports and Data Requirements

This brief subpart provides for the negotiation of all reporting and data requirements between the Indian tribe or tribal organization and the Secretary. Failure to reach an agreement on specific reporting and data requirements is subject to the declination process. Although the Indian Health Service proposes to develop a uniform data set, that data set will only be used as a guide for negotiation of specific requirements.

Subpart H—Lease of Tribally-Owned Buildings by the Secretary

Section 105(l) of the Act authorizes the Secretary to lease tribally-owned or tribally-leased facilities and allows for

the definition of "other reasonable expenses" to be determined by regulation. This subpart provides a non-exclusive list of cost elements that may be included as allowable costs under a lease between the Indian tribe or tribal organization and the Secretary. It further clarifies that except for "fair market rental," the same types of costs may be recovered as direct or indirect charges under a self-determination contract.

Subpart I—Property Donation Procedures

This subpart establishes procedures to implement section 105(f) of the Act. Section 900.85 provides a statement of the purpose of the subpart and explains that while the Secretary has discretion in the donation of excess and surplus property, "maximum" consideration must be given to an Indian tribe's or tribal organization's request.

This subpart also contains a provision for the Secretary to elect to reacquire property under specific conditions. It clarifies that certain property is eligible for operation and maintenance funding, as well as for replacement funding on the same basis as if title to the property were held by the United States.

Section 900.87 provides for the transfer of property used in connection with a self-determination contract. It provides slightly different procedures for personal property versus real property furnished before the effective date of the 1994 amendments and another procedure for property furnished after the enactment of the 1994 amendments.

Sections 900.91 and 900.92 address section 105(f)(2)(A) of the Act which provides that a tribal contractor automatically takes title to property acquired with contract funds unless an election is made not to do so. It also addresses the process for requesting that real property be placed "in trust."

Section 900.97 addresses BIA and IHS excess property donation while § 900.103 addresses excess or surplus property from other Agencies.

Subpart J—Construction Contracts

Subpart J addresses the process by which an Indian tribe or tribal organization may contract for construction activities or portions thereof. The subpart is intentionally written to inform readers of the breadth and scope of construction contracting activities conducted by the Departments, and provides opportunities for Indian tribes or tribal organizations to choose the degree to which they wish to participate in those activities. The subpart provides for extensive cooperation and sharing of

information between the Departments and an Indian tribe or tribal organization throughout the construction process. The subpart provides for different construction contracting methods, such as award of contracts through subpart J, award of contracts through section 108 of the Act, and award of grants in lieu of contracts depending on the degree of Federal involvement and the phase(s) of construction activities for which the Indian tribe or tribal organization seeks to contract.

The construction process is described in phases, starting with a preplanning phase, followed by a planning phase, a design phase, and a construction phase. Provisions are included so an Indian tribe or tribal organization can seek a contract through section 108 of the Act for the planning phase and for construction management services. It is not required that these functions be pursued through a section 108 contract, and if the Indian tribe or tribal organization so elects these activities can be part of a subpart J contract.

Definitions are provided that are specific to this subpart. The provisions contained in the subpart regarding construction management services provide an important participative process in construction activities for Indian tribes or tribal organizations that seek a voice in securing projects but do not wish to take upon themselves full responsibility for the entire construction process.

The subpart establishes new procedures to facilitate tribal contracting, through such measures as tribal notification, a tribal right of first refusal, and other provisions.

The subpart promotes the exploration of alternative contracting methods, and eliminates the applicability of the Federal acquisition regulations except as may be mutually agreed to by the parties.

The subpart describes the process for negotiating a construction contract, including the process for arriving at a fair and reasonable price, and details the process for resolving disagreements in the contracting process. The subpart also sets forth minimum requirements for contract proposals, and details the respective roles of tribes and the Secretary.

The subpart promotes tribal flexibility in several areas, including through periodic payments at least than quarterly, and the payment of contingency funds to be administered by the tribal contractor.

Subpart K—Waiver Procedures

The proposed regulation governing waiver procedures implements section 107(e) of the Act, which authorizes the Secretary to make exceptions to the regulations promulgated to implement the Act or to waive such regulations under certain circumstances. In addition section 107(e) of the Act provides that in reviewing waiver requests, the Secretary shall follow the time line, findings, assistance, hearing, and appeal procedures set forth in section 102 of the Act. The proposed regulation explains how an Indian tribe or tribal organization applies for a waiver, how the waiver request is processed, the applicable timeframes for approval or declination of waiver requests, and whether technical assistance is available. In addition, the proposed regulation restates the declination criteria of section 102 of the Act, which apply to waiver requests, and specifies that a denial of a waiver request is appealable under subpart L of these proposed regulations. Finally, the proposed regulation implements section 107(b) of the Act by providing a process for a determination by the Secretary that a law or regulation has been superseded by the provisions of the Indian Self-Determination Act, as amended.

Subpart L—Appeals (Other Than Emergency Reassumption and Suspension, Withholding or Delay in Payment)

The advisory committee decided to develop substantive regulations governing appeals of pre-award decisions by Federal officials. The proposed regulation does not govern appeals of post-award decisions subject to the Contract Disputes Act, since the provisions governing disputes under a contract can be found in subpart N of these proposed regulations. The proposed regulation governing pre-award appeals implements sections 102(b), 102(e), and 109 of the Act, as well as various other provisions requiring the Secretary to provide an administrative appeals process when making certain decisions under the Act. It provides a roadmap to the appeals process for Indian tribes and tribal organizations.

The proposed regulation is divided in two parts: Part I concerns appeals from decisions relating to declination of a proposal, an amendment of a proposal, or a program redesign; non-emergency reassumption decisions; decisions to refuse to waive regulations under section 107(e) of the Act; disagreements over reporting requirements; decisions relating to mature status conversions;

and a catchall provision relating to any other pre-award decisions except Freedom of Information Act appeals, and decisions relating to the award of discretionary grants under section 103 of the Act. Part II concerns decisions relating to emergency reassumptions under section 109 of the Act and decisions relating to suspension, withholding, or delay of payments under section 106(l) of the Act.

The proposed regulation allows for an informal conference to avoid more time-consuming and costly formal hearings, but delineates the appeal process available to Indian tribes and tribal organizations that are either unhappy with the results of the informal conference or who choose to bypass the informal process altogether. The proposed regulation also states that an Indian tribe or tribal organization may go directly to Federal district court rather than exhaust the administrative appeal process under this proposed regulation.

Under the proposed regulation, all appeals must be filed with the Interior Board of Indian Appeals. Hearings on the record are conducted by an Administrative Law Judge of the Department of the Interior's Office of Hearings and Appeals, Hearings Division, who renders a recommended decision. Objections to this recommended decision may be filed either with the Interior Board of Indian Appeals, if the case relates to a Department of the Interior decision, or with the Secretary of Health and Human Services, if the case relates to the Department of Health and Human Services.

Part II contains somewhat similar provisions concerning emergency reassumption and suspension decisions, but these decisions are treated separately because of the statutory requirement that a hearing on the record be held within ten days of the Secretary's notice to immediately rescind and reassume a program, or a notice of intent to suspend, withhold, or delay payment under a contract.

Subpart M—Federal Tort Claims Act Coverage

Coverage of the Federal Tort Claims Act (FTCA) has been extended to Indian tribes, tribal organizations and Indian contractors carrying out contracts, grants, and cooperative agreements under the Act. This subpart explains which tort claims are covered by the FTCA and which tort claims are not covered by the FTCA for both medical and non-medical related claims. It also provides for tribal assistance in giving notice of tort claims to the Federal

agency involved, and in providing assistance during the administrative claim or litigation process.

Subpart N—Post-Award Contract Disputes

Under section 110(d) of the Act, the Contract Disputes Act (CDA) applies to post-award contract claims. This subpart explains when a CDA claim can be filed; the contents of a claim; and where to file the claim. It also explains the difference in the handling of claims over \$100,000 and those less than that amount.

Subpart O—Retraction and Reassumption Procedures

Section 107(a)(1) of the Act authorizes the Secretaries to promulgate certain regulations governing retraction and reassumption procedures. Sections 900.230 through 900.234 define retraction, what entities are entitled to retrace, tribal rights for contracting and funding as a result of retraction, and tribal obligations regarding the return of property to the Secretary after retraction.

Sections 900.235 through 900.245 explain what is meant by reassumption, the two types of reassumption authorized under the Act, necessary circumstances when using emergency and non-emergency reassumption authority, and Secretarial responsibilities including detailed written notice requirements when reassumption is invoked. The subpart describes a number of activities after reassumption has been completed, such as authorization for "wind up" costs, tribal obligations regarding the return of property to the Secretary, and a funding reduction protection.

This rule is a significant regulatory action under Executive Order 12866 and requires review by the Office of Management and Budget.

The Departments certify that this rule will not have significant economic effects on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

In accordance with Executive Order 12630 the Department of the Interior and the Department of Health and Human Services have determined that this regulation does not have significant takings implications. The proposed rule does not pertain to the taking of private property interests, nor does it have an effect on private property.

The Department of the Interior and the Department of Health and Human Services have determined that this proposed rule does not have significant Federalism effects under Executive Order 12612 and will not interfere with

the roles, rights, and responsibilities of states.

The Departments of the Interior and Health and Human Services have determined that this rule does not constitute a major Federal action significantly affecting the quality of the human environment and that no detailed statement is required under the National Environmental Policy Act of 1969.

Paperwork Reduction Act of 1995

The information collection requirements contained in this proposed regulation have been negotiated between the Departments and tribal representatives through the negotiated rulemaking process. The sections of the regulations requiring the collection of information have been agreed to by the parties in the negotiation. The subparts summarized below contain information collection requirements. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507 (d)), the Departments of the Interior and Health and Human Services have submitted a copy of these sections to the Office of Management and Budget (OMB) for its review:

Subpart C—Contract Proposal Contents

Subpart C contains provisions relating to initial contract proposal contents. The proposed regulation governing initial contract proposal contents essentially consists of a checklist of 13 items that must be addressed in a proposal. These items include basic information about the respondent and program to be contracted, such as: name and address; authorizing resolution; date of submission of proposal; description of geographical service area; estimated number of Indian people to be served; brief statement of the program, functions, services or activities to be performed; description of the proposed program; financial, procurement, and property management standards; description of reports to be provided; staff qualifications, if any; budget information; and waiver information, if requested.

In addition, the proposed regulation contains a provision relating to the availability of technical assistance for Indian tribes and tribal organizations in preparing contract proposals and a provision relating to the identification of Federal property that the tribe or tribal organization intends to use during contract performance. The parties that would have to comply with the information collection requirements in these proposed regulations are tribal governments or tribal organizations authorized by tribal governments. The Departments need and will use the

information to determine eligibility of the applicant, evaluate applicant capabilities, protect the service population and safeguard Federal funds and other resources.

All information is to be collected and reported at the time a tribe makes initial application to contract a program. Annual reporting and recordkeeping burden for this collection of information is estimated to average 34 hours for each response for 50 respondents, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Thus, the total annual reporting and recordkeeping burden for this collection is estimated to be 1,700 hours.

Subpart G—Programmatic Reports and Data Requirements

Subpart G provides for the negotiation of all reporting and data requirements between the Indian tribe or tribal organization and the Secretary. The information collected is directly related to the operation of the program and will be negotiated on a contract by contract basis. The Departments need and will use the information to adequately monitor contract operations to determine if satisfactory services are being provided.

All information is to be collected and reported during the operation of the contract based on the terms negotiated in the contract. Annual reporting and recordkeeping burden for this collection of information is estimated to average 10 hours for each response for 500 respondents, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Thus, the total annual reporting and recordkeeping burden for this collection is estimated to be 5,000 hours.

Subpart I—Property Donation Procedures

Subpart I establishes procedures regarding donation of Federal excess and surplus property to tribes or tribal organizations and acquisition of property with funds provided under a self-determination contract. Two areas of this proposed subpart address the procedures to be followed when tribes or tribal organizations wish to acquire excess Bureau of Indian Affairs or Indian Health Service property, and excess or surplus government property from other agencies. The Departments need and use the information to determine what property the tribes want

to acquire and how the property will be used.

All information is to be collected and reported when a tribe applies for the identified property. Annual reporting and recordkeeping burden for this collection of information is estimated to average 8 hours for 100 respondents, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Thus, the total annual reporting and recordkeeping burden for this collection is estimated to be 800 hours.

Subpart J—Construction Contracts

Subpart J addresses the process by which an Indian tribe or tribal organization may contract for construction activities or portions thereof. The subpart requires the Indian tribe or tribal organization to submit descriptions of standards when proposing to contract a construction project. These standards include use of licensed and qualified architects and engineers; applicable health and safety standards; adherence to applicable Federal, state, local or tribal building codes and engineering standards; structural integrity; accountability of funds; adequate competition for subcontracting under tribal or other applicable law; the commencement, performance and completion of the contract; adherence to project plans and specifications (including any applicable Federal construction guidelines and manuals); the use of proper materials and workmanship; necessary inspection and testing; and a process for changes, modifications, stop work and termination of the work when warranted. In addition to the above, additional information is required when the tribe or tribal organization is proposing to contract design activities and construction activities.

The parties that would have to submit information under these proposed regulations are tribal governments or tribal organizations authorized by tribal governments. The Departments need and use the information to determine eligibility of the applicant, evaluate applicant capabilities, protect the service population and to safeguard Federal funds and other resources.

All information is to be collected and reported when a tribe makes initial application to contract a construction activity. Annual reporting and recordkeeping burden for this collection of information is estimated to average 80 hours for each response for 30 respondents, including the time for reviewing instructions, searching

existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Thus, the total annual reporting and recordkeeping burden for this collection is estimated to be 2,400.

Organizations and individuals who wish to submit comments on the information collection requirements should direct them to the Office of Information and Regulatory Affairs, OMB, Room 10235, New Executive Office Building, Washington, D.C. 20503; Attention: Interior Desk Officer.

The Departments consider comments by the public on these proposed collections of information in:

- Evaluating whether the proposed collections of information are necessary for the proper performance of the functions of the Department, including whether the information will have practical utility;
- Evaluating the accuracy of the Department's estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden or the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other forms of information technology, e.g., permitting electronic submission of responses.

OMB is required to make a decision concerning the collections of information contained in these proposed regulations between 30 and 60 days after publication of this document in the Federal Register. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment to the Departments on the proposed regulations.

This rule was drafted by a negotiated rulemaking committee that included representatives of the Departments of the Interior and Health and Human Services and of many tribes and tribal organizations.

List of Subjects in 25 CFR Part 900

Indians; Government contracts; Medical care; Construction; Government property management; financial management; Leasing; Tort claims; Appeals.

For the reasons given in the preamble, the Departments of the Interior and Health and Human Services propose to

establish a new chapter V in title 25 of the Code of Federal Regulations consisting of part 900 to read as set forth below.

Dated: December 5, 1995.

Bruce Babbitt,
Secretary of the Interior.

Dated: December 5, 1995.

Donna Shalala,
Secretary of Health and Human Services.

CHAPTER V—BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, AND INDIAN HEALTH SERVICE, DEPARTMENT OF HEALTH AND HUMAN SERVICES

PART 900—CONTRACTS UNDER THE INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

Sec.

Subpart A—General Provisions

- 900.1 Authority.
900.2 Purpose and scope.
900.3 Policy statements.
900.4 Effect on existing tribal rights.
900.5 Effect of these regulations on Federal program guidelines, manual, or policy directives.

Subpart B—Definitions.

- 900.6 Definitions.

Subpart C—Contract Proposal Contents

- 900.7 What technical assistance is available to assist in preparing an initial contract proposal?
900.8 What must an initial contract proposal contain?
900.9 May the Secretary require an Indian tribe or tribal organization to submit any other information beyond that identified in § 900.8(b)?
900.10 What should a tribe or tribal organization that is proposing a contract do about specifying the Federal property that the tribe or tribal organization may wish to use in carrying out the contract?
900.11 Are the proposal contents requirements the same for renewal of a contract that is expiring and for securing an annual funding agreement after the first year of the funding agreement?

Subpart D—Review and Approval of Contract Proposals

- 900.12 What does this subpart cover?
900.13 What shall the Secretary do upon receiving a proposal?
900.14 How long does the Secretary have to review and approve or decline a proposal?
900.15 Can the statutory 90-day period be extended?
900.16 What happens if a proposal is not declined within 90 days after it is received by the Secretary?

Subpart E—Declination Procedures

- 900.18 What does this subpart cover?
900.19 When can a proposal be declined?

- 900.20 For what reasons can the Secretary decline a proposal?
900.21 Can the Secretary decline a proposal where the Secretary's objection could be overcome through the contract?
900.22 Can a contract proposal for an Indian tribe's or tribal organization's share of administrative programs, functions, services, and activities be declined for any reason other than the five reasons specified above?
900.23 What if only a portion of a proposal raises one of the five declination criteria?
900.24 What happens if the Secretary declines a part of a proposal on the ground that the proposal proposes in part to plan, conduct, or administer a program, function, service or activity that is beyond the scope of programs covered under section 102(a) of the Act, or proposes a level of funding that is in excess of the applicable level determined under section 106(a) of the Act?
900.25 If an Indian tribe or tribal organization elects to contract for a severable portion of a proposal, does the Indian tribe or tribal organization lose its appeal rights to challenge the portion of the proposal that was declined?
900.26 Is technical assistance available to an Indian tribe or tribal organization to avoid declination of a proposal?
900.27 What is the Secretary required to do if the Secretary decides to decline all or a portion of a proposal?
900.28 When the Secretary declines all or a portion of a proposal, is the Secretary required to provide an Indian tribe or tribal organization with technical assistance?
900.29 When the Secretary declines all or a portion of a proposal, is an Indian tribe or tribal organization entitled to any appeal?
900.30 Can the Secretary decline an Indian tribe or tribal organization's proposed successor annual funding agreement?

Subpart F—Standards for Tribal or Tribal Organization Management Systems

General

- 900.35 What is the purpose of this subpart?
900.36 What requirements are imposed upon Indian tribes or tribal organizations by this subpart?
900.37 What provisions of Office of Management and Budget (OMB) circulars or the "common rule" apply to self-determination contracts?
900.38 Do these standards apply to the subcontractors of an Indian tribe or tribal organization carrying out a self-determination contract?
900.39 What is the difference between a standard and a system?
900.40 When are Indian tribe or tribal organization management standards and management systems evaluated?

Standards for Financial Management Systems

- 900.41 What are the general financial management system standards that apply to an Indian tribe or tribal organization carrying out a self-determination contract?
- 900.42 What are the general financial management system standards that apply to a tribal organization carrying out a self-determination contract?
- 900.43 What minimum general standards apply to all Indian tribe or tribal organization financial management systems when carrying out a self-determination contract?
- 900.44 What specific minimum requirements shall an Indian tribe or tribal organization financial management system contain to meet these standards?
- 900.45 What requirements are imposed upon the Secretary for financial management by these standards?

Procurement Management System Standards

- 900.46 When procuring property or services with self-determination contract funds, can an Indian tribe or tribal organization follow the same procurement policies and procedures applicable to other Indian tribe or tribal organization funds?
- 900.47 What procurement standards shall an Indian tribe or tribal organization have?
- 900.48 If the Indian tribe or tribal organization does not propose different standards, what are the basic standards that the Indian tribe or tribal organization shall follow?
- 900.49 What procurement standards apply to subcontracts?
- 900.50 What Federal laws, regulations, and Executive Orders apply to sub-contractors?

Property Management System Standards

- 900.51 What is an Indian tribe or tribal organization's property management system expected to do?
- 900.52 What type of property is the property management system required to track?
- 900.53 What kind of records shall the property management system maintain?
- 900.54 Should the property management system prescribe internal controls?
- 900.55 What are the standards for inventories?
- 900.56 What maintenance is required for property?
- 900.57 What if the Indian tribe or tribal organization chooses not to take title to property furnished or acquired under the contract?
- 900.58 Do the same accountability and control procedures described above apply to Federal property?
- 900.59 How are the inventory requirements for Federal property different than for tribal property?
- 900.60 How does an Indian tribe or tribal organization dispose of Federal property?

Subpart G—Programmatic Reports and Data Requirements

- 900.65 What programmatic reports and data shall the Indian tribe or tribal organization provide?
- 900.66 What if the Indian tribe or tribal organization and the Secretary cannot come to an agreement concerning the type and/or frequency of program narrative and/or program data report(s)?
- 900.67 Will there be a uniform data set for all IHS programs?
- 900.68 Will this uniform data set be required of all Indian tribe or tribal organizations contracting with the IHS under the Act?

Subpart H—Lease of Tribally-Owned Buildings by the Secretary

- 900.69 What is the purpose of this subpart?
- 900.70 What elements are included in the compensation for a lease entered into between the Secretary and an Indian tribe or tribal organization for a building owned or leased by the Indian tribe or tribal organization that is used for administration or delivery of services under the Act?
- 900.71 Is a lease with the Secretary the only method available to recover the types of cost described in § 900.70?
- 900.72 How may a tribe or tribal organization propose a lease to be compensated for the use of facilities?

Subpart I—Property Donation Procedures**General**

- 900.85 What is the purpose of this subpart?
- 900.86 How will the Secretary exercise discretion to acquire and donate BIA or IHS excess property and excess and surplus Federal property to an Indian tribe or tribal organization?

Government-Furnished Property

- 900.87 How does a tribe or tribal organization obtain title to property furnished by the Federal government for use in the performance of a contract or grant agreement pursuant to section 105(f)(2)(A) of the Act?
- 900.88 What should the tribe or tribal organization do if it wants to obtain title to government-furnished real property that includes land not already held in trust?
- 900.89 When may the Secretary elect to reacquire government-furnished property whose title has been transferred to a tribe or tribal organization?
- 900.90 Does government-furnished real property to which a tribe or tribal organization has taken title continue to be eligible for facilities operation and maintenance funding from the Secretary?

Contractor-Purchased Property

- 900.91 Who takes title to property purchased with funds under a self-determination contract or grant agreement pursuant to § 105 (f)(2)(A)?
- 900.92 What should the tribe or tribal organization do if it wants contractor-purchased real property to be taken into trust?

- 900.93 When may the Secretary elect to acquire title to contractor-purchased property?
- 900.94 Is contractor-purchased real property to which a tribe or tribal organization holds title eligible for facilities operation and maintenance funding from the Secretary?

BIA and IHS Excess Property

- 900.95 What is BIA or IHS excess property?
- 900.96 How can tribes or tribal organizations learn about BIA and IHS excess property?
- 900.97 How can a tribe or tribal organization acquire excess BIA or IHS property?
- 900.98 Who takes title to excess BIA or IHS property donated to a tribe or tribal organization?
- 900.99 Who takes title to any land that is part of excess BIA or IHS real property donated to a tribe or tribal organization?
- 900.100 May the Secretary elect to reacquire excess BIA or IHS property whose title has been transferred to a tribe or tribal organization?
- 900.101 Is excess BIA or IHS real property to which a tribe or tribal organization has taken title eligible for facilities operation and maintenance funding from the Secretary?

Excess or Surplus Government Property of Other Agencies

- 900.102 What is excess or surplus government property of other agencies?
- 900.103 How can tribes or tribal organizations learn about property that has been designated as excess or surplus government property?
- 900.104 How may a tribe or tribal organization receive excess or surplus government property of other agencies?
- 900.105 Who takes title to excess or surplus Federal property donated to a tribe or tribal organization?
- 900.106 If a contract or grant agreement or portion thereof is retroceded, reassumed, terminated, or expires, may the Secretary reacquire title to excess or surplus Federal property of other agencies that was donated to a tribe or tribal organization?

Property Eligible for Replacement Funding

- 900.107 Is property that a tribe or tribal organization obtains title under this subpart eligible for replacement funding?

Subpart J—Construction Contracts

- 900.110 What does this subpart cover?
- 900.111 What activities of construction programs are contractible?
- 900.112 What are construction phases?
- 900.113 Definitions.
- 900.114 Why is there a separate subpart in these regulations for construction contracts and grants?
- 900.115 How do self-determination construction contracts relate to ordinary Federal procurement contracts?
- 900.116 Are fixed price contracts treated the same as cost reimbursable contracts?
- 900.117 Do these "construction contract" regulations apply to planning services?

- 900.118 Do these "construction contract" regulations apply to construction management services?
- 900.119 To what extent shall the Secretary consult with affected Indian tribes before spending funds for any construction project?
- 900.120 How does an Indian tribe or tribal organization find out about a construction project?
- 900.121 Does the Indian tribe or tribal organization have a right of first refusal?
- 900.122 What happens during the preplanning phase and can an Indian tribe or tribal organization perform any of the activities involved in this process?
- 900.123 What does an Indian tribe or tribal organization do if it wants to secure a construction contract?
- 900.124 What if the Indian tribe or tribal organization and the Secretary cannot develop a mutually agreeable contract proposal?
- 900.125 May the Indian tribe or tribal organization elect to use a grant in lieu of a contract?
- 900.126 What shall a construction contract proposal contain?
- 900.127 Shall a construction contract proposal incorporate provisions of Federal construction guidelines and manuals?
- 900.128 What can be included in the Indian tribe's or tribal organization's contract budget?
- 900.129 What funding shall the Secretary provide in a construction contract?
- 900.130 How do the Secretary and Indian tribe or tribal organization arrive at an overall fair and reasonable price for the performance of a construction contract?
- 900.131 What role does the Indian tribe or tribal organization play during the performance of a self-determination construction contract?
- 900.132 What role does the Secretary play during the performance of a self-determination construction contract?
- 900.133 Once a contract is awarded, how will the Indian tribe or tribal organization receive payments?
- 900.134 Does the declination process or the Contract Disputes Act apply to construction contract amendments proposed either by an Indian tribe or tribal organization or the Secretary?
- 900.135 At the end of a self-determination construction contract, what happens to savings on a cost reimbursement contract?
- 900.136 Do all provisions of the other subparts apply to contracts awarded under this subpart?

Subpart K—Waiver Procedures

- 900.140 Can any provision of these regulations be waived?
- 900.141 How does an Indian tribe or tribal organization get a waiver?
- 900.142 Does an Indian tribe or tribal organization's waiver request have to be included in an initial contract proposal?
- 900.143 How is a waiver request processed?
- 900.144 What happens if the Secretary makes no decision within the 90-day period?

- 900.145 On what basis may the Secretary deny a waiver request?
- 900.146 Is technical assistance available?
- 900.147 What appeal rights are available?
- 900.148 How can an Indian tribe or tribal organization secure a determination that a law or regulation has been superseded by the Indian Self-Determination Act, as specified in section 107(b) of the Act?

Subpart L—Appeals (Other Than Emergency Reassumption and Suspension, Withholding or Delay in Payment)

- 900.150 What decisions can an Indian tribe or tribal organization appeal under this subpart?
- 900.151 Are there any appeals this part does not cover?
- 900.152 How does an Indian tribe or tribal organization know where and when to file its appeal?
- 900.153 Does an Indian tribe or tribal organization have any options besides an appeal?
- 900.154 How does an Indian tribe or tribal organization request an informal conference?
- 900.155 How is an informal conference held?
- 900.156 What happens after the informal conference?
- 900.157 Is the recommended decision always final?
- 900.158 How does an Indian tribe or tribal organization appeal the initial decision, if it does not request an informal conference or if it does not agree with the recommended decision resulting from the informal conference?
- 900.159 May an Indian tribe or tribal organization get an extension of time to file a notice of appeal?
- 900.160 What happens after an Indian tribe or tribal organization files an appeal?
- 900.161 How is a hearing arranged?
- 900.163 What is the Secretary's burden of proof for appeals from decisions under § 900.150(a) through § 900.150(g)?
- 900.164 What rights do Indian tribes, tribal organizations, and the government have during the appeal process?
- 900.165 What happens after the hearing?
- 900.166 Is the recommended decision always final?
- 900.167 If an Indian tribe or tribal organization object to the recommended decision, what will the Secretary of Health and Human Services or the IBIA do?
- 900.168 Will an appeal hurt the Indian tribe or tribal organization's position in other contract negotiations?
- 900.169 Will the decisions on appeals be available for the public to review?
- Appeals of Emergency Reassumption of Self-Determination Contracts or Suspension, Withholding or Delay of Payments Under a Self-Determination Contract
- 900.170 What happens in the case of emergency reassumption or suspension or withholding or delay of payments?
- 900.171 Will there be a hearing?
- 900.172 What happens after the hearing?
- 900.173 Is the recommended decision always final?

- 900.174 If an Indian tribe or tribal organization object to the recommended decision, what will the Secretary of Health and Human Services or the IBIA do?
- 900.175 Will an appeal hurt an Indian tribe or tribal organization's position in other contract negotiations?
- 900.176 Will the decisions on appeals be available for the public to review?

Subpart M—Federal Tort Claims Act Coverage General Provisions

- 900.180 What does this subpart cover?
- 900.181 What definitions apply to this Subpart?
- 900.182 What other statutes and regulations apply to FTCA coverage?
- 900.183 Do Indian tribes and tribal organizations need to be aware of areas which FTCA does not cover?
- 900.184 Is there a deadline for filing FTCA claims?
- 900.185 How long does the Federal government have to process an FTCA claim after the claim is received by the Federal agency, before a lawsuit may be filed?
- 900.186 Is it necessary for a self-determination contract to include any clauses about Federal Tort Claims Act coverage?
- 900.187 Does FTCA apply to a self-determination contract if FTCA is not referenced in the contract?
- 900.188 To what extent shall the contractor cooperate with the Federal government in connection with tort claims arising out of the contractor's performance?
- 900.189 Does this coverage extend to subcontractors of self-determination contracts?

Medical-Related Claims

- 900.190 Is FTCA the exclusive remedy for a tort claim for personal injury or death resulting from the performance of a self-determination contract?
- 900.191 Are employees of self-determination contractors providing health services under the self-determination contract protected by FTCA?
- 900.192 What employees are covered by FTCA for medical-related claims?
- 900.193 Does FTCA coverage extend to individuals who provide health care services under a personal services contract providing services in a facility that is owned, operated, or constructed under the jurisdiction of the IHS?
- 900.194 Does FTCA coverage extend to services provided under a staff privileges agreement with a non-IHS facility where the agreement requires a health care practitioner to provide reciprocal services to the general population?
- 900.195 Does FTCA coverage extend to the contractor's health care practitioners providing services to private patients on a fee-for-services basis when such personnel receive the fee, not the self-determination contractor?

- 900.196 Do covered services include the conduct of clinical studies and investigations and the provision of emergency services, including the operation of emergency motor vehicles?
- 900.197 Does FTCA cover employees of the contractor who are paid by the contractor from funds other than those provided through the self-determination contract?
- 900.198 Are Federal employees assigned to a self-determination contractor under the Intergovernmental Personnel Act or detailed under Section 214 of the Public Health Service Act covered to the same extent that they would be if working directly for a Federal agency?
- 900.199 Does FTCA coverage extend to a contractor's health care practitioners to whom staff privileges have been extended in contractor health care facilities operated under a self-determination contract on the condition that such practitioner provide health services to IHS beneficiaries covered by FTCA?
- 900.200 May persons who are not Indians or Alaska Natives assert claims under FTCA?

Procedure for Filing Medical-Related Claims

- 900.201 How should claims arising out of the performance of medical-related functions be filed?
- 900.202 What should a self-determination contractor or a contractor's employee do on receiving such a claim?
- 900.203 If the contractor or contractor's employee receives a summons and/or a complaint alleging a tort covered by FTCA, what should the contractor do?

Non-Medical Related Claims

- 900.204 Is FTCA the exclusive remedy for a non-medical related tort claim arising out of the performance of a self-determination contract?
- 900.205 To what non-medical-related claims against self-determination contractors does FTCA apply?
- 900.206 Does FTCA cover employees of self-determination contractors?
- 900.207 How are non-medical related tort claims and lawsuits filed for IHS?
- 900.208 How are non-medical related tort claims and lawsuits filed for DOI?
- 900.209 What should a self-determination contractor or contractor's employee do on receiving a non-medical related tort claim?
- 900.210 If the contractor or contractor's employee receives a summons and/or complaint alleging a non-medical related tort covered by FTCA, what should a tribe or tribal organization do?

Subpart N—Post-Award Contract Disputes

- 900.215 What does this subpart cover?
- 900.216 What other statutes and regulations apply to contract disputes?
- 900.217 Is filing a claim under the CDA our only option for resolving post-award contract disputes?
- 900.218 What is a claim under the CDA?
- 900.219 How does an Indian tribe or tribal organization submit a claim?

- 900.220 Does it make a difference whether the claim is large or small?
- 900.221 What happens next?
- 900.222 What goes into a decision?
- 900.223 When does an Indian tribe or tribal organization get the Secretary's decision?
- 900.224 What happens if the decision does not come within that time?
- 900.225 Does an Indian tribe or tribal organization get paid immediately if the awarding official decides in its favor?
- 900.226 Can the awarding official change the decision after it has been made?
- 900.227 Is an Indian tribe or tribal organization entitled to interest if it wins its claim?
- 900.228 What role will the awarding official play during an appeal?
- 900.229 What is the effect of a pending appeal?

Subpart O—Retrocession and Reassumption Procedures

- 900.230 What does retrocession mean?
- 900.231 Who may retrocede a contract, in whole or in part?
- 900.232 What effect will an Indian tribe or tribal organization's retrocession have on its rights to contract?
- 900.233 Will an Indian tribe or tribal organization's retrocession adversely affect funding available for the retroceded program?
- 900.234 What obligation does the Indian tribe or tribal organization have with respect to returning property that was used in the operation of the retroceded program?
- 900.235 What does reassumption mean?
- 900.236 Under what circumstances is a reassumption considered an emergency instead of non-emergency reassumption?
- 900.237 In a non-emergency reassumption, what is the Secretary required to do?
- 900.238 What happens if the contractor fails to take corrective action to remedy the contract deficiencies identified in the notice?
- 900.239 What shall the second written notice include?
- 900.240 What is the earliest date on which the contract will be rescinded?
- 900.241 In an emergency reassumption, what is the Secretary required to do?
- 900.242 What shall the written notice include?
- 900.243 May the contractor be reimbursed for actual and reasonable "wind up costs" incurred after the effective date of rescision?
- 900.244 What obligation does the Indian tribe or tribal organization have with respect to returning property that was used in the operation of the rescinded contract?
- 900.245 Will a reassumption adversely affect funding available for the reassumed program?

Authority: 25 U.S.C. 450f *et seq.*

Subpart A—General Provisions

§ 900.1 Authority.

These regulations are prepared, issued, and maintained jointly by the Secretary of Health and Human Services

and the Secretary of the Interior, with the active participation and representation of Indian tribes, tribal organizations, and individual tribal members pursuant to the guidance of the Negotiated Rulemaking procedures required by section 107 of the Indian Self-Determination and Education Assistance Act.

§ 900.2 Purpose and scope.

(a) *General.* These regulations codify uniform and consistent rules for contracts by the Department of Health and Human Services (DHHS) and the Department of the Interior (DOI) in implementing title I of the Indian Self-Determination and Education Assistance Act, Public Law 93-638, 25 U.S.C. 450 *et seq.*, as amended and sections 1 through 9 preceding that title.

(b) *Programs funded by other Departments and agencies.* Included under this part are programs administered (under current or future law or interagency agreement) by DHHS and the DOI for the benefit of Indians for which appropriations are made to other Federal agencies.

(c) *This part included in Contracts by Reference.* Each contract, including grants and cooperative agreements in lieu of contracts awarded under section 9 of the Act, shall include by reference the provisions of this part, and any amendment thereto, and they are binding on the Secretary and the contractor except as otherwise specifically authorized by a waiver under section 107(e) of the Act.

(d) *Freedom of Information.* Access to records maintained by the Secretary is governed by the Freedom of Information Act (5 U.S.C. 552) and other applicable Federal law. Except for previously provided copies of tribal records that the Secretary demonstrates are clearly required to be maintained as part of the recording keeping systems of the DHHS or the DOI, or both, records of the Contractors shall not be considered Federal records for the purpose of the Freedom of Information Act. The Freedom of Information Act does not apply to records maintained solely by Indian tribes and tribal organizations.

(e) *Privacy Act.* Section 108(b) of the Indian Self-Determination Act, states that records of the tribal government or tribal organizations shall not be considered Federal records for the purposes of the Privacy Act.

(f) *Information Collection.* The information collection requirements contained in these rules have been approved by the Office of Management and Budget and assigned the following approval numbers: [Approval numbers

will appear in this location in the final rule.]

§ 900.3 Policy statements.

(a) *Congressional policy.* (1) Congress has recognized 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, planning, conduct and administration of educational as well as other Federal programs and services to Indian communities so as to render such programs and services more responsive to the needs and desires of those communities.

(2) Congress has declared 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.

(3) Congress has declared 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.

(4) Congress has declared that the programs, functions, services, or activities that are contracted under this Act shall include administrative functions of the Department of the Interior and the Department of Health and Human Services (whichever is applicable) that support the delivery of services to Indians, including those administrative activities supportive of, but not included as part of, the service delivery programs described in this paragraph that are otherwise contractible. The administrative functions referred to in the preceding sentence shall be contractible without regard to the organizational level within the department that carries out such functions. Contracting of the administrative functions described

herein shall not be construed to limit or reduce in any way the funding for any program, function, service, or activity serving any other tribe under the Act or any other law. The Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this Act.

(5) Congress has further declared that each provision of the Act and each provision of contracts entered into thereunder shall be liberally construed for the benefit of the tribes or tribal organizations to transfer the funding and the related functions, services, activities, and programs (or portions thereof), that are otherwise contractible under the Act, including all related administrative functions, from the Federal Government to the Contractor.

(6) Congress has declared that one of the primary goals of the 1994 amendments to the Act was to minimize the reporting requirements applicable to tribal contractors and to eliminate excessive and burdensome reporting requirements. Reporting requirements over and above the annual audit report are to be negotiated with disagreements subject to the declination procedures of section 102 of the Act.

(7) Congress has declared that there not be any threshold issues which would avoid the declination, contract review, approval, and appeal process.

(8) Congress has declared that all self-determination contract proposals must be supported by the resolution of an Indian tribe(s) as appropriate.

(9) Congress has declared that to the extent that programs, functions, services, and activities carried out by tribes and tribal organizations pursuant to contracts entered into under this Act reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings that have not otherwise been included in the amount of contract funds determined under section 106(a) of the Act, the Secretary shall make such savings available for the provision of additional services to program beneficiaries, either directly or through contractors, in a manner equitable to both direct and contracted programs.

(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 and for which funds are appropriated by

Congress. 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 recognizes 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 responsibility and accountability to the tribal contractor 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 subject to 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 the 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).

(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 because of their status as Indians, 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) 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 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.

(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's or tribal organization's intention to contract), the Secretary shall plan to take 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 insure a timely transfer of responsibilities 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.

§ 900.4 Effect on existing tribal rights.

Nothing in these regulations shall be construed as:

(a) Affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by Indian tribes;

(b) Terminating, waiving, modifying, or reducing the trust responsibility of the United States to the Indian tribe(s) or individual Indians. The Secretary shall act in good faith in upholding such trust responsibility;

(c) Mandating an Indian tribe to apply for a contract(s) or grant(s) as described in the Act; or

(d) Impeding awards by other Departments and agencies of the United States to Indian tribes to administer Indian programs under any other applicable law.

§ 900.5 Effect of these regulations on Federal program guidelines, manual, or policy directives.

Except as specifically provided in the Act, or as specified in Subpart J, a Contractor is not required to abide by program guidelines, manuals, or policy directives of the Secretary, unless otherwise agreed to by the Contractor and the Secretary, or otherwise required by law.

Subpart B—Definitions

§ 900.6 Definitions.

Unless otherwise provided in this Part:

Act means § 1 through 9, and Title I of the Indian Self-Determination and Education Assistance Act of 1975, Public Law 93-638, as amended.

Annual funding agreement means a document that represents the negotiated agreement of the Secretary to fund, on an annual basis, the programs, services, activities and functions transferred to a tribe or tribal organization under the Act.

Appeal means a request by an Indian tribe or tribal organization for an administrative review of an adverse Agency decision.

Awarding official means any person who by appointment in accordance with applicable regulations has the authority to enter into and administer contracts on behalf of the United States of America and make determinations and findings with respect thereto.

BIA means the Bureau of Indian Affairs of the Department of the Interior.

Contract means a self-determination contract as defined in section 4(j) of the Act.

Contract appeals board means the Interior Board of Contract Appeals.

Contractor means an Indian tribe or tribal organization to which a contract has been awarded.

Days means calendar days; except where the last day of any time period specified in these regulations falls on a Saturday, Sunday, or a Federal holiday, the period shall carry over to the next business day unless otherwise prohibited by law.

Department(s) means the Department of Health and Human Services (HHS) or the Department of the Interior (DOI), or both.

IHS means the Indian Health Service of the Department of Health and Human Services.

Indian means a person who is a member of an Indian Tribe.

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 United States to Indians because of their status as Indians.

Indirect cost rate means the rate(s) arrived at through negotiation between an Indian tribe or tribal organization and the appropriate Federal Agency.

Indirect costs means costs incurred for a common or joint purpose benefiting more than one contract objective or which are not readily assignable to the contract objectives specifically benefitted without effort disproportionate to the results achieved.

Real property means any interest in land together with the improvements structures, and fixtures and appurtenances thereto.

Reassumption means rescission, in whole or in part, of a contract and assuming or resuming control or operation of the contracted program by the Secretary without consent of the Indian tribe or tribal organization.

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.

Secretary means the Secretary of Health and Human Services (HHS) or the Secretary of the Interior (DOI), or both (and their respective delegates).

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.

Trust resources means an interest in land, water, minerals, funds, or other assets or property which is held by the United States in trust for an Indian tribe or an individual Indian or which is held by an Indian tribe or Indian subject to a restriction on alienation imposed by the United States.

Subpart C—Contract Proposal Contents

§ 900.7 What technical assistance is available to assist in preparing an initial contract proposal?

The Secretary shall, upon request of a tribe or tribal organization and subject to the availability of appropriations, provide technical assistance on a non-reimbursable basis to such tribe or tribal organization to develop a new contract proposal or to provide for the assumption by the tribe or tribal organization of any program, service, function, or activity (or portion thereof) that is contractible under the Act.

§ 900.8 What must an initial contract proposal contain?

An initial contract proposal must contain the following information:

(a) the full name, address and telephone number of the Indian tribe or tribal organization proposing the contract.

(b) If the tribal organization is not an Indian tribe, the proposal must also include:

(1) a copy of the tribal organization's organizational documents (e.g., charter, articles of incorporation, bylaws, etc.).

(2) the full name(s) of Indian tribe(s) with which the tribal organization is affiliated.

(c) the full name(s) of the Indian tribe(s) proposed to be served.

(d) a copy of the authorizing resolution from the Indian tribe(s) to be served.

(1) If an Indian tribe or tribal organization proposes to serve a specified geographic area, it must provide authorizing resolution(s) from all Indian tribes located within the specific area it proposes to serve.

However, no resolution is required from an Indian tribe located outside the area proposed to be served whose members reside within the proposed service area.

(2) If a currently effective authorizing resolution covering the scope of an initial contract proposal has already been provided to the agency receiving the proposal, a reference to that resolution.

(e) an identification and signature of the authorized representative of the tribe or tribal organization submitting the contract proposal.

(f) the date of submission of the proposal.

(g) a brief statement of the programs, functions, services, or activities that the tribal organization proposes to perform, including:

(1) a description of the geographical service area, if applicable, to be served.

(2) the estimated number of Indian people who will receive the benefits or services under the proposed contract.

(3) a description of any local, Area, regional, or national level departmental programs, functions, services, or activities to be contracted, including administrative functions.

(4) a description of the proposed program and financial, procurement, and property management standards.

(5) an identification of the program reports, data and financial reports that the Indian tribe or tribal organization will provide, including their frequency.

(6) a description of any proposed redesign of the programs, services, functions, or activities to be contracted.

(7) minimum staff qualifications, if any.

(h) a budget which includes at a minimum:

(1) an identification of the funds requested under section 106(a)(1) of the Act, including tribal shares, if any, from any departmental local, Area, regional, or national level, presented as follows:

(i) for the IHS, by budget subactivity specified in the annual budget justification, as may be modified by Congressional action (e.g., hospitals and clinics, dental health, community health representatives, mental health, etc.);

(ii) for the BIA, by programs specified in the annual budget justification, as may be modified by Congressional action (e.g., social services, forestry, roads, and law enforcement); and

(iii) for non-BIA DOI bureaus and offices, by the lowest level of detail set out in the annual budget justification for the bureau or office (as may be modified by Congressional action).

(2) the amount of direct contract support costs, including one-time or preaward costs under section 106(a)(2) and related provisions of the Act, presented by major categories such as:

(i) Personnel (differentiating between salary and fringe benefits);

(ii) Equipment;

(iii) Materials and Supplies;

(iv) Travel;

(v) Subcontracts; and

(vi) Other appropriate items of cost.

(3) where the Indian tribe or tribal organization proposes to recover indirect contract support costs, the budget must include either:

(i) a copy of the most recent negotiated indirect cost rate agreement; or

(ii) an estimated amount requested for indirect costs, pending timely establishment of a rate or negotiation of administrative overhead costs.

(4) to the extent not stated elsewhere in the budget or previously reported to the Secretary, any preaward costs, including the amount and time period covered or to be covered; and

(5) an identification of anticipated sources of other funding relied upon to carry out the programs, services, functions, or activities specified in the contract proposal.

(i) the proposed starting date and term of the contract.

(j) in the case of a cooperative agreement, the nature and degree of Federal programmatic involvement anticipated during the term of the agreement.

(k) the extent of any planned use of Federal personnel and Federal resources.

(l) any proposed waiver(s) of these regulations.

§ 900.9 May the Secretary require an Indian tribe or tribal organization to submit any other information beyond that identified in § 900.8(b)?

No.

§ 900.10 What should a tribe or tribal organization that is proposing a contract do about specifying the Federal property that the tribe or tribal organization may wish to use in carrying out the contract?

The Indian tribe or tribal organization is encouraged to provide the Secretary, as early as possible, with:

(a) a list of the following Federal property intended for use under the contract:

(1) equipment;

(2) furnishings;

(3) facilities;

(4) and other property.

(b) a statement of how the Indian tribe or tribal organization will obtain each item by transfer of title under § 105(f)(2) of the Act and section 1(b)(8) of the model agreement set forth in section 108(c) of the Act, through a temporary use permit, similar arrangement, or otherwise; and

(c) where equipment is to be shared by contracted and non-contracted programs, services, functions, or activities, a proposal outlining proposed equipment sharing or other arrangements.

§ 900.11 Are the proposal contents requirements the same for renewal of a contract that is expiring and for securing an annual funding agreement after the first year of the funding agreement?

No. In these situations, an Indian tribe or tribal organization should submit a renewal proposal (or notification of intent not to renew) or an annual funding agreement proposal at least 90 days in advance of the expiration date of the contract or existing annual funding agreement. The proposal shall provide budget information in the same detail and format as the original proposal and may also identify any significant proposed changes.

Subpart D—Review and Approval of Contract Proposals

§ 900.12 What does this subpart cover?

This subpart covers any proposal to enter into a self-determination contract, to amend an existing self-determination contract, to renew an existing self-determination contract, or to redesign a program through a self-determination contract.

§ 900.13 What shall the Secretary do upon receiving a proposal?

Upon receipt of a proposal, the Secretary shall:

- (a) within five days notify the applicant in writing that the proposal has been received;
- (b) within 15 days notify the applicant in writing of any missing items required by § 900.8 and that the items be submitted within 15 days of receipt of the notification; and
- (c) review the proposal to determine whether there are declination issues under section 102(a)(2) of the Act.

§ 900.14 How long does the Secretary have to review and approve or decline a proposal?

The Secretary has 90 days after receipt of a proposal to review and approve or decline the proposal in compliance with section 102 of the Act and subpart E. At any time during the review period the Secretary may approve the proposal and award the requested contract.

§ 900.15 Can the statutory 90-day period be extended?

Yes, with written consent of the Indian tribe or tribal organization. If consent is not given, the 90-day deadline applies.

§ 900.16 What happens if a proposal is not declined within 90 days after it is received by the Secretary?

A proposal that is not declined within 90 days (or within any agreed extension under § 900.15) is deemed approved and the Secretary shall award the contract or any amendment or renewal within that 90-day period.

Subpart E—Declination Procedures

§ 900.18 What does this subpart cover?

This subpart explains how and under what circumstances the Secretary may decline a proposal to contract, to amend an existing contract, to renew an existing contract, to redesign a program, or to waive any provisions of these regulations. For annual funding agreements, see § 900.30.

§ 900.19 When can a proposal be declined?

As explained in §§ 900.14 and 900.15, a proposal can only be declined within 90 days after the Secretary receives the proposal, unless that period is extended with the voluntary and express written consent of the Indian tribe or tribal organization.

§ 900.20 For what reasons can the Secretary decline a proposal?

The Secretary may only decline to approve a proposal for one of five specific reasons:

- (a) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;
- (b) adequate protection of trust resources is not assured;
- (c) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract;
- (d) the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 106(a) of the Act; or
- (e) the program, function, service, or activity (or a portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities covered under section 102(a)(1) of the Act because the proposal includes activities that cannot lawfully be carried out by the contractor.

§ 900.21 Can the Secretary decline a proposal where the Secretary's objection could be overcome through the contract?

No. The Secretary may not decline to enter into a contract with an Indian tribe or tribal organization based on any objection that will be overcome through the contract.

§ 900.22 Can a contract proposal for an Indian tribe's or tribal organization's share of administrative programs, functions, services, and activities be declined for any reason other than the five reasons specified above?

No. The Secretary may only decline a proposal based upon one or more of the five reasons listed above. If a contract affects the preexisting level of services to any other tribe, the Secretary shall address that effect in the Secretary's annual report to Congress under section 106(c)(6) of the Act.

§ 900.23 What if only a portion of a proposal raises one of the five declination criteria?

The Secretary must approve any severable portion of a proposal that does not support a declination finding described in § 900.20, subject to any alteration in the scope of the proposal that the Secretary and the Indian tribe or tribal organization approve.

§ 900.24 What happens if the Secretary declines a part of a proposal on the ground that the proposal proposes in part to plan, conduct, or administer a program, function, service or activity that is beyond the scope of programs covered under section 102(a) of the Act, or proposes a level of funding that is in excess of the applicable level determined under section 106(a) of the Act?

In those situations the Secretary is required, as appropriate, to approve the portion of the program, function, service, or activity that is authorized under section 106(a) of the Act, or approve a level of funding that is authorized under section 106(a) of the Act. As noted in § 900.23, the approval is subject to any alteration in the scope of the proposal that the Secretary and the Indian tribe or tribal organization approve.

§ 900.25 If an Indian tribe or tribal organization elects to contract for a severable portion of a proposal, does the Indian tribe or tribal organization lose its appeal rights to challenge the portion of the proposal that was declined?

No, but the hearing and appeal procedures contained in these regulations only apply to the portion of the proposal that was declined.

§ 900.26 Is technical assistance available to an Indian tribe or tribal organization to avoid declination of a proposal?

Yes. In accordance with section 103(d) of the Act, upon receiving a proposal, the Secretary shall provide any necessary requested technical assistance to an Indian tribe or tribal organization, and shall share all relevant information with the Indian tribe or tribal organization, in order to avoid declination of the proposal.

§ 900.27 What is the Secretary required to do if the Secretary decides to decline all or a portion of a proposal?

If the Secretary decides to decline all or a severable portion of a proposal, the Secretary is required:

(a) to advise the Indian tribe or tribal organization in writing of the Secretary's objections, including a specific finding that clearly demonstrates that (or that is supported by a controlling legal authority that) one of the conditions set forth in § 900.20 exists, together with a detailed explanation of the reason for the decision to decline the proposal and, when appropriate, any documents relied on in making the decision; and

(b) to advise the Indian tribe or tribal organization in writing of the rights described in § 900.29.

(c) to provide tribes and tribal organizations within 20 days of issuing a declination decision under § 102(a), all documents that currently exist that support the declination decision. The provision of these documents does not preclude or limit the Secretary from providing or producing additional documents to be used in an appeal as evidence to support any findings identified in the declination decision (subject to any discovery time limitation or other evidentiary rules imposed by the Administrative law judge).

§ 900.28 When the Secretary declines all or a portion of a proposal, is the Secretary required to provide an Indian tribe or tribal organization with technical assistance?

Yes. The Secretary shall provide additional technical assistance to overcome the stated objections, in accordance with section 102(b) of the Act, and shall provide any necessary requested technical assistance to develop any modifications to overcome the Secretary's stated objections.

§ 900.29 When the Secretary declines all or a portion of a proposal, is an Indian tribe or tribal organization entitled to any appeal?

Yes. The Indian tribe or tribal organization is entitled to an appeal on the objections raised by the Secretary, with an agency hearing on the record, and the right to engage in full discovery relevant to any issue raised in the matter. The procedures for appeals are in subpart L of these regulations. Alternatively, at its option the Indian tribe or tribal organization has the right to sue in Federal district court to challenge the Secretary's decision.

§ 900.30 Can the Secretary decline an Indian tribe or tribal organization's proposed successor annual funding agreement?

No. If it is substantively the same as the prior annual funding agreement (except for mandatory funding increases or budget reductions as provided in section 106(b) of the Act) the Secretary shall approve and fund, and may not decline, any portion of a successor annual funding agreement. Any portion of an annual funding agreement proposal which is not substantively the same as that which was funded previously (e.g., a redesign proposal; waiver proposal; different proposed funding amount; or different program, service, function, or activity) is subject to the declination criteria and procedures in Subpart E. If there is a disagreement over the availability of appropriations, the Secretary may decline the proposal in part under the procedure in subpart E.

Subpart F—Standards for Tribal or Tribal Organization Management Systems

General

§ 900.35 What is the purpose of this subpart?

This subpart contains the minimum standards for the management systems used by Indian tribes or tribal organizations when carrying out self-determination contracts. It provides standards for an Indian tribe's or tribal organization's financial management system, procurement management system, and property management system.

§ 900.36 What requirements are imposed upon Indian tribes or tribal organizations by this subpart?

When carrying out self-determination contracts, Indian tribes and tribal organizations shall develop, implement, and maintain systems that meet these minimum standards, unless one or more of the standards have been waived, in whole or in part, under section 107(e) of the Act and subpart K.

§ 900.37 What provisions of Office of Management and Budget (OMB) circulars or the "common rule" apply to self-determination contracts?

The only provisions of OMB Circulars and the only provisions of the "common rule" that apply to self-determination contracts are the provisions adopted in these regulations, those expressly required or modified by the Act, and those negotiated and agreed to in a self-determination contract.

§ 900.38 Do these standards apply to the sub-contractors of an Indian tribe or tribal organization carrying out a self-determination contract?

An Indian tribe or tribal organization may require that some or all of the standards in this subpart be imposed upon its sub-contractors when carrying out a self-determination contract.

§ 900.39 What is the difference between a standard and a system?

(a) Standards are the minimum baseline requirements for the performance of an activity. Standards establish the "what" that an activity should accomplish.

(b) Systems are the procedural mechanisms and processes for the day-to-day conduct of an activity. Systems are "how" the activity will be accomplished.

§ 900.40 When are Indian tribe or tribal organization management standards and management systems evaluated?

(a) Management standards are evaluated by the Secretary when the Indian tribe or tribal organization submits an initial contract proposal.

(b) Management systems are evaluated by an independent auditor through the annual single agency audit report that is required by the Act and OMB Circular A-128.

Standards for Financial Management Systems

§ 900.41 What are the general financial management system standards that apply to an Indian tribe or tribal organization carrying out a self-determination contract?

An Indian tribe or tribal organization shall expend and account for contract funds in accordance with all applicable tribal laws, regulations, and procedures.

§ 900.42 What are the general financial management system standards that apply to a tribal organization carrying out a self-determination contract?

A tribal organization shall expend and account for contract funds in accordance with the procedures of the tribal organization.

§ 900.43 What minimum general standards apply to all Indian tribe or tribal organization financial management systems when carrying out a self-determination contract?

The fiscal control and accounting procedures of an Indian tribe or tribal organization shall be sufficient to:

(a) permit preparation of reports required by a self-determination contract and the Act; and

(b) permit the tracing of contract funds to a level of expenditure adequate to establish that they have not been used in violation of any restrictions or

prohibitions contained in any statute that applies to the self-determination contract.

§ 900.44 What specific minimum requirements shall an Indian tribe or tribal organization financial management system contain to meet these standards?

An Indian tribe or tribal organization financial management system shall include provisions for the following seven elements:

(a) *Financial reports.* The financial management system shall provide for accurate, current, and complete disclosure of the financial results of self-determination contract activities, as required in the financial reporting requirements negotiated and agreed to in the self-determination contract.

(b) *Accounting records.* The financial management system shall maintain records sufficiently detailed to identify the source and application of self-determination contract funds received by the Indian tribe or tribal organization. The system shall contain sufficient information to identify contract awards, obligations and unobligated balances, assets, liabilities, outlays, or expenditures and income.

(c) *Internal controls.* The financial management system shall maintain effective control and accountability for all self-determination contract funds received and for all Federal real property, personal property, and other assets furnished for use by the Indian tribe or tribal organization under the self-determination contract.

(d) *Budget controls.* The financial management system shall permit the comparison of actual expenditures or outlays with the amounts budgeted by the Indian tribe or tribal organization for each self-determination contract.

(e) *Allowable costs.* The financial management system shall be sufficient to determine the reasonableness, allowability, and allocability of self-determination contract costs based upon the terms of the self-determination contract and the tribe's or tribal organization's applicable OMB cost principles (see OMB Circulars A-87, A-122, or A-21, available from the Executive Office of the President, Publications Service, 725—17th Street NW., Washington, DC 20503), as amended by the Act and these regulations.

(f) *Source documentation.* The financial management system shall contain accounting records that are supported by source documentation, e.g., cancelled checks, paid bills, payroll records, time and attendance records, contract award documents, purchase orders, and other primary records that

support self-determination contract fund expenditures.

(g) *Cash management.* The financial management system shall establish procedures to ensure the timely receipt of reports from sub-contractors on their cash balances, expenditures, and disbursements, so that the Indian tribe or tribal organization may prepare complete and accurate cash transaction reports as required by the self-determination contract.

§ 900.45 What requirements are imposed upon the Secretary for financial management by these standards?

In regard to paragraph (g) of § 900.44, the Secretary shall establish procedures, consistent with Treasury regulations as modified by the Act, for the transfer of funds from the United States to the Indian tribe or tribal organization based upon the payment schedule provided for in the self-determination contract and the annual funding agreement.

Procurement Management System Standards

§ 900.46 When procuring property or services with self-determination contract funds, can an Indian tribe or tribal organization follow the same procurement policies and procedures applicable to other Indian tribe or tribal organization funds?

Yes.

§ 900.47 What procurement standards shall an Indian tribe or tribal organization have?

Indian tribes and tribal organizations shall have standards that conform with the standards in this subpart. If the Indian tribe or tribal organization relies upon standards different than those described below, it shall identify the standards it will use as a proposed waiver in the initial contract proposal or as a waiver request to an existing contract.

§ 900.48 If the Indian tribe or tribal organization does not propose different standards, what are the basic standards that the Indian tribe or tribal organization shall follow?

(a) The Indian tribe or tribal organization shall ensure that its vendors and/or sub-contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(b) The Indian tribe or tribal organization shall maintain written standards of conduct governing the performance of its employees who award and administer contracts.

(1) No employee, officer, elected official, or agent of the Indian tribe or tribal organization shall participate in the selection, award, or administration

of a procurement supported by Federal funds if a conflict of interest, real or apparent, would be involved.

(2) An employee, officer, elected official, or agent of an Indian tribe or tribal organization, or of a sub-contractor of the Indian tribe or tribal organization, is not allowed to solicit or accept gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to sub-agreements, with the following exemptions. The Indian tribe or tribal organization may exempt a financial interest that is not substantial or a gift that is an unsolicited item of nominal value.

(3) These standards shall also provide for penalties, sanctions, or other disciplinary actions for violations of the standards.

(c) The Indian tribe or tribal organization shall review proposed procurements to avoid buying unnecessary or duplicative items. The Indian tribe or tribal organization should consider consolidating or breaking out procurements to obtain more economical purchases. Where appropriate, the Indian tribe or tribal organization shall compare leasing and purchasing alternatives to determine which is more economical.

(d) The Indian tribe or tribal organization shall conduct all major procurement transactions by providing full and open competition, to the extent necessary to assure efficient expenditure of contract funds and to the extent feasible in the local area.

(1) Indian tribes or tribal organizations shall develop their own definition for "major procurement transactions."

(2) As provided for in sections 7 (b) and (c) of the Act, Indian preference and tribal preferences shall be applied in any procurement award.

(e) The Indian tribe or tribal organization shall make procurement awards only to responsible entities who have the ability to perform successfully under the terms and conditions of the proposed procurement. In making this judgment, the Indian tribe or tribal organization will consider such matters as the contractor's integrity, its compliance with public policy, its record of past performance, and its financial and technical resources.

(f) The Indian tribe or tribal organization shall maintain records on the significant history of all major procurement transactions. These records may include, but are not limited to, the rationale for the method of procurement, the selection of contract type, the contract selection or rejection, and the basis for the contract price.

(g) The Indian tribe or tribal organization is solely responsible, using good administrative practice and sound business judgment, for processing and settling all contractual and administrative issues arising out of a procurement. These issues include, but are not limited to, source evaluation, protests, disputes, and claims.

(1) The settlement of any protest, dispute, or claim shall not relieve the Indian tribe or tribal organization of any obligations under a self-determination contract.

(2) Violations of law shall be referred to the tribal or Federal authority having proper jurisdiction.

§ 900.49 What procurement standards apply to subcontracts?

Each subcontract entered into under the Act shall at a minimum:

- (a) be in writing;
- (b) identify the interested parties, their authorities, and the purposes of the contract;
- (c) state the work to be performed under the contract;
- (d) state the process for making any claim, the payments to be made, and the terms of the contract, which shall be fixed; and
- (e) be subject to sections 7 (b) and (c) of the Act.

§ 900.50 What Federal laws, regulations, and Executive Orders apply to sub-contractors?

In addition to the Act, all applicable Federal laws, regulations, and Executive Orders apply to subcontractors. If an Indian tribe or tribal organization's contract requires subcontractor compliance with other Federal laws, regulations, and Executive Orders, then the Indian tribe or tribal organization should include appropriate provisions in the subcontracts. The subcontractor is responsible for identifying and ensuring compliance with applicable Federal laws, regulations, and Executive Orders not identified in the subcontract.

Property Management System Standards

§ 900.51 What is an Indian tribe or tribal organization's property management system expected to do?

An Indian tribe or tribal organization's property management system shall account for all property furnished or transferred by the Secretary for use under a self-determination contract or acquired with contract funds. The property management system shall contain requirements for the use, care, maintenance, and disposition of Federally-owned and other property as follows:

(a) where title vests in the Indian tribe, in accordance with tribal law and procedures; or

(b) in the case of a tribal organization, according to the internal property procedures of the tribal organization.

§ 900.52 What type of property is the property management system required to track?

The property management system of the Indian tribe or tribal organization shall track:

- (a) personal property with an acquisition value in excess of \$5,000 per item;
- (b) sensitive property; and
- (c) real property provided by the Secretary for use under the contract.

§ 900.53 What kind of records shall the property management system maintain?

The property management system shall maintain records that accurately describe the property, including any serial number or other identification number. These records should contain information such as the source, titleholder, acquisition date, cost, share of Federal participation in the cost, location, use and condition of the property, and the date of disposal and sale price, if any.

§ 900.54 Should the property management system prescribe internal controls?

Yes. Effective internal controls should include procedures:

- (a) for the conduct of periodic inventories;
- (b) to prevent loss or damage to property; and
- (c) to ensure that property is used for an Indian tribe or tribal organization's self-determination contract(s) until the property is declared excess to the needs of the contract consistent with the Indian tribe or tribal organization's property management system.

§ 900.55 What are the standards for inventories?

A physical inventory should be conducted at least once every 2 years. The results of the inventory shall be reconciled with the Indian tribe or tribal organization's internal property and accounting records.

§ 900.56 What maintenance is required for property?

Required maintenance includes the performance of actions necessary to keep the property in good working condition, the procedures recommended by equipment manufacturers, and steps necessary to protect the interests of the contractor and the Secretary in any express warranties or guarantees covering the property.

§ 900.57 What if the Indian tribe or tribal organization chooses not to take title to property furnished or acquired under the contract?

If the Indian tribe or tribal organization chooses not to take title to property furnished by the government or acquired with contract funds, title to the property remains vested in the Secretary. A list of Federally-owned property to be used under the contract shall be included in the contract.

§ 900.58 Do the same accountability and control procedures described above apply to Federal property?

Yes, except that requirements for the inventory and disposal of Federal property are different.

§ 900.59 How are the inventory requirements for Federal property different than for tribal property?

There are three additional requirements:

- (a) The Indian or tribal organization shall conduct a physical inventory of the Federally-owned property and reconcile the results with the Indian tribe or tribal organization's property records annually rather than every 2 years;
- (b) within 90 days following the end of an annual funding agreement, the Indian tribe or tribal organization shall certify and submit to the Secretary an annual inventory of all Federally-owned real and personal property used in the contracted program; and
- (c) the inventory shall report any increase or decrease of \$5,000 or more in the value of any item of real property.

§ 900.60 How does an Indian tribe or tribal organization dispose of Federal property?

The Indian tribe or tribal organization shall report to the Secretary in writing any Federally-owned personal property that is worn out, lost, stolen, damaged beyond repair, or no longer needed for the performance of the contract.

(a) The Indian tribe or tribal organization shall state whether the Indian tribe or tribal organization wants to dispose of or return the property.

(b) If the Secretary does not respond within 60 days:

- (1) the Indian tribe or tribal organization may dispose of the property as it sees fit and inform the Secretary of the disposal; or
- (2) the Indian tribe or tribal organization may return the property to the Secretary, who shall accept transfer, custody, control, and responsibility for the property (together with all associated costs).

Subpart G—Programmatic Reports and Data Requirements

§ 900.65 What programmatic reports and data shall the Indian tribe or tribal organization provide?

Each Indian tribe or tribal organization shall negotiate with the Secretary the type and frequency of program narrative and program data report(s) required to meet the needs of the contracting parties. The extent of available resources will be a consideration in the negotiations.

§ 900.66 What if the Indian tribe or tribal organization and the Secretary cannot come to an agreement concerning the type and/or frequency of program narrative and/or program data report(s)?

Any disagreements over reporting requirements are subject to the declination criteria and procedures in section 102 of the Act and subpart E.

§ 900.67 Will there be a uniform data set for all IHS programs?

IHS will work with Indian tribe or tribal organization representatives to develop a mutually defined uniform subset of data that is consistent with Congressional intent, imposes a minimal reporting burden, and meets the needs of the contracting parties.

§ 900.68 Will this uniform data set be required of all Indian tribe or tribal organizations contracting with the IHS under the Act?

No. The uniform data set for applicable to the services to be performed, will serve as the target for the Secretary and the Indian tribes or tribal organizations during individual negotiations on program data reporting requirements.

Subpart H—Lease of Tribally-Owned Buildings by the Secretary

§ 900.69 What is the purpose of this subpart?

Section 105(l) of the Act requires the Secretary, at the request of an Indian tribe or tribal organization, to enter into a lease with the tribe or tribal organization for a building owned or leased by the tribe or tribal organization that is used for administration or delivery of services under the Act. The lease is to include compensation as provided in the statute as well as "such other reasonable expenses that the Secretary determines, by regulation, to be allowable." This subpart contains requirements for these leases.

§ 900.70 What elements are included in the compensation for a lease entered into between the Secretary and an Indian tribe or tribal organization for a building owned or leased by the Indian tribe or tribal organization that is used for administration or delivery of services under the Act?

To the extent that no element is duplicative, the following elements may be included in the lease compensation:

- (a) rent (sublease);
- (b) depreciation and use allowance based on the useful life of the facility based on acquisition costs not financed with Federal funds;
- (c) contributions to a reserve for replacement of facilities;
- (d) principal and interest paid or accrued;
- (e) operation and maintenance expenses, to the extent not otherwise included in rent or use allowances, including, but not limited to, the following:
 - (1) water, sewage;
 - (2) utilities;
 - (3) fuel;
 - (4) insurance;
 - (5) building management supervision and custodial services;
 - (6) custodial and maintenance supplies;
 - (7) pest control;
 - (8) site maintenance (including snow and mud removal);
 - (9) trash and waste removal and disposal;
 - (10) fire protection/fire fighting services and equipment;
 - (11) monitoring and preventive maintenance of building structures and systems, including but not limited to:
 - (i) heating/ventilation/air conditioning;
 - (ii) plumbing;
 - (iii) electrical;
 - (iv) elevators;
 - (v) boilers;
 - (vi) fire safety system;
 - (vii) security system; and
 - (viii) roof, foundation, walls, floors.
 - (12) unscheduled maintenance;
 - (13) scheduled maintenance (including replacement of floor coverings, lighting fixtures, repainting);
 - (14) security services;
 - (15) management fees; and
 - (16) other reasonable and necessary operation or maintenance costs justified by the contractor;
- (f) repairs to buildings and equipment;
- (g) alterations needed to meet contract requirements;
- (h) other reasonable expenses; and
- (i) the fair market rental for buildings or portions of buildings and land, exclusive of the Federal share of building construction or acquisition

costs, or the fair market rental for buildings constructed with Federal funds exclusive of fee or profit, and for land.

§ 900.71 Is a lease with the Secretary the only method available to recover the types of cost described in § 900.70?

No. With the exception of paragraph (h) in § 900.70 the same types of costs may be recovered in whole or in part under section 106(a) of the Act as direct or indirect charges to a self-determination contract.

§ 900.72 How may a tribe or tribal organization propose a lease to be compensated for the use of facilities?

There are three options available:

- (a) The lease may be based on fair market rental.
- (b) The lease may be based on a combination of fair market rental and paragraphs (a) through (h) of § 900.70, provided that no element of expense is duplicated in fair market rental.
- (c) The lease may be based on paragraphs (a) through (h) of § 900.70 only.

Subpart I—Property Donation Procedures

General

§ 900.85 What is the purpose of this subpart?

This subpart implements section 105(f) of the Act regarding donation of Federal excess and surplus property to tribes or tribal organizations and acquisition of property with funds provided under a self-determination contract or grant.

§ 900.86 How will the Secretary exercise discretion to acquire and donate BIA or IHS excess property and excess and surplus Federal property to an Indian tribe or tribal organization?

The Secretary will give maximum weight to the requests of tribes or tribal organizations for donation of BIA or IHS excess property and excess or surplus Federal property, provided that the requesting tribe or tribal organization shall certify and justify that requested property is appropriate for use for any purpose for which a self-determination contract or grant is authorized.

Government-Furnished Property

§ 900.87 How does a tribe or tribal organization obtain title to property furnished by the Federal government for use in the performance of a contract or grant agreement pursuant to section 105(f)(2)(A) of the Act?

- (a) For government-furnished personal property made available to a

tribe or tribal organization before October 25, 1994:

(1) The Secretary, in consultation with each tribe or tribal organization, shall develop a list of the property used in a self-determination contract.

(2) The tribe or tribal organization shall indicate any items on the list to which the tribe or tribal organization wants the Secretary to retain title.

(3) The Secretary shall provide the tribe or tribal organization with any documentation needed to transfer title to the remaining listed property to the tribe or tribal organization.

(b) For government-furnished real property made available to a tribe or tribal organization before October 25, 1994:

(1) The Secretary, in consultation with the tribe or tribal organization, shall develop a list of the property furnished for use in a self-determination contract.

(2) The Secretary shall inspect any real property on the list to determine the presence of any hazardous substance activity, as defined in 41 CFR 101-47.202(b)(10). If the tribe or tribal organization desires to take title to any real property on the list, the tribe or tribal organization shall inform the Secretary, who shall take such steps as necessary to transfer title to the tribe or tribal organization.

(c) For government-furnished real and personal property made available to a tribe or tribal organization on or after October 25, 1994:

(1) The tribe or tribal organization shall take title to all property unless the tribe or tribal organization requests that the United States retain the title.

(2) The Secretary shall determine the presence of any hazardous substance activity, as defined in 41 CFR 101-47.202(b)(10).

§ 900.88 What should the tribe or tribal organization do if it wants to obtain title to government-furnished real property that includes land not already held in trust?

If the land is owned by the United States but not held in trust for a tribe or individual Indian, the tribe or tribal organization shall specify whether it wants to acquire fee title to the land or whether it wants the land to be held in trust for the benefit of a tribe.

(a) If the tribe or tribal organization requests fee title, the Secretary shall take the necessary action under Federal law and regulations to transfer fee title.

(b) If the tribe or tribal organization requests beneficial ownership with fee title to be held by the United States in trust for a tribe:

(1) The tribe or tribal organization shall submit with its request a

resolution of support from the governing body of the tribe in which the beneficial ownership is to be registered.

(2) If the request is submitted to the Secretary of Health and Human Services for land under the jurisdiction of that Secretary, the Secretary shall take all necessary steps to effect a transfer the land to the Secretary of the Interior and shall also forward the tribe or tribal organization's request and the tribe's resolution.

(3) The Secretary of the Interior shall expeditiously process all requests in accordance with applicable Federal law and regulations.

(4) The Secretary shall not require the tribe or tribal organization to furnish any information in support of a request other than that required by law or regulation.

§ 900.89 When may the Secretary elect to reacquire government-furnished property whose title has been transferred to a tribe or tribal organization?

When a self-determination contract or grant agreement, or portion thereof, is retroceded, reassumed, terminated, or expires, the Secretary shall have the option to take title to any item of government-furnished property:

(a) whose title has been transferred to a tribe or tribal organization;

(b) that is still in use in the program; and

(c) that has a value in excess of \$5,000.

§ 900.90 Does government-furnished real property to which a tribe or tribal organization has taken title continue to be eligible for facilities operation and maintenance funding from the Secretary?

Yes.

Contractor-Purchased Property

§ 900.91 Who takes title to property purchased with funds under a self-determination contract or grant agreement pursuant to section 105(f)(2)(A)?

The contractor takes title to such property, unless the contractor chooses to have the United States take title. In that event, the contractor must inform the Secretary of the purchase and identify the property and its location in such manner as the contractor and the Secretary deem necessary. A request for the United States to take title to any item of contractor-purchased property may be made at any time. A request for the Secretary to take fee title to real property shall be expeditiously processed in accordance with applicable Federal law and regulation.

§ 900.92 What should the tribe or tribal organization do if it wants contractor-purchased real property to be taken into trust?

The contractor shall submit a resolution of support from the governing body of the tribe in which the beneficial ownership is to be registered. If the request to take contractor-purchased real property into trust is submitted to the Secretary of Health and Human Services, that Secretary shall transfer the request to the Secretary of the Interior. The Secretary of the Interior shall expeditiously process all requests in accord with applicable Federal law and regulation.

§ 900.93 When may the Secretary elect to acquire title to contractor-purchased property?

When a self-determination contract or grant agreement, or portion thereof, is retroceded, reassumed, terminated, or expires, the Secretary shall have the option to take title to any item of contractor-purchased property:

(a) whose title has been transferred to a tribe or tribal organization;

(b) that is still in use in the program; and

(c) that has a value in excess of \$5,000.

§ 900.94 Is contractor-purchased real property to which a tribe or tribal organization holds title eligible for facilities operation and maintenance funding from the Secretary?

Yes.

BIA and IHS Excess Property

§ 900.95 What is BIA or IHS excess property?

BIA or IHS excess property means property under the jurisdiction of the BIA or IHS that is excess to the agency's needs and the discharge of its responsibilities.

§ 900.96 How can tribes or tribal organizations learn about BIA and IHS excess property?

The Secretary shall periodically furnish to tribes or tribal organizations a listing of all excess BIA or IHS personal property before reporting the property to GSA or to any other Federal agency as excess. The listing shall identify the agency official to whom a request for donation shall be submitted.

§ 900.97 How can a tribe or tribal organization acquire excess BIA or IHS property?

(a) The tribe or tribal organization shall submit to the appropriate Secretary a request for specific property that includes a certification and justification that the property is

intended for use in connection with a self-determination contract or grant. The Secretary shall expeditiously process the request and shall exercise discretion to donate the property in the manner described in this subpart I.

(b) If more than one request for the same item of personal property is submitted, the Secretary shall award the item to the first requester. If there is a tie, the Secretary shall award the item to the requestor with the lowest transportation costs. The Secretary shall make the donation as expeditiously as possible.

(c) If more than one request for the same piece of real property is submitted, the Secretary shall award the property to the tribe or tribal organization whose reservation or trust land is closest to the real property requested.

§ 900.98 Who takes title to excess BIA or IHS property donated to a tribe or tribal organization?

The tribe or tribal organization takes title to donated excess BIA or IHS property. The Secretary shall provide the tribe or tribal organization with all documentation needed to vest title in the tribe or tribal organization.

§ 900.99 Who takes title to any land that is part of excess BIA or IHS real property donated to a tribe or tribal organization?

(a) If a tribe or tribal organization requests donation of fee title to excess real property that includes land not held in trust for a tribe, the tribe or tribal organization shall so specify in its request for donation. The Secretary shall take the necessary action under Federal law and regulations to transfer the title to the tribe or tribal organization.

(b) If a tribe or tribal organization asks the Secretary to donate excess real property that includes land and requests that fee title to the land be held by the United States in trust for a tribe, the requestor shall submit a resolution of support from the governing body of the tribe in which the beneficial ownership is to be registered.

(1) If the donation request is submitted to the Secretary of Health and Human Services, that Secretary shall take all steps necessary to transfer the land to the Secretary of the Interior with the tribe or tribal organization's request and the tribe's resolution. The Secretary of the Interior shall expeditiously process all requests in accord with applicable Federal law and regulations.

(2) The Secretary shall not require the tribe or tribal organization to furnish any information in support of a request other than that required by law or regulation.

§ 900.100 May the Secretary elect to reacquire excess BIA or IHS property whose title has been transferred to a tribe or tribal organization?

Yes. When a self-determination contract or grant agreement, or portion thereof, is retroceded, reassumed, terminated, or expires, the Secretary shall have the option to take title any item of the property:

- (a) whose title has been transferred to a tribe or tribal organization;
- (b) that is still in use in the program; and
- (c) that has a value in excess of \$5,000.

§ 900.101 Is excess BIA or IHS real property to which a tribe or tribal organization has taken title eligible for facilities operation and maintenance funding from the Secretary?

Yes.

Excess or Surplus Government Property of Other Agencies

§ 900.102 What is excess or surplus government property of other agencies?

(a) "Excess government property" is real or personal property under the control of a Federal agency, other than BIA and IHS, which is not required for the agency's needs and the discharge of its responsibilities.

(b) "Surplus government property" means excess real or personal property that is not required for the needs of and the discharge of the responsibilities of all Federal agencies that has been declared surplus by the General Services Administration.

§ 900.103 How can tribes or tribal organizations learn about property that has been designated as excess or surplus government property?

The Secretary shall periodically furnish to tribes or tribal organizations listings of such property as may be made available from time to time by GSA or other Federal agencies, and shall obtain listings upon the request of a tribe or tribal organization.

§ 900.104 How may a tribe or tribal organization receive excess or surplus government property of other agencies?

(a) The tribe or tribal organization shall file a request for specific property with the Secretary, and shall certify and justify that the property is appropriate for use for a purpose for which a self-determination contract or grant is authorized under the Act.

(b) The Secretary shall expeditiously process such request and shall exercise discretion to acquire the property in the manner described in the Federal Property Management Regulation, 41 CFR Chapter 101.

(c) Upon approval, the Secretary shall immediately request acquisition of the property from the GSA or the holding agency, as appropriate. If the tribe or tribal organization informs the Secretary that a "freeze" has been placed on the requested property, the Secretary shall make every good faith effort to process the request in order to obtain the property within the "freeze" period.

(d) The Secretary shall specify that the property is requested for donation to a tribe or tribal organization pursuant to authority provided in section 105(f)(3) of the Act.

(e) The Secretary shall request a waiver of any fees for transfer of the property in accordance with applicable Federal regulations.

§ 900.105 Who takes title to excess or surplus Federal property donated to a tribe or tribal organization?

(a) Title to any donated excess or surplus Federal personal property shall vest in the tribe or tribal organization upon taking possession.

(b) Legal title to donated excess or surplus Federal real property shall vest in the tribe or tribal organization upon acceptance by the tribe or tribal organization of a proper deed of conveyance.

(c) If the donation of excess or surplus Federal real property includes land owned by the United States but not held in trust for a tribe, the tribe or tribal organization shall specify whether it wants to acquire fee title to the land or whether it wants the land to be held in trust for the benefit of a tribe.

(1) If the tribe or tribal organization requests fee title, the Secretary shall take the necessary action under Federal law and regulations to transfer fee title to the tribe or tribal organization.

(2) If the tribe or tribal organization requests beneficial ownership with fee title to be held by the United States in trust for a tribe:

(i) The tribe or tribal organization shall submit with its request a resolution of support from the governing body of the tribe in which the beneficial ownership is to be registered.

(ii) If the donation request of the tribe or tribal organization is submitted to the Secretary of Health and Human Services, that Secretary shall take all necessary steps to acquire the land and transfer it to the Secretary of the Interior and shall also forward the tribe or tribal organization's request and the tribe's resolution.

(iii) The Secretary of the Interior shall expeditiously process all requests in accord with applicable Federal law and regulations.

(iv) The Secretary shall not require submission of any information other

than that required by Federal law and regulation.

§ 900.106 If a contract or grant agreement or portion thereof is retroceded, reassumed, terminated, or expires, may the Secretary reacquire title to excess or surplus Federal property of other agencies that was donated to a tribe or tribal organization?

No. Section 105(f)(3) of the Act does not give the Secretary the authority to reacquire title to excess or surplus government property acquired from other agencies for donation to a tribe or tribal organization.

Property Eligible for Replacement Funding

§ 900.107 Is property that a tribe or tribal organization obtains title under this subpart eligible for replacement funding?

Yes. Government-furnished property, contractor-purchased property and excess BIA and IHS property donated to a tribe or tribal organization to which a tribe or tribal organization holds title shall remain eligible for replacement funding to the same extent as if title to that property were held by the United States.

Subpart J—Construction Contracts

§ 900.110 What does this Subpart cover?

(a) This subpart establishes requirements for issuing fixed-price or cost-reimbursable contracts to provide: design, construction, repair, improvement, expansion, replacement, erection of new space, or demolition of one or more Federal facilities. It applies to tribal facilities where the Secretary is authorized by law to design, construct and/or renovate, or make improvements to such tribal facilities.

(b) Activities covered by construction contracts under this subpart are: design and architectural/engineering services, construction project management, and the actual construction of the building or facility in accordance with the construction documents, including all labor, materials, equipment, and services necessary to complete the work defined in the construction documents.

(1) Such contracts may include the provision of movable equipment, telecommunications and data processing equipment, furnishings (including works of art), and special purpose equipment, when part of a construction contract let under this subpart.

(2) While planning services and construction management services as defined in § 900.113 may be included in a construction contract under this subpart, they may also be contracted

separately using the model agreement in section 108 of the Act.

§ 900.111 What activities of construction programs are contractible?

The Secretary shall, upon the request of any Indian tribe by tribal resolution, enter into a self-determination contract to plan, conduct, and administer construction programs or portions thereof.

§ 900.112 What are construction phases?

(a) Construction programs generally include the following activities in phases which can vary by funding source (contact your funding source for more information regarding the conduct of their program):

(1) *The preplanning phase.* The phase during which an initial determination of project need is made and supporting information collected for presentation in a project application. This project application process is explained in more detail in § 900.122;

(2) *The planning phase.* The phase during which planning services are provided. This phase can include conducting and preparing a detailed needs assessment, developing justification documents, completing and/or verifying master plans, conducting pre-design site investigations, developing budget cost estimates, conducting feasibility studies, and developing a project Program of Requirements (POR);

(3) *The design phase.* The phase during which licensed design professional(s) using the POR as the basis for design of the project, prepare project plans, specifications, and other documents that are a part of the construction documents used to build the project.

(4) *The construction phase.* The phase during which the project is constructed. The construction phase includes providing the labor, materials, equipment, and services necessary to complete the work in accordance with the construction documents prepared as part of the design phase.

(b) The following activities may be part of phases described in paragraphs (a)(2), (a)(3), and (a)(4) of this section:

(1) Management; and
(2) Environmental, archeological, cultural resource, historic preservation, and similar assessments.

§ 900.113 Definitions.

(a) *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 Bureau of Indian Affairs administered by the Secretary of the Interior; or

(3) for the health facility maintenance and improvement program administered by the Secretary of Health and Human Services.

(b) *Construction management services (CMS)* means activities limited to administrative support services; coordination; and monitoring oversight of the planning, design, and construction process. The construction management services consultant (typically an engineer or architect) assists and advises the Indian tribe or tribal organizations in such activities as:

(1) coordination and information exchange between the Indian tribe or tribal organization and the Federal government;

(2) preparation of tribal or tribal organization construction contract proposals;

(3) tribal or tribal organization subcontract scope of work identification and subcontract preparation, and competitive selection of tribal or tribal organization construction contract subcontractors (see § 900.110);

(4) review of work to ensure compliance with the POR and/or the construction contract. This does not involve construction project management as defined in paragraph (d) of this section.

(c) *Construction programs* include programs for the planning, design, construction, repair, improvement, and expansion of buildings or facilities, including but not limited to, housing, law enforcement and detention facilities, sanitation and water systems, roads, schools, administration and health facilities, irrigation and agricultural work, water conservation, flood control, and port facilities, and environmental, archeological, cultural resource, historic preservation, and similar assessments.

(d) *Construction project management* means direct responsibility for the construction project through day-to-day on-site management and administration of the project. Activities may include cost management, project budgeting, project scheduling, procurement services.

(e) *Design* means services performed by licensed design professionals related to preparing drawings, specifications, and other design submissions specified in the contract, as well as services provided by or for licensed design professionals during the bidding/

negotiating, construction, and operational phases of the project.

(f) *Planning services* means activities undertaken to support agency and/or congressional funding of a construction project. Planning services may include performing a needs assessment, completing and/or verifying master plans, developing justification documents, conducting pre-design site investigations, developing budget cost estimates, conducting feasibility studies as needed and completion of approved justification documents and a program of requirements (POR) for the project.

(g) *Program of Requirements (POR)* is a planning document developed during the planning phase for an individual project. It provides background about the project; site information; programmatic needs; and, for facilities projects, a detailed room-by-room listing of spaces, including net and gross sizes, finish materials to be used, furnishings and equipment, and other information and design criteria on which to base the construction project documents.

(h) *Scope of Work* means the description of the work to be provided through a contract issued under this subpart and the methods and processes to be used to accomplish that work. A scope of work is typically developed based on criteria provided in a POR during the design phase, and project construction documents (plans and specifications) during the construction phase.

§ 900.114 Why is there a separate Subpart in these regulations for construction contracts and grants?

Because the Act differentiates between construction contracts and the model agreement in section 108 of the Act which is required for contracting other activities. Construction contracts are separately defined in the Act and are subject to a separate proposal and review process.

§ 900.115 How do self-determination construction contracts relate to ordinary Federal procurement contracts?

(a) A self-determination construction contract is a government-to-government agreement that transfers control of the construction project, including administrative functions, to the contracting Indian tribe or tribal organization to facilitate effective and meaningful participation by the Indian tribe or tribal organization in planning, conducting, and administering the construction project, and so that the construction project is responsive to the true needs of the Indian community. The Secretary's role in the conduct of a contracted construction project is

limited to the Secretary's responsibilities set out in § 900.132.

(b) Self-determination construction contracts are not traditional "procurement" contracts.

(1) With respect to a construction contract (or a subcontract of such a construction contract), the provisions of the Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.) and the regulations promulgated under such Act, shall apply to a construction contract or subcontract only to the extent that application of the provision is:

- (i) Necessary to ensure that the contract may be carried out in a satisfactory manner;
- (ii) Directly related to the construction activity; and
- (iii) not inconsistent with the Act.

(2) A list of the Federal requirements that meet the requirements of this paragraph shall be included in an attachment to the contract under negotiations between the Secretary and the tribal organization.

(3) Except as provided in paragraph (b)(2) of this section, no Federal law listed in section 105(3)(C)(ii) of the Act or any other provision of Federal law (including an Executive order) relating to acquisition by the Federal government shall apply to a construction contract that an Indian tribe or tribal organization enters into under this Act, unless expressly provided in the law.

(c) Provisions of a construction contract under this subpart shall be liberally construed in favor of the contracting Indian tribe or tribal organization.

§ 900.116 Are fixed-price contracts treated the same as cost-reimbursable contracts?

Yes, except that in fixed-price construction contracts, appropriate clauses shall be negotiated to properly allocate the contract risks between the government and the contractor.

§ 900.117 Do these "construction contract" regulations apply to planning services?

(a) These regulations apply to planning services contracts only as provided in this section.

(1) The Indian tribe or tribal organization shall submit to the Secretary for review and approval the POR documents produced as a part of a model contract under section 108 of the Act or under a construction contract under this subpart.

(i) Within 60 days after receipt of the POR from the Indian tribe or tribal organization for a project that has achieved priority ranking or that is funded, the Secretary shall:

(A) approve the POR; or

(B) notify the Indian tribe or tribal organization of and make available any objections to the POR that the Secretary may have; or

(C) notify the Indian tribe or tribal organization of the reasons why the Secretary will be unable either to approve the POR or to notify the Indian tribe or tribal organization of any objections within 60 days, and state the time within which the notification will be made, provided that the extended time shall not exceed 60 additional days.

(ii) Within a maximum of 180 days after receipt of a POR from an Indian tribe or tribal organization for a project that is not funded and is not described in paragraph (a)(1)(i) of this section, the Secretary shall:

(A) approve the POR; or

(B) notify the Indian tribe or tribal organization of and make available any objections to the POR; or

(C) notify the Indian tribe or tribal organization of the reasons why the Secretary will be unable either to approve the POR or to notify the Indian tribe or tribal organization of any objections within 180 days, and state the time within which the notification will be made, provided that the extended time shall not exceed 60 additional days.

(2) Any failure of the Secretary to act on a POR within the applicable period required in paragraph (a)(1) of this section will be deemed to be a rejection of the POR and will authorize the commencement of any appeal as provided in section 110 of the Act, or, if a model agreement under section 108 of the Act is used, the disputes provision of that agreement.

(3) If an Indian tribe or tribal organization elects to provide planning services as part of a construction contract rather than under a model agreement as set out in section 108 of the Act, the regulations in this subpart shall apply.

(b) The parties to the contract are encouraged to consult during the development of the POR and following submission of the POR to the Secretary.

§ 900.118 Do these "construction contract" regulations apply to construction management services?

No. Construction management services may be contracted separately under section 108 of the Act. Construction management services consultants assist and advise the Indian tribe or tribal organization to implement construction contracts, but have no contractual relationship with or

authority to direct construction contract subcontractors.

(a) If the Indian tribe or tribal organization chooses to contract solely for construction management services, these services shall be limited to:

(1) Coordination and exchange of information between the Indian tribe or tribal organization and Secretary;

(2) Review of work produced by the Secretary to determine compliance with: (i) the POR and design contract during the design stage; or

(ii) the project construction documents during the construction stage;

(3) Disputes shall be resolved in accordance with the disputes clause of the CMS contract.

(b) If the Indian tribe or tribal organization conducts CMS under section 108 of the Act and the Indian tribe or tribal organization contracts separately under this subpart for all or some of the activities in § 900.110, the contracted activities shall be limited to:

(1) Coordination and exchange of information between the Indian tribe or tribal organization and Secretary;

(2) Preparation of tribal or tribal organization construction subcontract scope of work identification and subcontract preparation, and competitive selection of tribal or tribal organization construction contract subcontractors;

(3) Review of work produced by tribal or tribal organization construction subcontractors to determine compliance with:

(i) the POR and the design contract during the design stage; or

(ii) the project construction documents during the construction stage.

§ 900.119 To what extent shall the Secretary consult with affected Indian tribes before spending funds for any construction project?

Before spending any funds for a planning, design, construction, or renovation project, whether subject to a competitive application and ranking process or not, the Secretary shall consult with any Indian tribe or tribal organization(s) that would be significantly affected by the expenditure to determine and to follow tribal preferences to the greatest extent feasible concerning: size, location, type, and other characteristics of the project.

§ 900.120 How does an Indian tribe or tribal organization find out about a construction project?

Within 30 days after the Secretary's allocation of funds for planning phase, design phase, or construction phase activities for a specific project, the

Secretary will notify the Indian tribe or tribal organization(s) to be benefitted of the availability of the funds for the project. The Secretarial notice of fund allocation shall offer technical assistance in the preparation of a contract proposal.

(a) The Secretary shall, within 30 days after receiving a request from an Indian tribe or tribal organization, furnish the Indian tribe or tribal organization with all information available to the Secretary about the project including, but not limited to: construction drawings, maps, engineering reports, design reports, plans of requirements, cost estimates, environmental assessments, or environmental impact reports and archeological reports.

(b) An Indian tribe or tribal organization is not required to request this information prior to submitting a notification of intent to contract or a contract proposal.

(c) The secretary shall have a continuing responsibility to furnish information.

§ 900.121 Does the Indian tribe or tribal organization have a right of first refusal?

(a) Yes. An Indian tribe or tribal organization shall notify the Secretary within 45 days after receiving the Secretarial notice described in § 900.120 if it wishes to contract one or more phases of the project. The Indian tribe or tribal organization will notify the Secretary by registered mail, return receipt requested. Notice by the Indian tribe or tribal organization does not require submission of a full contract proposal. After notifying the Secretary and unless already submitted as part of the Indian tribe or tribal organization's notification or intent to contract, the Indian tribe or tribal organization shall prepare a self-determination construction contract proposal in accordance with this subpart.

(b) Before the start of the contracting process for any phase during the construction process and unless previously notified by the Indian tribe or tribal organization of intent to contract for subsequent stages, the Secretary shall repeat the requirements of paragraph § 900.120(a).

(c) The Indian tribe's or tribal organization's decision not to contract under the Act or a prior attempt to contract under the Act will not bar an Indian tribe or tribal organization from bidding on or contracting for the construction project under any other act or process.

§ 900.122 What happens during the preplanning phase and can an Indian tribe or tribal organization perform any of the activities involved in this process?

(a) The application and ranking process for developing a priority listing of projects varies between agencies. There are, however, steps in the selection process that are common to most selection processes. An Indian tribe or tribal organization that wishes to secure a construction project should contact the appropriate agency to determine the specific steps involved in the application and selection process used to fund specific types of projects. When a priority process is used in the selection of construction projects, the steps involved in the application and ranking process are as follows:

(1) *Application.* The agency solicits applications from Indian tribes or tribal organizations. In the request for applications, the Secretary provides specific information regarding the type of project to be funded, the objective criteria that will be used to evaluate applications, the points or weight that each criterion will be assigned, and the time when applications are due. An Indian tribe or tribal organization may prepare the application (technical assistance from the agency, within resources available, shall be provided upon request from an Indian tribe or tribal organization) or may rely upon the agency to prepare the application.

(2) *Ranking/Prioritization.* The Secretary evaluates the applications based on the criteria provided as part of the application preparation process. The Secretary applies only criteria and weights assigned to each criteria that were disclosed to the Indian tribe or tribal organization during the application stage. The applications are then ranked in order from the application that best meets application criteria to the application that least meet the application criteria.

(3) *Validation.* Before final acceptance of a ranked application, the information, such as demographic information, deficiency levels reported in application, the condition of existing facilities, and program housing needs, is validated. During this process, additional information may be developed by the Indian tribe or tribal organization in support of the original information or the Secretary may designate a representative of the Department to conduct an on-site review of the information contained in the application.

§ 900.123 What does an Indian tribe or tribal organization do if it wants to secure a construction contract?

(a) The Act establishes a special process for review and negotiation of proposals for construction contracts which is different than that for other self-determination contract proposals. The Indian tribe or tribal organization should notify the Secretary of its intent to contract in accordance with § 900.121(a). After notification, the Indian tribe or tribal organization should prepare its contract proposal in accordance with the sections of this subpart. While developing its construction contract proposal, the Indian tribe or tribal organization can request technical assistance from the Secretary. Not later than 30 days after receiving a request from an Indian tribe or tribal organization, the Secretary will provide to the Indian tribe or tribal organization all information available about the construction project, including construction drawings, maps, engineering reports, design reports, plans of requirements, cost estimates, environmental assessments, or environmental impact reports, and archaeological reports. The responsibility of the Secretary to furnish this information shall be a continuing one.

(b) At the request of the Indian tribe or tribal organization and before finalizing its construction contract proposal, the Secretary shall provide for a precontract negotiation phase during the development of a contract proposal. Within 30 days the Secretary shall acknowledge receipt of the proposal and, if requested by the Indian tribe or tribal organization, shall confer with the Indian tribe or tribal organization to develop a negotiation schedule. The negotiation phase shall include, at a minimum:

(1) The provision of technical assistance under section 103 of the Act and paragraph (a) of this section;

(2) A joint scoping session between the Secretary and the Indian tribe or tribal organization to review all plans, specifications, engineering reports, cost estimates, and other information available to the parties, for the purpose of identifying all areas of agreement and disagreement;

(3) An opportunity for the Secretary to revise plans, designs, or cost estimates of the Secretary in response to concerns raised, or information provided by, the Indian tribe or tribal organization;

(4) A negotiation session during which the Secretary and the Indian tribe or tribal organization shall seek to develop a mutually agreeable contract proposal; and

(5) Upon the request of the Indian tribe or tribal organization, the use of alternative dispute resolution to resolve remaining areas of disagreement under the dispute resolution provisions under subchapter IV of chapter 5 of the United States Code.

§ 900.124 What if the Indian tribe or tribal organization and the Secretary cannot develop a mutually agreeable contract proposal?

(a) If the Secretary and the Indian tribe or tribal organization are unable to develop a mutually agreeable construction contract proposal under the procedures in § 900.123, the Indian tribe or tribal organization may submit a final contract proposal to the Secretary. Not later than 30 days after receiving the final contract proposal, the Secretary shall approve the contract proposal and award the contract, unless, during the period the Secretary declines the proposal under sections 102(a)(2) and 102(b) of the Act (including providing opportunity for an appeal under section 102(b)).

(b) Whenever the Secretary declines to enter into a self-determination contract or contracts under section 102(a)(2) of the Act, the Secretary shall:

(1) State any objections to the contract proposal (as submitted by the Indian tribe or tribal organization) in writing to the tribal organization;

(2) Provide assistance to the tribal organization to overcome the stated objections;

(3) Provide the tribal organization with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter and the opportunity for appeal on the objections raised, under the regulations set forth in subpart L, except that the Indian tribe or tribal organization may, in lieu of filing the appeal, initiate an action in a Federal district court and proceed directly to the court under section 110(a) of the Act.

§ 900.125 May the Indian tribe or tribal organization elect to use a grant in lieu of a contract?

Yes. A grant agreement or a cooperative agreement may be used in lieu of a contract under sections 102 and 103 of the Act when mutually agreed to by the Secretary and the Indian tribe or tribal organization. Under the grant concept, the grantee will assume full responsibility and accountability for design and construction performance within the funding limitations. The grantee will manage and administer the work with minimal involvement by the government. The grantee will be expected to have acceptable management systems for finance,

procurement, and property. The Secretary may issue Federal construction guidelines and manuals applicable to its construction programs, and the government shall accept tribal proposals for alternatives which are consistent with or exceed Federal guidelines or manuals applicable to construction programs.

§ 900.126 What shall a construction contract proposal contain?

(a) In addition to the full name, address, and telephone number of the Indian tribe or tribal organization submitting the construction proposal, a construction contract proposal shall contain descriptions of the following standards under which they propose to operate the contract:

(1) The use of licensed and qualified architects and engineers;

(2) Applicable health and safety standards;

(3) Adherence to applicable Federal, State, local, or tribal building codes and engineering standards;

(4) Structural integrity;

(5) Accountability of funds;

(6) Adequate competition for subcontracting under tribal or other applicable law;

(7) The commencement, performance, and completion of the contract;

(8) Adherence to project plans and specifications (including any applicable Federal construction guidelines and manuals);

(9) The use of proper materials and workmanship;

(10) Necessary inspection and testing;

(11) With respect to the self-determination contract between the Indian tribe or tribal organization and Federal government, a process for changes, modifications, stop work, and termination of the work when warranted;

(b) In addition to provisions regarding the program standards listed in paragraph (a) of this section or the assurances listed in paragraph (c) of this section, the Indian tribe or tribal organization shall also include in its construction contract proposal the following:

(1) In the case of a contract for design activities, this statement, "Construction documents produced as part of this contract will be produced in accordance with the Program of Requirements and/or Scope of Work," and the POR and/or Scope of Work shall be attached to the contract proposal. If tribal construction procedures, standards and methods (including national, regional, state, or tribal building codes or construction industry standards) are consistent with or exceed applicable

Federal standards then the Secretary shall accept the tribally proposed standards; and

(2) In the case of a contract for construction activities, this statement, "The facility will be built in accordance with the construction documents produced as a part of design activities. The project documents, including plans and specifications, are hereby incorporated into this contract through this reference." If tribal construction procedures, standards and methods (including national, regional, state, or tribal building codes or construction industry standards) are consistent with or exceed applicable Federal standards then the Secretary shall accept the tribally proposed standards; and

(3) Proposed methods to accommodate the responsibilities of the Secretary provided in § 900.132; and

(4) Proposed methods to accommodate the responsibilities of the Indian tribe or tribal organization provided in § 900.131 unless otherwise addressed in paragraph (a) of this section;

(5) A contract budget as described in § 900.128; and

(6) A period of performance for the conduct of all activities to be contracted.

(7) A payment schedule as described in § 900.133;

(8) If the Indian tribe or tribal organization is conducting CMS under this subpart, the Indian tribe or tribal organization will provide a job description and qualification statement for key positions.

(9) Current (unrevoked) authorizing resolutions in accordance with § 900.5(d) from all Indian tribes benefitting from the contract proposal;

(10) Any responsibilities, in addition to the Federal responsibilities listed in § 900.132, which the Indian tribe or tribal organization proposes the Federal government to perform to assist with the completion of the scope of work;

(c) The Indian tribe or tribal organization will provide the following assurances in its contract proposal:

(1) If the Indian tribe or tribal organization proposes to use Federal property in carrying out the contract, "The Indian tribe or tribal organization will not dispose of, modify the use of, or change the terms of the real property title, or other interest in the site and facilities without permission and instructions from the awarding agency. The Indian tribe or tribal organization will record the Federal interest in the title of real property in accordance with awarding agency directives and will include a covenant in the title of real property acquired in whole or in part with Federal assistance funds to assure

nondiscrimination during the useful life of the project"; and

(2) The Indian tribe or tribal organization will comply with the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4801 *et seq.*) which prohibits the use of lead based paint in construction or rehabilitation of residential structures; and

(3) The Indian tribe or tribal organization will comply, or has already complied, with the requirements of Titles II and III of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Pub. L. 91-646) which provides for fair and equitable treatment of persons displaced or whose property is acquired as a result of Federal participation in purchases; and

(4) Except for work performed by tribal or tribal organization employees, the Indian tribe or tribal organization will comply, as applicable, with the provisions of the Davis-Bacon Act (40 U.S.C. 276c and 18 U.S.C. 874), the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-333) regarding labor standards for Federally assisted construction subagreements; and

(5) The Indian tribe or tribal organization will comply with the flood insurance purchase requirements of section 102(a) of the Flood Disaster Protection Act of 1973 (Pub. L. 93-234) which requires recipients in a special flood hazard area to participate in the program and to purchase flood insurance if the total cost of insurable construction and acquisition is \$10,000 or more; and

(6) The Indian tribe or tribal organization will comply with all applicable Federal environmental laws, regulations, and Executive Orders; and

(7) The Indian tribe or tribal organization will comply with the Wild and Scenic Rivers Act of 1968 (16 U.S.C. 1271 *et seq.*) related to protecting the components or potential components of the national wild and scenic rivers system; and

(8) The Indian tribe or tribal organization will assist the awarding agency in assuring compliance with section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470), EO 11593 (identification and preservation of historic properties), and the Archaeological and Historic Preservation Act of 1974 (16 U.S.C. 469a-1 *et seq.*)".

(d) The Indian tribe or tribal organization and the Secretary will both make a good faith effort to identify any other applicable Federal laws, Executive Orders, or regulations applicable to the

contract, and share identified laws, Executive Orders, or regulations with the other party, and include reference to such laws in the construction contract.

§ 900.127 Shall a construction contract proposal incorporate provisions of Federal construction guidelines and manuals?

Each agency may provide or the Indian tribe or tribal organization may request Federal construction guidelines and manuals for consideration by the Indian tribe or tribal organization in the preparation of its contract proposal. If tribal construction procedures, standards and methods (including national, regional, state, or tribal building codes or construction industry standards) are consistent with or exceed applicable Federal standards then the Secretary shall accept the tribally proposed standards.

§ 900.128 What can be included in the Indian tribe's or tribal organization's contract budget?

(a) The costs incurred will vary depending on which phase (see § 900.112) of the construction process the Indian tribe or tribal organization is conducting and the type of contract that will be used. The total amount awarded under a construction contract shall reflect an overall fair and reasonable price to the parties.

(b) Costs for activities under this subpart that have not been billed, allocated, or recovered under a contract issued under section 108 of the Act should be included.

(c) The Indian tribe or tribal organization's budget should include the cost elements that reflect an overall fair and reasonable price. These costs include:

(1) the reasonable costs to the tribal organization of performing the contract, taking into consideration the terms of the contract and the requirements of the Act and any other applicable law;

(2) the costs of preparing the contract proposal and supporting cost data;

(3) the costs associated with auditing the general and administrative costs of the tribal organization associated with the management of the construction contract; and

(4) In cases where the Indian tribe or tribal organization is submitting a fixed-price construction contract:

(i) the reasonable costs to the Indian tribe or tribal organization for general administration incurred in connection with the project that is the subject of the contract;

(ii) the ability of the contractor that carries out the construction contract to make a reasonable profit, taking into consideration the risks associated with

carrying out the contract, local market conditions, and other relevant considerations.

(d) In establishing a contract budget for a construction project, the Secretary shall not be required to separately identify the components described in paragraphs (c)(4)(i) and (c)(4)(ii) above.

(e) The Indian tribe's or tribal organization's budget proposal includes a detailed budget breakdown for performing the scope of work including a total "not to exceed" dollar amount with which to perform the scope of work. Specific budget line items, if requested by the Indian tribe or tribal organization, can include the following:

(1) the administrative costs the Indian tribe or tribal organization may incur including:

(i) personnel needed to provide administrative oversight of the contract,

(ii) travel costs incurred, both local travel incurred as a direct result of conducting the contract and remote travel necessary to review project status with the Secretary,

(iii) meeting costs incurred while meeting with community residents to develop project documents,

(iv) fees to be paid to consultants, such as demographic consultants, planning consultants, attorneys, accountants, and personnel who will provide construction management services;

(2) the fees to be paid to architects and engineers to assist in preparing project documents and to assist in oversight of the construction process;

(3) the fees to be paid to develop project surveys including topographical surveys, site boundary descriptions, geotechnical surveys, archeological surveys, and NEPA compliance, and;

(4) In the case of a contract to conduct project construction activities, the fees to provide a part-time or full-time on-site inspector, depending on the terms of the contract, to monitor construction activities;

(5) In the case of a contract to conduct project construction activities, project site development costs;

(6) In the case of a contract to conduct project construction activities, project construction costs including those costs described in paragraph (c)(4), above

(7) the cost of securing and installing moveable equipment, telecommunications and data processing equipment, furnishings, including works of art, and special purpose equipment when part of a construction contract;

(8) A contingency amount for unanticipated conditions of the construction phase of cost-reimbursable contracts. The amount of the

contingency provided shall be 3 per cent of activities being contracted or 50 per cent of the available contingency funds, whichever is less. Any additional contingency funds for the construction phase will be negotiated on an as needed basis subject to the availability of funds and the nature, scope, and complexity of the project. Any contingency for other phases will be negotiated on a contract by contract basis. Unused contingency funds obligated to the contract and remaining at the end of the contract will be considered savings.

(9) Other costs incurred that are directly related to the conduct of contract activities.

§ 900.129 What funding shall the Secretary provide in a construction contract?

The Secretary shall provide an amount under a construction contract that reflects an overall fair and reasonable price to the parties. These costs include:

(a) the reasonable costs to the tribal organization of performing the contract, taking into consideration the terms of the contract and the requirements of the Act and any other applicable law;

(b) the costs of preparing the contract proposal and supporting cost data; and

(c) the costs associated with auditing the general and administrative costs of the tribal organization associated with the management of the construction contract; and

(d) If Indian tribe or tribal organization is submitting a fixed-price construction contract:

(1) the reasonable costs to the Indian tribe or tribal organization for general administration incurred in connection with the project that is the subject of the contract;

(2) the ability of the contractor that carries out the construction contract to make a reasonable profit, taking into consideration the risks associated with carrying out the contract, local market conditions, and other relevant considerations.

(3) In establishing a contract budget for a construction project, the Secretary is not required to separately identify the components described in clauses (1) and (2) above.

§ 900.130 How do the Secretary and Indian tribe or tribal organization arrive at an overall fair and reasonable price for the performance of a construction contract?

(a) Throughout the contract award process, the Secretary and Indian tribe or tribal organization shall share all construction project cost information available to them in order to facilitate reaching agreement on an overall fair

and reasonable price for the project or part thereof. In order to enhance this communication, the government's estimate of an overall fair and reasonable price shall:

(1) Contain a level of detail appropriate to the nature and phase of the work and sufficient to allow comparisons to the tribe or tribal organization estimate;

(2) Be prepared in a format coordinated with the Indian tribe or tribal organization; and

(3) Include the cost elements contained in section 105(m)(4) of the Act.

(b) The government's cost estimate shall be an independent cost estimate based on such information as the following:

(1) Prior costs to the government for similar projects adjusted for comparison to the target location, typically in unit costs, such as dollars per pound, square meter cost of building, or other unit cost that can be used to make a comparison;

(2) Actual costs previously incurred by the Indian tribe or tribal organization for similar projects;

(3) Published price lists, to include regional adjustment factors, for materials, equipment, and labor; and

(4) Projections of inflation and cost trends, including projected changes such as labor, material, and transportation costs.

(c) The Secretary shall provide the initial government cost estimate to the Indian tribe or tribal organization and make appropriate revisions based on concerns raised or information provided by the Indian tribe or tribal organization. The Secretary and the Indian tribe or tribal organization shall continue to revise, as appropriate, their respective cost estimates based on changed or additional information such as the following:

(1) Actual subcontract bids;

(2) Changes in inflation rates and market conditions, including local market conditions;

(3) Cost and price analyses conducted by the Secretary and the tribe or tribal organization during negotiations;

(4) Agreed upon changes in the size, scope and schedule of the construction project; and

(5) Agreed upon changes in project plans and specifications.

(d) Considering all of the information available, the Secretary and the tribe or tribal organization shall negotiate the amount of the construction contract. The objective of the negotiations is to arrive at an amount that is fair under current market conditions and reasonable to both the government and the tribe or tribal organization. As a

result, the agreement does not necessarily have to be in strict conformance with either party's cost estimate nor does agreement have to be reached on every element of cost, but only on the overall fair and reasonable price of each phase of the work included in the contract.

(e) If the fair and reasonable price arrived at under paragraph (d) above would exceed the amount available to the Secretary, then:

(1) If the Indian tribe or tribal organization elects to submit a final proposal, the Secretary may decline the proposal under section 105(m)(4)(C)(v) of the Act; or

(2) If requested by the Indian tribe or tribal organization:

(i) the Indian tribe or tribal organization and the Secretary may jointly explore methods of expanding the available funds through the use of contingency funds, rebudgeting, or seeking additional appropriations; or

(ii) the Indian tribe or tribal organization may elect to propose a reduction in project scope to bring the project price within available funds; or

(iii) the Secretary and Indian tribe or tribal organization may agree that the project be executed in phases.

§ 900.131 What role does the Indian tribe or tribal organization play during the performance of a self-determination construction contract?

(a) The Indian tribe or tribal organization is responsible for the successful completion of the project in accordance with the approved contract documents.

(b) If the Indian tribe or tribal organization is contracting to perform design phase activities, the Indian tribe or tribal organization shall have the following responsibilities:

(1) the Indian tribe or tribal organization shall subcontract with or provide the services of licensed and qualified architects and engineers and other consultants needed to accomplish the self-determination construction contract.

(2) the Indian tribe or tribal organization shall administer and disburse funds provided through the contract in accordance with subpart F, § 900.41 through § 900.44 and a management system in accordance with subpart F, § 900.51 through § 900.60.

(3) the Indian tribe or tribal organization shall direct the activities of project architects, engineers, and other project consultants, facilitate the flow of information between the Indian tribe or tribal organization and its subcontractors, resolve disputes between the Indian tribe or tribal

organization and its subcontractors or between its subcontractors, and monitor the work produced by its subcontractors to assure compliance with the POR.

(4) the Indian tribe or tribal organization shall direct the work of its subcontractors so that work produced is provided in accordance with the contract budget and contract performance period as negotiated between and agreed to by the parties.

(5) the Indian tribe or tribal organization shall provide the Secretary with an opportunity to review and approve for general compliance with contract requirements and project plans and specifications only at the concept phase, the schematic phase, the design development phase, and the final construction documents phase or as otherwise negotiated.

(6) the Indian tribe or tribal organization shall provide the Secretary with the plans and specifications after their final review so, if needed, the Secretary may obtain an independent government cost estimate for the construction of the project.

(7) the Indian tribe or tribal organization shall retain project records and design documents for a minimum of 3 years following completion of the contract.

(8) the Indian tribe or tribal organization shall provide progress reports and financial status reports quarterly or as negotiated that contain a narrative of the work accomplished, the percentage of the work completed, a report of funds expended during the reporting period, and total funds expended for the project. The Indian tribe or tribal organization shall also provide copies, for the information of the Secretary, of contracts and major subcontracts and modifications, an initial work and payment schedule and updates as they may occur, and A/E services deliverables.

(c) If the Indian tribe or tribal organization is contracting to perform project construction phase activities, the Indian tribe or tribal organization shall have the following responsibilities:

(1) the Indian tribe or tribal organization shall subcontract with or provide the services of licensed and qualified architects and engineers and other consultants needed to accomplish the self-determination construction contract.

(2) the Indian tribe or tribal organization shall administer and disburse funds provided through the contract in accordance with subpart F, § 900.41 through § 900.44 and a management system in accordance with subpart F, § 900.51 through § 900.60.

(3) the Indian tribe or tribal organization shall subcontract with or provide the services of construction contractors or provide its own forces to conduct construction activities in accordance with the project construction documents or as otherwise negotiated between and agreed to by the parties.

(4) the Indian tribe or tribal organization shall direct the activities of project architects, engineers, construction contractors, and other project consultants, facilitate the flow of information between the Indian tribe or tribal organization and its subcontractors, resolve disputes between itself and its subcontractors or between its subcontractors, and monitor the work produced by its subcontractors to assure compliance with the project plans and specifications.

(5) the Indian tribe or tribal organization shall manage or provide for the management of day-to-day activities of the contract including the issuance of construction change orders to subcontractors except that, unless the Secretary agrees:

(i) the Indian tribe or tribal organization may not issue a change order to a construction subcontractor that will cause the Indian tribe or tribal organization to exceed its self-determination contract budget;

(ii) the Indian tribe or tribal organization may not issue a change order to a construction subcontractor that will cause the Indian tribe or tribal organization to exceed the performance period in its self-determination contract budget;

(iii) the Indian tribe or tribal organization may not issue to a construction subcontractor a change order that is a significant departure from the scope or objective of the project.

(6) the Indian tribe or tribal organization shall direct the work of its subcontractors so that work produced is provided in accordance with the contract budget and performance period as negotiated between and agreed to by the parties.

(7) the Indian tribe or tribal organization shall provide to the Secretary progress and financial status reports.

(i) the reports shall be provided quarterly or as negotiated, and shall contain a narrative of the work accomplished, the percentage of the work completed, a report of funds expended during the reporting period, and total funds expended for the project.

(ii) the Indian tribe or tribal organization shall also provide copies, for the information of the Secretary, of

change orders, contracts and major subcontracts, an initial schedule of values and updates as they may occur, and an initial construction schedule and updates as they occur.

(8) the Indian tribe or tribal organization shall maintain on the job-site or project office, and make available to the Secretary during monitoring visits: construction documents, change orders, shop drawings, equipment cut sheets, inspection reports, testing reports, and current redline drawings.

(d) Upon completion of the project, the Indian tribe or tribal organization shall provide to the Secretary a reproducible copy of the record plans and a contract closeout report.

(e) For cost-reimbursable projects, the Indian tribe or tribal organization shall not be obligated to continue performance that requires an expenditure of more funds than were awarded under the contract. If the Indian tribe or tribal organization has a reason to believe that the total amount required for performance of the contract will be greater than the amount of funds awarded, it shall provide reasonable notice to the Secretary. If the Secretary does not take the action necessary to increase the amount of funds awarded under the contract, the Indian tribe or tribal organization may suspend performance of the contract until additional funds are awarded.

§ 900.132 What role does the Secretary play during the performance of a self-determination construction contract?

(a) If the Indian tribe or tribal organization is contracting solely to perform construction management services either under this subpart or section 108 of the Act, the Secretary has the following responsibilities:

(1) the Secretary is responsible for the successful completion of the project in accordance with the approved contract documents. In fulfilling those responsibilities, the Secretary shall consult with the Indian tribe or tribal organization on a regular basis as agreed to by the parties to facilitate the exchange of information between the Indian tribe or tribal organization and Secretary;

(2) the Secretary shall provide the Indian tribe or tribal organization with regular opportunities to review work produced to determine compliance with:

(i) the POR, during the conduct of design phase activities. The Secretary shall provide the Indian tribe or tribal organization with an opportunity to review the project construction documents at the concept phase, the schematic phase, the design

development phase, and the final construction documents phase or as otherwise negotiated. Upon receipt of project construction documents for review, the Indian tribe or tribal organization shall not take more than 21 days to make available to the Secretary any comments or objections to the construction documents as submitted by the Secretary. Resolution of any comments or objections shall be in accordance with dispute resolution procedures as agreed to by the parties and contained in the contract; or

(ii) the project construction documents, during conduct of the construction phase activities. The Indian tribe or tribal organization shall have the right to conduct monthly or critical milestone on-site monitoring visits or as negotiated with the Secretary;

(b) If the Indian tribe or tribal organization is contracting to perform design and/or construction phase activities, the Secretary shall have the following responsibilities:

(1) In carrying out the responsibilities of this section, and specifically in carrying out review and approval functions under this section, the Secretary shall provide for tribal participation in the decisionmaking process and shall honor tribal preferences and recommendations to the greatest extent feasible. This includes promptly notifying the Indian tribe or tribal organization of any concerns or issues that may lead to disapproval, meeting with the Indian tribe or tribal organization to discuss these concerns and issues and to share relevant information, and making a good faith effort to accommodate tribal recommendations. The time allowed for Secretarial review and approval shall be no more than 21 days per review unless a different time period is negotiated and specified in individual contracts. The 21-day time period may be extended if the Indian tribe or tribal organization agrees to the extension in writing. Disagreements over the Secretary's decisions in carrying out these responsibilities shall be handled under subpart N governing contract disputes under the Contract Disputes Act.

(2) To the extent the construction project is subject to NEPA or other environmental laws, the Secretary shall make the final determination under such laws. All other environmentally related functions are contractible.

(3) If the Indian tribe or tribal organization conducts planning activities under this subpart, the Secretary shall review and approve final planning documents for the project to

ensure compliance with applicable planning standards.

(4) When a contract or portion of a contract is for project construction activities, the Secretary shall obtain an independent government cost estimate that is derived from the final project plans and specifications or the Secretary may rely on Indian tribe or tribal organizations cost estimate. The Secretary shall obtain, if any, the cost estimate within 90 days or less of receipt of the final plans and specifications from the Indian tribe or tribal organization.

(5) If the contracted project involves design activities, the Secretary shall have the authority to review and approve for general compliance with contract requirements the project plans and specifications only at the concept phase, the schematic phase, the design development phase, and the final construction documents phase or as otherwise negotiated.

(6) If the contracted project involves design activities, the Secretary reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, for Federal government purposes:

(i) the copyright in any work developed under a contract or subcontract of this subpart; and

(ii) Any rights of copyright to which an Indian tribe or tribal organization or a tribal subcontractor purchases ownership through this contract.

(7) Changes that require an increase to the negotiated contract budget or an increase in the negotiated performance period or are a significant departure from the scope or objective of the project shall require approval of the Secretary.

(8) Review and comment on specific shop drawings as negotiated and specified in individual contracts.

(9) The Secretary retains the right to conduct monthly on-site monitoring visits, or alternatively if negotiated with the Indian tribe or tribal organization, critical milestone on-site monitoring visits.

(10) The Secretary retains the right to conduct final project inspections jointly with the Indian tribe or tribal organization and to accept the building or facility. Objections of the Secretary to the facility identified during final project inspections shall be provided to the Indian tribe or tribal organization and shall be limited to items that are materially noncompliant.

(11) The Secretary can require an Indian tribe or tribal organization to suspend work under a contract in accordance with this paragraph. The Secretary may suspend a contract for no

more than 30 days unless the Indian tribe or tribal organization has failed to correct the reason(s) for the suspension or unless the cause of the suspension cannot be resolved through either the efforts of the Secretary or the Indian tribe or tribal organization.

(i) The following are reasons the Secretary may suspend work under a self-determination contract for construction:

(A) differing site conditions encountered upon commencement of construction activities that impact health or safety concerns or shall require an increase in the negotiated project budget;

(B) the Secretary discovers materially non-compliant work;

(C) funds allocated for the project that is the subject of this contract are rescinded by Congressional action; or

(D) other Congressional actions occur that materially affect the subject matter of the contract.

(ii) If the Secretary wishes to suspend the work, the Secretary shall first provide written notice and an opportunity for the Indian tribe or tribal organization to correct the problem. The Secretary may direct the Indian tribe or tribal organization to temporarily suspend work under a contract only after providing a minimum of 5 working days advance written notice to the Indian tribe or tribal organization describing the nature of the performance deficiencies or imminent safety, health or environmental issues which are the cause for suspending the work.

(iii) The Indian tribe or tribal organization shall be compensated for reasonable costs incurred due to any suspension of work that occurred through no fault of the Indian tribe or tribal organization.

(iv) Disputes arising as a result of a suspension of the work by the Secretary shall be subject to the Contract Disputes Act or any other alternative dispute resolution mechanism as negotiated between and agreed to by the parties and contained in the contract.

(12) The Secretary can terminate the project for cause in the event non-compliant work is not corrected through the suspension process specified in paragraph (11) above.

(13) The Secretary retains authority to terminate the project for convenience for the following reasons:

(i) termination for convenience is requested by the Indian tribe or tribal organization;

(ii) termination for convenience is requested by the Secretary and agreed to by the Indian tribe or tribal organization;

(iii) funds allocated for the project that is the subject of the contract are rescinded by Congressional action;

(iv) other Congressional actions take place that affect the subject matter of the contract;

(v) if the Secretary terminates a self-determination construction contract for convenience, the Secretary shall provide the Indian tribe or tribal organization 21 days advance written notice of intent to terminate a contract for convenience.

§ 900.133 Once a contract is awarded, how will the Indian tribe or tribal organization receive payments?

(a) A schedule for advance payments shall be developed based on progress, need, and other considerations in accordance with applicable law. The payment schedule shall be negotiated by the parties and included in the contract. The payment schedule may be adjusted as negotiated by the parties during the course of the project based on progress and need.

(b) Payments shall be made to the Indian tribe or tribal organization according to the payment schedule contained in the contract. If the contract does not provide for the length of each allocation period, the Secretary shall make payments to the Indian tribe or tribal organization at least quarterly. Each allocation shall be adequate to provide funds for the contract activities anticipated to be conducted during the allocation period, except that:

(1) the first allocation may be greater than subsequent allocations and include mobilization costs, and contingency funds described in § 900.128(e)(8); and

(2) any allocation may include funds for payment for materials that will be used during subsequent allocation periods.

(c) The Indian tribe or tribal organization may propose a schedule of payment amounts measured by time or measured by phase of the project (e.g. planning, design, construction).

(d) The amount of each payment allocation shall be stated in the Indian tribe or tribal organizations contract proposal. Upon award of the contract, the Secretary shall transfer the amount of the first allocation to the Indian tribe or tribal organization within 21 days after the date of contract award. The second allocation shall be made not later than 7 days before the end of the first allocation period.

(e) Not later than 7 days before the end of each subsequent allocation period after the second allocation, the Secretary shall transfer to the Indian tribe or tribal organization the amount for the next allocation period, unless the Indian tribe or tribal organization is

delinquent in submission of allocation period progress reports and financial reports or the Secretary takes action to suspend or terminate the contract in accordance with § 900.132(b)(11), § 900.132(b)(12), or § 900.132(b)(13).

§ 900.134 Does the declination process or the Contract Dispute Act apply to construction contract amendments proposed either by an Indian tribe or tribal organization or the Secretary?

The Contract Disputes Act generally applies to such amendments. However, the declination process and the procedures in § 900.123 and § 900.124 apply to the proposal by an Indian tribe or tribal organization when the proposal is for a new project, a new phase or discreet stage of a phase of a project, or an expansion of a project resulting from an additional allocation of funds by the Secretary under § 900.120.

§ 900.135 At the end of a self-determination construction contract, what happens to savings on a cost-reimbursement contract?

The savings shall be used by the Indian tribe or tribal organization to provide additional services or benefits under the contract. Unexpended contingency funds obligated to the contract, and remaining at the end of the contract, are savings.

§ 900.136 Do all provisions of the other subparts apply to contracts awarded under this subpart?

Yes, except as otherwise provided in this subpart and unless excluded as follows: programmatic reports and data requirements, reassumption, contract review and approval process, contract proposal contents, and § 900.150 (d) and (e) of these regulations.

Subpart K—Waiver Procedures

§ 900.140 Can any provision of these regulations be waived?

Yes. Upon the request of an Indian tribe or tribal organization, the Secretary shall waive any provision of these regulations, including any cost principles adopted by these regulations, if the Secretary finds that granting the waiver either is in the best interest of the Indians served by the contract, or is consistent with the policies of the Act and is not contrary to statutory law.

§ 900.141 How does an Indian tribe or tribal organization get a waiver?

To obtain a waiver an Indian tribe or tribal organization shall submit a written request to the Secretary identifying the regulation to be waived and the basis for the request. The Indian tribe or tribal organization shall explain the intended effect of the waiver, the

impact upon the Indian tribe or tribal organization if the waiver is not granted, and the specific contract(s) to which the waiver will apply.

§ 900.142 Does an Indian tribe or tribal organization's waiver request have to be included in an initial contract proposal?

No. Although a waiver request may be included in a contract proposal, it can also be submitted separately.

§ 900.143 How is a waiver request processed?

The Secretary shall approve or deny a waiver within 90 days after the Secretary receives a written waiver request. The Secretary's decision shall be in writing. If the requested waiver is denied the Secretary shall include in the decision a full explanation of the basis for the decision.

§ 900.144 What happens if the Secretary makes no decision within the 90-day period?

The waiver request is deemed approved.

§ 900.145 On what basis may the Secretary deny a waiver request?

Consistent with section 107(e) of the Act, the Secretary may only deny a waiver request based on a specific written finding. The finding must clearly demonstrate (or be supported by controlling legal authority) that if the waiver is granted:

- (a) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;
- (b) adequate protection of trust resources is not assured;
- (c) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contractor;
- (d) the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 106(a) of the Act; or
- (e) the program, function, service, or activity (or portion of it) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities that are contractible under the Act because the proposal includes activities that cannot lawfully be carried out by the contractor.

§ 900.146 Is technical assistance available?

Yes. In accordance with section 102(b) of the Act (and in accordance with section 103(d), to the extent a waiver request is included in a proposal for a new self-determination contract), the Secretary shall provide the Indian

tribe or tribal organization with any necessary requested technical assistance to prepare a waiver request or to overcome any stated objection which the Secretary might have to the request.

§ 900.147 What appeal rights are available?

If the Secretary denies a waiver request, the Indian tribe or tribal organization has the right to appeal the decision and request a hearing on the record under the procedures for hearings and appeals contained in subpart L of these regulations. Alternatively, the Indian tribe or tribal organization may sue in Federal district court to challenge the Secretary's action.

§ 900.148 How can an Indian tribe or tribal organization secure a determination that a law or regulation has been superseded by the Indian self-determination act, as specified in section 107(b) of the Act?

Any Indian tribe or tribal organization may at any time submit a request to the Secretary for a determination that any law or regulation has been superseded by the Act and that the law has no applicability to any contract or proposed contract under the Act. The Secretary is required to provide an initial decision on such a request within 90 days after receipt. If such a request is denied, the Indian tribe or tribal organization may appeal under subpart L of these regulations. The Secretary shall provide notice of each determination made under this subpart to all Indian tribes and tribal organizations.

Subpart L—Appeals (Other Than Emergency Reassumption and Suspension, Withholding Or Delay In Payment)

§ 900.150 What decisions can an Indian tribe or tribal organization appeal under this subpart?

- (a) a decision to decline to award a self-determination contract, or a portion thereof, under section 102 of the Act;
- (b) a decision to decline to award a construction contract, or a portion thereof, under sections 105(m) and 102 of the Act.
- (c) a decision to decline a proposed amendment to a self-determination contract, or a portion thereof, under section 102 of the Act;
- (d) a decision not to approve a proposal, in whole or in part, to redesign a program;
- (e) a decision to rescind and reassume a self-determination contract, in whole or in part, under section 109 of the Act except for emergency reassumptions;

(f) a decision to refuse to waive a regulation under section 107(e) of the Act;

(g) a disagreement between an Indian tribe or tribal organization and the Federal government over proposed reporting requirements; or

(h) a decision to refuse to allow you to convert a contract to mature status, under section 4(h) of the Act.

(i) all other appealable pre-award decisions by a Federal official as specified in these regulations, whether an official of the Department of the Interior or the Department of Health and Human Services.

§ 900.151 Are there any appeals this part does not cover?

Yes. This subpart does not cover:

(a) disputes which arise after a self-determination contract has been awarded, or emergency reassumption of self-determination contracts or suspension of payments under self-determination contracts, which are covered under § 900.170 through § 900.176 of these regulations.

(b) other post-award contract disputes, which are covered under subpart N.

(c) denials under the Freedom of Information Act, 5 U.S.C. 552, which may be appealed under 43 CFR 2 for the Department of the Interior and 45 CFR 5 for the Department of Health and Human Services; and

(d) decisions relating to the award of discretionary grants under section 103 of the Act, which may be appealed under 25 CFR 2 for the Department of the Interior, and under 45 CFR 5 for the Department of Health and Human Services.

§ 900.152 How does an Indian tribe or tribal organization know where and when to file its appeal?

Every decision in any of the nine areas listed above shall contain information which shall tell you where and when to file your appeal. Each decision shall include the following statement:

Within 30 days of the receipt of this decision, you may request an informal conference under 25 CFR ____, or appeal this decision under 25 CFR ____. Should you decide to appeal this decision to the Interior Board of Indian Appeals (IBIA) under 25 CFR ____, you may request a hearing on the record. The IBIA will determine whether you are entitled to such a hearing under 25 CFR ____. An appeal to the IBIA under 25 CFR ____ shall be filed with the IBIA by certified mail or by hand delivery at the following address: Board of Indian Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203. You shall serve copies of your Notice of Appeal on the Secretary and on the official whose decision

is being appealed. You shall certify to the IBIA that you have served these copies.

§ 900.153 Does an Indian tribe or tribal organization have any options besides an appeal?

Yes. You may request an informal conference. An informal conference is a way to resolve issues as quickly as possible, without the need for a formal hearing. You may also choose to sue in U.S. District Court under section 102(b)(3) and section 110(a) of the Act.

§ 900.154 How does an Indian tribe or tribal organization request an informal conference?

You shall file your request for an informal conference with the office of the person whose decision you are appealing, within 30 days of the day you receive the decision. You may either hand-deliver the request for an informal conference to that person's office, or mail it by certified mail, return receipt requested. If you mail the request, it will be considered filed on the date you mailed it by certified mail.

§ 900.155 How is an informal conference held?

(a) The informal conference shall be held within 30 days of the date the request was received, unless the Indian tribe or tribal organization and the authorized representative of the Secretary agree on another date.

(b) If possible, the informal conference will be held at the Indian tribe or tribal organization's office. If the meeting cannot be held at your office, and is held more than fifty miles from your office, the Secretary shall arrange to pay transportation costs and per diem for incidental expenses to allow for adequate representation of the Indian tribe or tribal organization.

(c) The informal conference shall be conducted by a designated representative of the Secretary.

(d) Only people who are your designated representatives, or authorized by the Secretary of Health and Human Services or by the appropriate agency of the Department of the Interior, are allowed to make presentations at the informal conference.

§ 900.156 What happens after the informal conference?

(a) Within 10 days of the informal conference, the person who conducted the informal conference shall prepare and mail you a written report which summarizes what happened at the informal conference and a recommended decision.

(b) Every report of an informal conference shall contain the following language:

Within 30 days of the receipt of this recommended decision, you may file an appeal of the initial decision with the Interior Board of Indian Appeals (IBIA) under 25 CFR _____. You may request a hearing on the record. The IBIA will determine whether you are entitled to such a hearing under 25 CFR _____. An appeal to the IBIA under 25 CFR _____ shall be filed with the IBIA by certified mail or hand delivery at the following address: Board of Indian Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203. You shall serve copies of your Notice of Appeal on the Secretary and on the official whose decision is being appealed. You shall certify to the IBIA that you have served these copies.

§ 900.157 Is the recommended decision always final?

No. If you are dissatisfied with the recommended decision, you may still appeal the initial decision within 30 days of receiving the recommended decision and the report of the informal conference. If you do not file a notice of appeal within 30 days or the extension you have been granted under § 900.159, the recommended decision becomes final.

§ 900.158 How does an Indian tribe or tribal organization appeal the initial decision, if it does not request an informal conference or if it does not agree with the recommended decision resulting from the informal conference?

(a) If you decide to appeal, you shall file a notice of appeal with the IBIA within 30 days of receiving either the initial decision or the recommended decision.

(b) You may either hand-deliver the notice of appeal to the IBIA, or mail it by certified mail, return receipt requested. If you mail the Notice of Appeal, it will be considered filed on the date you mailed it by certified mail. You should mail the notice of appeal to: Board of Indian Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203.

(c) The notice of appeal shall:

(1) Briefly state why you think the initial decision is wrong;

(2) Briefly identify the issues involved in the appeal; and

(3) State whether you want a hearing on the record, or whether you want to waive your right to a hearing.

(d) You shall serve a copy of the notice of appeal upon the official whose decision you are appealing. You shall certify to the IBIA that you have done so.

(e) The authorized representative of the Secretary of Health and Human Services or the authorized representative of the Secretary of the Interior will be considered a party to all appeals filed with the IBIA under the Act.

§ 900.159 May an Indian tribe or tribal organization get an extension of time to file a notice of appeal?

Yes. If you need more time, you can request an extension of time to file your Notice of Appeal within 60 days of receiving either the initial decision or the recommended decision resulting from the informal conference. Your request shall be in writing, and shall give a good reason for not filing your notice of appeal within the 30-day time period. If you have a good reason for not filing your notice of appeal on time, you may receive an extension from the IBIA.

§ 900.160 What happens after an Indian tribe or tribal organization files an appeal?

(a) Within five days of receiving your notice of appeal, the IBIA will decide whether your appeal falls under § 900.150(a) through § 900.150(g) and you are entitled to a hearing.

(1) If the IBIA determines that your appeal falls under § 900(h) or § 900.150(i) and you have requested a hearing, the IBIA will grant your request for a hearing unless it determines that there are no genuine issues of material fact to be resolved.

(2) If the IBIA cannot make that decision based on the information included in the notice of appeal, the IBIA may ask for additional statements from the Indian tribe or tribal organization, or from the appropriate Federal agency. If the IBIA asks for more statements, it will make its decision within five days of receiving those statements.

(b) If the IBIA decides that you are not entitled to a hearing or if you have waived your right to a hearing on the record, the IBIA will ask for the administrative record under 43 CFR 4.335. The IBIA shall tell the parties that the appeal will be considered under the regulations at 43 CFR 4, subpart D, except the case shall be docketed immediately, without waiting for the 20-day period described in 43 CFR 4.336.

§ 900.161 How is a hearing arranged?

(a) If a hearing is to be held, the IBIA will refer your case to the Hearings Division of the Office of Hearings and Appeals of the U.S. Department of the Interior. The case will then be assigned to an Administrative Law Judge (ALJ), appointed under 5 U.S.C. 3105.

(b) Within 15 days of the date of the referral, the ALJ will hold a pre-hearing conference, by telephone or in person, to decide whether an evidentiary hearing is necessary, or whether it is possible to decide the appeal based on the written record. At the pre-hearing conference the ALJ will provide for:

(1) a briefing and discovery schedule;

(2) a schedule for the exchange of information, including, but not limited to witness and exhibit lists, if an evidentiary hearing is to be held;

(3) the simplification or clarification of issues;

(4) the limitation of the number of expert witnesses, or avoidance of similar cumulative evidence, if an evidentiary hearing is to be held;

(5) the possibility of agreement disposing of all or any of the issues in dispute; and

(6) such other matters as may aid in the disposition of the appeal.

(c) The ALJ shall order a written record to be made of any conference results that are not reflected in a transcript.

§ 900.162 What happens when a hearing is necessary?

(a) The ALJ shall hold a hearing within 60 days of the date of the order referring the appeal to the ALJ, unless the parties agree to have the hearing on a later date.

(b) At least 30 days before the hearing, the government agency shall file and serve you with a response to the notice of appeal.

(c) If the hearing is held more than 50 miles from the Indian tribe or tribal organization's office, the Secretary shall arrange to pay transportation costs and per diem for incidental expenses to allow for adequate representation of the Indian tribe or tribal organization.

(d) The hearing shall be conducted in accordance with the Administrative Procedure Act, 5 U.S.C. 556.

§ 900.163 What is the Secretary's burden of proof for appeals from decisions under § 900.150(a) through § 900.150(g)?

For those appeals, the Secretary has the burden of proof (as required by section 102(e)(1) of the Act) to establish by clearly demonstrating the validity of the grounds for declining the contract proposal.

§ 900.164 What rights do Indian tribes, tribal organizations, and the government have during the appeal process?

Both the Indian tribe or tribal organization and the government agency have the same rights during the appeal process. These rights include the right to:

(a) be represented by legal counsel;

(b) have the parties provide witnesses who have knowledge of the relevant issues, including specific witnesses with that knowledge, who are requested by either party;

(c) cross-examine witnesses;

(d) introduce oral or documentary evidence, or both;

(e) require that oral testimony be under oath;

(f) receive a copy of the transcript of the hearing, and copies of all documentary evidence which is introduced at the hearing;

(g) compel the presence of witnesses, or the production of documents, or both, by subpoena at hearings or at depositions;

(h) take depositions, to request the production of documents, to serve interrogatories on other parties, and to request admissions; and

(i) any other procedural rights under the Administrative Procedure Act, 5 U.S.C. 556.

§ 900.165 What happens after the hearing?

(a) Within 30 days of the end of the formal hearing or any post-hearing briefing schedule established by the ALJ, the ALJ shall send all the parties a recommended decision, by certified mail, return receipt requested. The recommended decision shall contain the ALJ's findings of fact and conclusions of law on all the issues. The recommended decision shall also state that you have the right to object to the recommended decision.

(b) If the appeal involves the Department of Health and Human Services, the recommended decision shall contain the following statement:

Within 30 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Secretary of Health and Human Services under 25 CFR _____. An appeal to the Secretary under 25 CFR _____ shall be filed at the following address: Department of Health and Human Services, 200 Independence Ave. S.W., Washington, DC, 20201. You shall serve copies of your notice of appeal on the official whose decision is being appealed. You shall certify to the Secretary that you have served this copy. If neither party files an objection to the recommended decision within 30 days, the recommended decision will become final.

(c) If the appeal involves the Department of the Interior, the recommended decision shall contain the following statement:

Within 30 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Interior Board of Indian Appeals (IBIA) under 25 CFR _____. An appeal to the IBIA under 25 CFR _____ shall be filed at the following address: Board of Indian Appeals, 4015 Wilson Boulevard, Arlington, VA 22203. You shall serve copies of your notice of appeal on the Secretary of the Interior, and on the official whose decision is being appealed. You shall certify to the IBIA that you have served these copies. If neither party files an objection to the recommended decision within 30 days, the recommended decision will become final.

§ 900.166 Is the recommended decision always final?

No. Any party to the appeal may file precise and specific written objections to the recommended decision, or any other comments, within 30 days of receiving the recommended decision. Objections shall be served on all other parties. The recommended decision shall become final 30 days after the Indian tribe or tribal organization receives the ALJ's recommended decision, unless a written statement of objections is filed with the Secretary of Health and Human Services or the IBIA during the 30-day period. If no party files a written statement of objections within 30 days, the recommended decision shall become final.

§ 900.167 If an Indian tribe or tribal organization object to the recommended decision, what will the Secretary of Health and Human Services or the IBIA do?

(a) The Secretary of Health and Human Services or the IBIA has 20 days from the date it receives any timely written objections to modify, adopt, or reverse the recommended decision. If the Secretary of Health and Human Services or the IBIA does not modify or reverse the recommended decision during that time, the recommended decision automatically becomes final.

(b) When reviewing the recommended decision, the IBIA or the Secretary may consider and decide all issues properly raised by any party to the appeal, based on the record.

(c) The decision of the Secretary or the IBIA shall:

- (1) be in writing;
- (2) specify the findings of fact or conclusions of law which are modified or reversed;
- (3) give reasons for the decision, based on the record; and
- (4) state that the decision is final for the Department.

§ 900.168 Will an appeal hurt the Indian tribe or tribal organization's position in other contract negotiations?

No. A pending appeal will not affect or prevent the negotiation or award of another contract.

§ 900.169 Will the decisions on appeals be available for the public to review?

Yes. The Secretary shall publish all final decisions from the ALJs, the IBIA, and the Secretary of Health and Human Services.

Appeals of Emergency Reassumption of Self-Determination Contracts or Suspension, Withholding or Delay of Payments Under a Self-Determination Contract

§ 900.170 What happens in the case of emergency reassumption or suspension or withholding or delay of payments?

(a) This subpart applies when the Secretary gives notice to an Indian tribe or tribal organization that the Secretary intends to:

(1) immediately rescind a contract or grant and reassume a program; or
(2) suspend, withhold, or delay payment under a contract.

(b) When the Secretary advises an Indian tribe or tribal organization that the Secretary intends to take an action referred to in paragraph (1) above, the Secretary shall also notify the Deputy Director of the Office of Hearings and Appeals, Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203.

§ 900.171 Will there be a hearing?

Yes. The Deputy Director of the Office of Hearings and Appeals shall appoint an Administrative Law Judge (ALJ) to hold a hearing.

(a) The hearing shall be held within 10 days of the date of the notice referred to in § 900.170 unless the Indian tribe or tribal organization agrees to a later date.

(b) If possible, the hearing will be held at the office of the Indian tribe or tribal organization. If the hearing is held more than 50 miles from the Indian tribe's or tribal organization's office, the Secretary shall arrange to pay transportation costs and per diem for incidental expenses. This will allow for adequate representation of the Indian tribe or tribal organization.

§ 900.172 What happens after the hearing?

(a) Within 30 days after the end of the hearing or any post hearing briefing schedule established by the ALJ, the ALJ shall send all parties a recommended decision by certified mail, return receipt requested. The recommended decision shall contain the ALJ's findings of fact and conclusions of law on all the issues. The recommended decision shall also state that you have the right to object to the recommended decision.

(b) If the appeal involves the Department of Health and Human Services, the recommended decision shall contain the following statement:

Within 15 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Secretary of Health and Human Services under 25 CFR _____. An appeal to the Secretary under 25 CFR _____ shall be filed at the following address: Department of Health

and Human Services, 200 Independence Ave. S.W., Washington, DC 20201. You shall serve copies of your notice of appeal on the official whose decision is being appealed. You shall certify to the Secretary that you have served this copy. If neither party files an objection to the recommended decision within 15 days, the recommended decision will become final.

(c) If the appeal involves the Department of the Interior, the recommended decision shall contain the following statement:

Within 15 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Interior Board of Indian Appeals (IBIA) under 25 CFR _____. An appeal to the IBIA under 25 CFR _____ shall be filed at the following address: Board of Indian Appeals, 4015 Wilson Boulevard, Arlington, VA 22203. You shall serve copies of your notice of appeal on the Secretary of the Interior, and on the official whose decision is being appealed. You shall certify to the IBIA that you have served these copies. If neither party files an objection to the recommended decision within 15 days, the recommended decision will become final.

§ 900.173 Is the recommended decision always final?

No. Any party to the appeal may file precise and specific written objections to the recommended decision, or any other comments, within 15 days of receiving the recommended decision. You shall serve a copy of your objections on the other party. The recommended decision will become final 15 days after the Indian tribe or tribal organization receives the ALJ's recommended decision, unless a written statement of objections is filed with the Secretary of Health and Human Services or the IBIA during the 15-day period. If no party files a written statement of objections within 15 days, the recommended decision will become final.

§ 900.174 If an Indian tribe or tribal organization object to the recommended decision, what will the Secretary of Health and Human Services or the IBIA do?

(a) The Secretary or the IBIA has 15 days from the date he/she receives timely written objections to modify, adopt, or reverse the recommended decision. If the Secretary or the IBIA does not modify or reverse the recommended decision during that time, the recommended decision automatically becomes final.

(b) When reviewing the recommended decision, the IBIA or the Secretary may consider and decide all issues properly raised by any party to the appeal, based on the record.

(c) The decision of the Secretary or of the IBIA shall:

(1) be in writing;

(2) specify the findings of fact or conclusions of law which are modified or reversed;

(3) give reasons for the decision, based on the record; and

(4) state that the decision is final for the Department.

§ 900.175 Will an appeal hurt an Indian tribe or tribal organization's position in other contract negotiations?

No. A pending appeal will not affect or prevent the negotiation or award of another contract.

§ 900.176 Will the decisions on appeals be available to the public to review?

Yes. The Secretary shall publish all final decisions from the ALJs, the IBIA, and the Secretary of Health and Human Services.

Subpart M—Federal Tort Claims Act Coverage

General Provisions

§ 900.180 What does this subpart cover?

This subpart explains the applicability of the Federal Tort Claims Act (FTCA). This section covers:

(a) coverage of claims arising out of the performance of medical-related functions under self-determination contracts;

(b) coverage of claims arising out of the performance of non-medical-related functions under self-determination contracts; and

(c) procedures for filing claims under FTCA.

§ 900.181 What definitions apply to this subpart?

(a) *Indian contractor* means:

(1) in California subcontractors of the California Rural Indian Health Board, Inc., or, subject to approval of the IHS Director after consultation with the DHHS Office of General Counsel, subcontractors of an Indian tribe or tribal organization which are:

(i) governed by Indians eligible to receive services from the Indian Health Service;

(ii) which carry out comprehensive IHS service programs within geographically defined service areas; and

(iii) which are selected and identified through tribal resolution as the local provider of Indian health care services; or

(2) subject to the approval of the IHS Director after consultation with the DHHS Office of General Counsel, tribes and tribal organizations which meet in all respects the requirements of the Indian Self-Determination Act to contract directly with the Federal

Government but which choose through tribal resolution to sub-contract to carry out IHS service programs within geographically defined service areas with another Indian tribe or tribal organization which contracts directly with IHS.

(b) *Self-determination contract or contract* means contracts, annual funding agreements, grants and cooperative agreements under Title I of the Act.

§ 900.182 What other statutes and regulations apply to FTCA coverage?

A number of other statutes and regulations, including the Federal Tort Claims Act (28 U.S.C. 1346(b), 2401, 2671–2680) and related Department of Justice regulations in 28 CFR part 14.

§ 900.183 Do Indian tribes and tribal organizations need to be aware of areas which FTCA does not cover?

Yes. There are claims against self-determination contractors which are not covered by FTCA, claims which may not be pursued under FTCA, and remedies that are excluded by FTCA. General guidance is provided below as to these matters but is not intended as a definitive description of coverage which is subject to review by the Department of Justice and the courts on a case-by-case basis.

(a) What claims are barred by FTCA and therefore may not be made against the United States, an Indian tribe or tribal organization? Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights, unless otherwise authorized by 28 U.S.C. 2680(h).

(b) What claims may not be pursued under FTCA but may be pursued under other provisions of law?

(1) Except as provided in § 900.181(a)(1) and § 900.189, claims against sub-contractors arising out of the performance of subcontracts with a self-determination contractor;

(2) claims for on-the-job injuries which are covered by workmen's compensation;

(3) claims for breach of contract rather than tort claims;

(4) a claim which is brought for violation of the Constitution of the United States; or

(5) a claim which is brought for a violation of a statute of the United States under which an action against an individual is otherwise authorized.

(c) What remedies are excluded by FTCA and therefore are barred?

(1) Punitive damages, unless otherwise authorized by 28 U.S.C. 2674; and

(2) other remedies not permitted under applicable State law.

§ 900.184 Is there a deadline for filing FTCA claims?

Yes. Claims shall be filed within 2 years of the date of accrual. (28 U.S.C. 2401).

§ 900.185 How long does the Federal government have to process an FTCA claim after the claim is received by the Federal agency, before a lawsuit may be filed?

Six months.

§ 900.186 Is it necessary for a self-determination contract to include any clauses about Federal Tort Claims Act coverage?

No, it is optional. At the request of Indian tribes and tribal organizations, self-determination contracts shall include the following clauses to clarify the scope of FTCA coverage:

(a) For purposes of Federal Tort Claims Act coverage, the contractor and its employees (including individuals performing personal services contracts with the contractor to provide health care services) are deemed to be employees of the Federal government while performing work under this contract. This status is not changed by the source of the funds used by the contractor to pay the employee's salary and benefits unless the employee receives additional compensation for performing covered services from anyone other than the contractor.

(b) *The following clause is for IHS contracts only:* Under this contract, the contractor's employee may be required as a condition of employment to provide health services to non-IHS beneficiaries in order to meet contractual obligations. These services may be provided in either contractor or non-contractor facilities. The employee's status for Federal Tort Claims Act purposes is not affected.

§ 900.187 Does FTCA apply to a self-determination contract if FTCA is not referenced in the contract?

Yes.

§ 900.188 To what extent shall the contractor cooperate with the Federal government in connection with tort claims arising out of the contractor's performance?

(a) The contractor shall designate an individual to serve as tort claims liaison with the Federal government.

(b) The contractor shall notify the Secretary immediately in writing of any tort claim (including any proceeding before an administrative agency or

court) filed against the contractor or any of its employees that relates to performance of a self-determination contract. This includes, but is not limited to, the performance of any subcontract.

(c) The contractor, through its designated tort claims liaison, shall assist the appropriate Federal agency in preparing a comprehensive, accurate, and unbiased report of the incident so that the claim may be properly evaluated. This report should be completed within 60 days of notification of the filing of the tort claim. The report should be complete in every significant detail and include as appropriate:

(1) the date, time and exact place of the accident or incident;

(2) a concise and complete statement of the circumstances of the accident or incident;

(3) the names and addresses of tribal and/or Federal employees involved as participants or witnesses;

(4) the names and addresses of all other eye witnesses;

(5) an accurate description of all government and other privately-owned property involved and the nature and amount of damage, if any;

(6) a statement whether any person involved was cited for violating a Federal, State or tribal law, ordinance, or regulation;

(7) the contractor's determination whether any of its employees involved in the incident giving rise to the tort claim were acting within the scope of their employment in carrying out the contract at the time the incident occurred; and

(8) copies of all relevant documentation, including available police reports, statements of witnesses, newspaper accounts, weather reports, plats and photographs of the site or damaged property, such as may be necessary or useful for purposes of claim determination by the Federal agency.

(d) The contractor shall cooperate with and provide assistance to the U.S. Department of Justice attorneys assigned to defend the tort claim, including, but not limited to, case preparation, discovery, and trial.

(e) If requested by the Secretary, the contractor shall make an assignment and subrogation of all the contractor's rights and claims (except those against the Federal government) arising out of a tort claim against the contractor.

(f) If requested by the Secretary, the contractor shall authorize representatives of the Secretary to settle or defend any tort claim and to represent the contractor in or take

charge of any action. If the Federal government undertakes the settlement or defense of any claim or action the contractor shall provide all reasonable additional assistance in reaching a settlement or asserting a defense.

§ 900.189 Does this coverage extend to subcontractors of self-determination contracts?

No. Subcontractors or subgrantees providing services to the Public Law 93-638 contractor or grantee are generally not covered. The only exceptions are Indian contractors such as those under subcontract with the California Rural Indian Health Board to carry out IHS programs in geographically defined service areas in California and personal services contracts under § 900.193 (for § 900.183(b)(1)) or § 900.183(b) (for § 900.190).

Medical-Related Claims

§ 900.190 Is FTCA the exclusive remedy for a tort claim for personal injury or death resulting from the performance of a self-determination contract?

Yes, except as explained in § 900.183(b). No claim may be filed against a self-determination contractor or employee for personal injury or death arising from the performance of medical, surgical, dental, or related functions by the contractor in carrying out self-determination contracts under the Act. All such claims shall be filed against the United States and are subject to the limitations and restrictions of that Act.

§ 900.191 Are employees of self-determination contractors providing health services under the self-determination contract protected by FTCA?

Yes. For the purpose of Federal Tort Claims Act coverage, an Indian tribe or tribal organization and its employees performing medical-related functions under a self-determination contract are deemed a part of the Public Health Service if the employees are acting within the scope of their employment in carrying out the contract.

§ 900.192 What employees are covered by FTCA for medical-related claims?

(a) Permanent employees;
(b) temporary employees;
(c) persons providing services without compensation in carrying out a contract; and

(d) persons required because of their employment by a self-determination contractor to serve non-IHS beneficiaries (even if the services are provided in facilities not owned by the contractor).

§ 900.193 Does FTCA coverage extend to individuals who provide health care services under a personal services contract providing services in a facility that is owned, operated, or constructed under the jurisdiction of the IHS?

Yes. The coverage extends to individual personal services contractors providing health services in such a facility, including a facility owned by a tribe or tribal organization but operated under a self-determination contract with IHS.

§ 900.194 Does FTCA coverage extend to services provided under a staff privileges agreement with a non-IHS facility where the agreement requires a health care practitioner to provide reciprocal services to the general population?

Yes, as long as the contractor's health care practitioners do not receive additional compensation for the performance of these services and they are acting within the scope of their employment under a self-determination contract. Reciprocal services include:

- (a) Cross-covering other medical personnel who temporarily cannot attend their patients;
- (b) assisting other personnel with surgeries or other medical procedures;
- (c) assisting with unstable patients or at deliveries; or
- (d) assisting in any patient care situation where additional assistance by health care personnel is needed.

§ 900.195 Does FTCA coverage extend to the contractor's health care practitioners providing services to private patients on a fee-for-services basis when such personnel receive the fee, not the self-determination contractor?

No.

§ 900.196 Do covered services include the conduct of clinical studies and investigations and the provision of emergency services, including the operation of emergency motor vehicles?

Yes, if the services are provided in carrying out a self-determination contract.

§ 900.197 Does FTCA cover employees of the contractor who are paid by the contractor from funds other than those provided through the self-determination contract?

Yes, as long as the services out of which the claim arose were performed in carrying out the self-determination contract.

§ 900.198 Are Federal employees assigned to a self-determination contractor under the Intergovernmental Personnel Act or detailed under section 214 of the Public Health Service Act covered to the same extent that they would be if working directly for a Federal agency?

Yes.

§ 900.199 Does FTCA coverage extend to a contractor's health care practitioners to whom staff privileges have been extended in contractor health care facilities operated under a self-determination contract on the condition that such practitioner provide health services to IHS beneficiaries covered by FTCA?

Yes, health care practitioners with staff privileges in a facility operated by a contractor are covered when they perform services to IHS beneficiaries. Such personnel are not covered when providing services to non-IHS beneficiaries.

§ 900.200 May persons who are not Indians or Alaska Natives assert claims under FTCA?

Yes. Non-Indian individuals who otherwise are eligible for services from IHS in accordance with Federal law and regulations, whether or not on a fee-for-service basis, may assert claims under this subpart.

Procedure for Filing Medical-Related Claims

§ 900.201 How should claims arising out of the performance of medical-related functions be filed?

Claims should be filed on Standard Form 95 (Claim for Damage, Injury or Death) or by submitting comparable written information (including a definite amount of monetary damage claimed) with the Chief, PHS Claims Branch, Room 18-20, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857, or such other address as shall have been provided to the contractor in writing.

§ 900.202 What should a self-determination contractor or a contractor's employee do on receiving such a claim?

You should immediately forward the claim to the PHS Claims Branch at the address indicated in § 900.201 and notify the contractor's tort claims liaison.

§ 900.203 If the contractor or contractor's employee receives a summons and/or a complaint alleging a tort covered by FTCA, what should the contractor do?

You should immediately inform the Chief, Litigation Branch, Business and Administrative Law Division, Office of General Counsel, Department of Health and Human Services, 330 Independence Avenue SW., Room 5362, Washington, DC 20201, and the contractor's tort claims liaison, and forward the following materials:

(a) four copies of the claimant's medical records of treatment, inpatient and outpatient, and any related correspondence, as well as reports of consultants;

(b) a narrative summary of the care and treatment involved;

(c) the names and addresses of all personnel who were involved in the care and treatment of the claimant; and

(d) any comments or opinions that the employees who treated the claimant believe to be pertinent to the allegations contained in the claim.

Non-Medical Related Claims

§ 900.204 Is FTCA the exclusive remedy for a non-medical related tort claim arising out of the performance of a self-determination contract?

Except as explained in § 900.183(b), no claim may be filed against a self-determination contractor or employee based upon performance of non-medical-related functions under a self-determination contract. Claims of this type shall be filed against the United States under FTCA.

§ 900.205 To what non-medical-related claims against self-determination contractors does FTCA apply?

It applies to:

(a) all tort claims arising from the performance of self-determination contracts under the authority of the Act on or after October 1, 1989; and

(b) any tort claims first filed on or after October 24, 1989, regardless of when the incident which is the basis of the claim occurred.

§ 900.206 Does FTCA cover employees of self-determination contractors?

Yes. A contractor and its employees carrying out a self-determination contract are considered part of the Public Health Service or the Department of the Interior, as the case may be, for FTCA purposes.

§ 900.207 How are non-medical related tort claims and lawsuits filed for IHS?

Non-medical-related tort claims and lawsuits arising out of the performance of self-determination contracts with the Indian Health Service should be filed in the manner described in § 900.201 (for both § 900.207 and § 900.208).

§ 900.208 How are non-medical related tort claims and lawsuits filed for DOI?

Non-medical-related claims arising out of the performance of self-determination contracts with the Secretary of the Interior should be filed in the manner described with the Assistant Solicitor, Procurement and Patents, Office of the Solicitor, Department of the Interior, Room 6511, 1849 C Street NW., Washington, DC 20240.

§ 900.209 What should a self-determination contractor or contractor's employee do on receiving a non-medical related tort claim?

(a) If the contract is with DHHS, you should immediately forward the claim to the PHS Claims Branch at the address indicated in § 900.201 and notify the contractor's tort claims liaison.

(b) If the contract is with DOI, you should immediately notify the Assistant Solicitor, Procurement and Patents, Office of the Solicitor, Department of the Interior, Room 6511, 1849 C Street NW., Washington, DC 20240.

§ 900.210 If the contractor or contractor's employee receives a summons and/or complaint alleging a non-medical related tort covered by FTCA, what should a tribe or tribal organization do?

(a) If the contract is with the DHHS, you should immediately inform the Chief, Litigation Branch, Business and Administrative Law Division, Office of General Counsel, Department of Health and Human Services, 330 Independence Avenue SW., Room 5362, Washington, DC 20201 and the contractor's tort claims liaison.

(b) If the contract is with the Department of the Interior, you should immediately notify the Assistant Solicitor, Procurement and Patents, Office of the Solicitor, Department of the Interior, Room 6511, 1849 C Street NW., Washington, DC 20240, and the contractor's tort claims liaison.

Subpart N—Post-Award Contract Disputes

§ 900.215 What does this subpart cover?

(a) This subpart covers:
(1) all HHS and DOI self-determination contracts, including construction contracts; and
(2) all disputes regarding an awarding official's decision relating to a self-determination contract.

(b) This subpart does not cover the decisions of an awarding official that are covered under subpart L.

§ 900.216 What other statutes and regulations apply to contract disputes?

(a) The Contract Disputes Act of 1978 (CDA), Public Law 95-563 (41 U.S.C. 601); and

(b) If the matter is submitted to the Interior Board of Contract Appeals, 43 CFR 4, subpart C, §§ 4.110-126.

§ 900.217 Is filing a claim under the CDA our only option for resolving post-award contract disputes?

No. The Federal government attempts to resolve all contract disputes by agreement at the awarding official's level. These are alternatives to filing a claim under the CDA:

(a) Before issuing a decision on a claim, the awarding official should consider using informal discussions between the parties, assisted by individuals who have not substantially participated in the matter, to aid in resolving differences.

(b) In addition to filing a CDA claim, or instead of filing a CDA claim, the parties may choose to use an alternative dispute resolution mechanism, pursuant to the provisions of the Administrative Dispute Resolution Act, Public Law 101-552, 5 U.S.C. 581 *et seq.*, and section 108(1)(b)(12) of the Act, as applicable.

§ 900.218 What is a claim under the CDA?

(a) A claim is a written demand by one of the contracting parties, asking for one or more of the following:

(1) payment of a specific sum of money under the contract;

(2) adjustment or interpretation of contract terms; or

(3) any other claim relating to the contract.

(b) However, an undisputed voucher, invoice, or other routing request for payment is not a claim under the CDA. A voucher, invoice, or routing request for payment may be converted into a CDA claim if:

(1) It is disputed as to liability or amount; or

(2) It is not acted upon in a reasonable time; and

(c) Written notice of the claim is given to the awarding official by the senior official designated in the contract.

§ 900.219 How does an Indian tribe or tribal organization submit a claim?

(a) If you are an Indian tribe or tribal organization, you shall submit your claim in writing to the awarding official. The awarding official shall document the contract file with evidence of the date the claim was received.

(b) If you are a Federal agency, you shall submit your claim in writing to the contractor's senior official, as designated in the contract.

§ 900.220 Does it make a difference whether the claim is large or small?

Yes. An Indian tribe or tribal organization making a claim for more than \$100,000, shall certify that:

(a) the claim is made in good faith,

(b) supporting documents or data are accurate and complete;

(c) the amount claimed accurately reflects the amount believed to be owed by the Federal government; and

(d) the person making the certification is authorized to do so on behalf of the Indian tribe or tribal organization.

§ 900.221 What happens next?

(a) If the parties do not agree on a settlement, the awarding official will issue a written decision on the claim.

(b) The awarding official shall always give a copy of the decision to the Indian tribe or tribal organization by certified mail, return receipt requested, or by any other method which provides a receipt.

§ 900.222 What goes into a decision?

A decision shall:

(a) describe the claim or dispute;

(b) refer to the relevant terms of the contract;

(c) set out the factual areas of agreement and disagreement;

(d) set out the actual decision, based on the facts, and outline the reasoning which supports the decision; and

(e) contain the following language:

This is a final decision. You may appeal this decision to the Interior Board of Contract Appeals (IBCA), U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203. If you decide to appeal, you shall, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the IBCA and provide a copy to the individual from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, and refer to the decision and contract number. Instead of appealing to the IBCA, you may bring an action in the U.S. Court of Federal Claims or in the United States District Court within 12 months of the date you receive this notice.

§ 900.223 When does an Indian tribe or tribal organization get the Secretary's decision?

(a) If the claim is for more than \$100,000, the awarding official shall issue the decision within sixty days of the day he or she receives the claim. If the awarding official cannot issue a decision that quickly, he or she shall tell you when the decision will be issued.

(b) If the claim is for \$100,000 or less, and you want a decision within 60 days, you shall advise the awarding official in writing that you want a decision within that period. If you advise the awarding official in writing that you do want a decision within 60 days, the awarding official shall issue the decision within 60 days of the day he or she receives your written notice.

(c) If your claim is for \$100,000 or less and you do not advise the awarding official that you want a decision within 60 days, or if your claim exceeds \$100,000 and the awarding official has notified you of the time within which a decision will be issued, the awarding official shall issue a decision within a reasonable time. What is "reasonable" depends upon the size and complexity of your claim, and upon the adequacy of the information you have given to the

awarding official in support of your claim.

§ 900.224 What happens if the decision does not come within that time?

If the awarding official does not issue a decision within the required time, the Indian tribe or tribal organization may treat the delay as though the awarding official has denied the claim, and proceed according to § 900.222(e), above.

§ 900.225 Does an Indian tribe or tribal organization get paid immediately if the awarding official decides in its favor?

Yes. Once the awarding official decides that money should be paid under the contract, the amount due, minus any portion already paid, should be paid as promptly as possible, without waiting for either party to file an appeal. Any payment which is made under this subsection will not affect any other rights either party might have. In addition, it will not create a binding legal precedent as to any future payments.

§ 900.226 Can the awarding official change the decision after it has been made?

(a) The decision of the awarding official is final and conclusive, and not subject to review by any forum, tribunal or government agency, unless an appeal or suit is timely commenced as authorized by the Contract Disputes Act. Once the decision has been made, the awarding official may not change it, except by agreement of the parties, or under the following limited circumstances:

(1) if evidence is discovered which could not have been discovered through due diligence before the awarding official issued the decision;

(2) if the awarding official learns that there has been fraud, misrepresentation, or other misconduct by a party;

(3) if the decision is beyond the scope of the awarding official's authority;

(4) if the claim has been satisfied, released or discharged; or

(5) for any other reason justifying relief from the decision.

(b) Nothing in this subpart shall be interpreted to discourage settlement discussions or prevent settlement of the dispute at any time.

(c) If an appeal or suit is filed, the awarding official may modify or withdraw his or her final decision.

§ 900.227 Is an Indian tribe or tribal organization entitled to interest if it wins its claim?

Yes. If you win the claim, you will be entitled to interest on the amount of the award. The interest will be calculated from the date the awarding official

receives the claim until the day you are paid. The interest rate will be the rate which the Secretary of the Treasury sets for the Renegotiation Board under the Renegotiation Act of 1951, Public Law 92-41, 26 U.S.C. 1212 and 26 U.S.C. 7447.

§ 900.228 What role will the awarding official play during an appeal?

(a) The awarding official shall provide any data, documentation, information or support required by the IBCA for use in deciding a pending appeal.

(b) Within 30 days of receiving an appeal or learning that an appeal has been filed, the awarding official shall assemble a file which contains all the documents which are pertinent to the appeal, including:

(1) the decision and findings of fact from which the appeal is taken;

(2) the contract, including specifications and pertinent modifications, plans and drawings;

(3) all correspondence between the parties which relates to the appeal, including the letter or letters of claims in response to which the decision was issued;

(4) transcripts of any testimony taken during the course of the proceedings, and affidavits or statements of any witnesses on the matter in dispute, which were made before the filing of the notice of appeal with the IBCA; and

(5) any additional information which may be relevant.

§ 900.229 What is the effect of a pending appeal?

(a) Indian tribes and tribal organizations shall continue performance of a contract during the appeal of any claims to the same extent they would had there been no dispute.

(b) A pending dispute will not affect or bar the negotiation or award of any subsequent contract or negotiation between the parties.

Subpart 0—Retraction and Reassumption Procedures**§ 900.230 What does retraction mean?**

A retraction means the 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.

§ 900.231 Who may retrocede a contract, in whole or in part?

An Indian tribe or tribal organization authorized by an Indian tribe.

§ 900.232 What effect will an Indian tribe or tribal organization's retrocession have on its rights to contract?

An Indian tribe or tribal organization's retrocession shall not negatively affect:

- (a) any other contract to which it is a party;
- (b) any other contracts it may request; and
- (c) any future request by the Indian tribe or tribal organization to contract for the same program.

§ 900.233 Will an Indian tribe or tribal organization's retrocession adversely affect funding available for the retroceded program?

No. The Secretary shall provide not less than the same level of funding that would have been available if there had been no retrocession.

§ 900.234 What obligation does the Indian tribe or tribal organization have with respect to returning property that was used in the operation of the retroceded program?

On the effective date of any retrocession, the Indian tribe or tribal organization shall, at the request of the Secretary deliver to the Secretary all property and equipment provided under the contract which have a per item value in excess of \$5,000 at the time of the retrocession.

§ 900.235 What does reassumption mean?

Reassumption means rescission, in whole or in part, of a contract and assuming or resuming control or operation of the contracted program by the Secretary without consent of the Indian tribe or tribal organization. There are two types of reassumption: emergency and non-emergency.

§ 900.236 Under what circumstances is a reassumption considered an emergency instead of non-emergency reassumption?

- (a) A reassumption is considered a non-emergency reassumption if there has been:
 - (1) a violation of the rights or endangerment of the health, safety, or welfare of any person; or
 - (2) 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.

(b) A reassumption is considered an emergency reassumption if an Indian tribe or tribal organization fails to fulfill the requirements of the contract and this failure poses:

- (1) an immediate threat of imminent harm to the safety of any person; or
- (2) imminent substantial and irreparable harm to trust funds, trust lands, or interest in such lands.

§ 900.237 In a non-emergency reassumption, what is the Secretary required to do?

- (a) notify the Indian tribes or tribal organizations served by the contract and the contractor in writing by certified mail of the details of the deficiencies in contract performance; and
- (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, the necessary technical assistance and advice to assist the contractor to overcome the deficiencies in contract performance.

§ 900.238 What happens if the contractor fails to take corrective action to remedy the contract deficiencies identified in the notice?

The Secretary shall provide a second written notice by certified mail to the Indian tribes or tribal organizations served by the contract and the contractor that the contract will be rescinded, in whole or in part.

§ 900.239 What shall the second written notice include?

- The second written notice shall include:
 - (a) the intended effective date of the reassumption;
 - (b) the details and facts supporting the intended reassumption; and
 - (c) instructions that explain the Indian tribe or tribal organization's right to a formal hearing within 30 days of receipt of the notice.

§ 900.240 What is the earliest date on which the contract will be rescinded?

The contract will not be rescinded by the Secretary before the completion of any administrative hearing or appeal.

§ 900.241 In an emergency reassumption, what is the Secretary required to do?

- (a) immediately rescind, in whole or in part, the contract;
- (b) assume control or operation of all or part of the program; and
- (c) give written notice to the Contractor and the Indian tribes or tribal organizations served.

§ 900.242 What shall the written notice include?

- (a) A detailed statement of the findings which support the Secretary's determination;
- (b) a statement explaining the contractor's right to a hearing on the record under § 900.160 and § 900.161 within 10 days of the emergency reassumption or such later date as the contractor may approve;
- (c) an explanation that the contractor may be reimbursed for actual and reasonable "wind up costs" incurred after the effective date of the rescission; and
- (d) a request for the return of property, if any.

§ 900.243 May the contractor be reimbursed for actual and reasonable "wind up costs" incurred after the effective date of rescision?

Yes.

§ 900.244 What obligation does the Indian tribe or tribal organization have with respect to returning property that was used in the operation of the rescinded contract?

On the effective date of any rescission, the Indian tribe or tribal organization shall, at the request of the Secretary, deliver to the Secretary all property and equipment provided under the contract which have a per item value in excess of \$5,000 at the time of the rescission.

§ 900.245 Will a reassumption adversely affect funding available for the reassumed program?

No. The Secretary shall provide not less than the same level of funding that would have been provided if there had been no reassumption.

[FR Doc. 96-497 Filed 1-23-96; 8:45 am]

BILLING CODE 4310-02-P; 4160-16-P