

# COMPARISON OF TITLES I, IV AND V OF THE INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

## Introduction

This paper discusses the similarities and differences among Titles I, IV, and V of the Indian Self-Determination and Education Assistance Act (ISDEAA or Act), P.L. 93-638, as amended. The 1994 amendments to the Act revised a number of provisions in Title I and included a new Title IV, which implements a permanent Tribal Self-Governance program within the Department of the Interior (DOI). Title V, which repealed the Title III self-governance demonstration project, enacted a permanent self-governance program within the Department of Health and Human Services (DHHS) in 2000.

When reviewing Titles I, IV, and V, it is important to keep in mind that Title I applies only to self-determination contracts with the Secretary of DHHS and the Secretary of the DOI. Titles IV and V are the self-governance programs. Title IV applies only to self-governance compacts and annual funding agreements with the Bureau of Indian Affairs (BIA) and other DOI bureaus such as the Bureau of Reclamation and the National Park Service. Title V applies only to self-governance compacts and funding agreements with the Indian Health Service (IHS).

The general intent behind Titles I, IV and V of the Act is similar: they are designed to implement the congressional policies of enhancing tribal control over programs, functions, services and activities (PFSAs) provided to Indians and Alaska Natives by the federal government; of transferring the responsibility over such PFSAs from the federal government to Indian tribes; and of enhancing the ability of tribal governments to govern their communities.

Although Titles I, IV and V share the same general intent, they differ substantively in significant respects. This memorandum will not discuss all of the differences among these titles. It will focus only on some of the more substantive ones. In addition to focusing on the statutory language, this memorandum also draws from the Title I regulations jointly promulgated by the Departments of Interior and Health and Human Services,<sup>1</sup> the Title IV regulations promulgated by the Department of Interior,<sup>2</sup> and the Title V regulations promulgated by the Department of Health and Human Services.<sup>3</sup>

An interesting feature of both Title IV and V is that they permit tribes to include any provision of Title I in their agreements if they so choose. Section 403(l) of the Act requires that, at tribal option, any and all Title I provisions may be included in Title IV agreements,<sup>4</sup> and similarly, section 516(b) provides that Title I provisions can be included in Title V agreements at tribal option, so long as such provisions do not conflict with Title V.<sup>5</sup> The question of whether any provision of Title I conflicts with Title IV has yet to be addressed by the BIA, however.

---

<sup>1</sup> 25 C.F.R. § 900.

<sup>2</sup> 25 C.F.R. § 1000.

<sup>3</sup> 42 C.F.R. §§ 136-137.

<sup>4</sup> See also 25 C.F.R. § 1000.84.

<sup>5</sup> See also 42 C.F.R. § 137.46.

## Titles V and VI

The "Tribal Self-Governance Amendments of 2000" make the self-governance demonstration project in Title III of the ISDEAA a permanent program in the DHHS. The bill was signed into law by the President on August 18, 2000. The legislation repeals Title III and enacts titles V and VI. Title V establishes a permanent self-governance program for IHS within DHHS and Title VI directs the DHHS Secretary to examine the feasibility of applying Title V to other agencies in the DHHS.

Title V retains Title III's broad goals of strengthening tribal sovereignty and the principles of Indian self-determination, as well as promoting the federal government's government-to-government relationship with tribes. The provisions of Title V are much more comprehensive than those in Title III, however, and were drafted to address up front many of the problems that tribal leaders have run into as they have sought full implementation of Title IV. Title V also makes several very important amendments to Title I of the ISDEAA:

1. Section 6 of the 2000 Amendments amends section 102(e)(1) of Title I to make clear that in any civil action under section 110 of the Act (federal district court actions), the Secretary has the burden of proof to establish the validity of his grounds for declining a proposal.<sup>6</sup>
2. Section 7 amends section 105(k) of Title I to provide that tribes and tribal organizations are "part of the Indian Health Service" for federal property acquisition purposes. This change should allow tribes and tribal organizations to use the Veterans Administration Prime Vendor as a source of supplies as it was intended. However, this provision has not yet been fully implemented by the federal agencies. Section 105(k) is also amended to require the Secretary to enter into acquisition agreements with tribes for goods available to GSA or other federal agencies, but currently not available to tribes.
3. Section 8 adds a new section 105(o) to Title I, allowing tribes to designate patient records as federal records in order to make those records eligible for storage in Federal Records Centers.<sup>7</sup>
4. Finally, Section 9 reinstates section 106(c) of Title I, a provision requiring the Secretaries of DHHS and DOI to prepare and submit to Congress an annual report on the implementation of the ISDEAA.

---

<sup>6</sup> See also 25 C.F.R. § 900.163.

<sup>7</sup> See also 42 C.F.R. § 137.178.

## Comparison of Titles I, IV, and V of the ISDEAA

### A. Eligibility/Participation

Title I. All tribes (and tribal organizations authorized by tribes) have the right to submit a contract proposal to either the Secretary of DHHS or DOI for review under section 102.<sup>8</sup> Section 102 sets out a detailed process which the Secretaries must follow when reviewing a contract proposal.<sup>9</sup> The section requires the Secretaries to either decline or approve a proposal within 90 days of submission using specific statutory standards.<sup>10</sup> If a proposal is approved, the agencies must award a contract by the 90th day.<sup>11</sup> The section also describes certain appeal rights available to a tribe that has had its proposal declined, including a right to a formal hearing.<sup>12</sup>

Title IV. Section 402 permits the Secretary of the Interior to select up to 50 tribes per year to participate in the Interior self-governance program.<sup>13</sup> A consortium of tribes may participate if each member tribe requests participation.<sup>14</sup> The qualified applicant pool for the program is to consist of each tribe that successfully completes the planning phase, has requested participation by resolution or other official action of the tribal governing body, and has demonstrated financial stability and financial management capability for the previous three fiscal years.<sup>15</sup>

Title V. Section 503 permits each existing Title III tribe to participate in self-governance under Title V instead. In addition to tribes and consortia transitioning from Title III to Title V, an additional 50 eligible tribes per year are entitled to participate in Title V.<sup>16</sup> Like Title IV, eligible tribes are those that have completed a planning phase, requested entry into the program and demonstrated for three years financial stability and financial management capability.<sup>17</sup> However, Title V adds that evidence of the absence of uncorrected significant and material audit exceptions in the required annual audit is conclusive evidence of financial stability and capability.<sup>18</sup>

Title V provides tribes with a right of "final offer" in compact and funding agreement negotiations where the Secretary and participating tribe cannot agree on the terms of a compact or funding agreement, including funding levels. The final offer must be submitted to the

---

<sup>8</sup> 25 C.F.R. §§ 900.6-900.7.

<sup>9</sup> See also 25 C.F.R. §§ 900.14-900.19.

<sup>10</sup> See also 25 C.F.R. § 900.16.

<sup>11</sup> 25 C.F.R. § 900.18.

<sup>12</sup> As noted above, Section 6 of the Tribal Self-Governance Amendments of 2000 amends Section 102(e) to clarify that in any civil action under Section 110 (federal district court actions), the Secretary has the burden of proof to establish the validity of his grounds for declining a proposal. See 25 C.F.R. §§ 900.20-900.33.

<sup>13</sup> See also 25 C.F.R. § 1000.15.

<sup>14</sup> 25 C.F.R. § 1000.2.

<sup>15</sup> 25 C.F.R. § 1000.17.

<sup>16</sup> 42 C.F.R. § 137.15.

<sup>17</sup> 42 C.F.R. § 137.18.

<sup>18</sup> See also 42 C.F.R. § 137.22.

Secretary, who has no more than 45 days (or longer if agreed to by the tribe) to make a determination on the offer. If the final offer is not properly or timely rejected, it is deemed approved.<sup>19</sup> The Secretary's rejection of a final offer must be contained in a written notification based on a finding, supported by controlling legal authority, that the funding level request exceeds what is due, that the requested program is an inherent federal function (defined in section 501(a)(4)), that the tribe cannot carry out the requested program without creating a risk to public health, or that the tribe is ineligible to participate in self-governance.<sup>20</sup>

If a final offer is rejected, Title V provides that tribes may appeal the Secretary's decision in a hearing on the record.<sup>21</sup> The burden of proof is on the Secretary to justify the denial.<sup>22</sup> Title V also provides that the tribe could instead proceed directly to Federal district court pursuant to section 110 of Title I.<sup>23</sup>

When a final offer is rejected, the Secretary must agree to all severable portions of a "final offer" that do not justify a rejection and provide the tribe with an option to enter into a partial compact or funding agreement, subject to any additional changes necessary to conform the compact or funding agreement to the severed portions.<sup>24</sup> A tribe that enters into such a partial agreement retains the right to appeal the Secretary's rejection.<sup>25</sup>

## B. Reporting Requirements

Title I. Under section 5(f), contractors are required to submit an annual audit report to the Secretary under the Single Audit Act (SAA), 31 U.S.C. § 7501 et seq. The SAA requires that all non-federal entities that expend \$300,000 or more of federal funds per year complete an annual audit in conformity with the SAA. Further, the section requires that tribal contractors report any additional information concerning the conduct of the contract activity that the tribe and Secretary have negotiated.<sup>26</sup> Any disagreements over reporting requirements are subject to the declination criteria and procedures set out in section 102 of the Act.<sup>27</sup>

Section 9 of the Tribal Self-Governance Amendments of 2000 reinstates section 106(c) of Title I, which requires the Secretaries of DHHS and DOI to prepare and submit to Congress an annual report on the implementation of the ISDEAA.

---

<sup>19</sup> Section 507(b); *see also* 42 C.F.R. §§ 137.130-137.138.

<sup>20</sup> Section 507(c)(1)(A); *see also* 42 C.F.R. §§ 137.140-137.141.

<sup>21</sup> 42 C.F.R. § 137.146.

<sup>22</sup> Section 507(c)(1)(C) and (d); *see also* 42 C.F.R. § 137.150.

<sup>23</sup> Section 507(c)(1)(C); *see also* 42 C.F.R. § 137.146.

<sup>24</sup> Section 507(c)(1)(D); *see also* 42 C.F.R. § 137.147.

<sup>25</sup> 42 C.F.R. § 137.148.

<sup>26</sup> The 1994 amendments significantly decreased the amount of reporting that tribal contractors are required to provide the agencies. The amendments failed, however, to extend these reduced reporting requirements to mature contractors. Thus, mature contractors presently have more reporting requirements than non-mature contractors under the Act. We believe that this result was unintended and will eventually be corrected by Congress.

<sup>27</sup> See footnote above regarding the amendment to Section 102(e).

Title IV. Section 5(f) also applies to Title IV self-governance participants, requiring compliance with the SAA, which requires that all non-federal entities that expend \$300,000 or more of federal funds per year complete an annual audit in conformity with the SAA.<sup>28</sup>

Section 405 requires the Secretary to submit an annual report to Congress on the administration of the program.<sup>29</sup> The report is to identify the relative costs and benefits of the program; funds related to the provision of services to tribes and their members; and the corresponding reduction in the federal bureaucracy. The report should also include the separate views of the tribes and the funding formula for tribal shares of central office funds.

The Secretary is also required to report on non-BIA programs. He/she must produce a list of all programs, services, functions, and activities, or portions thereof, administered by DOI bureaus other than the BIA that the Secretary determines, with the concurrence of self-governance tribes, are eligible for inclusion in self-governance agreements. The list, together with programmatic targets to encourage participation by Interior bureaus in the program, is required to be published in the Federal Register annually prior to January 1.<sup>30</sup>

Title V. Under Section 506, the SAA expressly applies to Title V agreements.<sup>31</sup> Under Section 507, a Title V agreement must include a negotiated provision requiring the tribe “to report on health status and service delivery” if several conditions are met: the requested information is not otherwise available to the Secretary, funds are specifically provided to the tribe for reporting, reporting imposes only minimal burdens on the tribe, and the reporting requirements are promulgated in Title V regulations.<sup>32</sup> For construction activities, tribes must provide “project progress and financial reports not less than semiannually.”<sup>33</sup>

If the Secretary and the Tribes disagree about the reporting requirements, the disagreement is subject to the “final offer” process.<sup>34</sup> As discussed above, if the Secretary rejects the final offer, the tribe may either appeal the Secretary’s decision in an administrative hearing on the record or may proceed to Federal district court.

Section 514 requires the Secretary to submit an annual report to Congress with a “detailed analysis of the level of need being presently funded or unfunded for each Indian tribe.”<sup>35</sup> As with Title IV, the Secretarial report is to include the relative costs and benefits of the program, the funds transferred to tribes and the corresponding reduction in the federal bureaucracy, funds related to the provision of services to tribes and their members, and the funding formula for central office tribal shares.<sup>36</sup> Unlike the previous self-governance titles, Title V requires the Secretary to identify the funds expended to carry out inherent federal

---

<sup>28</sup> 25 C.F.R. § 1000.394.

<sup>29</sup> *See also* 25 C.F.R. § 1000.381.

<sup>30</sup> *See* 25 C.F.R. §§ 1000.131-1000.132 (explaining the procedures used by the Secretary to promulgate the annual list of eligible programs).

<sup>31</sup> *See also* 42 C.F.R. § 137.165.

<sup>32</sup> *See also* 42 C.F.R. §§ 137.200-137.207.

<sup>33</sup> Section 509; *see also* 42 C.F.R. § 137.351.

<sup>34</sup> Sections 507(b) and(c).

<sup>35</sup> *See also* 42 C.F.R. § 137.405.

<sup>36</sup> 42 C.F.R. § 137.407.

functions in the previous year “by type and location.”<sup>37</sup> Additionally, the annual report shall contain a description of the method used to determine individual tribal shares for self-governance agreements.<sup>38</sup> This tribal shares methodology is also the subject of a separate report that the Secretary is required to provide to Congress within 180 days of enactment of the title. The Secretary's report does not have to be based on “mutually determined baseline measurements” as did reports under Title III.

### C. Scope of Contractibility/Compactibility

Title I. Section 102 provides authority for tribes, or tribal organizations sanctioned by tribes, to plan, conduct and administer PFSAs provided to the Indians and Alaska Natives by DOI or DHHS under certain laws.<sup>39</sup> Tribes have the right to include in contracts certain administrative functions that support the delivery of PFSAs to Indians and Alaska Natives without regard to organizational level or the “office” or “agency” of DHHS or DOI where they are performed.

Additionally, section 102(a)(2)(E) provides that the scope of the contract, *i.e.*, what PFSAs may be included in a contract, is subject to the declination procedures.<sup>40</sup> The federal agency may decline to include a PFSA in a contract on the grounds that it is not subject to section 102 because the PFSA cannot be lawfully carried out by the contractor.<sup>41</sup> The contractor has the right to appeal this decision under the declination procedures.<sup>42</sup>

Title IV. Section 403(b)(1) authorizes a participating tribe to plan, conduct, consolidate, and administer PFSAs, or portions thereof, administered by the BIA, without regard to the agency or office of the BIA within which the PFSAs are performed.<sup>43</sup> These include functions performed at the agency, area or central office level, and those administered by the agency under the authority of the Johnson-O'Malley Act of April 16, 1934 (relating to contracts for education, medical attention, relief and social welfare), the Snyder Act of November 2, 1921 (authorizing specific federal services to Indians), and those that are otherwise available to tribes or Indians for which appropriations are made to agencies other than the DOI.<sup>44</sup> They do not include, however, any functions related to the Tribally Controlled Community College Assistance Act of 1978 (25 U.S.C. § 1801 *et seq.*), to BIA-funded elementary and secondary schools (25 U.S.C. § 2001 *et seq.*) or the Flathead Agency Irrigation Division or the Flathead Power Division.

Section 403(b)(2) permits agreements to plan, conduct, consolidate and administer PFSAs, or portions thereof, administered by DOI, other than through the BIA, that are

---

<sup>37</sup> *Id.* at 137.407(e).

<sup>38</sup> *Id.* at 137.407(d).

<sup>39</sup> These include PFSAs related to the Tribally Controlled Community College Assistance Act of 1978 (25 U.S.C. § 1801 *et seq.*), to BIA-funded elementary and secondary schools (25 U.S.C. § 2001 *et seq.*) and the Flathead Agency Irrigation Division or the Flathead Power Division. All PFSAs related to these statutes are excluded from those that are compactible under Title IV. Section 403(b)(3). Title I may apply to DHHS programs other than IHS. Little attention has been given to this possibility by tribes.

<sup>40</sup> *See also* 25 C.F.R. § 900.22.

<sup>41</sup> *Id.*

<sup>42</sup> 25 C.F.R. § 900.31.

<sup>43</sup> *See also* 25 C.F.R. § 1000.86.

<sup>44</sup> *Id.*

“otherwise available” to Indian tribes or Indians.<sup>45</sup> This provision may not be construed to provide any tribe with a preference to administer a particular PFSA unless such preference is otherwise provided by law. Non-BIA Interior bureaus have concluded that almost none of their programs may be included as a right by Indian tribes under this provision. In other words, the DOI believes that it retains discretion over whether DOI programs administered through non-BIA bureaus may be included in self-governance agreements.

Additionally, the parties can agree to include in self-governance agreements other PFSAs, or portions thereof, administered by the Secretary of the Interior that are of “special geographic, historical, or cultural significance” to the Indian tribe requesting an agreement.<sup>46</sup> Finally, the Secretary is directed to interpret federal laws and regulations in a manner that will facilitate the implementation of agreements and the inclusion of PFSAs in such agreements.

Title V. Title V requires that the Secretary negotiate and enter into funding agreements that authorize participating tribes to “plan, conduct, consolidate, administer, and receive full tribal share funding,” including IHS competitive grants (not earmarked), for all PFSAs “that are carried out for the benefit of Indians because of their status as Indians” without regard to the DHHS agency or office where the program is performed.<sup>47</sup> Title V also authorizes contracting for programs that are “for the benefit of Indians,” but the scope of that term has given rise to disagreements between the agency and the tribes. Under Section 505(b), PFSAs refers to all IHS programs “where Indian tribes or Indians are primary or significant beneficiaries.”

Title V significantly strengthens tribal rights in comparison with Title IV in that it includes declination appeal procedures similar to Title I, limiting the Secretary’s discretion not to enter into an agreement.<sup>48</sup> As discussed above, Title V provides a tribal right of “final offer” in compact and funding agreement negotiations.<sup>49</sup> If the final offer is not timely and properly rejected, it is deemed approved.<sup>50</sup> The Secretary’s rejection must be based on a finding, supported by controlling legal authority, that the funding level request exceeds what is due, that the requested program is an inherent federal function (as defined in section 501(a)(4)), that the tribe cannot carry out the requested program without creating a risk to public health, or that the tribe is ineligible to participate in self-governance.<sup>51</sup> Tribes have a right of appeal with full discovery, and the burden of proof is on the Secretary to justify his rejection of the “final offer.”<sup>52</sup> Title V provides that instead of participating in an administrative appeal, the tribe may directly proceed with a court action in federal district court pursuant to Section 110 of Title I.<sup>53</sup>

---

<sup>45</sup> See also 25 C.F.R. § 1000.122.

<sup>46</sup> 25 C.F.R. § 1000.125.

<sup>47</sup> Section 505(b)(1); see also 42 C.F.R. § 137.41.

<sup>48</sup> Section 507(b), (c) & (d); see also 42 C.F.R. §§ 137.140-137.142.

<sup>49</sup> See 42 C.F.R. §§ 137.130-137.155.

<sup>50</sup> 42 C.F.R. § 137.136.

<sup>51</sup> 42 C.F.R. § 137.140.

<sup>52</sup> 42 C.F.R. § 137.146.

<sup>53</sup> *Id.*

#### D. Applicable Standards

Title I. Section 102(a)(2) requires that contract proposals include the standards under which the tribe will operate the programs, services, activities, or functions that are included in the proposal.<sup>54</sup> Standards that are applicable to construction contracts are discussed later in this paper. The provision makes clear that the program standards proposed by a contractor may only be rejected by the federal agencies in accordance with the declination procedures.<sup>55</sup> Applicable standards are to be included in the contract.<sup>56</sup>

Title IV. For construction agreements, Section 403(e)(2) requires that the Secretary include proper health and safety standards.<sup>57</sup> Otherwise, there are no provisions in Title IV which require that standards be included in compacts or annual funding agreements. Presumably, some compacting tribes may choose to identify applicable standards in their annual funding agreements.

Title V. For construction projects, Section 509(c) requires that the Secretary and tribe agree upon and specify appropriate building codes and architectural/engineering standards, including health and safety standards, which must conform with nationally recognized standards for comparable projects.<sup>58</sup>

For investment of self-governance funds, Title V requires that tribes manage the funds using the prudent investment standard.<sup>59</sup> In comparison, section 111 of the DOI appropriations, P.L. 106-113, which does not apply to Title V funds, places limitations on how tribes, tribal organizations and consortia can invest fiscal year 2000 ISDEAA funds. Section 111's limitations on investments do not, however, set forth a standard for investing.

#### E. Rights Relating To Federal Property

Title I. Section 105(f) relates to the Secretaries' authority to donate and transfer property to tribal contractors.<sup>60</sup> Section 105(f)(1) permits the agencies to enter into agreements with tribal contractors that allow the contractors to use existing government real property and personal property in carrying out contracts under Title I.

Under section 105(f)(2)(A), title to government-furnished property and to property purchased under a self-determination contract or grant vests in the contractor unless the contractor requests otherwise.<sup>61</sup> On its face, this provision applies to real as well as personal property, although the transfer of title to real property would need to be completed through compliance with applicable provisions of state law. It is important for tribes, in case they do not wish to take title to property under this provision, to make clear their intention not to do so.

---

<sup>54</sup> See also 25 C.F.R. § 900.8.

<sup>55</sup> 25 C.F.R. § 900.16.

<sup>56</sup> 25 C.F.R. § 900.8.

<sup>57</sup> See also 25 C.F.R. § 1000.243.

<sup>58</sup> See also 42 C.F.R. § 137.328.

<sup>59</sup> Section 508(h); see also 42 C.F.R. § 137.101.

<sup>60</sup> See also 25 C.F.R. §§ 900.85-900.107.

<sup>61</sup> See also 25 C.F.R. § 900.91.

Section 105(f)(2) also provides that the Secretary may donate to a contractor title to any excess government personal or real property.<sup>62</sup> However, if an item of property has a value in excess of \$5,000 at the time a contract or grant is terminated, rescinded or retroceded, title to such property reverts to the government at its option and any donated or purchased property is eligible for replacement on the same basis as if the government had title to it (but this provision does not apply to funds for repair).<sup>63</sup>

Section 107(a)(1) limits the topics on which the Secretary may promulgate regulations. Regulations for property donation procedures arising under section 105(f) are permitted and in place.<sup>64</sup>

Title IV. Section 406(c) specifically makes the property provisions in section 105(f) applicable to Title IV compacts and annual funding agreements.

Title V. Section 512(c) includes the same property provisions as section 105(f) of Title I, except that Title V makes mandatory certain provisions that are permissive under Title I.<sup>65</sup>

#### F. Right to Redesign Programs and Reallocate Contract/Compact Funds

Title I. Section 105(j) gives a contractor the right to propose to redesign non-construction PFSAAs included in a contract, including non-statutory program standards, to make them more responsive to the population being served. The appropriate Secretary must be notified of the tribe's intent to redesign. A proposal to redesign must be evaluated by the Secretary under the declination criteria and procedures set forth in section 102.<sup>66</sup> Section 106(o)<sup>67</sup> authorizes contractors, with respect to allocations within the approved budget of the contract, to re-budget funding allocations if such re-budgeting would not have an adverse effect on the performance of the contract.

Thus, Title I gives the agencies a limited review function over proposals to redesign, subject to the criteria and procedures in section 102. With respect to reallocation of funds under Title I, however, the agency is not given that review function. Discretion is left with the contractor to determine when reallocation is necessary to meet contract requirements and whether re-budgeting will affect contract performance. Of course, a re-budgeting that adversely affects the contractor's ability to perform may be met by a reassumption action on the part of the federal agency.

Title IV. Section 403(b)(3) authorizes a tribe, subject to the terms of the funding agreement, to redesign or consolidate PFSAAs and to reallocate funds for DOI PFSAAs.

---

<sup>62</sup> See also 25 C.F.R. §§ 900.101-900.103.

<sup>63</sup> 25 C.F.R. § 900.100.

<sup>64</sup> See 25 C.F.R. §§ 900.85-900.107.

<sup>65</sup> See 42 C.F.R. § 137.215.

<sup>66</sup> 25 C.F.R. § 900.32.

<sup>67</sup> Note that because Section 9 of the Tribal Self-Governance Amendments of 2000 reinstated Section 106(c), all sections following it have been renumbered (i.e. section 106(k) has become section 106(l)).

Reallocation, consolidation or redesign of self-governance programs that are administered by the DOI other than through the BIA are subject to Secretarial approval.<sup>68</sup>

Title V. Section 506(e) is similar to section 403(b)(3) in that it authorizes tribes to redesign or consolidate PFSAs and reallocate or redirect funds for such PFSAs “in any manner which the Indian tribe deems to be in the best interest of the health and welfare of the Indian community being served,” if such action does not result in denying eligibility for services to groups that would otherwise be eligible for service under federal law.<sup>69</sup> The provision includes no Secretarial right to review.

## G. Construction Activities

Title I. Section 4(m) defines the term “construction contract” as any fixed price or cost reimbursement contract for construction projects, excluding contracts that are limited to providing planning and construction management services or a combination thereof, Housing Improvement Program contracts, roads maintenance contracts, and contracts for health facilities maintenance and improvement activities.<sup>70</sup> These other activities may be contracted under regular Title I provisions rather than the construction contract provisions.<sup>71</sup> Section 7(a) provides that tribes or tribal organizations, as contractors or subcontractors under the ISDEAA, are exempt from the requirements of the Davis-Bacon Act with respect to wage levels paid for construction-related work when the work is performed by contractor employees.<sup>72</sup>

Section 102(a)(2)(E) specifies the standards that must be included in construction contract proposals as follows: use of licensed and qualified architects, applicable health and safety standards, and adherence to applicable federal, state, local and tribal building codes and engineering standards.<sup>73</sup>

Section 105(a)(3)(A) explains that provisions of the Federal Procurement Policy Act and Federal Acquisition Regulations (FARs) shall only apply to construction contracts or subcontracts to the extent necessary to ensure the following: (1) that the contract is carried out in a satisfactory manner, (2) that it is directly related to the construction activity, and (3) that it is not inconsistent with the Act.<sup>74</sup> Section 105(a)(3)(B) specifies that a list of applicable requirements conforming to section 105(a)(3)(A) must be attached to the contract.<sup>75</sup>

Finally, section 105(a)(3)(C) lists a number of federal laws and executive orders that shall not automatically apply to construction contracts under the Act. The effect of this section is that a variety of federal laws will apply only if they meet the requirements of section 105(a)(3) and are listed in the contract.

---

<sup>68</sup> 25 C.F.R. § 1000.144,

<sup>69</sup> See also 42 C.F.R. § 137.185.

<sup>70</sup> See also 25 C.F.R. § 900.113(a).

<sup>71</sup> 25 C.F.R. § 900.110(2).

<sup>72</sup> See also 25 C.F.R. § 900.125(c)(4).

<sup>73</sup> See also 25 C.F.R. § 900.125(a) (listing the standards under which the contractor proposes to operate the contract).

<sup>74</sup> See also 25 C.F.R. § 900.115(b)(1).

<sup>75</sup> See also 25 C.F.R. § 900.115(b)(2).

Section 105(m) contains a number of special requirements for construction contracts. Section 105(m)(1) specifies that several sections of the Act are not automatically applicable to construction contracts: section 102(a)(2) (relating to the declination of a contract proposal); section 106(l) (relating to cost principles); section 108 (setting out model contract provisions); and section 109 (dealing with Secretarial reassumption of programs).<sup>76</sup> Note, however, that if the parties are unable to develop a mutually agreeable contract proposal, a tribe may submit a final proposal which the Secretary must approve or decline within 30 days in accordance with section 102 and declination criteria.<sup>77</sup>

Section 105(m)(2) explains that the Secretary must, within 30 days of receipt of a request from a tribe or tribal organization interested in submitting a proposal for a construction project, provide all available information that relates to the request.<sup>78</sup> Section 105(m)(3) describes a number of issues that, at the request of an interested tribe or tribal organization, must be covered during a pre-contract negotiation phase prior to the finalization of the contract.<sup>79</sup>

Section 105(m)(4) addresses a number of other issues relating to the funding of construction contracts.<sup>80</sup> In determining the contract funding level, the Secretary must provide reasonable funds for general administration costs and a reasonable profit.<sup>81</sup> The overall price for the contract must be reasonable and fair to the parties and take into account all of the costs that a contractor would incur to perform under the contract.<sup>82</sup>

Title IV. Section 403(e) controls construction projects.<sup>83</sup> Paragraph (1) provides that the Secretary and a tribe may negotiate the inclusion of certain provisions of the Office of Federal Procurement and Policy Act and Federal Acquisition Regulations in any annual funding agreement.<sup>84</sup> If those provisions and regulatory requirements are not included in the final agreement, they do not apply.<sup>85</sup> Paragraph (2) provides that in all construction projects the Secretary shall ensure that proper health and safety standards are provided for in the annual funding agreement.<sup>86</sup> Title IV contains no limitations on the type of construction project that can be included in a Title IV compact.<sup>87</sup>

---

<sup>76</sup> See also 25 C.F.R. § 900.137 (listing other subparts that do not apply to construction contracts).

<sup>77</sup> 25 C.F.R. § 900.123.

<sup>78</sup> See also 25 C.F.R. § 900.122(a).

<sup>79</sup> See also 25 C.F.R. § 900.122(b).

<sup>80</sup> See also 25 C.F.R. §§ 900.127-900.129.

<sup>81</sup> See 25 C.F.R. § 900.128 (enumerating what funding the Secretary must provide).

<sup>82</sup> 25 C.F.R. §§ 900.127-900.129.

<sup>83</sup> See also 25 C.F.R. §§ 1000.240-1000.256.

<sup>84</sup> See also 25 C.F.R. § 1000.242.

<sup>85</sup> *Id.*

<sup>86</sup> See also 25 C.F.R. § 1000.243.

<sup>87</sup> But see 25 C.F.R. § 1000.240 (defining what programs and activities are not “construction programs and activities”).

Title V. Section 509(a)-(e) addresses the carrying out of construction projects under Title V.<sup>88</sup> It authorizes tribes to conduct construction activities provided they agree to assume federal responsibilities under the National Environmental Policy Act and the Historic Preservation Act and related laws that would apply if the Secretary were to undertake a construction project.<sup>89</sup> Also, tribes are required to accept federal court jurisdiction for enforcement of such laws.<sup>90</sup> Tribes must negotiate in accordance with section 105(m) and must adopt building codes, architectural/engineering standards, and health and safety standards that conform with nationally recognized standards.<sup>91</sup> Finally, tribes are required to assume responsibility to complete the construction project.<sup>92</sup> Funding may be in the form of annual or semi-annual advance payments, at tribal option.<sup>93</sup>

Title V provides the Secretary with the right to review planning and design documents prior to work commencing and to review significant changes in scopes of work.<sup>94</sup> Tribes must provide project and financial reports semi-annually and the Secretary has the right to semi-annual on-site visits.<sup>95</sup>

Consistent with Section 7(a) of the ISDEAA, Title V makes the Davis-Bacon wage requirements generally applicable to construction under Title V, and clarifies that it does not apply if a tribe or tribal organization performs the work itself.<sup>96</sup> Federal procurement laws and regulations do not apply unless the tribe agrees, under Sections 509(h) and 510, which is different from Title I (under which such procurement laws and regulations apply only if they expressly state that they apply to Indian tribes).<sup>97</sup>

“Construction management services” can be included in a funding agreement, but such services are not subject to Section 509, which governs all other Title V construction projects.

## H. Funding

Title I. Section 106(a)(1) states that the amount of funds provided under a contract shall not be less than the Secretary would have spent on the PFSA regardless of the organizational level within the Department at which it is operated.

Section 106(a)(2) requires the Secretary to add to the funding level required by section 106(a)(1) contract support costs:

---

<sup>88</sup> See also 42 C.F.R. §§ 137.270-137.379.

<sup>89</sup> 42 C.F.R. § 137.285.

<sup>90</sup> 42 C.F.R. § 137.310.

<sup>91</sup> 42 C.F.R. § 137.328.

<sup>92</sup> 42 C.F.R. § 137.350.

<sup>93</sup> 42 C.F.R. § 137.341.

<sup>94</sup> 42 C.F.R. §§ 137.360-137.361.

<sup>95</sup> Section 509(f); see also 42 C.F.R. § 137.351.

<sup>96</sup> Section 509(g); see also 42 C.F.R. §§ 137.378-137.379.

<sup>97</sup> See 42 C.F.R. 137.377.

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 out 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.

Section 106(a)(3) specifies that the contract support costs that are eligible costs for the purpose of funding under the Act must include the cost of reimbursing a contractor for reasonable and allowable costs of direct program expenses, and additional administrative or other overhead expenses related to the operation of the PFSA contained in the contract. However, such funds must not duplicate other funding under section 106(a)(1) of the Act. We think that the reference to “direct program expenses” is intended to make clear that the funding mandated by section 106(a)(2) may cover “direct” as well as “indirect” costs (in accordance with existing IHS guidelines).

Section 106(a)(5) clarifies that during the first year that a self-determination contract is in effect, the amount of funds provided to the contractor shall include start-up costs consisting of certain reasonable costs that have or will be incurred by the contractor on a one-time basis.

Section 106(k) clarifies applicable cost principles by listing specific purposes for which a contractor may expend contract funds without approval from the Secretary. The section lists 12 items of cost for which a tribe may expend contract funds without advance approval.

Section 106(l) permits the Secretary to delay, suspend or withhold payments under a contract for a period of 30 days if a determination is made that the contractor has failed to substantially carry out the contract without good cause. In such cases, the Secretary is required to provide the contractor with advance written notice and technical assistance to overcome the problem, and a hearing on the record no later than 10 days after the determination (unless the contractor agrees to a different date). Upon compliance, the Secretary must promptly release any funds withheld. If a hearing is held under this section, the Secretary has the burden of proof to clearly demonstrate the validity of the grounds for suspending, withholding, or delaying the payment of funds. BIA guidelines deviate from this requirement by providing suspension of payments without a hearing as a penalty for late filing of audits.

Section 106(m) requires a contractor to use any “program income” generated in the course of carrying out a contract to further the general purpose of the contract. Such income cannot be a basis for reducing the amount of funds provided by the Secretary under the contract.

The model contract in section 108(1)(b)(6)(B) provides for a variety of payment systems that tribes can choose to apply, including a single annual lump-sum payment, and requires the first payment to be made no later than 10 calendar days after the date OMB apportions the funds to the agency. Section 108(1)(b)(6)(B)(iii) requires the government to pay interest under the Prompt Payment Act on late payments under a Title I contract.

Title IV. Section 403(g)(3) states that funds shall be provided in an amount equal to the amount the contractor would have been eligible to receive under contracts and grants under the

Act.<sup>98</sup> These funds include direct program costs, contract support costs and any funds that are specifically or functionally related to the provision by the Secretary of services and benefits to the tribe or its members, without regard to the organizational level within the Department.<sup>99</sup>

Section 403(g)(4) explains that funds for trust services to individual Indians are available under an annual funding agreement only to the extent that the same services that would have been provided by the Secretary are provided to individual Indians by the self-governance tribe.<sup>100</sup>

Annual or semi-annual payment is authorized by section 403(g)(2). The Prompt Payment Act is not made expressly applicable. Title IV does not have provisions similar to several in section 106 that affect a contracting tribe's ability to use contract funds. For example, Title IV has no provision similar to section 106(l), which permits the Secretary to delay payments under a contract under certain circumstances, and it has no provision similar to section 106(m), which requires contractors to use program income to further the general purpose of the contract. These Title I provisions, however, may be negotiated as compact or annual funding agreement terms.

Title IV also does not have a provision comparable to section 106(k) of Title I that relates to allowable cost expenditures. The costs listed in section 106(k) are based on a list of costs contained in a July 16, 1991 letter from the OMB to the DOI. The letter sets out a number of cost principles that deviate from existing OMB Circulars and explains that they apply to compacting tribes. The list of cost principles in section 106(k) includes all of the principles listed in OMB's July 16, 1991 letter. Section 106(k)'s list includes several principles (e.g., costs for capital assets and repairs and costs associated with management studies) that were not in OMB's July letter. Section 403(l) of the Act now gives tribes the option of including the provisions of section 106(k) in a compact or annual funding agreement.

Title V. The funding provisions of Title V are functionally the same as those under Title IV.<sup>101</sup> Title V includes the same restrictions on reductions of funding that apply under Title I.<sup>102</sup> Title V also authorizes stable base funding at tribal option, specifying transfer of recurring funds, subject to change only with certain congressional appropriations actions.<sup>103</sup> Section 508(a) requires that payment be made within 10 days of apportionment by OMB to the Department, unless otherwise agreed,<sup>104</sup> and Section 508(g) makes the Prompt Payment Act applicable to agreements under Title V.<sup>105</sup>

## I. Contents of Agreements

Title I. One of the most significant provisions of Title I is the model contract set out in section 108. The model contract contains provisions that Congress requires be present in all contracts. Some of the provisions must be included in the contracts exactly as mandated by

---

<sup>98</sup> See also 25 C.F.R. § 1000.137.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Section 508(c); see also 42 C.F.R. §§ 137.75-137.90.

<sup>102</sup> Section 508(d); see also 42 C.F.R. § 137.86.

<sup>103</sup> Section 505(g); see also 42 C.F.R. §§ 137.120-137.124. .

<sup>104</sup> 42 C.F.R. § 137.76.

<sup>105</sup> 42 C.F.R. § 137.96.

Congress and others permit contractors to select certain options (e.g., payment method). Section 108 also permits the agencies and contractors to negotiate and add mutually acceptable provisions to the contract.

Many of the provisions in the model contract implement provisions in Title I in a manner that is beneficial to contractors. Some of the provisions extend to contractors benefits that were previously only available under the Title III demonstration program. For example, as already noted, section 108(l)(b)(6)(B) permits a contractor to receive payments under a contract in quarterly, semi-annual or annual lump sum payments. Payments can also be received according to “any other method of payment authorized by law.” Any interest earned on lump sum payments may be retained and spent by the contractor, and it is not accountable to the agency for the use of such interest.<sup>106</sup>

Other provisions in the model contract give rights to contractors that are not presently available to Title IV self-governance tribes. For example, section 108(l)(b)(6)(B)(iii) specifically makes the Prompt Payment Act, which requires agencies to pay interest on late payments, applicable to the payment of funds under Title I contracts. Again, we note, however, that section 403(l) provides self-governance tribes the option to include “any and all” provisions of Title I in self-governance agreements.<sup>107</sup>

The advantage of having contract terms mandated by Congress is clear: the agencies are required by law to include provisions that benefit contractors in all Title I contracts. Thus, a tribe that sits down at the negotiation table with an agency will be assured that its contract will include at a minimum certain basic provisions that are favorable to the contractor.

Titles IV. Title IV does not contain provisions similar to those set forth in section 108. All of the terms of compacts and annual funding agreements must be negotiated by the parties. As a result, provisions in compacts and annual funding agreements can vary and be less predictable, and, since there are no declination appeal procedures, tribes have less leverage to negotiate the terms. Section 403(l) now makes clear that a tribe may choose to include in its compact or annual funding agreement any provision of Title I.<sup>108</sup>

Title V. Like Title IV, but unlike Title I, there is no “model” for required provisions in a Title V agreement. Nevertheless, both compacts and funding agreements are required and certain provisions must be included in the agreements.<sup>109</sup> The compact should include general terms of the government-to-government relationship and terms that control from year to year.<sup>110</sup> The funding agreements must set forth terms generally identifying the PFSA to be performed, budget categories, funds to be provided (including those provided on a recurring basis), time and transfer method of funds, responsibilities of Secretary, and other provisions as agreed.<sup>111</sup> Either the compact or funding agreement must include provisions relating to health status reports, reassumption, final offers for compacts and funding agreements and rejection thereof, negotiation in good faith, expenditure of Secretarial savings, prohibition on the Secretary’s

---

<sup>106</sup> Section 105(b).

<sup>107</sup> See 25 C.F.R. § 1000.84.

<sup>108</sup> See 25 C.F.R. § 1000.84.

<sup>109</sup> See 42 C.F.R. § 137.45.

<sup>110</sup> Section 504(b).

<sup>111</sup> Section 505(d); see also 42 C.F.R. § 137.45.

diminishment of the trust responsibility, and an identification of which agency officials can make a “final agency action.”<sup>112</sup>

Tribes that entered into Title III agreements have had the option to retain existing compacts and annual funding agreements to the extent they do not conflict with Title V, or they may adopt new compacts and agreements under Title V.<sup>113</sup>

## J. Reassumption

Title I. Section 109 gives the Secretary authority to reassume the operation of PFSAAs that are included in a Title I contract.<sup>114</sup> The Secretary may exercise reassumption authority in instances where there is a violation of the rights or endangerment of the health, safety, or welfare of any person, or when a contractor mismanages trust funds, trust lands or interests in such lands under a contract or grant.<sup>115</sup>

The provision also sets forth certain procedures that the Secretary must follow in exercising reassumption authority.<sup>116</sup> For example, in exercising this authority the Secretary must provide notice to the contractor and, a hearing on the record.<sup>117</sup> Further, the Secretary has the burden of proof on appeal to establish that reassumption was justified under the statutory criteria.

The Secretary may reassume a program immediately without a hearing in advance in the limited circumstances in which there is an immediate threat of imminent harm to a person's safety or imminent substantial and irreparable harm to trust funds, trust lands (or interests therein) and the threat arises from the failure of the contractor to fulfill the requirements of the contract.<sup>118</sup> Congress probably intended the condition that the justification for reassumption include a failure to fulfill the contract should apply to non-emergency, as well as emergency, reassumptions.

Title IV. Section 403(d) sets out a number of provisions relating to the authority of the Secretary. The provision requires that annual funding agreements include a provision that permits the Secretary to reassume a PFSA, or portion thereof, if there is a finding of “imminent jeopardy to a physical trust asset, natural resources or public health and safety.”<sup>119</sup> The provision does not contain the appeal and hearing requirements included in Title I, although such procedures are included in Title IV regulations.<sup>120</sup>

---

<sup>112</sup> Section 507.

<sup>113</sup> Sections 504(c) and 505(f).

<sup>114</sup> See also 25 C.F.R. §§ 900.246-900.256.

<sup>115</sup> See also 25 C.F.R. § 900.247 (discussing the circumstances for “emergency reassumption”).

<sup>116</sup> See 25 C.F.R. §§ 900.248-900.253.

<sup>117</sup> *Id.*

<sup>118</sup> 25 C.F.R. § 900.247.

<sup>119</sup> See also 25 C.F.R. §§ 1000.301-1000.304 (defining what “imminent jeopardy to a physical trust asset, natural resources or public health and safety” means).

<sup>120</sup> 25 C.F.R. §§ 1000.305-1000.318.

Title V. Section 507(a)(2) allows the Secretary to reassume a PFSA if there is a finding of "imminent endangerment of the public health caused by an act or omission" of the tribe.<sup>121</sup> That provision is similar to the reassumption provision in Title IV, section 403(d). Title V permits reassumption if there is "gross mismanagement" of ISDEAA funds as determined by the Secretary and the Inspector General.<sup>122</sup> Title V does not permit reassumption prior to written notice to the tribe, a hearing on the record, and a lack of corrective action by the tribe, except in emergencies which are defined as "imminent substantial and irreparable endangerment of the public health caused by an act or omission of the Indian tribe; and ... the endangerment arises out of a failure to carry out the compact or funding agreement."<sup>123</sup>

## K. Regulations

Title I. Section 107 establishes an elaborate rulemaking process with built-in timelines. Section 107(a)(1) provides that, with specific exceptions, both Secretaries are prohibited from promulgating regulations and rules or from imposing any non-regulatory requirements under the Act. The exceptions permit the Secretaries to promulgate regulations only on the following topics: FTCA coverage, Contract Disputes Act procedures, declination and waiver procedures, appeal procedures, reassumption procedures, discretionary grant procedures for grants awarded under section 103, property donation procedures arising under section 105(f), 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.

Section 107(a)(2) specifies that Title I regulations must be promulgated in conformance with the notice and comment requirements of the Administrative Procedure Act and must be promulgated as a single set of regulations under Title 25 of the Code of Federal Regulations. Further, section 107(d)(2), which was added to the Act in 1994 based on tribal and Congressional reaction to the proposed regulations published in that year, required that the rulemaking process follow the guidance of the Negotiated Rulemaking Act, including tribal representation in the drafting and promulgation of regulations.

Section 107(a)(2)(B) specified that the Secretaries' authority to promulgate regulations would expire 20 months after October 25, 1994 (the date of the enactment of the Pub.L. 103-413, the 1994 ISDEAA amendments). Regulations on permissible topics have been promulgated and are found at 25 C.F.R. Part 900. Any revisions to the regulations must also follow the guidance of the Negotiated Rulemaking Act.

Section 107(b) clarifies that the 1994 amendments to the Act supersede any conflicting provisions of law, including existing regulations, and gives the Secretaries the authority to repeal any regulation inconsistent with the Act.

Finally, subsection 107(e) gives the Secretaries the authority to waive any regulation promulgated under the Act upon a determination that such a waiver is in the best interest of

---

<sup>121</sup> See also 42 C.F.R. § 137.256(a)(1).

<sup>122</sup> Section 507(a)(2)(a)(ii); see also 42 C.F.R. § 137.256(a)(2).

<sup>123</sup> Sections 507(a)(2)(C), 507(a)(2)(D); see also 42 C.F.R. §§ 137.257-137.262.

Indians served by contracts awarded under the Act.<sup>124</sup> In reviewing a waiver request the Secretaries are required to follow the timelines and declination procedures set forth in section 102.<sup>125</sup>

Title IV. Section 407 requires the Secretary to initiate a process of negotiated rulemaking for the promulgation of regulations applicable to Title IV. The Secretary initiated the process by notice in the Federal Register and established a negotiated rulemaking committee made up of federal and tribal government representatives, a majority of whom are representatives of Indian tribes with agreements under Title IV. Final regulations were promulgated on December 15, 2000.

Title IV contains a waiver process. Section 403(i) provides that a tribe may submit to the Secretary a written request for a waiver of a regulation.<sup>126</sup> The Secretary is directed to either approve or deny the requested waiver in writing within 60 days after receipt. A denial may only be made upon a specific finding by the Secretary that identified language in the regulation may not be waived because such waiver is prohibited by federal law.<sup>127</sup> Finally, the Secretary's decision is final for the Department -- there is no administrative appeal.

Title V. The Secretary is required to initiate a process of negotiated rulemaking between federal government and tribal government representatives. Proposed regulations must be published no later than one year after enactment of Title V and the authority to promulgate regulations expires 21 months after date of enactment of Title V.<sup>128</sup>

Title V allows tribes to request waivers of regulations promulgated under Title V and other statutes applicable to health programs (which are listed in Section 505(b)) and requires Secretarial action on those requests within 90 days.<sup>129</sup> A lack of action within that time deems the requests approved.<sup>130</sup> Waiver requests may be denied only if the Secretary makes a finding that such waiver is prohibited by federal law.<sup>131</sup>

## **Conclusion**

If you have any questions about this memorandum please contact Geoff Strommer via e-mail at: [gstrommer@hsdwor.com](mailto:gstrommer@hsdwor.com) or at 503-242-1745.

---

<sup>124</sup> See also 25 C.F.R. § 900.140.

<sup>125</sup> See also 25 C.F.R. §§ 900.140-900.148.

<sup>126</sup> See also 25 C.F.R. §§ 1000.221-1000.222.

<sup>127</sup> See 25 C.F.R. § 1000.226.

<sup>128</sup> Section 517.

<sup>129</sup> See also 42 C.F.R. §§ 137.225, 137.227.

<sup>130</sup> Section 512(b); see also 42 C.F.R. § 137.229.

<sup>131</sup> 42 C.F.R. § 137.228.