

### Statutory Notes and Related Subsidiaries

#### CONTINUED AVAILABILITY OF CERTAIN FUNDS

Pub. L. 105-277, div. A, §101(e) [title I], Oct. 21, 1998, 112 Stat. 2681-231, 2681-246, provided in part that: “hereafter funds made available to tribes and tribal organizations through contracts, compact agreements, or grants, as authorized by the Indian Self-Determination Act of 1975 [25 U.S.C. 5321 et seq.] or grants authorized by the Indian Education Amendments of 1988 (25 U.S.C. 2001 and 2008A [probably means prior versions of 25 U.S.C. 2001 and 2008a]) shall remain available until expended by the contractor or grantee”.

### § 5325. Contract funding and indirect costs

#### (a) Amount of funds provided

(1) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this chapter shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, without regard to any organizational level within the Department of the Interior or the Department of Health and Human Services, as appropriate, at which the program, function, service, or activity or portion thereof, including supportive administrative functions that are otherwise contractable, is operated.

(2) There shall be added to the amount required by paragraph (1) contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which—

(A) normally are not carried on by the respective Secretary in his direct operation of the program; or

(B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

(3)(A) The contract support costs that are eligible costs for the purposes of receiving funding under this chapter shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of—

(i) direct program expenses for the operation of the Federal program that is the subject of the contract; and

(ii) any additional administrative or other expense incurred by the governing body of the Indian Tribe or Tribal organization and any overhead expense incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract,

except that such funding shall not duplicate any funding provided under subsection (a)(1) of this section.

(B) In calculating the reimbursement rate for expenses described in subparagraph (A)(ii), not less than 50 percent of the expenses described in subparagraph (A)(ii) that are incurred by the governing body of an Indian Tribe or Tribal organization relating to a Federal program, function, service, or activity carried out pursuant to the contract shall be considered to be reasonable and allowable.

(C) On an annual basis, during such period as a tribe or tribal organization operates a Federal

program, function, service, or activity pursuant to a contract entered into under this chapter, the tribe or tribal organization shall have the option to negotiate with the Secretary the amount of funds that the tribe or tribal organization is entitled to receive under such contract pursuant to this paragraph.

(4) For each fiscal year during which a self-determination contract is in effect, any savings attributable to the operation of a Federal program, function, service, or activity under a self-determination contract by a tribe or tribal organization (including a cost reimbursement construction contract) shall—

(A) be used to provide additional services or benefits under the contract; or

(B) be expended by the tribe or tribal organization in the succeeding fiscal year, as provided in section 13a of this title.

(5) Subject to paragraph (6), during the initial year that a self-determination contract is in effect, the amount required to be paid under paragraph (2) shall include startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis pursuant to the contract necessary—

(A) to plan, prepare for, and assume operation of the program, function, service, or activity that is the subject of the contract; and

(B) to ensure compliance with the terms of the contract and prudent management.

(6) Costs incurred before the initial year that a self-determination contract is in effect may not be included in the amount required to be paid under paragraph (2) if the Secretary does not receive a written notification of the nature and extent of the costs prior to the date on which such costs are incurred.

#### (b) Reductions and increases in amount of funds provided

The amount of funds required by subsection (a) of this section—

(1) shall not be reduced to make funding available for contract monitoring or administration by the Secretary;

(2) shall not be reduced by the Secretary in subsequent years except pursuant to—

(A) a reduction in appropriations from the previous fiscal year for the program or function to be contracted;

(B) a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution;

(C) a tribal authorization;

(D) a change in the amount of pass-through funds needed under a contract; or

(E) completion of a contracted project, activity, or program;

(3) shall not be reduced by the Secretary to pay for Federal functions, including, but not limited to, Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring;

(4) shall not be reduced by the Secretary to pay for the costs of Federal personnel displaced by a self-determination contract; and

(5) may, at the request of the tribal organization, be increased by the Secretary if nec-

essary to carry out this chapter or as provided in section 5324(c) of this title.

Notwithstanding any other provision in this chapter, the provision of funds under this chapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this chapter.

**(c) Annual reports**

Not later than May 15 of each year, the Secretary shall prepare and submit to Congress an annual report on the implementation of this chapter. Such report shall include—

(1) an accounting of the total amounts of funds provided for each program and the budget activity for direct program costs and contract support costs of tribal organizations under self-determination;

(2) an accounting of any deficiency in funds needed to provide required contract support costs to all contractors for the fiscal year for which the report is being submitted;

(3) the indirect cost rate and type of rate for each tribal organization that has been negotiated with the appropriate Secretary;

(4) the direct cost base and type of base from which the indirect cost rate is determined for each tribal organization;

(5) the indirect cost pool amounts and the types of costs included in the indirect cost pool; and

(6) an accounting of any deficiency in funds needed to maintain the preexisting level of services to any Indian tribes affected by contracting activities under this chapter, and a statement of the amount of funds needed for transitional purposes to enable contractors to convert from a Federal fiscal year accounting cycle, as authorized by section 5324(d) of this title.

**(d) Treatment of shortfalls in indirect cost recoveries**

(1) Where a tribal organization's allowable indirect cost recoveries are below the level of indirect costs that the tribal organizations should have received for any given year pursuant to its approved indirect cost rate, and such shortfall is the result of lack of full indirect cost funding by any Federal, State, or other agency, such shortfall in recoveries shall not form the basis for any theoretical over-recovery or other adverse adjustment to any future years' indirect cost rate or amount for such tribal organization, nor shall any agency seek to collect such shortfall from the tribal organization.

(2) Nothing in this subsection shall be construed to authorize the Secretary to fund less than the full amount of need for indirect costs associated with a self-determination contract.

**(e) Liability for indebtedness incurred before fiscal year 1992**

Indian tribes and tribal organizations shall not be held liable for amounts of indebtedness attributable to theoretical or actual under-recoveries or theoretical over-recoveries of indirect costs, as defined in Office of Management and Budget Circular A-87, incurred for fiscal years prior to fiscal year 1992.

**(f) Limitation on remedies relating to cost disallowances**

Any right of action or other remedy (other than those relating to a criminal offense) relating to any disallowance of costs shall be barred unless the Secretary has given notice of any such disallowance within three hundred and sixty-five days of receiving any required annual single agency audit report or, for any period covered by law or regulation in force prior to October 19, 1984, any other required final audit report. Such notice shall set forth the right of appeal and hearing to the board of contract appeals pursuant to section 5331 of this title. For the purpose of determining the 365-day period specified in this paragraph, an audit report shall be deemed to have been received on the date of actual receipt by the Secretary, if, within 60 days after receiving the report, the Secretary does not give notice of a determination by the Secretary to reject the single-agency report as insufficient due to noncompliance with chapter 75 of title 31 or noncompliance with any other applicable law. Nothing in this subsection shall be deemed to enlarge the rights of the Secretary with respect to section 5123 of this title.

**(g) Addition to contract of full amount contractor entitled; adjustment**

Upon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under subsection (a) of this section, subject to adjustments for each subsequent year that such tribe or tribal organization administers a Federal program, function, service, or activity under such contract.

**(h) Indirect costs for contracts for construction programs**

In calculating the indirect costs associated with a self-determination contract for a construction program, the Secretary shall take into consideration only those costs associated with the administration of the contract and shall not take into consideration those moneys actually passed on by the tribal organization to construction contractors and subcontractors.

**(i) Indian Health Service and Bureau of Indian Affairs budget consultations**

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).

**(j) Use of funds for matching or cost participation requirements**

Notwithstanding any other provision of law, a tribal organization may use funds provided under a self-determination contract to meet matching or cost participation requirements under other Federal and non-Federal programs.

**(k) Allowable uses of funds without approval of Secretary**

Without intending any limitation, a tribal organization may, without the approval of the

Secretary, expend funds provided under a self-determination contract for the following purposes, to the extent that the expenditure of the funds is supportive of a contracted program:

- (1) Depreciation and use allowances not otherwise specifically prohibited by law, including the depreciation of facilities owned by the tribe or tribal organization.
- (2) Publication and printing costs.
- (3) Building, realty, and facilities costs, including rental costs or mortgage expenses.
- (4) Automated data processing and similar equipment or services.
- (5) Costs for capital assets and repairs.
- (6) Management studies.
- (7) Professional services, other than services provided in connection with judicial proceedings by or against the United States.
- (8) Insurance and indemnification, including insurance covering the risk of loss of or damage to property used in connection with the contract without regard to the ownership of such property.
- (9) Costs incurred to raise funds or contributions from non-Federal sources for the purpose of furthering the goals and objectives of the self-determination contract.
- (10) Interest expenses paid on capital expenditures such as buildings, building renovation, or acquisition or fabrication of capital equipment, and interest expenses on loans necessitated due to delays by the Secretary in providing funds under a contract.
- (11) Expenses of a governing body of a tribal organization that are attributable to the management or operation of programs under this chapter.
- (12) Costs associated with the management of pension funds, self-insurance funds, and other funds of the tribal organization that provide for participation by the Federal Government.

**(l) Suspension, withholding, or delay in payment of funds**

(1) The Secretary may only suspend, withhold, or delay the payment of funds for a period of 30 days beginning on the date the Secretary makes a determination under this paragraph to a tribal organization under a self-determination contract, if the Secretary determines that the tribal organization has failed to substantially carry out the contract without good cause. In any such case, the Secretary shall provide the tribal organization with reasonable advance written notice, technical assistance (subject to available resources) to assist the tribal organization, a hearing on the record not later than 10 days after the date of such determination or such later date as the tribal organization shall approve, and promptly release any funds withheld upon subsequent compliance.

(2) With respect to any hearing or appeal conducted pursuant to this subsection, the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for suspending, withholding, or delaying payment of funds.

**(m) Use of program income earned**

The program income earned by a tribal organization in the course of carrying out a self-determination contract—

(1) shall be used by the tribal organization to further the general purposes of the contract; and

(2) shall not be a basis for reducing the amount of funds otherwise obligated to the contract.

**(n) Reduction of administrative or other responsibilities of Secretary; use of savings**

To the extent that programs, functions, services, or activities carried out by tribal organizations pursuant to contracts entered into under this chapter 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 subsection (a) of this section, 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.

**(o) Rebudgeting by tribal organization**

Notwithstanding any other provision of law (including any regulation), a tribal organization that carries out a self-determination contract may, with respect to allocations within the approved budget of the contract, rebudget to meet contract requirements, if such rebudgeting would not have an adverse effect on the performance of the contract.

(Pub. L. 93-638, title I, §106, as added Pub. L. 100-472, title II, §205, Oct. 5, 1988, 102 Stat. 2292; amended Pub. L. 101-301, §2(a)(8), (9), May 24, 1990, 104 Stat. 207; Pub. L. 101-644, title II, §203(a), Nov. 29, 1990, 104 Stat. 4666; Pub. L. 103-413, title I, §102(14)-(19), Oct. 25, 1994, 108 Stat. 4257-4259; Pub. L. 105-362, title VIII, §801(g), Nov. 10, 1998, 112 Stat. 3288; Pub. L. 106-260, §9, Aug. 18, 2000, 114 Stat. 733; Pub. L. 116-180, title II, §204, Oct. 21, 2020, 134 Stat. 880.)

**Editorial Notes**

**REFERENCES IN TEXT**

This chapter, referred to in subsecs. (a)(1), (3), (b), (c), (k)(11), and (n), was in the original “this Act”, meaning Pub. L. 93-638, Jan. 4, 1975, 88 Stat. 2203, known as the Indian Self-Determination and Education Assistance Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 5301 of this title and Tables.

**CODIFICATION**

Section was formerly classified to section 450j-1 of this title prior to editorial reclassification and renumbering as this section.

**PRIOR PROVISIONS**

A prior section 106 of Pub. L. 93-638 was renumbered section 105 by Pub. L. 100-472 and is classified to section 5324 of this title.

**AMENDMENTS**

2020—Subsec. (a)(3)(A). Pub. L. 116-180, §204(1), substituted “; and” for “, and” in cl. (i) and “expense incurred by the governing body of the Indian Tribe or Tribal organization and any overhead expense incurred” for “expense related to the overhead incurred” in cl. (ii).

Subsec. (a)(3)(B), (C). Pub. L. 116-180, §204(2), (3), added subpar. (B) and redesignated former subpar. (B) as (C).

2000—Subsecs. (c) to (o). Pub. L. 106-260 added subsec. (c) and redesignated former subsecs. (c) to (n) as (d) to (o), respectively.

1998—Subsecs. (c) to (o). Pub. L. 105-362 redesignated subsecs. (d) to (o) as (c) to (n), respectively, and struck out former subsec. (c) which related to Secretary's annual report to Congress on implementation of this chapter.

1994—Subsec. (a)(1). Pub. L. 103-413, §102(14)(A), inserted before period at end “, without regard to any organizational level within the Department of the Interior or the Department of Health and Human Services, as appropriate, at which the program, function, service, or activity or portion thereof, including supportive administrative functions that are otherwise contractable, is operated”.

Subsec. (a)(2). Pub. L. 103-413, §102(14)(B), inserted “an amount for” after “consist of”.

Subsec. (a)(3). Pub. L. 103-413, §102(14)(C), added par. (3) and struck out former par. (3) which read as follows: “Any savings in operation under a self-determination contract shall be utilized to provide additional services or benefits under the contract or be expended in the succeeding fiscal year as provided in section 13a of this title.”

Subsec. (a)(4) to (6). Pub. L. 103-413, §102(14)(C), added pars. (4) to (6).

Subsec. (c). Pub. L. 103-413, §102(15)(A), substituted “May 15” for “March 15” in introductory provisions.

Subsec. (c)(1), (2). Pub. L. 103-413, §102(15)(B), substituted “contract support costs” for “indirect costs”.

Subsec. (c)(6). Pub. L. 103-413, §102(15)(C)-(E), added par. (6).

Subsec. (f). Pub. L. 103-413, §102(16), inserted after second sentence “For the purpose of determining the 365-day period specified in this paragraph, an audit report shall be deemed to have been received on the date of actual receipt by the Secretary, if, within 60 days after receiving the report, the Secretary does not give notice of a determination by the Secretary to reject the single-agency report as insufficient due to non-compliance with chapter 75 of title 31 or noncompliance with any other applicable law.”

Subsec. (g). Pub. L. 103-413, §102(17), added subsec. (g) and struck out former subsec. (g) which read as follows: “Upon the approval of a self-determination contract and at the request of an Indian tribe or tribal organization, the Secretary shall add the indirect cost funding amount awarded for a self-determination contract to the amount awarded for direct program funding for the first year and, subject to adjustments in the amount of direct program costs for the contract, for each subsequent year that the program remains continuously under contract.”

Subsec. (i). Pub. L. 103-413, §102(18), added subsec. (i) and struck out former subsec. (i) which read as follows: “Within one month after October 5, 1988, the Secretary is mandated to establish a team in each area of the Bureau of Indian Affairs which consists of agency personnel (area personnel in the Navajo Area and in the case of Indian tribes not served by an agency) and tribal representatives for the purpose of analyzing the ‘Indian Priority System’ and other aspects of the budgeting and funding allocation process of the Bureau of Indian Affairs for the purpose of making a report to Congress with appropriate recommendations for changes and legislative actions to achieve greater tribal decision-making authority over the use of funds appropriated for the benefit of the tribes and their members. The report along with the analysis, findings and recommendations of the area teams shall be submitted to Congress within six months of October 5, 1988. The Secretary may submit to Congress separate comments on the information and recommendations on the report.”

Subsecs. (j) to (o). Pub. L. 103-413, §102(19), added subsecs. (j) to (o).

1990—Subsec. (e). Pub. L. 101-644 substituted “1992” for “1988”.

Subsec. (f). Pub. L. 101-301, §2(a)(8), substituted “prior to enactment of chapter 75 of title 31” for “prior to enactment of the Single Agency Audit Act of 1984 (chapter 75 of title 31)”, which for purposes of codification was translated as “prior to October 19, 1984”, requiring no change in text.

Subsec. (i). Pub. L. 101-301, §2(a)(9), substituted “agency personnel (area personnel in the Navajo Area and in the case of Indian tribes not served by an agency)” for “agency personnel”.

#### **§ 5326. Indian Health Service: availability of funds for Indian self-determination or self-governance contract or grant support costs**

Before, on, and after October 21, 1998, and notwithstanding any other provision of law, funds available to the Indian Health Service in this Act or any other Act for Indian self-determination or self-governance contract or grant support costs may be expended only for costs directly attributable to contracts, grants and compacts pursuant to the Indian Self-Determination Act [25 U.S.C. 5321 et seq.] and no funds appropriated by this or any other Act shall be available for any contract support costs or indirect costs associated with any contract, grant, cooperative agreement, self-governance compact, or funding agreement entered into between an Indian tribe or tribal organization and any entity other than the Indian Health Service.

(Pub. L. 105-277, div. A, §101(e) [title II], Oct. 21, 1998, 112 Stat. 2681-231, 2681-280.)

#### **Editorial Notes**

##### **REFERENCES IN TEXT**

The Indian Self-Determination Act, referred to in text, is title I of Pub. L. 93-638, Jan. 4, 1975, 88 Stat. 2206, which is classified principally to this subchapter (§5321 et seq.). For complete classification of this Act to the Code, see Short Title note set out under section 5301 of this title and Tables.

##### **CODIFICATION**

Section was enacted as part of the Department of the Interior and Related Agencies Appropriations Act, 1999, and also as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, and not as part of the Indian Self-Determination and Education Assistance Act which comprises this chapter.

Section was formerly classified to section 450j-2 of this title prior to editorial reclassification and renumbering as this section.

#### **§ 5327. Department of the Interior: availability of funds for Indian self-determination or self-governance contract or grant support costs**

Notwithstanding any other provision of law, including but not limited to the Indian Self-Determination Act of 1975, as amended [25 U.S.C. 5321 et seq.], on and after November 29, 1999, funds available to the Department of the Interior for Indian self-determination or self-governance contract or grant support costs may be expended only for costs directly attributable to contracts, grants and compacts pursuant to the Indian Self-Determination Act of 1975 and on and after November 29, 1999, funds appropriated in this title<sup>1</sup> shall not be available for any con-

<sup>1</sup> See References in Text note below.