



SEP 08 2005

TO: Area Directors
Regional Attorneys

FROM: Deputy Director for Indian Health Policy

SUBJECT: Process for Review by Area and Headquarters Staff of Contract Disputes Act (CDA) Claims Relative to Contract Support Costs (CSC) and Shortfall Resulting from the Cherokee v. Leavitt Decision. Establishment of the CDA/CSC Review Group.


Since approximately June 2005, the Indian Health Service (IHS) has received claims from Tribes and Tribal organizations filed under the Contract Disputes Act (CDA) alleging that they are entitled by statute and terms of their funding agreements to additional Contract Support Costs (CSC). For CDA claims based on Title I contracts, the Area Office Contracting Officer is the decisionmaker. For CDA claims based on Title V compacts, the Director, IHS, is the decisionmaker. It is important for the IHS to respond in a timely and consistent manner to these claims from both a policy and a legal perspective. These CDA claims involve alleged underpayment of CSC for fiscal years 1992 through 2005. These claims need to be evaluated as to whether they are timely and whether the IHS has any legal defenses remaining in light of Cherokee v. Leavitt. A CDA claim over \$100,000 must be responded to within 60 days either by an agency decision or a notice of when the decision will be issued. A CDA claim under \$100,000 must be responded to within a reasonable time or within 60 days if a Tribe or Tribal organization requests a response within that time period.

To address these CDA/CSC claims in a timely and consistent manner, the IHS has established a Headquarters review team, the CDA/CSC Review Group (CDARG). The CDARG will be chaired by the IHS Deputy Director for Indian Health Policy (IHP) or a designee of the Deputy Director for IHP. The CDA principal contact for the Agency is the Director, Division of Regulatory and Legal Affairs (DLRA), Records Access and Policy Liaison. In addition, the membership of the CDARG will consist of representatives from the Office of Tribal Self-Governance (OTSG), the Office of Tribal Programs (OTP) and the DRLA. The Office of General Counsel (OGC) will provide legal counsel to the CDARG.

The CDARG will review Area calculations of CSC/CDA claims and Regional Attorneys' recommendations regarding legal defenses, if any, with a view towards paying those cases falling within the four corners of the Cherokee case, settling others, and defending others. The CDARG will make recommendations to the Director, IHS, for Title V claims and clear all responses of the Area Contracting Officers for Title I claims.

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The responsibilities of the Area Contracting Officers, Agency Lead Negotiators and Headquarters staff in responding to CDA/CSC claims submitted by Tribes and Tribal organizations are detailed in the attached CDARG Process and flowchart.


Mary Lou Stanton

2 Attachments:

Tab A - Process of the CDA/CSC Review Group

Tab B - CDA/CSC Review Group Flowchart

cc: Office of Tribal Programs
 Office of Tribal Self-Governance
 Division of Regulatory Affairs, Records Access and Policy Liaison
 Office of General Counsel
 Agency Lead Negotiators
 Contract Proposal Liaison Officers
 Executive Secretariat

Process for review by Area and Headquarters staff of Contract Disputes Act claims relative to Contract Support Costs and shortfall resulting from Cherokee v. Leavitt decision.

CDA/CSC Review Group (CDARG)

Policy

The CDA/CSC Review Group (CDARG) is charged with making recommendations to Area Contracting Officers and the Director, IHS regarding Contract Disputes Act (CDA) claims involving the alleged underpayment of Contract Support Costs (CSC) in fiscal years 1992 through 2005.

Composition

The CDARG will be chaired by the IHS Deputy Director for Indian Health Policy (IHP) or a designee of the Deputy Director for IHP. The CDA Principal Contact for the Agency is the Director, Division of Regulatory and Legal Affairs (DLRA), Records Access and Policy Liaison. In addition, the membership of the CDARG will consist of representatives from the Office of Tribal Self-Governance (OTSG), the Office of Tribal Programs (OTP) and the DRLA. The Office of General Counsel (OGC) will provide legal counsel to the CDARG.

The Chair has broad discretion to invite or conference-in other representatives on an ad hoc basis as needed depending on the nature of the issues to be discussed and the expertise required.

Process

A response must be issued within 60 days of receipt for a CDA claim over \$100,000, or the claimant may treat the claim as denied and appeal to the Interior Board of Contract Appeals or bring an action in Federal court. For a CDA claim under \$100,000, a decision must be issued within a reasonable time or within 60 days of receipt of a written request for a decision from a Tribe or Tribal organization. In the event that the Agency needs more time to respond to a CDA claim, it should send a letter within the 60-day time period indicating when a decision will be made.

The Area Office will be responsible for analyzing and making recommendations to the CDARG regarding CDA/CSC claims filed. The Area Office Contracting Officer will be responsible for drafting responses for CDA/CSC claims based on Title I contracts and the

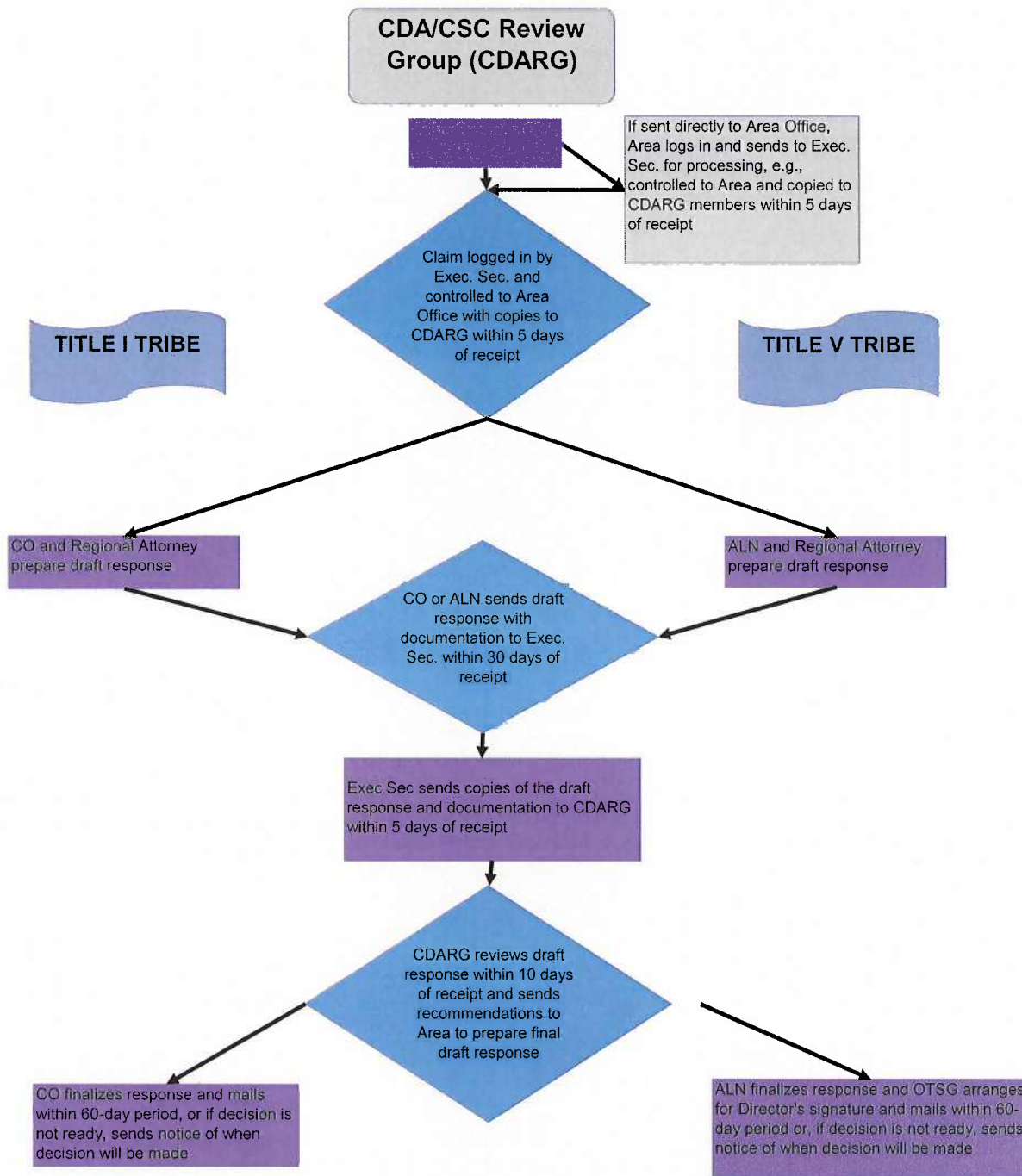
Agency Lead Negotiator will be responsible for drafting responses to claims based on Title V compacts.¹

1. For CDA/CSC claims received directly by the Area from a Tribe or Tribal organization, the Agency Lead Negotiators or Area Contracting Officers in receipt of the claims shall immediately forward the original copy of the claim to the IHS Executive Secretariat and notify the CDA Principal Contact of the nature of the claim and the date received. The IHS Executive Secretariat will forward a copy of the CDA/CSC claim to the members of the CDARG and control the file to the Area within 5 days of receipt.
2. If the Office of the Director directly receives a CDA/CSC claim from a Tribe or Tribal organization, the IHS Executive Secretariat will control the file to the Area and forward a copy of the claim to the members of the CDARG within 5 days of receipt.
3. Within 30 days of receipt of a CDA/CSC claim, the Area must submit to the IHS Executive Secretariat: (1) its analysis of the amount owed and its recommendation for settlement, payment, or denial; and (2) an initial draft of the awarding official's decision in response to the claim. The IHS Executive Secretariat will, within 5 days of receipt, forward copies of the Area's submission to the members of the CDARG.
 - a. The analysis prepared by the Area shall be coordinated with the Regional Attorney and the draft decision shall cite any legal reasons for which the claim could be denied.
 - b. The financial analysis of the CDA/CSC claim shall include: (1) the amount(s) the Tribe claims it is entitled to; (2) a calculation of the amount called for under the relevant contract/compact and Funding Agreement/Annual Funding Agreement; and (3) the amount paid to the Tribe. A complete explanation of how these amounts were determined shall be included with the Area's submission along with the following supporting documentation:
 - i. copies of worksheets used to complete the financial analysis and copies of relevant sections from the contract, compact, AFA or FA used to make the determination of the amount potentially due;
 - ii. an analysis of the amount claimant believes it is owed;
 - iii. a copy of the first page and last page of the official signed contract or compact along with any relevant CSC language on which the

¹ If a CDA/CSC claim involves a fiscal year in which a Tribe had both a Title I contract and a Title V compact in place, the claim will be split into two claims based on the underlying contract and compact. The Contracting Officer will address the Title I portion of the claim and the Agency Lead Negotiator will address the Title V portion of the claim.

- claim is based and any financial tables showing program and CSC funds awarded;
- iv. a copy of the first page and the last page of the applicable FA or AFA along with any relevant CSC language on which the claim is based and any financial tables showing program and CSC funds awarded; and
 - v. any other documents relevant to the claim.
4. The DRLA will track the CDA/CSC claims received and responses sent. The DRLA will keep a separate working file for each CDA/CSC claim received, which will contain: (1) a copy of the CDA/CSC claim; (2) all documentation submitted by the Area regarding the CDA/CSC claim; and (3) a copy of the final decision letter.
 5. The DRLA will convene the CDARG within 10 days of receipt of the Area Office's analysis and draft decision. The CDARG will review the Area Office's analysis and recommendation, and either concur or recommend modifications to the draft decision. Additional CDARG meetings may be held if all issues cannot be resolved at the initial meeting. The Agency Lead Negotiators and Contracting Officers working with their Regional Attorneys will be responsible for making any necessary modifications and preparing a final draft decision.
 6. If the CDA/CSC claim is based on a Title I contract, the Contracting Officer will be responsible for finalizing the decision and mailing it within the 60-day time period. If a final decision can not be made within the 60-day time period, the Contracting Officer working with the Regional Attorney shall send a notice within the 60-day time period notifying the claimant of when a decision will be issued.
 7. If the CDA/CSC claim is based on a Title V compact, the Agency Lead Negotiator will be responsible for finalizing the decision. The OTSG will be responsible for securing the Director's signature and mailing the decision within the 60-day time period. If a final decision can not be made within the 60-day time period, the Agency Lead Negotiator working with the Regional Attorney shall send a notice within the 60-day time period notifying the claimant of when a decision will be issued.
 8. The OTP will provide staff support, including summaries of meetings.

NOTE: Meetings of the CDARG are a part of the deliberative process of the IHS. Discussions and deliberations of the workgroup should be kept confidential by all meeting participants.



NOTES

--CDARG is chaired by the Deputy Director for Indian Health Policy or designee and consists of OTSG, OTP and DLRA with legal counsel from OGC. The agency's CDA Principal Contact is the Director, DRLA

--CDA claims over \$100,000 must be responded to within 60 days of receipt by decision or the claimant may treat the claim as denied. For CDA claims under \$100,000, the Tribe may request a response within 60 days; in this instance, the claim may be treated as denied by the Tribe if no response is received within the 60-day period.

--If the CDA claim involves a Title I Tribe that converted to Title V, the claim will be assigned to the ALN or CO for the purpose of preparing the draft response based on the agreement associated with the particular year of the claim; e.g., each claim will be assigned by contract/compact.

--DRLA is the focal and tracking point for CDARG and maintains a working file of all claims.