DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

25 CFR Part 900

RINs 1076–AD21; 0905–AC98

Indian Self-Determination and Education Assistance Act Amendments

AGENCIES: Departments of the Interior and Health and Human Services.

ACTION: Final rule.

SUMMARY: The Secretaries of the Department of Interior (DOI) and the Department of Health and Human Services (DHHS) hereby issue a joint rule to implement section 107 of the Indian Self-Determination Act, as amended, including Title I, Pub. L. 103–413, the Indian Self-Determination Contract Reform Act of 1994. This 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 final rule with active tribal participation, using the guidance of the Negotiated Rulemaking Act.

DATES: This rule will become effective on August 23, 1996.

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) 208–5727 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, Pub. L. 93–638, gave Indian 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, Pub. L. 98–250; Pub. L. 100–202; Interior Appropriations Act for Fiscal Year 1988, Pub. L. 100- 446; Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. 100–472; Indian Reorganization Act Amendments of 1988, Pub. L. 100–581; miscellaneous Indian Law Amendments, Pub. L. 101–301; Pub. L. 101–512; Indian Self-Determination and Education Assistance Act Amendments of 1990, Pub. L. 101–644; Pub. L. 102–184; Pub. L. 103–138; Indian Self-Determination Act Amendments of 1994, Pub. L. 103–413; and Pub. L. 103–435. Of these, the most significant were Pub. L. 100–472 (the 1988 Amendments) and Pub. L. 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 Indian 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 (1994 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 review the 1994 NPRM closely 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 1994 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.
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> Section 105(l) amends section 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 rule covers substantially fewer topics than the January 1994 NPRM.

As specified by Congress, the new rule 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 three of these permitted regulatory topics—discretionary grant procedures, internal agency procedures, and tribal organization relinquishment procedures—are addressed in this rule.

The 1994 amendments also required that, if the Departments elected 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 required 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 was to develop regulations that implement amendments to the Act.

The advisory committee had 63 members. Forty-eight of these members represented Indian tribes—two tribal members from each BIA area and two from each IHS area. Nine members were from the Department of the Interior and six members were from the Department of Health and Human Services. Additionally, four individuals from the Federal Mediation and Conciliation Service served as facilitators. The committee was co-chaired by four tribal representatives and two Federal representatives. While the committee was much larger than those 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.

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 was, 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 published draft regulations in a Notice of Proposed Rulemaking in the Federal Register on January 24, 1996, at 61 FR 2038. (1996 NPRM) In the 1996 NPRM, the Departments invited the public to comment on the draft provisions. In addition, the Departments outlined five areas in which the Committee had not yet reached consensus and asked for public comments specifically addressing those topics.

Ultimately, the Departments received approximately 76 comments from Indian tribes and tribal organizations, addressing virtually every aspect of the proposed regulation. The full committee reconvened in Denver between April 29, 1996 and May 3, 1996 to review the comments, to evaluate changes suggested by the comments, and to approve final regulatory language.

As a result of that meeting, the full committee was able to transmit a report to the Secretaries which included consensus regulatory language on all but four issues: internal agency procedures; contract renewal proposals; conflicts of interest; and construction management services. Tribal and Federal representatives prepared non-consensus reports on these four issues, which were submitted to the Secretaries for a decision. One additional question arose, pertaining to § 900.3(b)(11) of the regulation, and that was also referred to the Secretaries. On May 23, 1996 a delegation of tribal representatives met with the Chiefs of Staff of the two departments to present the tribal view of the unresolved issues. Decisions have been made based upon the arguments presented at that meeting, and the regulation incorporates those decisions.

The Departments commend the ability of the committee to cooperate and develop a rule that addresses the interests of the tribes and the Federal agencies. This negotiated rulemaking process has been 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, 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 agreed to publish additional introductory materials under subpart ''A.''

Summary of Regulations and Comments Received

The narrative and discussion of comments below is keyed to specific subparts of the rule. Matters addressed under the heading ''Key Areas of Disagreement'' in the Notice of Proposed Rulemaking are discussed under the appropriate Subpart.

Subpart A—Policy

Summary of Subpart

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

A number of comments recommended that the statement that tribal records are exempt from disclosure under the Freedom of Information Act (§ 900.2(d)) be further explained to include annual audit reports prepared by tribal contractors and tribal records archived by the Federal government. The suggestion regarding archived tribal records has been adopted. However, section 7502(f) of the Single Audit Act of 1984, 31 U.S.C. 7502(f), and OMB Circular No. A–128, Audits of State and Local Governments, subparagraph 13(e), state that single audit reports shall be available for public inspection within

30 days after the completion of the audit. Therefore, these audit reports are available for public inspection.

Numerous comments expressed concern over the nonapplicability of the Privacy Act to tribal medical records, in section 900.2(e). Although section 108(b) of the Act is binding in this respect, Subpart C (§ 900.8) has been amended to address the confidentiality of medical records. Indian Tribes and tribal organizations remain free to adopt their own confidentiality procedures, including procedures that are similar to Privacy Act procedures.

A large number of comments urged that the NPRM be amended to include a Secretarial policy to interpret Federal laws and regulations in a manner that will facilitate the inclusion of programs in contracts authorized by the Act. In response to these comments, the Committee has added the language in Secretarial policy statement in § 900.3(b)(8). This policy is not intended to limit in any manner the scope of programs, functions, services or activities that are contractible under section 102(a)(1) of the Act.

Discussion of Comments

Several comments recommended that various policy statements be clarified to reflect the congressional policy that funds for programs, services, functions and activities are transferred to tribal contractors when contracts are awarded under the Act. These comments have been adopted and appropriate changes made to § 900.3(a)(4), § 900.3(b)(4) and § 900.3(b)(9).

One comment found the last two words of § 900.3(a)(8) confusing due to the inclusion of the words ''as appropriate.'' In response, these words have been deleted in the final rule.

Several comments recommended that the phrase ''and for which funds are appropriated by Congress'' be deleted from the Secretarial policy statement set forth in § 900.3(b)(1). The Committee agreed and deleted this phrase in the final rule.

The Committee revised 900.3(b)(7) (referring to the scope of programs that are contractible under the Act) to be consistent with the new policy set forth in 900.3(b)(8).

Several comments urged that § 900.d(b)(9) be amended to articulate more clearly the Secretaries' duty to commence planning for the transfer of programs to tribal operation immediately upon receipt of a contract proposal. In response to the comments, § 900.3(b)(9) has been revised.

A large number of comments urged that the provision regarding Federal program guidelines, manuals, or policy directives set forth in § 900.5 of the NPRM be revised to refer more generally to any unpublished requirements. In response to these comments, § 900.5 has been revised in the final rule.

Some comments urged that language be included to identify the inherent Federal functions that cannot lawfully be carried out by an Indian tribe or tribal organization, and that therefore may not be contracted under the Act. The Committee did not adopt these comments due to the subject-matter limitations on its rulemaking authority set forth in section 107(a)(1) of the Act. Similarly, the Committee did not address comments relating to the appropriate uses of program income generated under the Federal Medicare and Medicaid programs.

One comment expressed concern regarding the absence of clear provisions for tribal participation in the administration of Federal Indian programs. No change was made as this concern is already dealt with in § 900.3(a)(1).

One comment recommended that the Secretary adopt a policy that Indian tribes participate in the development of the budgets of agencies other than the Indian Health Service and the Bureau of Indian Affairs. The Committee did not adopt this proposal due to the subject-matter limitation set forth in section 107(a)(1) of the Act, and the limitation in section 106(I) of the Act regarding tribal participation.

One comment urged that the Secretarial policy regarding tribal participation in budgetary matters set forth in § 900.3(b)(6) be more clearly articulated as a mandatory duty. Nothing in the new regulation is intended to change the Department's current consultation requirements. Accordingly, no change was made in the text of the regulation.

A few comments urged that the phrase ''for the benefit of Indians because of their status as Indians'' or the phrase ''for the benefit of Indians'' be further defined in the regulation. The Committee rejected suggestions that the concept of ''contractibility'' be further explored in the regulations due to the specific subject-matter limitations of section 107(a)(1) of the Act.

Subpart B—Definitions

Summary of Subpart

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.

Summary of Comments

In response to one comment regarding the term ''awarding official'' the definition has been revised and an additional sentence added to make clear that an ''awarding official'' need not necessarily be a warranted contracting officer. Who the awarding official is in a particular situation will depend on to whom the Secretary has delegated authority to award the contract.

In response to comments regarding the scope of Subpart C (which deals with ''initial contract proposals''), the term ''initial contract proposal'' has been added as a new definition in the final rule. The definition clarifies that the requirements for an ''initial contract proposal'' do not apply to other proposals such as proposals to renew contracts governing programs, services, functions or activities that are already under tribal operation.

In response to one comment regarding the procedural aspects of reassumption, the definition of ''reassumption'' has been revised to refer the reader to the notice and other procedures set forth in Subpart P.

One comment requested that the term ''Indian tribe'' be revised. The Committee rejected the comment in favor of the definition of this term already set forth in the statute and repeated in § 900.6 of the final rule.

Two comments urged that the Secretary add a new definition of the term ''consultation'' to establish a framework for this activity. The Committee rejected this proposal as beyond the scope of subjects which may be regulated under section 107(a)(1) of the Act. Similarly, the Committee rejected requests that the regulations include a definition of ''trust responsibility.''

In the NPRM, the public was invited to comment on the disagreement within the Committee regarding the development of internal agency procedures. Specifically, as noted in 61 FR at 2039–2040, tribal representatives on the Committee urged that internal agency procedures be developed in precisely the same fashion as other regulations implementing the Indian Self-Determination Act Amendments of 1994, through the use of the negotiated rulemaking process. Federal representatives on the Committee supported instead a joint tribal and Federal commitment to work together to generate a procedural manual which would promote the purposes underlying the Act and facilitate contracting by Indian tribes and tribal organizations. The Federal committee members proposed committing to a firm timeline

within which to produce such a manual. Further, the Federal Government committed to ''meaningful consultation'' throughout the manual development process.

The Departments received many comments from tribal representatives addressing the issue of internal agency procedures as a subject for negotiated rulemaking. Those comments consistently supported the tribal proposal to include a Subpart in the regulation concerning internal agency procedures.

Many of the comments indicated a belief that all internal agency procedures under which Indian tribes and tribal organizations exercise their self-determination should be promulgated by negotiated rulemaking. Those comments cited sections 107 (a) and (d) of the Act as authority for their recommendation.

Tribal representatives also indicated a concern that absent formal rulemaking, Federal agencies might use internal procedures to circumvent the policies underlying the Act, thwarting the intent to simplify the contracting process and free Indian tribes from excessive Federal control. Two comments suggested that negotiating rulemaking procedures will ensure that Federal agencies would be bound to follow uniform procedures to implement and interpret the Act and the regulations.

Two other comments wanted the regulation to state explicitly that the Secretaries lack authority to interpret the meaning or application of any provision of the Act or the regulations. Tribal representatives feared that a myriad of letters containing policy statements and correspondence interpreting reporting requirements would result if internal agency procedures are not tied to formal rulemaking.

In response to the Federal proposal as detailed in the NPRM, several comments stated that it would not be acceptable to develop a manual in a setting which is less formal and structured than a negotiated rulemaking committee. In addition, comments objected that developing such a manual after the publication of a final regulation would violate the mandatory deadline imposed on the Secretaries by Congress.

Several comments were suspicious of the government's commitment to seek tribal consultation on internal agency procedures. They stated that consultation alone would be insufficient to ensure that Indian tribes and tribal organizations are accorded the full benefits of the Act. Without full and active participation, one comment stated, Indian tribes would be in the position of attempting to change decisions made in advance by Federal agencies.

The Departments agree to an enhanced consultation process in developing procedures that do not involve resource allocation issues. Features of this enhanced process could include facilitation by professional facilitators, consensus decision-making, opportunity for comment by tribal entities, and reporting of decisions to the Secretaries. The Departments will convene a meeting to begin this process within sixty days of the regulations becoming effective.

Subpart C—Contract Proposal Contents

Summary of Regulation

Subpart C contains provisions relating to initial contract proposal contents. In this area, the committee opted to have minimal regulations. Subpart C consists of a checklist of 13 items that must be addressed in a proposal. In addition, the 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.

Summary of Comments

Several comments recommended amending § 900.7 to permit the Secretary to provide technical assistance funding in addition to technical assistance. To reflect the concerns the two sentences were added at the end of the section. The first sentence authorizes the Secretary to make technical assistance grants, and the second authorizes an Indian tribe or tribal organization to request reimbursement of pre-award costs for obtaining technical assistance under the Act.

One comment recommended the insertion of objective standards in § 900.7 to measure the authenticity of a claim that technical assistance cannot be provided due to the availability of appropriations. This recommendation was not adopted because the provision that technical assistance be subject to the availability of appropriations comes directly from Section 103(d) of the Act. In addition, it is clear that if qualified agency personnel are available, technical assistance will be provided to prepare an initial contract proposal.

Several comments recommended deleting the word ''must'' and inserting the word ''should'' in the first sentence of § 900.8. This recommendation was not adopted because the proposal requirements in this subsection represent the minimum amount of information required for the Departments to approve a proposal.

Several comments generally objected to § 900.8 on the grounds that it requires the production of information that the Federal Government has no right to know, or that is in excess of statutory requirements. Although some modifications were made to § 900.8 in response to comments, it is the consensus of the Committee that the information included in the final version of § 900.8 is necessary to protect Indian tribes or tribal organizations, or because it is essential information required by the Departments in order to be able to review or decline a contract proposal, to determine whether any of the statutory declination criteria exist.

A number of comments expressed concern that § 900.8(d) does not clearly bar the Secretary from revising service area boundaries over the objections of tribes located in an established service area. This recommendation was not adopted because it is the intent of this provision for the applicant to define the service area. This specific provision was debated at length by the Negotiated Rulemaking Committee, and the proposed regulatory provision in § 900.8(d) is the compromise agreed to by consensus of the Committee.

In response to a comment, the words ''an identification'' were deleted from § 900.8(e), and replaced with the words ''the name, title,'' for clarification purposes.

In response to a comment, the words ''a description'' were deleted from § 900.8(g)(3), and replaced with the words ''an identification'' for clarification purposes.

In response to a comment, § 900.8(g)(7) was amended to read ''minimum staff qualifications proposed by the Indian tribe or tribal organization, if any'' for clarification purposes.

In response to several comments objecting to the requirement in § 900.8(g)(4) that financial, procurement, and property management standards be included in the proposal, reference to these standards was deleted from this subsection, and a new subsection (g)(8) was added to require a statement that the Indian tribe or tribal organization meet minimum procurement, property, and financial management standards set forth in Subpart F, subject to waivers that may have been granted under Subpart K.

In response to several comments requesting that the words ''tribal shares'' be defined, § 900.8(h)(1) was modified by removing these words and inserting

''the Indian tribe or tribal organization's share of funds.''

In response to a comment, § 900.8(h)(2) was amended by including the word ''start-up'' after the word ''one-time'' to make this section consistent with the Act.

Several comments objected to the use of the word ''budget'' in § 900.8(h), and to the level of detail required under this subsection. This subsection was redrafted to delete the word ''budget'' wherever it appears, and replace it with ''amount of funds requested'' or ''funding request.'' In addition, §§ 900.8(h)(1) (i), (ii), and (iii) were deleted.

In response to a comment that the information sought in § 900.8(h)(5) was unnecessary, this subsection was redrafted for clarification purposes, and the words ''[a]t the option of the Indian tribe or tribal organization'' were added at the beginning of the subsection.

A new subparagraph (m) was added to § 900.8 to provide that in its contract proposal, an Indian tribe or tribal organization must state that it will implement procedures appropriate to the program being contracted to assure the confidentiality of information relating to the financial affairs of individual Indians obtained under a proposed contract, and of medical records, or as otherwise required by law. While tribal comments objected to the imposition of regulatory procedures on confidentiality of personal financial information, many comments were received from Indian tribes indicating a concern that the confidentiality of personal medical records in the hands of tribal contractors be preserved, notwithstanding the opinion of DHHS Office of General Counsel that the Privacy Act does not apply to such records. The provision for such an assurance with respect to personal financial information resulted from a compromise in the Committee between the Federal and tribal positions.

In response to a comment suggesting that Indian tribes or tribal organizations should receive a list of Federal property used in carrying out programs to be contracted, a new question and answer were added immediately preceding § 900.10. In response to a comment, this new section also includes a requirement that the condition of the property be described.

In response to a comment, § 900.11(a)(4) was modified to add the words ''real and personal'' before the word ''property'' for clarification purposes.

Several comments requested clarification regarding whether the contract proposal becomes part of the contract document. In response, a new question and answer were added to clarify that the contract proposal becomes part of the final contract only by mutual agreement of the parties.

Several comments suggested that Subpart C be clarified to address what is contractible and what is inherently Federal and thus residual. The Committee did not adopt the suggestion. Federal agency decisions regarding residual functions are subject to the appeals process.

Subpart D—Review and Approval of Contract Proposals

Summary of Regulation

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. This subpart 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.

Summary of Comments

One comment indicated that the word ''Secretary'' in this Subpart does not define where the proposal should actually be submitted. Subpart B defines the word ''Secretary'' to include either Secretary or their delegates. It is clear that a proposal should therefore be submitted to the agency with jurisdiction over the program to be contracted, i.e., the Bureau of Indian Affairs, the Indian Health Service, the Bureau of Land Management, the National Park Service, etc.

A comment suggested amending § 900.15(a) to require the Secretary to return any proposal lacking the required authorizing resolution(s) to the applicant without further action. This suggestion was not adopted because § 900.15(b) requires that the applicant be notified of any missing information. It should be clear, however, that Section 102(a)(2) of the Act only requires the Secretary to consider a proposal if ''so authorized by an Indian tribe'' pursuant to the tribal resolution required under Section 102(a)(1) of the Act. Therefore, although technically outside of the enumerated declination criteria in Section 102(a)(2) of the Act, it is also clear that the Act precludes the approval of any proposal and award of any self-determination contract absent an authorizing tribal resolution.

Several comments requested that the 15-day timeframe in § 900.15 be cut to 10 days. This suggestion was not adopted because 15 days are needed to evaluate the application. The word ''request'' was added before the words ''that the items'' in this subsection for clarification purposes, and in response to several comments.

Several comments expressed concerns with the failure of this Subpart to specify what happens when a proposal is approved. The comments recommended addressing the award and funding of the contract. In response to these concerns, the question and the answer in § 900.16 were amended to reflect that the award of the contract occurs upon approval of the proposal. Also, the committee added the words ''and add to the contract the full amount of funds pursuant to § 106(a) of the Act'' were added at the end of § 900.18. Also, a new section was added to explain what happens when a proposal is approved.

One comment suggested adding a provision in § 900.18 to provide that costs incurred after the 90-day period be deemed allowable costs under the contract and be reimbursed. This suggestion was not adopted because it is beyond the scope of this Subpart.

A comment inquired whether the 90-day period continues to run if the Indian tribe is notified that there are missing items, or whether the 90-day period starts only when there is a complete proposal. The regulation in § 900.15(b) requires the Secretary to notify the applicant of any missing items, and to request the applicant to furnish these items within 15 days. If the applicant fails to submit the missing items altogether, the Secretary must either approve or decline the proposal that was received within 90 days of receipt. Similarly, if the applicant submits the missing items within the 15-day deadline, the 90-day period continues to run from the time of receipt of the original proposal.

Subpart E—Declination Procedures

Summary of Subpart

This subpart implements sections 102 (a)(2), (a)(4), (b) and (d) of the Act. It 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. Subpart E also informs Indian tribes and tribal organizations of the requirements the Secretary must follow 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.

Summary of Comments

Several comments noted that the proposed regulations fail to address the continuation of mature contracts, and recommended that this issue be addressed. This recommendation was not adopted because there is no statutory authority to issue regulations on the mature contract process. In addition, the right to mature contracts is addressed in Section 105(c)(1) of the Act and in the Model Contract under Section 108 of the Act. Continuation of any contract is also addressed in § 900.32 of the final rule.

One comment recommended that declination of construction contracts be addressed in this Subpart. This recommendation was not adopted because this issue is addressed in § 900.123 of the final rule.

Several comments recommended a further explanation of the criteria in § 900.22. These comments were not adopted because it was decided not to interpret the declination criteria in the regulation, but to leave their interpretation to case-by-case adjudication.

One comment suggested adding an applicant's failure to submit the single agency audit report and/or failure to correct prior audit deficiencies as a declination ground in § 900.22. This comment was not adopted because there is no statutory authority to add declination criteria to those specified in Section 102(a)(2) of the Act.

In response to a comment, the reference to Section 106 of the Act in § 900.26 was replaced with a reference to Section 102(a) of the Act.

There were numerous comments objecting to the document disclosure provisions in § 900.27 of NPRM (now § 900.29). In response to these objections, § 900.27(a) was amended to delete the words ''when appropriate'' and replace them with the words ''within 20 days.'' In addition, § 900.27(c) was deleted in its entirety.

Several comments requested that the Secretary's burden of proof when declining a proposal in § 900.297(a) be changed to ''clear and convincing evidence.'' This recommendation was not adopted because it is different from the statutory burden of proof contained in Section 102(a)(2) of the Act.

A comment requested that the technical assistance to be provided in § 900.30 be clearly identified. This recommendation was not adopted because the type of technical assistance required will vary with each proposal. It is impossible to define generally the type of technical assistance required for all proposals.

Pursuant to several comments, the word ''substantively'' was deleted from two places in § 900.32, and replaced by the word ''substantially.''

The Committee received several comments regarding the ability of the BIA and other agencies of the Department of the Interior to review contract renewal proposals for declination issues, where the renewal proposal is substantially similar to the contract previously held by that Indian tribe or tribal organization. In the past, as a matter of practice, neither IHS nor the BIA has reviewed contract renewal proposals for declination issues. Therefore, the Departments have agreed that IHS and the BIA will not use the declination process in contract renewals where there is no material or significant change to the contract. However, as no past practice exists for the non-BIA agencies within DOI, those agencies will have discretion to use the declination process in appropriate contract renewal situations. The regulatory language of § 900.32 has been amended to reflect this decision.

Subpart F—Standards for Tribal or Tribal Organization Management Systems

Summary of Subpart

Indian self-determination contracts are unique agreements because, by definition, they are not procurement contracts, discretionary grants or cooperative agreements. This means that none of the usual procurement or grant regulations apply to the management of the Federal funds provided under these contracts. The absence of established guidelines presented a special challenge to the committee to develop standards which would assure appropriate stewardship of the Federal funds and other assets being transferred through these contracts. Deliberations on this issue led to the review of OMB Circular A–102 and the Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments (the ''Common Rule''). Although an Indian self-determination contract is not a discretionary grant, the Common Rule provides certain government-to-government management principles that apply to discretionary Federal grants to states, local governments, and Indian tribes.

The Common Rule has two-tiered management rules. On one tier, it generally defers to state law and regulations and accepts a state's management standards without imposing more detailed requirements. On the second tier, other local governments and Indian tribes (which vary greatly in size and structure) must observe the Rule's more detailed standards for the management of Federal grants.

In the interest of giving greater recognition to the government-to-government relationship which exists between Indian tribes and the Federal government, and to transfer greater responsibility to Indian tribes commensurate with their status, the committee established standards permitting the management of contract resources in accordance with tribal laws, regulations and procedures, just as the Common Rule permits states to manage Federal resources in accordance with state laws and procedures. Systems established by Indian tribes will govern the administration of contracts provided that they include the core management principles or standards adopted from the Common Rule which the committee determined best meet the needs of Indian tribes and tribal organizations.

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.

The standards contained in this subpart are designed to be the targets which the Indian tribe 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. Subpart F includes 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 subcontractors; (5) identify the difference between a standard and a system; and (6) specify when the management standards and management systems are evaluated.

Section § 900.44 contains the standards for financial management

systems. Subpart F establishes 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 standards for procurement management systems. This subpart establishes the minimum requirements for seven elements: (1) To ensure that vendors and subcontractors 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 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 subcontract terms, and include a provision in its subcontracts that addresses the application of Federal laws, regulations and executive orders to subcontractors.

Section 900.51 contains the minimum requirements for property management systems. Subpart F addresses 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. Subpart F 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.

Summary of Comments

A comment requested that the rule clarify the application of Office of Management & Budget (OMB) Circulars or portions of OMB Circulars that apply to the operation of Indian Self-Determination Act contracts.

Section 900.37 specifies that the only OMB Circulars that apply to self-determination contracts are those (1) Incorporated the by Act, such as OMB Circular A–128, ''Audits of States and Local Governments''; (2) adopted by these regulations; or (3) agreed to by the Indian tribe or tribal organization pursuant to negotiations with the Secretary. In regard to these regulations, § 900.45(e) identifies the appropriate OMB Circular Cost Principles that should be used in determining the propriety of contract costs.

One comment asked the Committee to delete § 900.40(a) because it is overreaching and exceeds statutory requirements. This section was a fundamental underpinning of the entire Subpart. The negotiators agreed that the regulations would include standards, to be treated as minimum requirements, for the administration of contracts. For an initial contract proposal only, Federal officials may review the standards proposed by the Indian tribe or tribal organization, to determine that they meet or exceed these minimum regulatory requirements. Indian tribes or tribal organizations are responsible for the implementation of administrative systems that meet the standards and that are subject to review in accordance with the Single Agency Audit requirements as provided in Section 5(f) of the Act. In many respects, this dichotomy between the standards and systems was designed to acknowledge the unique and special nature of self-determination contacts (non-procurement intergovernmental agreements) and a shift in the regulatory emphasis from the unnecessary and burdensome review of systems to an emphasis on the acceptance of fundamental guiding management principles. This approach is consistent with provisions in the Act at Sections 5(b), 102(a)(2), 105 (a)(1) (2) and (3) and 107(a)(1) and in the Model Contract Section 108(b)(7)(c). For these reasons no change was made in § 900.40.

It was suggested that the Committee delete the words ''or tribal organization'' in § 900.42 from both the question and the answer as this section applies only to Indian tribes. The comment was correct and the words have been deleted.

The Committee was requested to clarify the period of time that Indian tribes and tribal organizations must retain records of contract operations. A new § 900.41 was created to address these issues. That section specifies that Indian tribes and tribal organizations should keep: (1) Financial records for three years from the date of the single audit submission; (2) procurement records for three years from the date of final payment to the supplier; and (3) property management records for three years from the date of disposition, replacement or transfer of the property. In addition, records related to litigation, audit exceptions and claims should be retained until the action is completed.

One comment suggested that the regulation provide for the Secretary to obtain consistent and timely financial information to respond to Congressional inquiries and to otherwise support budget justifications. Section 900.45(a) was amended by adding a provision that provides for the submission of a Financial Status Report, SF 269A. The frequency of submission of the SF 269A remains the subject of negotiation between the Indian tribe or tribal organization and the Secretary. The Department expect that the frequency will not be less than once per year. This change only affects how the information is transmitted to the government and is consistent with Section 5(f)(2) of the Act.

The committee was asked to specify which of the three Office of Management and Budget Circulars dealing with cost principles apply to a tribal organization. In that regard, a tribal organization could be a chartered entity of a tribe, a non-profit organization, and/or an educational institution.

Section 900.45(e) has been amended by revising the parenthetical statement and including a chart to clarify the application of the Office of Management & Budget circulars. The parenthetical statement makes clear that which circular is applicable is negotiable with the Secretary and that current agreements concerning Office of Management & Budget cost principles need not be renegotiated.

The committee was asked to adopt proposed clarifying language for Subsection 900.45(g). The regulations were amended to adopt the suggested language that provides a more accurate description of the standards for a cash management component of financial management systems.

One comment suggested adding the following new language to § 900.45(h):

If an Indian tribe or tribal organization contracts to assume a program, service, function, or activity which includes a physical trust asset or natural resource, the

Indian tribe or tribal organization shall enter upon its financial management system and provide for an accurate, current, and complete disclosure of the value of those assets, provide for an accurate, current and complete disclosure of funds by source and application utilized to keep the physical trust assets or natural resources in good repair and maintenance; provide for an accurate, current, and complete disclosure of any increase or decrease in the valuation of the asset; and provide for an accurate, current and complete disclosure of any other costs, function or activity which would improve, increase, or cause devaluation or decrease in the value of the physical trust asset or natural resource as would be required to account for any asset using generally accepted accounting principles and standards.

The Committee did not include this provision principally because it is beyond the scope of these regulations. Currently, the United States does not track the values of natural resources (i.e. national parks or Indian lands) in this fashion. Therefore, no financial basis exists to begin the process. The cost of establishing the basis would undermine and frustrate self-determination contracting. While the proposal has merits, it would not be possible to implement it effectively until appropriate guidance is issued on valuation of Federal natural resources, the United States enters the information in its financial records, and funds are made available to tribal governments to cover the cost of implementation. In regard to guidance, the Federal Accounting Standards Advisory Board has not issued any authoritative instructions on the valuation of Federal natural resources. This matter is currently under consideration by the Board.

Another comment asked the Committee to revise § 900.46 to require the Secretary to be held to a ''strict standard of compliance with the terms of the contract and the annual funding agreement.'' Further, the comment suggested deleting the words ''In regard to paragraph (g) of Sec. 900.44 [of the NPRM]'' and ''based upon the payment schedule provided for in.'' The Committee was asked to add ''in strict compliance with'' for the last phrase deleted. Section 900.46 was amended to make this section of the regulations consistent with the statute.

A comment recommended that § 900.48(c) be amended to include provisions requiring ''cost and price analysis'' in the procurement standards. Subsection § 900.48(c) was amended by adding the phrase ''and ensure the reasonableness of the price'' at the end of the subsection. This was done to ensure that cost or price analysis be considered in all procurements, but to avoid the application of a full Federal procurement-type cost or price analysis since self-determination contracts are not subject to the Federal Acquisition Regulations (FARs). It is the responsibility of the Indian tribe or tribal organization to design a procurement system based upon the standards in Subpart F. The amendment will require those systems to consider the ''reasonableness of price'' when making procurement purchases.

The Committee was asked to clarify § 900.50, including the provision of further guidance about the application of tribal law generally and the application of Tribal Employment Rights Ordinances (TERO) specifically. § 900.50 was substantially revised, to make clear that subcontracts by an Indian tribe or tribal organization may require the subcontractor to comply with certain provisions of the Act and other Federal laws. The new language informs subcontractors that they are responsible for identifying and complying with applicable Federal laws and regulations. The section was further amended to provide that, to the extent the Secretary and the Indian tribe or tribal organization identify and specify laws and regulations that are applicable to subcontracts in the negotiation of the self- determination contract, those identified and specified provisions will then be included in subcontracts.

These regulations do not specifically address the application of tribal law, but establish minimum standards for the operations of management systems. Indian tribes may exercise discretion and create higher standards by operation or enactment of tribal law. Similarly, an Indian tribe may seek a waiver of a standard as noted in § 900.36 of the regulations. Nothing in the regulations is designed to supersede or suspend the operation of tribal law that meets these standards. Further nothing in the regulations affects the operation of tribal law to activities not paid for by self-determination contract funds.

Sections 7(b) and (c) of the Act authorize the application of Indian Preference and Tribal Preference (TERO) in the performance of a self-determination contract. To the extent a TERO ordinance is consistent with the terms of Section 7(b) and (c) of the Act it can be made applicable to procurement subcontracts.

Property Management

The Committee was asked to define ''sensitive property'' in § 900.52, and as a result, a definition of ''sensitive personal property'' was inserted at § 900.52(b). That definition includes all firearms and provides that the Indian tribes and tribal organization are to define such other personal property ''that is subject to theft and pilferage.'' Since the activities vary from contract to contract to such a large extent, the committee decided that a locally-created definition best meets the needs of all contractors.

One comment indicated § 900.60(b) might require revision regarding the authority of an Indian tribe or tribal organization to dispose of Federal property. The Committee revised subsection (b) of § 900.60 by deleting all of subsection (1), that previously allowed for disposal if the Secretary failed to respond to a disposal request. As a result, if the Secretary fails to respond to a request from an Indian tribe or tribal organization within the sixty day period, the Indian tribe or tribal organization may return the Federal property to the Secretary. The Secretary is required to accept the property and is required to reimburse the contractor for all costs associated with the transfer. This ensures that Indian tribes and tribal organizations have a process to dispose of unneeded Federal property, and the reimbursement of transfer costs should provide the Secretary with an incentive to respond in a timely fashion to disposal requests.

The committee was asked to clarify that the property disposal procedures in § 900.60 only apply to personal property, because the answer to the question uses the terms ''personal property'' and ''property.'' Using the term ''property'' which, by definition, includes both real and personal property, creates ambiguity about application of the paragraph to the disposal of real property.

Section 900.60 only applies to the disposal of personal property. The matter has been clarified through editorial revision of the introductory question, to read as follows: ''How does an Indian tribe or tribal organization dispose of Federal personal property?''

Subpart G—Programmatic Reports and Data Requirements

Summary of Subpart

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.

Summary of Comments

One comment argued for the revision of § 900.65, that provides for the submission of programmatic reports and data ''to meet the needs of the contracting parties.'' The comment was concerned that the section could be used to force Federal minimum reporting requirements upon Indian tribes and tribal organizations despite the provision in Section 5(f) of the Act that make reporting the subject of negotiations.

Section 900.65 has been amended to address the comment. A new introductory sentence was added that makes clear that unless there is a statutory requirement, these regulations create no mandatory reporting requirements. The negotiation of reporting is to be responsive to the needs of the parties and appropriate for the purpose of the contract. This provides the Indian tribe or tribal organization, as well as the Secretary, with guidance and limits for negotiations. Furthermore, because of the numerous comments made concerning the § 900.65 provision, ''meet the needs of the contracting parties,'' and the amendment noted above, § 900.67 was also amended to make it consistent with § 900.65 by substituting, ''which responds to the needs of the contracting parties,'' for ''meets the needs of the contracting parties''.

The Committee was asked to clarify grammar in § 900.68. The Committee concluded that the word ''for'' was inadvertently included in the first line of § 900.68. The ''for'' has been and a comma added between ''set'' and ''applicable'' in the first line. This should eliminate the confusion.

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

Summary of Subpart

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.

The Subpart was substantially revised based upon comments received following the NPRM. Please note that two sections have been added, and previous § 900.71 and § 900.72 have now become § 900.73 and § 900.74 respectively.

Summary of Comments

Comments requested that the Committee specify the type of account and the guardian of the account for a reserve for replacement of facilities identified in § 900.70(c).

The final regulation adds two new sections to accomplish this. New § 900.71 was added to set forth the type of account as a ''special revenue fund'' or a ''capital project fund.'' New § 900.72 was also added to provide that the Indian tribe or tribal organization is the guardian of the fund. It permits fund investments in a manner consistent with the laws, regulations and policies of the Indian tribe or tribal organization, subject to lease terms and the self-determination contract.

The Committee was asked to add landscaping costs to those items of cost included in § 900.70(e)(1–16). No such addition was made as the Committee believed that such costs were included in either subsection (8) or subsection (16) of § 900.70(e).

Likewise, another comment suggested adding profit to those matters listed in § 900.70(e). In the Committee's view, a lease based upon fair market value provides for the recovery of profit, adjusted as appropriate, based upon the Federal Share (if any) of acquisition or construction. Therefore, no change was made to this provision.

The committee was asked to identify the source of funds for these lease payments. The source of funds is a subject of negotiation between the parties to a self-determination contract.

Subpart I—Property Donation Procedures

Summary of Subpart

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 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 § 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 § 900.102 addresses excess or surplus property from other Agencies.

Summary of Comments

The committee was asked to clarify this Subpart as it is confusing and generally repetitive. The Subpart addresses the methodology that provides property to Indian tribes and tribal organizations pursuant to the Indian Self-Determination Act. Because there are several classes of property, with varying rights and mechanisms, the Subpart must address each separately. In order to reduce confusion, the final regulations provide more uniformity depending on the property type.

It was suggested that the Committee restore the language that was initially adopted by the Committee, but not included, in § 900.86. The language change in the NPRM accommodates the use of ''plain English'' and was not intended to change the manner in which the Secretary exercised discretion. The Committee has reinstated the originally-approved version by striking the words ''give maximum weight'' and substituting ''exercise discretion in a way that gives maximum effect'' following the word ''will'' in the first line of the answer in § 900.86. A similar amendment can be found at § 900.97(a).

To ensure clarity, several comments requested that the regulation specify as to whether property is real property or personal property in given instances. The Committee has used the word ''property'' in these regulations to mean both real and personal property except where not applicable to one or the other type of property. If either the words ''real'' or ''personal'' modify ''property'' that provision is limited to that type of property.

The committee was asked to change the incorrect reference to 41 CFR 101–47, 202.2(b)(10) in §§ 900.87 (b)(2) and (c)(2). The miscitation has been corrected.

In addition, the committee was asked to delete the terms ''justify and certify''

in § 900.86 as well as § 900.97 and § 900.104 because these terms frustrate the statutory intent and limit access to property needed to carry out self-determination contracts. The Committee amended the above-noted sections and substituted ''state how'' or ''statement of how'' for the ''justify and certify'' provision. This was done to make clear that what is needed is a concise, simple statement of how the subject property is ''appropriate for use for a purpose of which a self-determination contract is authorized under the Act,'' the statutory language. The Committee expects that the deletion of the terms ''justify or certify'' makes it clear that no detailed submission will be required by the Secretary or his designee.

Comments requested revision in the process described in § 900.87 pertaining to property that was made available before or after October 25, 1994. The Committee has chosen not to make changes, as the October 25, 1994 date is the result of the 1994 Amendments to the Act. That date is the effective date of Public Law 103–413. Those amendments provided at Section 105 of the Act that Indian tribes or tribal organizations could take title to government-furnished property used in performance of the contract property unless the Indian tribe or tribal organization preferred the Secretary to retain title. Prior to October 25, 1994, title to such property remained with the Secretary.

This provision allows an Indian tribe or tribal organization to receive title to government-furnished property put in use prior to October 25, 1994. In part, that allows Indian tribes or tribal organizations greater flexibility with the Property Management standards in Subpart F above. For these, reasons no further changes were made in § 900.87.

One comment suggested that the regulation clarify the references to the value of property subject to reacquisition or acquisition by the Secretary at the time of retrocession, reassumption, termination or expiration of the contract. Among the concerns expressed were the value at the time of reacquisition, whether it was acquisition or reacquisition, the lack of consideration of depreciation, and the use of property by multiple contracts when only one or a portion of one contract triggers this issue. These comments relate to Sections 900.89, 900.93, and 900.100, all of which address this issue depending upon the class of property.

The Committee took action to make uniform sections 900.89, 900.93, and 900.100. These new sections all contain an additional subsection that addresses the issue of property used in multiple contracts. This new subsection provides that the Secretary and contractor shall negotiate an ''acceptable arrangement'' for continued sharing and the title to the property.

In order to address current value (at the time of retrocession, etc.) the section was revised to ''current fair market'' and another clause was added, ''less the cost of improvements borne by the Indian tribe or tribal organization.'' This was done so that where an Indian tribe or tribal organization has made improvements to a piece of property, the value of the improvements is factored into arriving at the $5,000 value threshold. The Committee also reviewed the depreciation questions but concluded that the current fair market value approach would adequately take these factors into consideration. Moreover, since services would be provided to Indian beneficiaries by the Secretary, the best approach with the reacquired property was current fair market value.

In regard to § 900.93, one comment proposed a change to the question by substituting ''reacquire'' for ''acquire.'' Upon review the Committee concluded that ''acquire'' was the correct term because this section addresses contractor-purchased property. In that instance, the Secretary has never had title and ''acquire'' is the proper term.

The revisions to the above-noted sections have also been incorporated into Subpart P of the regulations. No further comments will be discussed in this preamble on Sections 900.89, 900.93, or 900.100 since the operative provisions are now uniform.

With regard to Sections 900.96 and 900.103, several comments asked when the Secretary will notify Indian tribes and tribal organizations about the availability of excess BIA and IHS personal property and GSA excess and surplus property. Suggestions of quarterly or semi-annually were made. At both § 900.96 and § 900.103 the term ''not less than annually'' has been added. This creates a minimum requirement that the Secretary must meet yet allows for more frequent notices.

Some comments asked the Committee to provide further instruction in § 900.97(b) relating to multiple requests by contractors the same excess or surplus property.

The Committee revised these subsections to clarify what will occur in that situation. In regard to personal property, the request first received by the Secretary will have precedence. If the requests are received by the Secretary on the same date, the requestor with the lowest transportation costs will prevail.

A technical amendment was made to § 900.97(c) by changing ''piece of real property'' to ''parcel of real property.''

The committee was asked to delete the reference to the Federal Property Management Regulation, 41 CFR Chapter 101, as that reference had at § 900.104(b) the potential to incorporate an entirely different set of regulations, not consistent with the Act. The references to the Federal Property Management Regulation (FPMR) and 41 CFR Chapter 101 were deleted and ''Section 900.86 of this Subpart'' was substituted. The Committee made this revision to reflect that these regulations are unique to self-determination contracts and to avoid any conflict between these regulations and the FPMR.

Several comments were made concerning the need for the Secretary to act expeditiously to acquire excess or surplus government property when the property is frozen by the Indian tribe or tribal organization, in § 900.104(c). The Committee revised subsection (c) of § 900.104 by harmonizing the several suggestions.

Several comments called for clarification of § 900.107 by explaining which type of property remains eligible for replacement funding. The Committee changed the question in § 900.107 and deleted ''Yes'' from the answer. This makes clear that government-furnished property, contractor-purchased property and excess BIA and IHS property are eligible for replacement funding consistent with Section 105(f) of the Act. Only excess or surplus government property from other agencies is not eligible for such replacement.

Subpart J—Construction Contracts

Summary of Subpart

Subpart J addresses the process by which an Indian tribe or tribal organization may contract for construction activities or portions thereof. The subpart is 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: 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 and this subpart establishes new procedures to facilitate tribal contracting, through such measures as tribal notification 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 quarterly, and the payment of contingency funds to be administered by the tribal contractor.

Summary of Comments

Approximately 185 comments were received from non-governmental representatives, most of these from Nations and tribes rather than individuals. This preamble reflects the committee response to each comment in a section-by-section format. References to no action being taken by the Committee indicate that no change was made to the regulation.

Several comments proposed that the phrase ''or real property'' be added after ''Federal facilities.'' The comments were adopted to ensure that related construction work was covered under Subpart J. The new phrase adds ''and/or other related work'' after ''demolition.''

Eight comments argued that supportive administrative functions should be specifically recognized as contractible in the language of § 900.111. The Committee decided that the language was adequate as published. One comment proposed adding ''or tribal organization authorized'' after ''tribe.'' This comment was adopted.

One comment proposed to add a bid award phase. The comment was not adopted because it is presently included in the individual phases described in the regulation. Three comments stated that tribal involvement was not included in the site selection process. Site selection was adopted and inserted into subsection 900.112(a)(2) and (3). One comment proposed to add ''assessment and'' after ''initial'' at § 900.112(a)(1) and ''associated activities'' after ''assessments'' at § 900.112(b)(2). Both comments were adopted.

Several comments stated that § 900.113(b) implies that Indian tribes and tribal organizations will always subcontract with a consultant rather than using tribal employees to perform certain functions. This was not the intent of the proposed regulation. The Committee adopted the proposed language: ''An Indian tribe or tribal organization's employee or construction management services consultant (typically an engineer or architect) performs such activities as:'' and struck ''The construction management services consultant (typically an engineer or architect) assists and advises the Indian tribe or tribal organizations in such activities as.''

Five comments suggested that the phrase ''and real property'' should be included at § 900.113(c) after ''Buildings and Facilities.'' The committee took no action on these comments.

Three comments stated that the critical distinction between construction contracts and section 108 model agreements are the requirements which apply to each. The committee took no action on this comment.

One comment stated that § 900.115(b)(1) should be clarified to indicate that the term ''Act'' refers to the Office of Federal Procurement Policy Act. The comment was adopted and the work ''such'' was deleted and the word ''that'' was inserted.

Nine comments suggested that cost reimbursement contracts should also allocate the risk. The Committee took no action. One comment suggested replacing ''fixed-price'' with ''negotiated.'' The Committee adopted ''negotiated'' and inserted it before ''fixed-price'' in both the question and response.

Two comments stated that subsection 900.117(a)(2) treats the consequences of the Secretary's failure to act in a way that is very unfavorable to Indian tribes and, therefore, against the policy of the Self-Determination Act. The comments argued that the Secretary's failure to act should render the POR *accepted* rather than rejected. The Committee did not agree on this change. Three comments stated that this section should contain standards or other objective criteria against which the POR will be reviewed. The Committee concluded that these criteria will be negotiated between the parties and identified in the contract. One comment suggested revising the timeframes contained in the subsection to accommodate a shorter construction period due to weather concerns. The Committee decided to add a subsection at the end of Subpart J to address this issue.

Seven comments argued that construction management services may be performed by tribal employees. The Committee adopted the language ''and/or tribal or tribal organization employees'' after ''consultants.''

The Committee received two comments on subsection 900.120. The first urged that the 30-day time period be reduced to 14 days. The Committee did not agree with this change. The second comment recommended inserting the word ''shall'' in place of ''will'' and inserting ''By registered mail with return receipt in order to document mailing after notify.'' This language was adopted.

The Committee received eight comments on subsection 900.121 of the NPRM. Six suggested inserting the word ''each'' before the word ''phase,'' requiring the Secretary to notify Indian tribes and tribal organizations before each phase. One comment proposed adding the following language: ''Failure of the tribe or tribal organization to notify the Secretary within 45 days after receiving Secretarial notice described in § 900.120 shall not serve as a bar to the applicant tribe or tribal organization from contracting for the desired project.'' Although the proposed language accurately reflects a Comptroller General's Opinion, the Committee did not agree to this addition. To resolve the impasse, the Committee struck subsection 900.121 in its entirety.

Eight comments suggested adding language to § 900.121 to clarify who will be solicited and how. The committee took no action on these suggestions.

Three comments stated that section 105(m) of the Act establishes a

negotiation process to be invoked at the tribes' option, and section 105(m) language should be reflected in subsection 900.122 rather than imposing a mandatory process that may not be applicable in all situations. The regulation will be interpreted consistently with the applicable statutory provisions. The reference ''in accordance with section 900.121(a)'' was stricken since § 900.121 was in its entirety. One comment suggested changing ''will'' to ''shall'' after ''Secretary'' in § 900.122(a). This change was adopted.

Eight comments stated that the language of this section should be changed to mirror the requirements found at § 900.29. The Committee took no action on these comments. One comment suggested adding ''and provide all documents relied on in making the declination decision'' at § 900.123(b)(1) after the words ''in writing.'' The Committee agreed to this language with the addition after the word ''decision'' of ''within 20 days of such decision.'' The Committee did not agree to the proposed addition of subsection 900.124(b)(1)(I): ''The Secretary shall be barred from relying on any and all such documents which are not provided in any defense of this declination decision.'' The regulation therefore does not address what the Secretary may or may not rely upon, leaving such matters for decision by administrative bodies or the courts.

Three comments on § 900.124 stated that the requirements for grants are not clear. The Committee took no action.

Five comments raised the issue of the applicability of the Contract Work Hours Act. The Committee agreed that the applicability of the Contract Work Hours Act and other laws is adequately addressed in § 900.125(d). Accordingly, the reference to the Contract Work Hours Act at § 900.125(c)(4) was deleted.

One comment stated that § 900.125(c)(1) requires the contract to state that the tribal contractor will not alter title to real property ''without permission and instructions from the awarding Agency'' and is, therefore, inconsistent with section 105(f) of the Act, which states that title to property furnished by the Federal government for a contracted program ''shall, unless otherwise requested by the tribe or tribal organization, vest in the appropriate tribe or tribal organization.'' The Committee adopted ''elects not to take title (pursuant to Subpart I) to Federal property used in carrying out the contract'' at § 900.125(c)(1) after the word ''organization.'' The Committee also struck the language ''proposes to use Federal property in carrying out the contract.''

One comment stated that ''engineers'' should be deleted at § 900.126(a)(1) and § 900.130(c)(1) because the Act does not require the use of licensed engineers, only architects. The comment was adopted and the word ''engineers'' was deleted from those sections.

One comment suggested that § 900.125(a)(8) be expanded to include the following language after the word ''manuals'': ''and the Secretary shall accept tribal proposals for alternatives which are consistent with or exceed Federal guidelines or manuals applicable to construction programs.'' The Committee adopted this language.

One comment stated that § 900.125(b)(8) was overreaching and required production of information that the Federal government had no legitimate need to know. The Committee compromised by agreeing to strike the language as written and to substitute the following: ''(8) Identify if the tribe or tribal organization has a CMS contract related to this project,'' and added after the word ''section'' at § 900.125(b)(4) ''and minimum staff qualifications proposed by the tribe or tribal organization, if any.''

One comment proposed adding language at § 900.125(d) which would include tribal laws, ordinances and resolutions. The Committee agreed and added the sentence ''The parties will make a good faith effort to identify tribal laws, ordinances and resolutions which may affect either party in the performance of the contract.''

Three comments questioned the applicability of § 900.126 to cost reimbursement, fixed-price and non-construction contract construction activities. The Committee took no action.

Ten comments proposed changes to the provision on contingency funds. Four suggested the following language: ''the amount of the contingency provided shall be 10 percent of the contingency funds, whichever is greater.'' Two comments proposed that 100 percent of the available contingency should be open for negotiation and one comment advocated that 100 percent of the available contingency should be included in the contract. The comments proposed alternative language: ''* * * allow all of the contingency funds to be transferred to the tribe unless the government could show proof as to why such funds should not be transferred.'' The Committee compromised on the following language: ''The amount of the contingency provided shall be 3 percent of activities being contracted or 50 percent of the available contingency funds, whichever is greater.'' Additionally, the following sentence was added to address concerns regarding funding: ''In the event provision of required contingency funds will cause the project to exceed available project funds, the discrepancy shall be reconciled in accordance with § 900.129(e).''

One comment objected to the term ''contract budget,'' and urged the language be changed to ''funding proposal.'' The Committee took no action, and noted that the present language was written to accommodate redistribution of funds within the budget.

One comment stated that the ''fair and reasonable'' language at § 900.127(a) ''gives too much discretion to government officials to determine what is fair and reasonable.'' The Committee adopted the reference to § 900.129 at the end of § 900.127(a).

Three comments raised the question of the applicability of § 900.128 to cost reimbursement, fixed-price, and non-construction contract construction activities. The Committee took no action on this concern, but to clarify changes made at § 900.127(e)(8), the following language at § 900.128(d)(3): ''including but not limited to contingency.''

Seven comments stated that § 900.129(e)(1) should be amended to reflect that only the amount in excess of the available amount may be declined. The Committee decided not to make the recommended change, but did adopt the following language after the word ''Act'' at § 900.129(e)(1): ''or, if the contract has been awarded, dispute the matter under the Contract Disputes Act.''

One comment urged that § 900.129(e)(2)(i) ''should be modified to expressly authorize the parties to jointly agree on a lump-sum advance payment to generate earned interest, in order to bridge the gap between a fair and reasonable price and the amount available to the Secretary.'' The Committee added the phrase ''advance payments in accordance with section 900.132'' at § 900.129(e)(2)(i) after ''contingency funds.''

Three comments raised the applicability of § 900.129 to cost reimbursement, fixed-price, and non-construction contract construction activities. The Committee took no action.

Five comments stated that architect and engineer services were appropriate at the design phase (§ 900.130(b)(1)) but not required at the construction phase and should be deleted. One comment addressed the language requiring licensed engineers at §§ 900.130(b)(1) and (c)(1). The Committee struck ''and

engineers'' in both places, and inserted the word ''as'' before ''needed.''

Three comments stated that language at § 900.130(c)(5) should be changed to read: ''The tribe or tribal organization may not issue a change order which is outside the general scope of work defined in the contract or which exceeds the contract budget including contingency funds without Secretarial approval.'' The Committee took no action.

One comment argued that the timing of the independent cost estimate should be clarified to facilitate negotiations. The Committee took no action.

Three comments raised the applicability of § 900.130 to cost-reimbursement, fixed-price and non-construction contract construction activities. The Committee took no action.

One comment proposed that § 900.130(b)(5) should delete the Secretarial approval and substitute ''review and provide written comments.'' In compromise, the Committee adopted language which allows for Secretarial review and written comments on the project plans and specifications only at the concept phase, the schematic (or preliminary design) phase, the design development phase, and the final construction documents phase, and Secretarial approval of the project plans and specifications for general compliance with contract requirements only at the schematic (or preliminary design) phase and the final construction documents phase, or as otherwise negotiated.

One comment proposed replacing the word ''shall'' at § 900.130(b)(8) with ''may,'' and striking the last sentence requiring production of copies of contracts and subcontracts. In compromise, the Committee struck the following language: ''of contracts and major subcontracts and modifications * * * and A/E service deliverables.'' At the end of the first sentence of § 900.130(b)(8) the Committee adopted the following language: ''including but not limited to descriptions of contracts, major subcontracts and modifications implemented during the report period and A/E service deliverables.''

The Committee struck the following language at § 900.130(c)(7)(ii): ''of change orders, contracts and major subcontracts'' and inserted at § 900.130(c)(8) ''contracts, major subcontracts, modifications.''

One comment argued that § 900.130(e) should require the Secretary to act ''within 30 days or as negotiated between and agreed to by the parties.'' Another comment suggested that the word ''sufficient'' replace ''additional'' before''funds are awarded.'' The Committee took no action on the first comment and adopted the word ''sufficient'' in addition to, rather than in lieu of, ''additional.''

Six comments urged that § 900.131(b)(7) be rewritten as follows: ''The tribe or tribal organization may not issue a change order which is outside the general scope of work defined in the contract or which exceeds the contract budget including contingency funds without Secretarial approval.'' The Committee took no action.

Eight comments recommended the deletion of § 900.131(b)(11)(i)(A), stating that this section takes authority from an Indian tribe when the tribe is acting as the contracting officer for its subcontracts. The Committee took no action.

Eight comments suggested that overhead costs should be included at § 900.131(b)(11)(i)(D)(iii). The Committee adopted the language ''including but not limited to overhead costs'' before ''reasonable costs.''

One comment stated that the Secretary's role under § 900.131 generally should be substantially narrower. Specifically, the comment stated:

> The Secretary should not have final approval authority over planning documents once a contract is set for planning activities, the Secretary should not retain final approval authority for general compliance with contract requirements, and the Secretary should not be able to decline acceptance of the constructed building or facility. The Secretary should instead be limited to monitoring contract performance and to invoking such remedies as may be available to the Secretary under the Contract Disputes Act or under other provisions of the Self-Determination Act.

The Committee adopted compromise language on this issue at § 900.130(b)(5).

One comment stated that the independent cost estimate described at § 900.131(b)4) is a fully contractible function and the report should be shared with both parties. The Committee took no action on this comment.

One comment urged that § 900.131(b)(11)(i)(B) is unacceptable because it allows the Secretary subjective discretion to determine what is ''materially non-compliant work,'' The Committee took no action on this comment.

Three comments questioned the applicability of § 900.131 to cost-reimbursement, fixed-price and non-construction contract construction activities. The Committee took no action on those comments.

One comment proposed eliminating the Secretarial approval function at § 900.131(b)(1) and inserting the word ''maximum'' before the words ''tribal participation.'' The Committee adopted the word ''comment'' before ''and approval functions'' and ''full'' before ''tribal participation.'' The Committee also adopted the words ''in writing'' with regard to Secretarial notification of any concerns or issues that may lead to disapproval and the words ''and documents'' after ''relevant information.'' The Committee struck the language ''accommodate tribal recommendations'' and inserted ''resolve all issues and concerns of the tribe or tribal organization'' after the words ''good faith effort to.'' The Committee added ''appropriate'' before the word ''Secretary'' at § 900.131(b)(2).

One comment proposed changing § 900.131(b)(4) to read ''Secretary may rely on the Indian tribe's or tribal organization's cost estimate or the Secretary may'' obtain an independent government cost estimate that is derived from the final project plans and specifications, striking the balance of the sentence. The Committee adopted this comment and, after ''tribal organization,'' added the following: ''and shall provide all supporting documentation of the independent cost estimate to the tribe or tribal organization within the 90-day time limit.''

One comment proposed to strike ''approve'' at § 900.131(b)(5) and insert ''provide written comments.'' The Committee adopted the following language after ''the Secretary shall have the authority to review'': ''for general compliance with the contract requirements and provide written comments on,'' and struck ''approve for general compliance with contract requirements.'' After ''final construction documents phase,'' the Committee also added ''and approve for general compliance with contract requirements the project plans specifications only at the schematic phase and final construction documents phase.''

One comment argued that § 900.131(b)(9) be deleted and the following substituted: ''The Secretary shall be limited to the number of on-site monitoring visits negotiated between and agreed upon by the parties.'' The Committee achieved consensus by striking ''retains the right to'' and inserting ''may'' after ''the Secretary.''

In response to a comment regarding § 900.131(b)(1)(iii), the Committee inserted ''including but not limited to overhead costs.''

One comment proposed an additional subsection at § 900.131(b)(13)(vi) to read: ''The Indian tribe or tribal organization shall be compensated for

reasonable costs incurred due to termination of the contract.'' The Committee adopted this comment.

One comment proposed adding ''No further approval or justifying documentation by the contractor shall be required before expenditure of funds'' to § 900.134. The Committee adopted this suggestion.

Two additional subsections to Subpart J were adopted by the Committee. One responds to tribal concerns regarding the short period of actual time available to engage in construction activities where weather is an issue. The second clarifies that tribal employment rights ordinances do apply to construction contracts and subcontracts.

The Committees received comments urging both approval and rejection of Subpart J as proposed. The Committee only considered comments which addressed a specific subsection and/or proposed language.

Construction management services: Of the comments received regarding the proposed rule for construction activities under Public Law 93–638, many were directed towards the definition of Construction Management Services (CMS) and Construction Project Management (CPM) contained as part of the rule. Indeed, one comment, representative of several Indian tribes, ''. . . objects to the excessively narrow definition of construction management services (§ 900.113(b)) in a fashion which unlawfully defeats the tribal right to contract for management services through an ordinary self-determination contract, contrary to section 4(m) of the Act.'' CMS is a management process for construction projects that in some instances can provide for project delivery. Several comments feel that the activities described in the definition of CPM should be considered CMS activities. The distinction is important in that the statute provides that self-determination contracts for CMS can be through the Section 108 Model Agreement and not through a self-determination construction contract (Subpart J) as the regulations require for conduct of CPM activities.

The statute does not provide a definition for CMS and efforts to develop a definition dominated Committee discussion through the regulation process. At the start of the negotiation process, discussion departed upon a path that quickly stalled in a quagmire of divided opinion as to the role, both appropriate and statutorily permissible, available to the Federal government in self-determination contracts involving construction. However, at no point was there any dispute between tribal or Federal representatives that a tribe can contract for all management functions of a construction contract. The dispute regarding this issue revolves around the contracting vehicle utilized—a self-determination contract versus a Section 108 Model Agreement—and not the contractibility of management functions. Consistent with the Federal argument for limited Federal involvement in construction projects was an unwavering view that a Model Agreement, invoked through provision CMS, could not be used to circumvent other provisions of the statute dealing with construction.

To move forward, the Committee set aside initial efforts to define roles and involvement, and instead focused on describing processes through which tribes could pursue construction activities. From these scenarios, much discussion ensued and the roles of each party developed. Through these efforts, the regulations evolved in a manner that provides for Indian tribes or tribal organizations to contract for a spectrum of responsibilities, ranging from oversight of Federal efforts to tribal responsibility for all aspects of the construction process, through multiple options of contracting methods. From the standpoint of the tribal representatives that actively and consistently participated throughout the negotiation process, the practical effect of the CMS definition is negligible towards the overall goal of increasing tribal control of the contracting process. The limit of the Federal involvement, as described in § 900.132 of the regulation, is a direct reflection of efforts to describe reasonable points of Federal involvement. Both tribal and Federal representatives of the Committee charged with developing the regulations agree that the end result reflects a lessening Federal involvement in and an increase of tribal control of the construction process through 638 contracting.

However, Federal and tribal committee members did not reach consensus on the definition of CMS. Tribal and federal representatives included this issue in their non-consensus reports. The tribal non-consensus position sought to eliminate the definition of ''construction project management'' and include a less restrictive definition of ''construction management services'' with conforming changes to the balance of Subpart J. Tribal representatives are of the view that these definitions inappropriately limit the scope of construction management activities which should be contractible outside Subpart J. They are further of the view that the precise contours of ''construction management services'' should be worked out on a case-by-case basis as tribes engage in negotiations with particular agencies over specific construction projects. Accordingly, the Departments did not change the definition of CPM.

While the Departments have given careful consideration to the views of the tribal representatives on this issue, they cannot accept the tribal proposal. The Departments are persuaded that, as a legal matter, the Act treats construction contracts governed by Subpart J differently from contracts for other activities which may be contracted using the model agreement in section 108 of the Act. The two definitions allow contracting under a section 108 model, agreement for certain administrative support, coordination, and monitoring activities. However, construction project design and construction activities (including day-to-day on site project management and administration) are appropriately contracted under Subpart J. Although the tribal representatives are of a different legal view, we believe that expanding the definition of ''construction management services'' so that construction projects may be conducted under a section 108 construction management agreement circumvents the statutory requirements for a construction contract between the government and the Indian tribe or tribal organization.

Subpart K—Waiver Procedures

Summary of Subpart

This subpart 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. 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. Subpart K 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, subpart K 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 regulations. Finally, subpart K 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.

Summary of Comments

Several comments indicated that the scope of Subpart K was unclear. Some argued that the scope should be narrowed to authorizing only waivers under Part 900, while others argued that it should be expanded to include other regulations as well. The language in § 900.140 has been redrafted to clarify that the statutory waiver authority in Section 107(e) of the Act is limited to regulations under this Part. It should be noted that the Secretary of the Interior has the reserved authority to waive other regulations in 25 CFR if permitted by law. *See* 25 CFR 1.2.

One comment asked whether the Secretary can delegate his or her authority to waive regulations to lower administrative levels. The Secretary does have such authority, but has not chosen to exercise it.

One comment recommended a modifying of the last sentence of § 900.143 to require a ''clear and convincing'' burden of proof on the Secretary where a waiver request is denied. This recommendation was rejected because it is different from the statutory burden of proof in Section 102(a)(2) of the Act.

One comment objected that the 90-day period in § 900.143 was too long, and recommended shortening it to 30 days. This recommendation was rejected because it is contrary to the 90-day time frame in Section 102(a)(2) of the Act. Section 107(e) of the Act specifically provides that the timeline in Section 102 of the Act applies to the review of waiver requests.

One comment asked whether waivers can be granted even if they are against the law. Although such a clarification is unnecessary in this regulation, the Secretary is not authorized to waive any provision of the Act that may be restated in these regulations.

One comment stated that § 900.146 should be amended to allow Indian tribes or tribal organizations the discretion to draw on expertise from other tribes and/or tribal organizations to meet their needs. To address this concern, § 900.146 was amended to cross-reference the provision of technical assistance under § 900.7.

One comment recommended the inclusion of an additional paragraph in § 900.148 requiring the Secretary to attach a list of all applicable Federal requirements to each contract. This suggestion was not adopted because any addition to the contract must be by mutual agreement of the parties pursuant to Section 108 of the Act.

The Office of Management and Budget (OMB) expressed concern about recognition of its ultimate responsibility for the approval of waivers of any principles contained in OMB cost circulars. Therefore, in reviewing waivers of any cost principles, OMB requests that the Secretary consult with OMB prior to approving any requests under Subpart K.

Subpart L—Appeals

Summary of Subpart

The advisory committee decided to develop substantive regulations governing appeals of pre-award decisions by Federal officials. This subpart 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 regulations. Subpart L 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 road map to the appeals process for Indian tribes and tribal organizations.

The regulation is divided in two parts: the first part 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; decisions relating to a request that a law or regulation has been superseded by the Act; and a catchall provision relating to any other preaward decisions, except Freedom of Information Act appeals and decisions relating to the award of discretionary grants under section 103 of the Act. The second part 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.

Subpart L 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. Subpart L 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 regulation.

Under the 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 for Health and Human Services, if the case relates to the Department of Health and Human Services.

The second part contains 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 of his or her intent to rescind and reassume a program immediately, or a notice of intent to suspend, withhold, or delay payment under a contract.

Summary of Comments

Several comments noted that the words ''you'' and ''your'' appear throughout this Subpart, rather than the words ''Indian tribe'' and ''tribal organization.'' Where appropriate, the words ''you'' and ''your'' have been replaced throughout this Subpart.

Pursuant to several comments, § 900.150 was amended by adding a new paragraph (j) subjecting decisions relating to requests for determination that a law or regulation has been superseded by the Act to the appeal procedures under this Subpart.

One comment objected to having IHS appeals go to the Interior Board of Indian Appeals (IBIA). This recommendation was not adopted because to have all appeals heard by a single administrative appeals body so that the Act and these regulations are uniformly interpreted by both Departments.

One comment recommended that Indian tribes should be required to go through the administrative appeal process before going to Federal district court. This recommendation was not adopted because Section 110 of the Act specifically authorizes direct access to Federal courts.

One comment recommended that there be a mandatory completion time of six months from the time an Indian tribe or tribal organization files a notice of appeal to the time for a final decision

from the IBIA. This recommendation was not adopted because there is no way for the IBIA to anticipate when all briefings, discovery extensions, and settlement discussions will be concluded. Flexibility needs to be maintained during this process. The regulation already includes time frames for the IBIA to render decisions once all required filings have been made. *See, e.g.,* § 900.167 and § 900.174.

One comment recommended enlarging the 30-day period in § 900.152 to 90 days. This recommendation was not adopted because § 900.159 already provides for an extension of time.

Several comments requested that § 900.152 be clarified to provide that Indian tribes may appeal decisions made by agencies of DHHS besides the IHS. This recommendation was adopted, and the question in § 900.152 was amended to reflect this clarification.

One comment suggested that § 900.155(b) be redrafted to define the words ''adequate representation'' and suggested that the section be redrafted so that the costs of the appeal are chargeable either to the contract, if the tribe prevails on the appeal, or to the tribe if the appeal is unsuccessful. These recommendations were not adopted. Federal agencies reserve the rights to determine what is adequate representation in specific cases. To force tribes to repay the expense of appeals either through a charge to the contract or through tribal funds would be unjust and would discourage appeals which are well taken.

Many comments objected to a provision in § 900.152 and § 900.156 which provides that ''the IBIA will determine whether you are entitled to a hearing.'' This sentence was deleted from these two sections. As pointed out in many comments, the standards governing these decisions are set forth in § 900.160.

Several comments objected to the certification requirement in § 900.158(d) because it is not a statutory requirement of the Act, and conflicts with the government-to-government relationship between tribes and U.S. Government. This recommendation was not adopted. The certification requirements here are the same as in courts and other administrative appeal forums. The purpose of the requirement is simply to ensure that the deciding official has been informed that his/her decision has been appealed, and that the IBIA be informed of this notification. It is not intended to be a burdensome requirement, but merely a certification that is obtained for information purposes.

Pursuant to a comment, the words ''good reason'' in § 900.159 were changed to the words ''valid reason.''

One comment recommended deletion of § 900.159 because any request for an extension should be made within the 30-day time frame in § 900.158. This recommendation was not adopted because, although a matter of considerable debate during the Committee's negotiations, it was agreed that there could be extenuating circumstances that could prevent a Indian tribe or tribal organization from filing its notice of appeal within the 30-day time frame in § 900.158.

One comment sought clarification of what happens if the IBIA determines not to grant an extension. If the IBIA determines that the appellant does not have a valid reason to extend the deadline, and the tribe disagrees with this determination, it can appeal that decision to Federal District Court pursuant to Section 110 of the Act.

Section 900.160(a) was restructured into two sentences for clarification purposes. The second sentence of § 900.160 now begins with the words ''[i]f so.

One comment recommended changing the 15-day time frame in § 900.161(b) to a longer period. This recommendation was not adopted because it is the Committee's belief that the time frame is adequate to hold a pre-hearing conference.

Several comments suggested that § 900.163 be amended to impose a clear and convincing evidence burden of proof on the Secretary. This recommendation was rejected because it is different from the statutory burden of proof in Section 102(a)(2) of the Act.

Several comments recommended rewriting the question in § 900.163 to include all appealable issues. This recommendation was not adopted because the burden of proof is on the appellant to show by a preponderance of the evidence that the agency erred for issues under appeals in §§ 900.150(h), (i), and (j). This is consistent with the usual Administrative Procedure Act standard.

One comment objected to the agency which is one of the parties to the appeal making the final decision in § 900.167. The regulatory provision is consistent with the Act. Section 102(e)(2) of the Act provides that any decision which represents final agency action shall be made ''by an official of the Department who holds a position at a higher organizational level within the Department * * * than the agency * * * in which the decision was made'' or by an administrative judge.

Several comments noted that Subpart L does not address the statutory right of Indian tribes to recover attorney fees under the Equal Access to Justice Act (EAJA). In response to these comments, a new section was added at the end of Subpart L clarifying that EAJA applies to administrative appeals under this Subpart, and cross-referencing the appropriate EAJA regulations.

Subpart M—Federal Tort Claims Act Coverage

Summary of Subpart

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.

Summary of Comments

Two comments stated that there should be no distinction between medical-related and non-medical-related functions under self-determination contracts for purposes of FTCA coverage, defense or payment. This comment was rejected because the medical provisions have a unique history grounded in the Public Health Service Act, and in Section 102(d) of the Act.

Several comments expressed concern that the proposed regulations lacked guidance regarding insurance. Insurance is beyond the scope of FTCA authority for these regulations.

Several comments stated that portions of this Subpart reflect a fundamental misunderstanding of the scope of the Federal government's obligation to defend and indemnify tribal contractors for non-tort claims and claims outside the contract. Another set of comments requested that § 900.183 be amended to explain that an Indian tribe or tribal organization may not be sued for claims beyond the scope of the FTCA arising out of the performance of self-determination contacts. In amending § 900.183, the Committee determined to narrow the scope of the regulation strictly to the remedial FTCA provisions of section 102(d) of the Act and section 314 of Public Law 101–512, as required by section 107(a)(1) of the Act. The Committee therefore chose not to address the extent to which Indian

tribes or tribal organizations are protected from suits on other claims, which is beyond the scope of these regulations.

One comment recommended that ''Indian contractor,'' as defined in § 900.181(a), should be expanded to include non-medical services as well as medical services. Although the Eighth Circuit Court of Appeals (see *FGS Constructors, Inc.* v. *Carlow,* 64 F.3d 1230) has interpreted this provision as applying only to health programs, § 900.181(a)(3) was added to reflect the desire of some Indian tribes to continue disputing the scope of this term.

One comment recommended deleting § 900.181(b) since ''contract'' is defined elsewhere. The comment was adopted.

One comment suggested clarifying § 900.183(a) by stating with specificity which tort claims are barred. The comment was adopted and this section was changed.

One comment recommended § 900.183(b) be amended by adding a new subsection including activities performed by an employee which are outside of the scope of employment. The comment was adopted.

One comment asked what law will be used to implement breach of contract claims and whether tribal contractors are subject to Federal employment statutes. The comment was rejected because this subject is beyond the scope of regulatory authority under section 107(a)(1) of the Act.

One comment questioned the reference to violations of the U.S. Constitution in § 900.183(b)(4). The provision was deleted. As sovereigns pre-existing the Constitution, Indian tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on Federal and state authority. See *Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49, 56 (1978). To the extent applicable, 28 U.S.C. 2679(b)(2) continues to be relevant.

Several comments asked whether tribal law applied to tort claims. No change was made because state law applies to the determination of liability for tort claims under the FTCA.

One comment suggested amending § 900.188(c)(7) to add ''including Federal employees assigned to the contractor,'' after the word ''employees.'' The comment was adopted and the sentence re-written.

Two comments recommended that the notice requirements of 28 U.S.C. 2679(c) be referenced in § 900.188(b). Also, one comment suggested adding the same notice provision to § 900.203. The comments were adopted.

One comment recommended synchronizing § 900.206 with § 900.192 so that the list of employees covered for non-medical-related claims is the same as for medical-related claims. The comment was adopted.

Subpart N—Post-Award Contract Disputes

Summary of Subpart

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.

Summary of Comments

Several comments recommended that language from the withdrawn 1994 NPRM regarding the application of the Equal Access to Justice Act be incorporated into the Subpart. The comments were adopted by adding § 900.216(c).

Several comments recommended adding paragraph 900.805(k) from the withdrawn 1994 NPRM regarding using accounting principles as ''guides'' rather ''rigid measures'' in IBCA appeals. The comments were adopted and a new section was added.

One comment was concerned that § 900.217 was silent regarding the Tribal Court system alternative for alternative disputes resolution. A change was made in § 900.217(b) to adopt this recommendation. Two comments indicated that § 900.217(b) needs to add the right of the tribe, if it desires, to file in Federal District Court or the Court of Federal Claims. This concern is already addressed in § 900.222.

Several comments recommended that § 900.220(b) be revised to read: ''supporting documents or data are accurate and complete to the best of the Indian tribe or tribal organization's knowledge and belief.'' The comments were adopted.

Two comments recommended that § 900.224 be amended so that delay of the awarding official in making a final decision should be treated as though the claim were approved, rather than denied. These comments were rejected because the existing language is statutory.

Several comments recommended adding the following language to § 900.227: ''If a decision is withdrawn and a new decision acceptable to the contractor is not issued, the contractor may proceed with the appeal based on the new decision or, if no new decision is issued, proceed under § 900.224.'' The comments were adopted and a new § 900.227(c) was added.

One comment expressed concern that § 900.230(a) requires an Indian tribe to keep performing its contract in spite of the possibility that the claim being appealed represents crucial operating funds from the contact. This is addressed by the limitation of cost clause of the model contract.

Subpart O—Conflicts of Interest

Summary of Subpart

Section 900.231 defines an organizational conflict of interest, and § 900.233 defines personal conflicts of interest which could affect self-determination contracts. The balance of the subpart advises Indian tribes what must be done in the event a conflict arises. The subpart also provides that Indian tribes may elect to negotiate specific conflicts provisions on a contract-by-contract basis.

Summary of Comments

The area of conflict of interests—where an Indian tribe or tribal organization's and/or their employees' administrations of a self-determination contract affecting allottees and others could be impaired by financial bias—raises difficult questions for DOI, including the proper balance between the Federal-tribal government-to-government relationship and the Secretary's mandated trust responsibility. Additional issues include the degree of monitoring required for conflicts, if any, where the United States contracts with Indian tribes to perform duties that directly affect the statutory rights of third parties. In attempting to reconcile these difficult questions, the DOI has opted for an approach that seeks to minimize intrusion and burden to Indian tribes and tribal organizations, yet provides for a degree of accountability where conflicts arise.

The Committee reached consensus on a personal conflict of interest provision in the procurement management standards in Subpart F. The Federal committee members believed this section should be supplemented by a regulation addressing conflicts of the Indian tribe or tribal organization itself and conflicts of individual employees involved in trust resource management. These regulations appear in Subpart O of the final regulation and only apply to contracts awarded by the DOI.

Several comments on the NPRM noted that no provision on conflicts of interest has previously been adopted in the 20 years of contracting trust

programs. The need to address the conflicts issue in some form has become more apparent as the DOI's experience with 638 contracts has increased.

Some comments assert that excellent tribal track records make it clear that no federal regulation is necessary. Several other comments state that the NPRM proposal suggests that in the absence of regulation Indian tribes will engage in fraudulent actions. The DOI does not contend that there is a widespread problem of unmitigated conflicts of interest. Rather it is adopting the rule in recognition of its responsibility as trustee to ensure that in a trust relationship, the acts of its agents are in accordance with high fiduciary standards. Therefore, the rule is intended to protect trust beneficiaries. Because the regulation only requires an Indian tribe or tribal organization to provide notice in the case of an organizational conflicts of interest, compliance should not be burdensome.

Several comments stated that any potential conflict between a tribe and allottees is no different than any other relationship between a government and its citizens, where a government uses its own employees to value private land to be condemned for government purposes. Several other comments state the NPRM's ''organizational conflict'' proposal was vague and nonsensical since the United States retains a residual component (such as lease approval or taking fee land into trust status) which gives the DOI ample opportunity to protect the interests of the United States. A related comment stated that this proposal appeared to pass on to Indian tribes the costs of the federal government's continuing responsibilities as trustee, constituting an unauthorized failure to perform non-delegable functions.

The final regulations do address organizational conflicts, because there is a significant difference between the obligation of a trustee to a beneficiary and that of a government to a citizen. In response to these comments, the DOI significantly altered the organizational conflicts regulation from the NPRM. First, the final regulation clearly states that it only applies when the contract affects the interests of allottees, trust resources or statutory obligations to third parties. Second, the Indian tribe or tribal organization is only required to provide notice to the federal government when such a situation arises, that is not already covered in their 638 contract.

Several Indian tribes commented that Federal regulations must not dictate internal tribal operations in the area of personal conflicts of interest. Some of them acknowledge that the federal proposal would not be particularly burdensome, but state that it is inconsistent with the federal policy of Indian self-determination.

The personal conflict of interest provisions are narrowly drawn to cover only trust programs. While there is a strong federal policy of Indian self-determination, there is also a strong federal policy of strict adherence to the trust responsibilities arising from treaty and statute. The self-determination statute does not sever the fiduciary relationship between the United States and Indian trust beneficiaries. For this reason the ethical standards involved are not solely an internal tribal concern.

One comment recommended reliance on tribal codes, supplemented by negotiated contract provisions, to protect against personal conflicts of interest. The comment analogized the federal proposal to unsatisfactory past experiences with BIA ''model codes.''

The rule accommodates tribal codes and negotiated contract provisions, that the Department agrees would be the ideal manner in which to address conflicts. However it also provides a rule to apply in the absence of tribal code or contract terms that adequately protect trust beneficiaries from conflicts of interest.

Several comments agree that regulations should address the problem of conflicts of interest arising from familial relations, organizational relations where elected officials also serve in programmatic capacities, and financial relations. These comments suggest that Indian tribes be authorized to employ their own written codes of standards of conducts. Until the Secretary approves such codes, the comments suggest terms that should apply that draw upon standards applicable to federal employees and other government contractors.

The Department agrees that regulations are needed and has provided in § 900.236 that it will negotiate conflicts provisions in contracts, to displace these regulations if there is agreement to provide equivalent protection to these regulations. The Department's regulations focus solely on financial interests, and not familial and organizational relations, believing that the latter is more susceptible to internal tribal regulation. Because of concerns about tribal sovereignty, the final regulation does not require Departmental approval of tribal codes, except as agreed to in individual contract negotiations.

Some comments described the proposal in the NPRM as presenting micro-management opportunities for federal agency personnel inconsistent with a government-to-government relationship. To avoid micro-management, the final rule was modified, in the case of organizational conflicts, to require only notice to the DOI when and Indian tribe or tribal organization learns of the existence of a conflict. No mitigation plan, as proposed in the 1996 NPRM, is required. The personal conflicts regulation only requires the Indian tribe to address the conflict in a manner that enables the Department to meet its trust responsibilities.

Some comments recommended that Indian tribes and the DOI rely on contract-by-contract negotiations for addressing conflicts provision. As mentioned earlier, because of the trust and legal responsibilities of the Department, the regulations are necessary to address situations where terms cannot be negotiated in the short time permitted for negotiation.

Several Indian tribes commented that the Government does not similarly regulate its own actions, and consult with Indian tribes concerning conflicts with actions proposed on allottee properties. The DOI agrees that consultations is appropriate, but recognized that it has a very high duty to assure that actions taken with respect to allottee properties are consistent with its fiduciary responsibilities to those allottees. The rule does not require consultation with allottees on actions concerning tribal lands, or vice versa.

One comment written on behalf of several individual owners of trust resources, strongly supported the adoption of minimum standards to assure the integrity of the performance and administration of trust resources. The comment suggests that, at a minimum trust resources be subject to the same conflict standards applied to procurement in the proposed § 900.48.

The final rule is very similar to the agreed provisions in § 900.48.

Subpart P—Retrocession and Reassumption Procedures

Summary of Subpart

Section 107(a)(1) of the Act authorizes the Secretaries to promulgate regulations governing retrocession and reassumption procedures. Sections 900.240 through 900.245 define retrocession, what entities are entitled to retrocede, tribal rights for contracting and funding as a result of retrocession, and tribal obligations regarding the return of property to the Secretary after retrocession.

Sections 900.246 through 900.256 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.

Summary of Comments

One comment recommended that the phrase ''may retrocede a contract'' be added to the end of the answer in § 900.232 to provide a more complete answer to the question of who may retrocede a contract. This suggestion adds clarity to the answer, and has been adopted.

Several comments recommended that an additional question and answer be added to address when a retrocession becomes effective. The recommended language is contained in the Act, provides meaningful information to the users of this regulation, and has been adopted and inserted as a new § 900.233.

Several comments recommended that the term ''fair market'' be added to the answer in § 900.236 and § 900.246 in describing the value of property to be returned to the Secretary in the event of a retrocession or reassumption. While the essence of this recommendation has been adopted, to remain consistent throughout the regulation the definition of ''fair market'' as provided in Subpart I will be restated in this Subpart. (Subpart I states ''current fair market value, less the cost of improvements borne by the Indian tribe or tribal organization in excess of $5,000.'') Also, for clarity the word ''requested'' has been added to the answer in § 900.236 in describing property to be returned to the Secretary.

One comment recommended that the answer provided in § 900.238, which has (a) and (b) components, be reversed to track the order of the question and avoid confusion. This recommendation has been adopted to promote uniformity in this question and answer.

A comment recommended language be added to the answer in § 900.239 incorporating the option for the award of grants to Indian tribes from the Secretary for technical assistance to overcome non-emergency deficiencies. While the exact language suggested is not used, the recommendation has been adopted since such grants are authorized under the Act.

Several comments recommended that language be added to § 900.238(b)(1) dealing with the conditions for emergency reassumptions. These comments were not adopted because the language now contained in § 900.238(b)(1) precisely tracks the Act and the suggested additional language may confuse statutory intent.

One comment recommended that a statement be added to § 900.242 that the Secretary will not rescind a contract until there is a final decision in any administrative hearing or appeal on a non-emergency reassumption. This recommendation has been adopted.

Internal Agency Procedures

The Departments' 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 Indian Self-Determination 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.

Administrative Matters

This rule is a significant regulatory action 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 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 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.

This rule imposes no unfunded mandates on any governmental or private entity in excess of $100 million annually and is in compliance with the provisions of the Unfunded Mandates Act of 1995.

Paperwork Reduction Act of 1995

The Office of Management and Budget has approved, under 44 U.S.C. chapter 35, the information collection requirements in part 900 under assigned control number 1076–0136. The information for part 900 is being collected and used by the Departments to determine applicant eligibility, evaluate applicant capabilities, protect the service population, safeguard Federal funds and other resources, and permit the Departments to administer and evaluate contract programs.

The Departments estimate that the average burden of complying with the collection, broken down by subpart, will be as follows: Subpart C (Contract Proposal Contents), 222 hours; Subpart F (Standards for Tribal or Tribal Organization Management Systems), 250 hours; Subpart G (Programmatic Reports and Data Requirements), 150 hours; Subpart I (Property Donation Procedures), 10 hours; Subpart J (Construction), 564 hours; Subpart K (Waiver Procedures), 10 hours; and Subpart L (Appeals), 40 hours.

Responses to the collection of information under this regulation are required in order for Indian tribes or tribal organizations to obtain or retain benefits under the Act. However, not every tribal contractor will need to respond to each request for information contained in the regulation, as some of the requests pertain to specific

situations or to certain types of self-determination contracts. Moreover, under section 5(f)(2) of the Act, tribal organizations are given authority to negotiate their individual reporting requirements with the Secretary on a contract-by-contract basis. Any disagreements over reporting requirements are subject to the declination criteria and procedures in section 102 of the Act and subpart E of the regulation.

There is no assurance of confidentiality provided to respondents concerning this information collection.

The Departments may not conduct or sponsor a collection of information, nor are Indian tribes or tribal organizations or other persons required to respond to such collections unless the Departments display a currently valid OMB control number.

List of Subjects in 25 CFR Part 900

Indians; Administrative practice and procedure, Buildings and facilities, Claims, Government contracts, Grant programs—Indians, Health care, Indians—business and finance, Government property management.

For the reasons given in the preamble, the Departments of the Interior and Health and Human Services hereby establish a new part 900 in chapter V of title 25 of the Code of Federal Regulations as set forth below.

Dated: June 14, 1996.

Bruce Babbitt,

Secretary of the Interior.

Dated: June 13, 1996.

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

Subpart A—General Provisions

Sec.

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?
900.10 How does an Indian tribe or tribal organization secure a list of all Federal property currently in use in carrying out the programs, functions, services, or activities that benefit the Indian tribe or tribal organization to assist in negotiating a contract?
900.11 What should an Indian tribe or tribal organization that is proposing a contract do about specifying the Federal property that the Indian tribe or tribal organization may wish to use in carrying out the contract?
900.12 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?
900.13 Does the contract proposal become part of the final contract?

Subpart D—Review and Approval of Contract Proposals

900.14 What does this Subpart cover?
900.15 What shall the Secretary do upon receiving a proposal?
900.16 How long does the Secretary have to review and approve the proposal and award the contract, or decline a proposal?
900.17 Can the statutory 90-day period be extended?
900.18 What happens if a proposal is not declined within 90 days after it is received by the Secretary?
900.19 What happens when a proposal is approved?

Subpart E—Declination Procedures

900.20 What does this Subpart cover?
900.21 When can a proposal be declined?
900.22 For what reasons can the Secretary decline a proposal?
900.23 Can the Secretary decline a proposal where the Secretary's objection can be overcome through the contract?
900.24 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 in § 900.22
900.25 What if only a portion of a proposal raises one of the five declination criteria?
900.26 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?
900.27 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?
900.28 Is technical assistance available to an Indian tribe or tribal organization to avoid declination of a proposal?
900.29 What is the Secretary required to do if the Secretary decides to decline all or a portion of a proposal?
900.30 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?
900.31 When the Secretary declines all or a portion of a proposal, is an Indian tribe or tribal organization entitled to any appeal?
900.32 Can the Secretary decline an Indian tribe or tribal organization's proposed successor annual funding agreement?
900.33 Are all proposals to renew term contracts subject to the declination criteria?

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?
900.41 How long must an Indian tribe or tribal organization keep management system records?

Standards for Financial Management Systems

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

Procurement Management System Standards

900.47 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?
900.48 If the Indian tribe or tribal organization does not propose different standards, what basic standards shall the Indian tribe or tribal organization 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 What type of reserve fund is anticipated for funds deposited into a reserve for replacement of facilities as specified in § 900.70(c)?
900.72 Who is the guardian of the fund and may the funds be invested?
900.73 Is a lease with the Secretary the only method available to recover the types of cost described in 900.70?
900.74 How may an Indian 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 an Indian 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 Indian 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 an Indian tribe or tribal organization?
900.90 Does government-furnished real property to which an Indian 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 section 105(f)(2)(A)?
900.92 What should the Indian 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 an Indian 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 Indian tribes or tribal organizations learn about BIA and IHS excess property?
900.97 How can an Indian tribe or tribal organization acquire excess BIA or IHS property?
900.98 Who takes title to excess BIA or IHS property donated to an Indian tribe or tribal organization?
900.99 Who takes title to any land that is part of excess BIA or IHS real property donated to an Indian tribe or tribal organization?
900.100 May the Secretary elect to reacquire excess BIA or IHS property whose title has been transferred to an Indian tribe or tribal organization?
900.101 Is excess BIA or IHS real property to which an Indian 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 Indian tribes or tribal organizations learn about property that has been designated as excess or surplus government property?
900.104 How may an Indian 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 an Indian 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 an Indian tribe or tribal organization?

Property Eligible for Replacement Funding

900.107 What property to which an Indian tribe or tribal organization obtains title under this Subpart is eligible for replacement funding?

Subpart J—Construction

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 negotiated 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 What happens during the preplanning phase and can an Indian tribe or tribal organization perform any of the activities involved in this process?
900.122 What does an Indian tribe or tribal organization do if it wants to secure a construction contract?

900.123 What happens if the Indian tribe or tribal organization and the Secretary cannot develop a mutually agreeable contract proposal?
900.124 May the Indian tribe or tribal organization elect to use a grant in lieu of a contract?
900.125 What shall a construction contract proposal contain?
900.126 Shall a construction contract proposal incorporate provisions of Federal construction guidelines and manuals?
900.127 What can be included in the Indian tribe or tribal organization—s contract budget?
900.128 What funding shall the Secretary provide in a construction contract?
900.129 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?
900.130 What role does the Indian tribe or tribal organization play during the performance of a self-determination construction contract?
900.131 What role does the Secretary play during the performance of a self-determination construction contract?
900.132 Once a contract and/or grant is awarded, how will the Indian tribe or tribal organization receive payments?
900.133 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?
900.134 At the end of a self-determination construction contract, what happens to savings on a cost-reimbursement contract?
900.135 May the time frames for action set out in this Subpart be reduced?
900.136 Do tribal employment rights ordinances apply to construction contracts and subcontracts?
900.137 Do all provisions of the other subparts apply to contracts awarded under this subpart?

Subpart K—Waiver Procedures

900.140 Can any provision of the regulations under this Part 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 for waiver requests?
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

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 from decisions made by agencies of DOI or DHHS?
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?
900.162 What happens when a hearing is necessary?
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 objects 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 Suspensions, 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 objects 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?

Applicability of the Equal Access to Justice Act

900.177 Does the Equal Access to Justice Act (EAJA) apply to appeals under this subpart?

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 (not the self-determination contractor) receive the fee?

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 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 What employees are covered by FTCA for non-medical-related claims?
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 an Indian 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?
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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 the 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 record keeping systems of the DHHS or the DOI, or both, records of the contractors (including archived records) 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 Office of Management and Budget has approved, under 44 U.S.C. chapter 35, the information collection requirements in Part 900 under assigned control number 1076–0136. The information for Part 900 is being collected and used by the Departments to determine applicant eligibility, evaluate applicant capabilities, protect the service population, safeguard Federal funds and other resources, and permit the Departments to administer and evaluate contract programs.

§ 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 and funded 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 Indian 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).

(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. 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 the responsibility with the

associated funding. The tribal contractor is accountable 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 under section 102(a)(1) (A) through (D) and for the benefit of Indians because of their status as Indians under section 102(a)(1)(E), 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) It is the policy of the Secretary that the contractibility of programs under this Act should be encouraged. In this regard, Federal laws and regulations should be interpreted in a manner that will facilitate the inclusion of those programs or portions of those programs that are for the benefit of Indians under section 102(a)(1) (A) through (D) of the Act, and that are for the benefit of Indians because of their status of Indians under section 102(a)(1)(E) of 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 or tribal organization's intention to contract), the Secretary shall commence planning 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 ensure a timely transfer of responsibilities and funding 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.

(11) 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 Indian 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.

§ 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 this 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, an Indian tribe or tribal organization is not required to abide by any unpublished requirements such as program guidelines, manuals, or policy directives of the Secretary, unless otherwise agreed to by the Indian tribe or tribal organization and the Secretary, or otherwise required by law.

Subpart B—Definitions

§ 900.6 Definitions.

Unless otherwise provided in this Part:

Act means Secs. 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 an Indian 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 or delegation 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. Pursuant to the Act, this person can be any Federal official, including but not limited to, contracting officers.

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.

Initial contract proposal means a proposal for programs, functions, services, or activities that the Secretary is authorized to perform but which the Indian tribe or tribal organization is not now carrying out.

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 pursuant to the notice and other procedures set forth in Subpart P.

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 an Indian tribe or tribal organization and subject to the availability of appropriations, provide technical assistance on a non-reimbursable basis to such Indian tribe or tribal organization to develop a new contract proposal or to provide for the assumption by the Indian tribe or tribal organization of any program, service, function, or activity (or portion thereof) that is contractible under the Act. The Secretary may also make a grant to an Indian tribe or tribal organization for the purpose of obtaining technical assistance, as provided in section 103 of the Act. An Indian tribe or tribal organization may also request reimbursement for pre-award costs for obtaining technical assistance under sections 106(a) (2) and (5) of 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 the 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) The name, title, and signature of the authorized representative of the Indian 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) An identification 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 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 proposed by the Indian tribe and tribal organization, if any; and

(8) A statement that the Indian tribe or tribal organization will meet the minimum procurement, property and financial management standards set forth in Subpart F, subject to any waiver that may have been granted under Subpart K.

(h) The amount of funds requested, including:

(1) An identification of the funds requested by programs, functions, services, or activities, under section 106(a)(1) of the Act, including the Indian tribe or tribal organization's share of funds related to such programs, functions, services, or activities, if any, from any Departmental local, area, regional, or national level.

(2) An identification of the amount of direct contract support costs, including one-time start-up 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) An identification of funds the Indian tribe or tribal organization requests to recover for indirect contract support costs. This funding request 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) At the option of the Indian tribe or tribal organization, an identification of programs, functions, services, or activities specified in the contract proposal which will be funded from sources other than the Secretary.

(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 the regulations in this part; and

(m) A statement that the Indian tribe or tribal organization will implement procedures appropriate to the programs, functions, services or activities proposed to be contracted, assuring the confidentiality of medical records and of information relating to the financial affairs of individual Indians obtained under the proposal contract, or as otherwise required by law.

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

No.

§ 900.10 How does an Indian tribe or tribal organization secure a list of all Federal property currently in use in carrying out the programs, functions, services, or activities that benefit the Indian tribe or tribal organization to assist in negotiating a contract?

The Indian tribe or tribal organization submits a written request to the Secretary. The Secretary shall provide the requested information, including the condition of the property, within 60 days.

§ 900.11 What should an Indian tribe or tribal organization that is proposing a contract do about specifying the Federal property that the Indian 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; and

(4) Other real and personal 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.

§ 900.12 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 before the expiration date of the contract or existing annual funding agreement. The proposal shall provide funding information in the same detail and format as the original proposal and may also identify any significant proposed changes.

§ 900.13 Does the contract proposal become part of the final contract?

No, unless the parties agree.

Subpart D—Review and Approval of Contract Proposals

§ 900.14 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.

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

Upon receipt of a proposal, the Secretary shall:

(a) Within two 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 request 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.

§ 900.16 How long does the Secretary have to review and approve the proposal and award the contract, or decline a proposal?

The Secretary has 90 days after receipt of a proposal to review and approve the proposal and award the contract 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.

§ 900.17 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.

§ 900.18 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 § 900.17) is deemed approved and the Secretary shall award the contract or any amendment or renewal within that 90-day period and add to the contract the full amount of funds pursuant to Section 106(a) of the Act.

§ 900.19 What happens when a proposal is approved?

Upon approval the Secretary shall award the contract and add to the contract the full amount of funds to which the contractor is entitled under section 106(a) of the Act.

Subpart E—Declination Procedures

§ 900.20 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 § 900.32.

§ 900.21 When can a proposal be declined?

As explained in Secs. 900.16 and 900.17, 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.

§ 900.22 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.

§ 900.23 Can the Secretary decline a proposal where the Secretary's objection can 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.

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

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.

§ 900.25 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.

§ 900.26 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 102(a) of the Act, or approve a level of funding that is authorized under section 106(a) of the Act. As noted in § 900.25, the approval is subject to any alteration in the scope of the proposal that the Secretary and the Indian tribe or tribal organization approve.

§ 900.27 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.

§ 900.28 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.

§ 900.29 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 § 900.22 exists, together with a detailed explanation of the reason for the decision to decline the proposal and, within 20 days, 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 § 900.31.

§ 900.30 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.

§ 900.31 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.

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

No. If it is substantially the same as the prior annual funding agreement (except for funding increases included in appropriations acts or funding reductions as provided in section 106(b) of the Act) and the contract is with DHHS or the BIA, the Secretary shall approve and add to the contract the full amount of funds to which the contractor is entitled, and may not decline, any portion of a successor annual funding agreement. Any portion of an annual funding agreement proposal which is not substantially 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), or any annual funding agreement proposal which pertains to a contract with an agency of DOI other than the BIA, 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.

§ 900.33 Are all proposals to renew term contracts subject to the declination criteria?

Department of Health and Human Services and the Bureau of Indian Affairs will not review the renewal of a term contract for declination issues where no material and substantial

change to the scope or funding of a program, functions, services, or activities has been proposed by the Indian tribe or tribal organization. Proposals to renew term contracts with DOI agencies other than the Bureau of Indian Affairs may be reviewed under the declination criteria.

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 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 subcontractors 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 subcontractors 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.

§ 900.41 How long must an Indian tribe or tribal organization keep management system records?

The Indian tribe or tribal organization must retain financial, procurement and property records for the minimum periods described below. Electronic, magnetic or photographic records may be substituted for hard copies.

(a) *Financial records.* Financial records include documentation of supporting costs incurred under the contract. These records must be retained for three years from the date of submission of the single audit report to the Secretary.

(b) *Procurement records.* Procurement records include solicitations, purchase orders, contracts, payment histories and records applicable of significant decisions. These records must be retained for three years after the Indian tribe or tribal organization or subcontractors make final payment and all other pending matters are closed.

(c) *Property management records.* Property management records of real and personal property transactions must be retained for three years from the date of disposition, replacement, or transfer.

(d) *Litigation, audit exceptions and claims.* Records pertaining to any litigation, audit exceptions or claims requiring management systems data must be retained until the action has been completed.

Standards for Financial Management Systems

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

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

§ 900.43 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.

§ 900.44 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.

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

An Indian tribe or tribal organization's 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. This includes providing the Secretary a completed Financial Status Report, SF 269A, as 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 Indian tribe or tribal organization's applicable OMB cost principles, as amended by the Act and these regulations. (The following chart lists certain OMB Circulars and suggests the entities that may use each, but the final selection of the applicable circular may differ from those shown, as agreed to by the Indian tribe or tribal organization and the Secretary. Agreements between an Indian tribe or tribal organization and the Secretary currently in place do not require renegotiation.) Copies of these circulars are available from the Executive Office of the President, Publications Service, 725 17th Street N. W., Washington, D. C. 20503.

Type of tribal organization	Applicable OMB cost circular
Tribal Government	A–87, ''Cost Principles for State, Local and Indian Tribal Governments.''
Tribal private non-profit other than: (1) an institution of higher education, (2) a hospital, or (3) an organization named in OMB Circular A–122 as not subject to that circular.	A–122, ''Cost Principles for Non-Profit Organizations.''
Tribal educational institution	A–21, ''Cost Principles for Educational Institutions.''

(f) *Source documentation.* The financial management system shall contain accounting records that are supported by source documentation, e.g., canceled 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 provide for accurate, current, and complete disclosure of cash revenues disbursements, cash-on-hand balances, and obligations by source and application for each Indian tribe or tribal organization, and subcontractor if applicable, so that complete and accurate cash transactions may be prepared as required by the self-determination contract.

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

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 in strict compliance with the self-determination contract and the annual funding agreement.

Procurement Management System Standards

§ 900.47 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?

Indian tribes and tribal organizations shall have standards that conform to 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 basic standards shall the Indian tribe or tribal organization follow?

(a) The Indian tribe or tribal organization shall ensure that its vendors and/or subcontractors 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 subcontractor 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 and ensure the reasonableness of the price. The Indian tribe or tribal organization should consider consolidating or breaking out procurement 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 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 subcontractors?

Certain provisions of the Act as well as other applicable Federal laws, regulations, and Executive Orders apply to subcontracts awarded under self-determination contracts. As a result, subcontracts should contain a provision informing the recipient that their award is funded with Indian Self-Determination Act funds and that the recipient is responsible for identifying and ensuring compliance with applicable Federal laws, regulations, and Executive Orders. The Secretary and the Indian tribe or tribal organization may, through negotiation, identify all or a portion of such requirements in the self-determination contract and, if so identified, these requirements should be identified in subcontracts.

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 personal property, which is all personal property that is subject to theft and pilferage, as defined by the Indian tribe or tribal organization. All firearms shall be considered sensitive personal 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 tribe 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 personal 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, 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?

Unless required by statute, there are no mandatory reporting requirements. Each Indian tribe or tribal organization shall negotiate with the Secretary the type and frequency of program narrative and program data report(s) which respond to the needs of the contracting parties and that are appropriate for the purposes of the contract. The extent of available resources will be a consideration in the negotiations.

§ 900.66 What happens 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 which responds to 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, 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 Indian 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 What type of reserve fund is anticipated for funds deposited into a reserve for replacement of facilities as specified in § 900.70(c)?

Reserve funds must be accounted for as a capital project fund or a special revenue fund.

§ 900.72 Who is the guardian of the fund and may the funds be invested?

(a) The Indian tribe or tribal organization is the guardian of the fund.

(b) Funds may be invested in accordance with the laws, regulations and policies of the Indian tribe or tribal organization subject to the terms of the lease or the self-determination contract.

§ 900.73 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 (i) 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.

§ 900.74 How may an Indian 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 Indian 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 exercise discretion in a way that gives maximum effect to the requests of Indian tribes or tribal organizations for donation of BIA or IHS

excess property and excess or surplus Federal property, provided that the requesting Indian tribe or tribal organization shall state how the 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 an Indian 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 an Indian tribe or tribal organization before October 25, 1994:

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

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

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

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

(1) The Secretary, in consultation with the Indian 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 101–47.202.2(b)(10). If the Indian tribe or tribal organization desires to take title to any real property on the list, the Indian tribe or tribal organization shall inform the Secretary, who shall take such steps as necessary to transfer title to the Indian tribe or tribal organization.

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

(1) The Indian tribe or tribal organization shall take title to all property unless the Indian 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 101–47.202.2(b)(10).

§ 900.88 What should the Indian 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 an Indian tribe or individual Indian, the Indian 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 Indian 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 Indian tribe or tribal organization requests beneficial ownership with fee title to be held by the United States in trust for an Indian tribe:

(1) The Indian tribe or tribal organization shall submit with its request a resolution of support from the governing body of the Indian 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 of the land to the Secretary of the Interior and shall also forward the Indian 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 Indian 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 an Indian tribe or tribal organization?

(a) Except as provided in paragraph (b) of this section, 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:

(1) That title has been transferred to an Indian tribe or tribal organization;

(2) That is still in use in the program; and

(3) That has a current fair market value, less the cost of improvements borne by the Indian tribe or tribal organization in excess of $5,000.

(b) If property referred to in paragraph (a) of this section is shared between one or more ongoing contracts or grant agreements and a contract or grant agreement that is retroceded, reassumed, terminated or expires and the Secretary wishes to use such property in the retroceded or reassumed program, the Secretary and the contractor or grantee using such property shall negotiate an acceptable arrangement for continued sharing of such property and for the retention or transfer of title.

§ 900.90 Does government-furnished real property to which an Indian 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) of the Act?

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 Indian 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 Indian 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?

(a) Except as provided in paragraph (b) of this section 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:

(1) Whose title has been transferred to an Indian tribe or tribal organization;

(2) That is still in use in the program; and

(3) That has a current fair market value, less the cost of improvements borne by the Indian tribe or tribal organization, in excess of $5,000.

(b) If property referred to in paragraph (a) of this section is shared between one or more ongoing contracts or grant agreements and a contract or grant agreement that is retroceded, reassumed, terminated or expires and the Secretary wishes to use such property in the retroceded or reassumed program, the Secretary and the contractor or grantee using such property shall negotiate an acceptable arrangement for continued sharing of such property and for the retention or transfer of title.

§ 900.94 Is contractor-purchased real property to which an Indian 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 Indian tribes or tribal organizations learn about BIA and IHS excess property?

The Secretary shall not less than annually send to Indian tribes and 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 an Indian tribe or tribal organization acquire excess BIA or IHS property?

(a) The Indian tribe or tribal organization shall submit to the appropriate Secretary a request for specific property that includes a statement of how 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 in a way that gives maximum effect to the request of Indian tribes or tribal organizations for the donation of excess BIA or IHS property.

(b) If more than one request for the same item of personal property is submitted, the Secretary shall award the item to the requestor whose request is received on the earliest date. If two or more requests are received on the same date, 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 parcel of real property is submitted, the Secretary shall award the property to the Indian 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 an Indian tribe or tribal organization?

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

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

(a) If an Indian tribe or tribal organization requests donation of fee title to excess real property that includes land not held in trust for an Indian tribe, the Indian 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 Indian tribe or tribal organization.

(b) If an Indian 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 an Indian tribe, the requestor shall submit a resolution of support from the governing body of the Indian 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 Indian tribe or tribal organization's request and the Indian tribe's resolution. The Secretary of the Interior shall expeditiously process all requests in accordance with applicable Federal law and regulations.

(2) The Secretary shall not require the Indian 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 an Indian 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 to any item of the property;

(a) Except as provided in paragraph (b) of this section 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:

(1) Whose title has been transferred to an Indian tribe or tribal organization;

(2) That is still in use in the program; and

(3) That has a current fair market value, less the cost of improvements borne by the Indian tribe or tribal organization, in excess of $5,000.

(b) To the extent that any property referred to in paragraph (a) of this section is shared between one or more ongoing contracts or grant agreements and a contract or grant agreement that is retroceded, reassumed, terminated or expires and the Secretary wishes to use such property in the retroceded or reassumed program, the Secretary and the contractor or grantee using such property shall negotiate an acceptable arrangement for continued sharing of such property and for the retention or transfer of title.

§ 900.101 Is excess BIA or IHS real property to which an Indian 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 (GSA).

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

The Secretary shall furnish, not less than annually, to Indian 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 an Indian tribe or tribal organization.

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

(a) The Indian tribe or tribal organization shall file a request for specific property with the Secretary, and shall state how 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 § 900.86 of this Subpart.

(c) Upon approval of the Indian tribe or tribal organization's request, the Secretary shall immediately request acquisition of the property from the GSA or the holding agency, as appropriate, by submitting the necessary documentation in order to acquire the requested property prior to the expiration of any ''freeze'' placed on the property by the Indian tribe or tribal organization.

(d) The Secretary shall specify that the property is requested for donation to an Indian 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 an Indian tribe or tribal organization?

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

(b) Legal title to donated excess or surplus Federal real property shall vest in the Indian tribe or tribal organization upon acceptance by the Indian 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 an Indian tribe, the Indian 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 an Indian tribe.

(1) If the Indian 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 Indian tribe or tribal organization.

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

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

(ii) If the donation request of the Indian 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 Indian tribe or tribal organization's request and the Indian 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 an Indian 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 an Indian tribe or tribal organization.

Property Eligible for Replacement Funding

§ 900.107 What property to which an Indian tribe or tribal organization obtains title under this Subpart is eligible for replacement funding?

Government-furnished property, contractor-purchased property and excess BIA and IHS property donated to an Indian tribe or tribal organization to which an Indian 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

§ 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 and other related work for 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 or tribal organization authorized 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 (an Indian tribe or tribal organization should contact its funding source for more information regarding the conduct of its program):

(1) *The preplanning phase.* The phase during which an initial assessment and 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 predesign site investigations and selection, 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. Site investigation and selection activities are completed in this phase if not conducted as part of the planning phase.

(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 and associated activities.

§ 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. An Indian tribe or tribal organization's employee or construction management services consultant (typically an engineer or architect) performs such activities as:

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

(2) Preparation of Indian tribe or tribal organization's construction contract proposals;

(3) Indian tribe or tribal organization subcontract scope of work identification and subcontract preparation, and competitive selection of Indian tribe 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 conduct of 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?

There is a separate subpart 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 § 900.131.

(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 that 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 Indian tribe or 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 negotiated fixed-price contracts treated the same as cost-reimbursable contracts?

Yes, except that in negotiated fixed-price construction contracts, appropriate clauses shall be negotiated to allocate properly 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;

(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 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 and/or Indian tribe or tribal organization employees 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 the 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 shall notify, by registered mail with return receipt in order to document mailing, the Indian tribe or tribal organization(s) to be benefitted by the availability of the funds for each phase of a 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 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.

(b) [Reserved]

§ 900.122 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. 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 shall 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.

§ 900.123 What happens 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 § 900.122, 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 and provide all documents relied on in making the declination decision within 20 days of such decision to the Indian tribe or tribal organization;

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

(3) Provide the Indian tribe or 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 under section 110(a) of the Act.

§ 900.124 May the Indian tribe or tribal organization 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 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.

§ 900.125 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;

(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 and the Secretary shall accept tribal proposals for alternatives which are consistent with or exceed Federal guidelines or manuals applicable to construction programs);

(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 § 900.131; and

(4) Proposed methods to accommodate the responsibilities of the Indian tribe or tribal organization provided in § 900.130 unless otherwise addressed in paragraph (a) of this section and minimum staff qualifications proposed by the Indian tribe or tribal organization, if any;

(5) A contract budget as described in § 900.127; and

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

(7) A payment schedule as described in § 900.132;

(8) A statement indicating whether or not the Indian tribe or tribal organization has a CMS contract related to this project;

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

(10) Any responsibilities, in addition to the Federal responsibilities listed in § 900.131, which the Indian tribe or tribal organization proposes the Federal government 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 elects not to take title (pursuant to subpart I) to Federal property used 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;

(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),'' for Federally assisted construction subagreements;

(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;

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

(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;''

(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, share them with the other party, and refer to them in the construction contract. The parties will make a good faith effort to identify tribal laws, ordinances, and resolutions which may affect either party in the performance of the contract.

§ 900.126 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, the Secretary shall accept the tribally proposed standards.

§ 900.127 What can be included in the Indian tribe 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 (see § 900.129).

(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 Indian tribe or 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 Indian tribe or 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 identify separately the components described in paragraphs (c)(4)(i) and (c)(4)(ii) of this section.

(e) The Indian tribe 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), of this section;

(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 percent of activities being contracted or 50 percent of the available contingency funds, whichever is greater. In the event provision of required contingency funds will cause the project to exceed available project funds, the discrepancy shall be reconciled in accordance with § 900.129(e). 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.

§ 900.128 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 Indian tribe or 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 the 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 including but not limited to contingency.

(3) In establishing a contract budget for a construction project, the Secretary is not required to identify separately the components described in paragraph (d)(1) and (d)(2) of this sections.

§ 900.129 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 Indian tribe or tribal organization's 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 Indian 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 Indian 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 Indian 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) of this section 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 if the contract has been awarded, dispute the matter under the Contract Disputes 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, advance payments in accordance with § 900.132, 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.

§ 900.130 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 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, § 900.42 through § 900.45 and implement a property 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 ensure 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 provide written comments on the project plans and specifications only at the concept phase, the schematic phase (or the preliminary design), the design development phase, and the final construction documents phase and approve the project plans and specifications for general compliance with contract requirements only at the schematic phase (or the preliminary design) 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 in accordance with § 900.131(b)(4) 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, including but not limited to descriptions of contracts, major subcontracts, and modifications implemented during the report period and A/E service deliverables, 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 an initial work and payment schedule and updates as they may occur.

(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 other consultants as needed to accomplish the self-determination construction contract.

(2) The Indian tribe or tribal organization shall administer and dispense funds provided through the contract in accordance with subpart F, § 900.42 through § 900.45 and implement a property 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; or

(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 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: contracts, major subcontracts, modifications, 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 increase the amount of funds awarded under the contract, the Indian tribe or tribal organization may suspend performance of the contract until sufficient additional funds are awarded.

§ 900.131 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 the following documents:

(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, comment, and approval functions under this section, the Secretary shall provide for full tribal participation in the decision making 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 in writing 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 documents, and making a good faith effort to resolve all issues and concerns of the Indian tribe or tribal organization. The time allowed for Secretarial review, comment, 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 appropriate 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 may rely on the Indian tribe or tribal organization's cost estimate or the Secretary may obtain an independent government cost estimate that is derived from the final project plans and specifications. The Secretary shall obtain the cost estimate, if any, within 90 days or less of receiving the final plans and specifications from the Indian tribe or tribal organization and shall provide all supporting documentation of the independent cost estimate to the Indian tribe or tribal organization within the 90 day time limit.

(5) If the contracted project involves design activities, the Secretary shall have the authority to review for general compliance with the contract requirements and provide written comments on the project plans and specifications only at the concept phase, the schematic phase, the design development phase and the final construction documents phase, and approve for general compliance with contract requirements the project plans and specifications only at the schematic 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 may 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. If the Secretary identifies problems during final project inspections the information shall be provide 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 suspend temporarily 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, including but not limited to overhead 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) of this section.

(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; or

(vi) The Indian tribe or tribal organization shall be compensated for

reasonable costs incurred due to termination of the contract.

§ 900.132 Once a contract and/or grant 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 organization's 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 § 900.131(b)(11), § 900.131(b)(12), or § 900.131(b)(13).

§ 900.133 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 § 900.122 and § 900.123 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.

§ 900.134 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. No further approval or justifying documentation by the Indian tribe or tribal organization shall be required before expenditure of funds.

§ 900.135 May the time frames for action set out in this subpart be reduced?

Yes. The time frames in this subpart are intended to be maximum times and may be reduced based on urgency and need, by agreement of the parties. If the Indian tribe or tribal organization requests reduced time frames for action due to unusual or special conditions (such as limited construction periods), the Secretary shall make a good faith effort to accommodate the requested time frames.

§ 900.136 Do tribal employment rights ordinances apply to construction contracts and subcontracts?

Yes. Tribal employment rights ordinances do apply to construction contracts and subcontracts pursuant to § 7(b) and § 7(c) of the Act.

§ 900.137 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 the regulations under this Part 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 the regulations under this part, if the Secretary finds that granting the waiver is either 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 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 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 for waiver requests?

Yes. Technical assistance is available as provided in section 900.7 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

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;

(h) A decision to refuse to allow an Indian tribe or tribal organization 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; or

(j) A decision relating to a request for a determination that a law or regulation has been superseded by the Act.

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

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 from decisions made by agencies of DOI or DHHS?

Every decision in any of the ten areas listed above shall contain information which shall tell the Indian tribe or tribal organization where and when to file the Indian tribe or tribal organization's 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 900.154, or appeal this decision under 25 CFR 900.158 to the Interior Board of Indian Appeals (IBIA). Should you decide to appeal this decision, you may request a hearing on the record. An appeal to the IBIA under 25 CFR 900.158 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. The Indian tribe or tribal organization 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. The Indian tribe or tribal organization 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?

The Indian tribe or tribal organization shall file its request for an informal conference with the office of the person whose decision it is appealing, within 30 days of the day it receives the decision. The Indian tribe or tribal organization 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 the Indian tribe or tribal organization mails the request, it will be considered filed on the date the Indian tribe or tribal organization 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 the Indian tribe or tribal organization's office and is held more than fifty miles from its 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 the designated representatives of the Indian tribe or tribal organization, 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 to the Indian tribe or tribal organization 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 of the DOI or DHHS agency with the Interior Board of Indian Appeals (IBIA) under 25 CFR 900.157. You may request a hearing on the record. An appeal to the IBIA under 25 CFR 900.157 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 the Indian tribe or tribal organization is dissatisfied with the recommended decision, it may still appeal the initial decision within 30 days of receiving the recommended decision and the report of the informal conference. If the Indian tribe or tribal organization does not file a notice of appeal within 30 days, or before the expiration of the extension it has received 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 the Indian tribe or tribal organization decides to appeal, it shall file a notice of appeal with the IBIA within 30 days of receiving either the initial decision or the recommended decision.

(b) The Indian tribe or tribal organization may either hand-deliver the notice of appeal to the IBIA, or mail it by certified mail, return receipt requested. If the Indian tribe or tribal organization mails the Notice of Appeal, it will be considered filed on the date the Indian tribe or tribal organization mailed it by certified mail. The Indian tribe or tribal organization 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 the Indian tribe or tribal organization thinks the initial decision is wrong;

(2) Briefly identify the issues involved in the appeal; and

(3) State whether the Indian tribe or tribal organization wants a hearing on the record, or whether the Indian tribe or tribal organization wants to waive its right to a hearing.

(d) The Indian tribe or tribal organization shall serve a copy of the notice of appeal upon the official whose decision it is appealing. The Indian tribe or tribal organization shall certify to the IBIA that it has 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 the Indian tribe or tribal organization needs more time, it can request an extension of time to file its Notice of Appeal within 60 days of receiving either the initial decision or the recommended decision resulting from the informal conference. The request of the Indian tribe or tribal organization shall be in writing, and shall give a reason for not filing its notice of appeal within the 30-day time period. If the Indian tribe or tribal organization has a valid reason for not filing its notice of appeal on time, it may receive an extension from the IBIA.

§ 900.160 What happens after an Indian tribe or tribal organization files an appeal?

(a) Within 5 days of receiving the Indian tribe or tribal organization's notice of appeal, the IBIA will decide whether the appeal falls under § 900.150(a) through § 900.150(g). If so, the Indian tribe or tribal organization is entitled to a hearing.

(1) If the IBIA determines that the appeal of the Indian tribe or tribal organization falls under § 900.150(h), § 900.150(i), or § 900.150(j), and the Indian tribe or tribal organization has requested a hearing, the IBIA will grant the request for a hearing unless the IBIA 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 5 days of receiving those statements.

(b) If the IBIA decides that the Indian tribe or tribal organization is not entitled to a hearing or if the Indian tribe or tribal organization has waived its 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 the Indian tribe or tribal organization's 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 the Indian tribe or tribal organization 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 the Indian tribe or tribal organization has 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 900.165(b). An appeal to the Secretary under 25 CFR 900.165(b) 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 900.165(c). An appeal to the IBIA under 25 CFR 900.165(c) 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 objects 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 Suspensions, 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 (a)(1) of this section, 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 office of the Indian tribe or tribal organization, 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 the Indian tribe or tribal organization has 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 900.165(b). An appeal to the Secretary under 25 CFR 900.165(b) 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 900.165(c). An appeal to the IBIA under 25 CFR 900.165(c) 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 objects 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 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.

Applicability of the Equal Access to Justice Act

§ 900.177 Does the Equal Access to Justice Act (EAJA) apply to appeals under this subpart?

Yes. EAJA claims against the DOI or the DHHS will be heard by the IBIA under 43 CFR 4.601–4.619. For DHHS, appeals from the EAJA award will be according to 25 CFR 900.165(b).

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?

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.

(2) Subject to the approval of the IHS Director after consultation with the DHHS Office of General Counsel, Indian 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 subcontract to carry out IHS service programs within geographically defined service areas with another Indian tribe or tribal organization which contracts directly with IHS.

(3) Any other contractor that qualifies as an ''Indian contractor'' under the Indian Self-Determination Act.

§ 900.182 What other statutes and regulations apply to FTCA coverage?

A number of other statutes and regulations apply to FTCA coverage, 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 expressly barred by FTCA and therefore may not be made against the United States, an Indian tribe or tribal organization?* Any claim under 28 U.S.C. 2680, including claims 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?*

(1) Except as provided in § 900.181(a)(1) and § 900.189, claims against subcontractors 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; or

(4) claims resulting from activities performed by an employee which are outside the scope of employment.

(c) *What remedies are expressly 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) The following clause may be used for all contracts:

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) As part of the notification required by 28 U.S.C. 2679(c), 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 or 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 eyewitnesses;

(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 as to whether any person involved was cited for violating a Federal, State or tribal law, ordinance, or regulation;

(7) The contractor's determination as to whether any of its employees (including Federal employees assigned to the contractor) 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;

(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; and

(9) Insurance coverage information, copies of medical bills, and relevant employment records.

(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 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 a 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. Related functions include services such as those provided by nurses, laboratory and x-ray technicians, emergency medical technicians and other health care providers including psychologists and social workers. All such claims shall be filed against the United States and are subject to the limitations and restrictions of the FTCA.

§ 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;

(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); and

(e) Federal employees assigned to the contract.

§ 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 an Indian 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. Those services are covered, as long as the contractor's health care practitioners do not receive additional compensation from a third party 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 (not the self-determination contractor) receive the fee?

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. (An emergency motor vehicle is a vehicle, whether government, contractor, or employee-owned, used to transport passengers for medical services.)

§ 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 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 served under the contract 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 at 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?

They 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?

As part of the notification required by 28 U.S.C. 2679(c), the contractor 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;

(d) Any comments or opinions that the employees who treated the claimant believe to be pertinent to the allegations contained in the claim; and

(e) Other materials identified in § 900.188(c).

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?

Yes. 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 must 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 What employees are covered by FTCA for non-medical-related claims?

(a) Permanent employees;

(b) Temporary employees;

(c) Persons providing services without compensation in carrying out a contract;

(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); and

(e) Federal employees assigned to the contract.

§ 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 in § 900.201 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, they 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, they should immediately notify the Assistant Solicitor, Procurement and Patents, Office of the Solicitor, Department of the Interior, Room 6511, 1849 C Street N.W., 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 an Indian tribe or tribal organization do?

(a) If the contract is with the DHHS, they 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 S.W., Room 5362, Washington, DC 20201 and the contractor's tort claims liaison.

(b) If the contract is with the Department of the Interior, they should immediately notify the Assistant Solicitor, Procurement and Patents, Office of the Solicitor, Department of the Interior, Room 6511, 1849 C Street N.W., 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 as amended);

(b) If the matter is submitted to the Interior Board of Contract Appeals, 43 CFR 4.110–126; and

(c) The Equal Access to Justice Act, 5 U.S.C. 504 and 28 U.S.C. 2412 and regulations at 43 CFR 4.601 through 4.619 (DOI) and 45 CFR 13 (DHHS).

§ 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, as amended, 5 U.S.C. 581 et seq., or the options listed in section 108(1)(b)(12) of the Indian Self-Determination 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 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, tribal organization, or Federal agency submit a claim?

(a) An Indian tribe or tribal organization shall submit its 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) A Federal agency shall submit its 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. The Contract Disputes Act requires that 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 to the best of the Indian tribe or tribal organization's knowledge and belief;

(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 decision?

(a) If the claim is for more than $100,000, the awarding official shall issue the decision within 60 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 time required under § 900.223, 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),

§ 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 What rules govern appeals of cost disallowances?

In any appeal involving a disallowance of costs, the Board of Contract Appeals will give due consideration to the factual circumstances giving rise to the disallowed costs, and shall seek to determine a fair result without rigid adherence to strict accounting principles. The determination of allowability shall assure fair compensation for the work or service performed, using cost and accounting data as guides, but not rigid measures, for ascertaining fair compensation.

§ 900.227 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 a decision is withdrawn and a new decision is issued that is not acceptable to the contractor, the contractor may proceed with the appeal based on the new decision. If no new decision is issued, the contractor may proceed under § 900.224.

(d) If an appeal or suit is filed, the awarding official may modify or withdraw his or her final decision.

§ 900.228 Is an Indian tribe or tribal organization entitled to interest if it wins its claim?

Yes. If an Indian tribe or tribal organization wins the claim, it 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 it is 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.

§ 900.229 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.

§ 900.230 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 O—Conflicts of Interest

§ 900.231 What is an organizational conflict of interest?

An organizational conflict of interest arises when there is a direct conflict between the financial interests of the contracting Indian tribe or tribal organization and:

(a) The financial interests of beneficial owners of Indian trust resources;

(b) The financial interests of the United States relating to trust resources, trust acquisitions, or lands conveyed or to be conveyed pursuant to the Alaska Native Claims Settlement Act 43 U.S.C. 1601 *et seq.*; or

(c) An express statutory obligation of the United States to third parties. This section only applies if the conflict was not addressed when the contract was first negotiated. This section only applies where the financial interests of the Indian tribe or tribal organization are significant enough to impair the Indian tribe or tribal organization's objectivity in carrying out the contract, or a portion of the contract.

§ 900.232 What must an Indian tribe or tribal organization do if an organizational conflict of interest arises under a contract?

This section only applies if the conflict was not addressed when the contract was first negotiated. When an Indian tribe or tribal organization becomes aware of an organizational conflict of interest, the Indian tribe or tribal organization must immediately disclose the conflict to the Secretary.

§ 900.233 When must an Indian tribe or tribal organization regulate its employees or subcontractors to avoid a personal conflict of interest?

An Indian tribe or tribal organization must maintain written standards of conduct to govern officers, employees, and agents (including subcontractors) engaged in functions related to the management of trust assets.

§ 900.234 What types of personal conflicts of interest involving tribal officers, employees or subcontractors would have to be regulated by an Indian tribe?

The Indian tribe or tribal organization would need a tribally-approved mechanism to ensure that no officer, employee, or agent (including a subcontractor) of the Indian tribe or tribal organization reviews a trust transaction in which that person has a financial or employment interest that conflicts with that of the trust beneficiary, whether the tribe or an allottee. Interests arising from membership in, or employment by, an Indian tribe or rights to share in a tribal claim need not be regulated.

§ 900.235 What personal conflicts of interest must the standards of conduct regulate?

The standards must prohibit an officer, employee, or agent (including a subcontractor) from participating in the review, analysis, or inspection of trust transactions involving an entity in which such persons have a direct financial interest or an employment relationship. 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 Indian tribe) with an interest in the trust transactions under review. Such standards must also provide for sanctions or remedies for violation of the standards.

§ 900.236 May an Indian tribe elect to negotiate contract provisions on conflict of interest to take the place of this regulation?

Yes. An Indian tribe and the Secretary may agree to contract provisions, concerning either personal or organizational conflicts, that address the issues specific to the program and activities contracted in a manner that provides equivalent protection against conflicts of interest to these regulations. Agreed-upon contract provisions shall be followed, rather than the related provisions of this regulation. For example, the Indian tribe and the Secretary may agree that using the Indian tribe's own written code of ethics satisfies the objectives of the personal conflicts provisions of this regulation, in whole or in part.

Subpart P—Retrocession and Reassumption Procedures

§ 900.240 What does retrocession mean?

A retrocession 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.

§ 900.241 Who may retrocede a contract, in whole or in part?

An Indian tribe or tribal organization authorized by an Indian tribe may retrocede a contract.

§ 900.242 What is the effective date of retrocession?

The retrocession is effective on the date which is the earliest date among:

(a) One year from the date of the Indian tribe or tribal organization's request;

(b) The date the contract expires; or

(c) A mutually agreed-upon date.

§ 900.243 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.

§ 900.244 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.

§ 900.245 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 requested property and equipment provided under the contract which have a per item current fair market value, less the cost of improvements borne by the Indian tribe or tribal organization, in excess of $5,000 at the time of the retrocession.

§ 900.246 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.

§ 900.247 Under what circumstances is a reassumption considered an emergency instead of non-emergency reassumption?

(a) 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.

(b) 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.

§ 900.248 In a non-emergency reassumption, what is the Secretary required to do?

The Secretary must:

(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;

(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. The Secretary may also make a grant for the purpose of obtaining such technical assistance as provided in section 103 of the Act.

§ 900.249 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.

§ 900.250 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.

§ 900.251 What is the earliest date on which the contract will be rescinded in a non-emergency reassumption?

The contract will not be rescinded by the Secretary before the issuance of a final decision in any administrative hearing or appeal.

§ 900.252 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.

§ 900.253 What shall the written notice include?

The written notice shall include the following:

(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.

§ 900.254 May the contractor be reimbursed for actual and reasonable ''wind up costs'' incurred after the effective date of rescission?

Yes.

§ 900.255 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 has a per item current fair market value, less the cost of improvements borne by the Indian tribe or tribal organization, in excess of $5,000 at the time of the retrocession.

§ 900.256 Will a reassumption adversely affect funding available for the reassumed program?

No. The Secretary shall provide at least the same level of funding that would have been provided if there had been no reassumption.

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