



Payment of Contract Support Costs Is Mandatory; Why Isn't the Funding?

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For over 20 years, tribal contractors have fought with the United States to be paid the full administrative costs of their contracts, like other government contractors. The Supreme Court has affirmed that the requirement to pay the full amount of contract support costs due to tribes and tribal organizations under the Indian Self-Determination and Education Assistance Act (ISDEAA) is a binding legal obligation on the part of the federal government. Nevertheless, funding for CSC has historically been appropriated on a discretionary basis, leading to decades of implementation challenges and litigation that has twice put the question of the federal government's liability for unpaid contract support costs before the Supreme Court. It is time to square the appropriations process with the mandatory nature of contract support costs under substantive law: funding for contract support costs must be appropriated on a mandatory basis.

The United States Supreme Court has twice considered the United States' responsibility to pay contract support costs to contracting tribes and tribal organizations under ISDEAA contracts. In both instances, the Supreme Court has held that due to the legally binding nature of an ISDEAA contract, a tribal contractor has the right to recover its promised contract support costs in full - even if the contracting agency underpaid those costs due to aggregate restrictions on amounts allocated by the agencies or appropriated by Congress for payment of contract support costs.

In the 2006 *Cherokee Nation* case the Supreme Court held that the government could not avoid its contractual obligation to pay contract support costs under ISDEAA contracts on the grounds of insufficient appropriations or on the grounds that the agency had to use its legally unrestricted funds to pay the costs of "inherent federal functions," such as the cost of running the agency's central office, rather than contract support costs. In the more recent 2012 *Ramah* case, the Supreme Court held that caps on the aggregate amount available for contract support cost payments set by Congress in appropriations acts did not limit the government's liability for failure to fully pay an ISDEAA contractor's contract support costs, so long as the capped amount was sufficient to pay the individual contractor in full and even though the capped amount was not enough to fully pay all contractors.

Each contracting tribe and tribal organization therefore has a right, as a matter of substantive law, to full payment of contract support costs under mandatory and legally binding contracts entered into pursuant to the ISDEAA. Despite the mandatory nature of ISDEAA contracts and the entitlement to full contract support costs under those contracts, contract support costs are currently paid out of the BIA and IHS annual discretionary appropriations. This fundamental

disconnect between the authorizing statute and the appropriations process has caused decades of problems, pitting funding for contract support costs against funding for Indian programs and services and exposing the federal government to legal liability for underpayments.

Against the backdrop of the *Ramah* Supreme Court decision, in FY 2014 the Committees on Appropriations directed the IHS and BIA to fully fund CSC out of their discretionary appropriation funds. Notably, the Committees recognized that until a long term solution is developed, the Committees are “in the untenable position of appropriating discretionary funds for the payment of any legally obligated contract support costs.” The Committees also recognized that “[t]ypically obligations of this nature are addressed through mandatory spending, but in this case since they fall under discretionary spending, they have the potential to impact all other programs funded under the Interior and Environment Appropriations bill, including other equally important tribal programs.” The Committees went on to direct the IHS and BIA “to consult with the Tribes and work with the House and Senate committees of jurisdiction, the Office of Management and Budget, and the Committees on Appropriations to formulate long-term accounting, budget, and legislative strategies to address the situation.”

It is clear that to date the appropriation process has failed to reflect the status of contract support costs as legal obligations, a failure that is ultimately at the root of the persistent funding problems that have clouded the otherwise largely successful efforts to diminish federal domination of Indian service programs under bold new self-determination and self-governance initiatives. Appropriating contract support costs on a mandatory basis would solve this problem once and for all by bringing the appropriations process into line with the clear legal requirements of the authorizing statute. In 2000, even before the *Cherokee* and *Ramah* decisions, H.R. 4148 was introduced and reported in part “to clarify that contract support costs are an entitlement” and to appropriate necessary amounts to pay for contract support costs when not otherwise provided for. Now, with federal liability twice affirmed by the Supreme Court and full funding for contract support costs provided in FY 2014, it is clearer than ever that the appropriation must be consistent, reliable, sufficient in amount, and reflective of the mandatory nature of contract support cost payments.

Contract support cost funds are already an entitlement under substantive law, as they must be for the ISDEAA to function as intended by Congress. If they are not paid, they are due as damages in a suit to recover unpaid amounts. It is contradictory and problematic, therefore, to appropriate funding for contract support costs on a discretionary basis. The commonsense solution is to bring the appropriation process into line with the authorizing statute and the *Cherokee* and *Ramah* decisions by appropriating funding for contract support costs on a mandatory basis through a permanent, indefinite appropriation in substantive law. A simple amendment to a permanent appropriations statute could solve the decades-long contract support cost dilemma. At no net cost, the Government would avoid liability, protect Indian programs, and honor tribal contracts. *Geoffrey Strommer, Steve Osborne and Caroline Mayhew are attorneys with the law firm of Hobbs, Straus, Dean & Walker LLP. Their practice is focused on the representation of tribes and tribal organizations, including litigating tribal contract support cost claims.*

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