

(i) The Tribe/Consortium will perform work previously performed at the regional or central office level;

(ii) The work is not compensated in the indirect cost rate; and

(iii) Including management and support costs in the AFA does not result in the Tribe/Consortium being paid twice for the same work when negotiated indirect cost rate is applied.

(c) *Funding Limitations.* The amount of funding must be subject to the availability and level of Congressional appropriations to the bureau for that program or activity. As the various bureaus use somewhat differing budgeting practices, determining the amount of funds available for inclusion in the AFA for a particular program or activity is likely to vary among bureaus or programs.

(1) The AFA may not exceed the amount of funding the bureau would have spent for direct operations and indirect support and management of that program in that year.

(2) The AFA must not include funding for programs still performed by the bureau.

§ 1000.138 How are indirect cost rates determined?

The Department's Office of the Inspector General (OIG) or other cognizant Federal agency and the Tribe/Consortium negotiate indirect cost rates. These rates are based on the provisions of the Office of Management and Budget (OMB) Circular A-87 or other applicable OMB cost circular and the provisions of Title I of Pub. L. 93-638 (See § 1000.142). These rates are used generally by all Federal agencies for contracts and grants with the Tribe/Consortium, including self-governance agreements.

§ 1000.139 Will the established indirect cost rates always apply to new AFAs?

No, the established indirect cost rates will not always apply to new AFAs.

(a) A Tribe's/Consortium's existing indirect cost rate should be reviewed and renegotiated with the inspector general or other cognizant agency if:

(1) Using the previously negotiated rate would include the recovery of indi-

rect costs that are not reasonable, allocable, or allowable to the relevant program; or

(2) The previously negotiated rate would result in an under-recovery by the Tribe/Consortium.

(b) If a Tribe/Consortium has a fixed amount indirect cost agreement under OMB Circular A-87, then:

(1) Renegotiation is not required and the duration of the fixed amount agreement will be that provided for in the fixed amount agreement; or

(2) The Tribe/Consortium and bureau may negotiate an indirect cost amount or rate for use only in that AFA without the involvement of the inspector general or other cognizant agency.

§ 1000.140 How does the Secretary determine the amount of indirect contract support costs?

The Secretary determines the amount of indirect contract support costs by:

(a) Applying the negotiated indirect cost rate to the appropriate direct cost base;

(b) Using the provisional rate; or

(c) Negotiating the amount of indirect contract support.

§ 1000.141 Is there a predetermined cap or limit on indirect cost rates or a fixed formula for calculating indirect cost rates?

No, indirect cost rates vary from Tribe to Tribe. The Secretary should refer to the appropriate negotiated indirect cost rates for individual Tribes, that apply government-wide. Although this cost rate is not capped, the amount of funds available for inclusion is capped at the level available under the relevant appropriation.

§ 1000.142 Instead of the negotiated indirect cost rate, is it possible to establish a fixed amount or another negotiated rate for indirect costs where funds are limited?

Yes, OMB Circular A-87 encourages agencies to test fee-for-service alternatives. If the parties agree to a fixed price, fee-for-service agreement, then they must use OMB Circular A-87 as a guide in determining the appropriate price (OMB circulars are available at <http://www.whitehouse.gov/omb/> or see 5 CFR 1310.3). Where limited appropriated

§ 1000.143

funds are available, negotiating the fixed cost option or another rate may facilitate reaching an agreement with that Tribe/Consortium.

OTHER TERMS AND CONDITIONS

§ 1000.143 May the bureaus negotiate terms to be included in an AFA for non-Indian programs?

Yes, as provided for by section 403(b)(2) and 403(c) and as necessary to meet program mandates.

REALLOCATION, DURATION, AND AMENDMENTS

§ 1000.144 Can a Tribe reallocate funds for a non-BIA non-Indian program?

Yes, section 403(b) permits such reallocation upon joint agreement of the Secretary and the Tribe/Consortium.

§ 1000.145 Do Tribes/Consortia need Secretarial approval to reallocate funds between Title-I eligible programs that the Tribe/Consortium administers under a non-BIA AFA?

No, unless otherwise required by law, the Secretary does not have to approve the reallocation of funds with the exception of construction projects.

§ 1000.146 Can a Tribe/Consortium negotiate an AFA with a non-BIA bureau for which the performance period exceeds one year?

Yes, subject to the terms of the AFA, a Tribe/Consortium and a non-BIA bureau may agree to provide for the performance under the AFA to extend beyond the fiscal year. However, the Department may not obligate funds in excess and advance of available appropriations.

§ 1000.147 Can the terms and conditions in a non-BIA AFA be amended during the year it is in effect?

Yes, terms and conditions in a non-BIA AFA may be amended during the year it is in effect as agreed to by both the Tribe/Consortium and the Secretary.

§ 1000.148 What happens if an AFA expires before the effective date of the successor AFA?

If the effective date of a successor AFA is not on or before the expiration of the current AFA, subject to terms

25 CFR Ch. VI (4-1-06 Edition)

mutually agreed upon by the Tribe/Consortium and the Department at the time the current AFA was negotiated or in a subsequent amendment, the Tribe/Consortium may continue to carry out the program authorized under the AFA to the extent resources permit. During this extension period, the current AFA shall remain in effect, including coverage of the Tribe/Consortium under the Federal Tort Claims Act (FTCA) 28 U.S.C. 2671-2680 (1994); and the Tribe/Consortium may use any funds remaining under the AFA, savings from other programs or Tribal funds to carry out the program. Nothing in this section authorizes an AFA to be continued beyond the completion of the program authorized under the AFA or the amended AFA. This section also does not entitle a Tribe/Consortium to receive, nor does it prevent a Tribe from receiving, additional funding under any successor AFA. The successor AFA must provide funding to the Tribe/Consortium at a level necessary for the Tribe/Consortium to perform the programs, functions, services, and activities (PFSA) or portions thereof for the full period they were or will be performed.

Subpart G—Negotiation Process for Annual Funding Agreements

PURPOSE

§ 1000.160 What is the purpose of this subpart?

This subpart provides the process and timelines for negotiating a self-governance compact with the Department and an AFA with any bureau.

(a) For a newly selected or currently participating Tribe/Consortium negotiating an initial AFA with any bureau, see §§ 1000.173 through 1000.179.

(b) For a participating Tribe/Consortium negotiating a successor AFA with any bureau, see §§ 1000.180 through 1000.182.