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INTERIOR BOARD OF CONTRACT APPEALS

ARCTIC SLOPE NATIVE ASSOCIATION,)	
LTD.)	
P.O. Box 1232)	
Barrow, Alaska 99723)	
)	IBCA Nos. _____ through _____
Appellant,)	
vs.)	ISDA Contract No. 243-96-6025 (effective
)	through Sept. 30, 1997);
MICHAEL O. LEAVITT, SECRETARY,)	
U.S. DEPARTMENT OF HEALTH AND)	ISDA Compact No. 58G980054 (effective
HUMAN SERVICES; CHARLES GRIM,)	Oct. 1, 1997 to the present)
DIRECTOR, INDIAN HEALTH)	
SERVICE; UNITED STATES OF)	
AMERICA)	
)	
Appellees.)	
_____)	

COMPLAINT

Contractor-Appellant, ARCTIC SLOPE NATIVE ASSOCIATION, LTD. (ASNA), by and through its attorneys Sonosky, Chambers, Sachse, Miller & Munson, LLP, complains and alleges as follows:

I. INTRODUCTION

1. This appeal involves the failure of the Federal Government, acting through the Secretary of Health and Human Services and the Director of the Indian Health Service (IHS), to recognize properly and to pay in full various contract support costs (CSCs) over a period of years associated with ASNA's annual operation of the Federal Government's IHS Samuel Simmonds Memorial Hospital in Barrow, Alaska, and associated health care programs in the IHS Barrow Service Unit, pursuant to contracts and compacts awarded to ASNA under the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. §§ 450–458aaa-18.

2. The multiple claims covered by this appeal and this Complaint encompass:
- (a) the claim that the Secretary, during each of fiscal years 1996 through 2000, unlawfully failed to pay in full the CSCs which the Secretary acknowledged were due and owing to ASNA; and
 - (b) the claim that the Secretary, during each of fiscal years 1996 through 2000, unlawfully failed to calculate correctly, and thus underpaid, the indirect administrative CSCs the Secretary was required to pay under the ISDA, as construed in Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997).

II. JURISDICTION

3. The Board has jurisdiction over this appeal pursuant to 25 U.S.C. §§ 450m-1(a) & (d) of Title I of the ISDA; § 303(d) of the Tribal Self-Governance Demonstration Project Act, 25 U.S.C. § 450f note (1999) (repealed) (incorporating by reference the remedies specified in 25 U.S.C. § 450m-1(a) & (d) of Title I of the ISDA); 25 U.S.C. § 458aaa-10(a) of Title V of the ISDA (incorporating by reference the remedies specified in 25 U.S.C. § 450m-1(a) & (d) of Title I of the ISDA); 41 U.S.C. §§ 605(c)(5), 606 & 607(d) of the Contract Disputes Act; and 43 C.F.R. § 4.100(b).

III. PARTIES

4. ASNA is a non-profit Alaska corporation based in Barrow, Alaska. ASNA is established, controlled and sanctioned by eight federally recognized Tribes situated across the North Slope of Alaska. ASNA is a “tribal organization” as that term is defined by the Indian Self-Determination Act at 25 U.S.C. § 450b(*I*) and used throughout Titles I, III and V of the ISDA.

5. Michael O. Leavitt is the Secretary of the Department of Health and Human Services (DHHS) and exercises delegated responsibilities from Congress pursuant to the ISDA and other applicable law. Dr. Charles Grim is the Director of the Indian Health Service (IHS) and exercises authority delegated to him by the Secretary to carry out the Secretary’s responsibilities under the ISDA and other applicable law. As used throughout this Complaint (and unless context commands otherwise), the terms “Secretary,” “Director,” and “IHS” are used interchangeably.

IV. FACTS AND GENERAL ALLEGATIONS

6. Prior to October 1, 1996, ASNA operated various Federal programs on the North Slope of Alaska, pursuant to a contract with the Bureau of Indian Affairs awarded under Title I of the ISDA, 25 U.S.C. §§ 450–450n. As of January 18, 1996 (fiscal year 1996), ASNA began to operate the Federal Government’s Samuel Simmonds Memorial Hospital in Barrow, Alaska and associated programs, functions, services and activities (hereinafter “Barrow Service Unit”) under Contract No. 243-96-6025 with the Indian Health Service, as authorized under Title I of the ISDA. From October 1, 1997 to the present, ASNA has continued to operate the Federal Government’s Barrow Service Unit under the Alaska Tribal Health Compact (“ATHC” or

“Compact”). The specific contracts and compacts at issue in this appeal are as follows:

- (a) ISDA Contract No. 243-96-6025 (effective through Sept. 30, 1997); and
- (b) ISDA Compact No. 58G980054 (effective Oct. 1, 1997 to the present).

Collectively the foregoing contracts, compacts and annual funding agreements are referred to herein as “contracts.”

7. The Secretary’s funding obligations associated with CSCs under the contract identified in subpar. 6(a) of this Complaint were, at all relevant times, controlled by 25 U.S.C. §§ 450j-1(a)(2), (3) and (5); 25 U.S.C. § 450j-1(g); and related funding provisions of Title I of the ISDA.

8. At all times relevant to this Complaint the self-governance compact identified in subpar. 6(b) of this Complaint was authorized by Title III of the ISDA, known as the “Tribal Self-Governance Demonstration Project [Act],” as amended, formerly reprinted at 25 U.S.C. § 450f note (1999) (repealed by Pub. L. No. 106-260, § 10, 114 Stat. 734 (2000)). The funding provisions of Title III, section 303(a)(6), incorporated by reference the funding provisions of Title I, requiring that the Secretary shall pay “an amount equal to that which the [compacting] tribe would have been eligible to receive under contracts or grants under [Title I of the ISDA], including direct program costs and indirect costs,” Thus, the Secretary’s funding obligations associated with CSCs under the compact described in this paragraph were at all relevant times through FY 2000 controlled by 25 U.S.C. § 450j-1(a)(2), (3) and (5); 25 U.S.C. § 450j-1(g); and related funding provisions of Title I of the ISDA.

9. Beginning in FY 2001 and continuing to the present the self-governance compact identified in subpar. 6(b) of this Complaint has been authorized by Title V of the ISDA,

25 U.S.C. §§ 458aaa–458aaa-18. The funding provisions of Title V (25 U.S.C. §§ 458aaa-7(c) & (d)) replicate and incorporate the funding provisions of Title I by requiring, inter alia, in 25 U.S.C. § 458aaa-7(c) that:

[t]he Secretary shall provide funds under a funding agreement under this title in an amount equal to the amount that the Indian tribe would have been entitled to receive under self-determination contracts under this Act, including amounts for direct program costs specified under [25 U.S.C. § 450j-1(a)(1)] and amounts for contract support costs specified under [25 U.S.C. §§ 450j-1(a)(2), (3), (5) and (6)].

Thus, the Secretary’s funding obligations associated with CSCs under the foregoing compact were at all relevant times after FY 2000 controlled by 25 U.S.C. § 450j-1(a)(2), (3) and (5); 25 U.S.C. § 450j-1(g); and related funding provisions of Title I of the ISDA.

10. The provisions of Titles I, III and V of the ISDA governing the determination and payment of CSCs are materially identical.

11. At all relevant times, the provisions of 25 U.S.C. §§ 450j-1(a)(2), (3) and (5); 25 U.S.C. § 450j-1(g); and related funding provisions of Title I of the ISDA controlled the Secretary’s funding obligations under the contracts identified in par. 6 of this Complaint. These are the same provisions that the Supreme Court construed in Cherokee Nation v. Leavitt, 543 U.S. 631 (2005).

12. Title I of the ISDA, 25 U.S.C. §§ 450j-1(a)(2), (3) & (5), requires that the Secretary shall pay to a contracting Tribe “contract support costs” of various categories, and further requires at 25 U.S.C. § 450j-1(g) that “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 [25 U.S.C. § 450j-1(a)].”

13. The general categories of “contract support costs” (CSCs) to which a contracting Tribe or Tribal organization is entitled under the ISDA are:

- (a) “indirect administrative costs, such as special auditing or other financial management costs,” Cherokee Nation, 543 U.S. at 635 (citing § 450j-1(a)(3)(A)(ii)) (hereinafter “indirect CSCs”);
- (b) “direct costs, such as workers’ compensation insurance” for certain annually recurring costs attributable directly to the personnel and facilities employed or used to carry out the Federal IHS programs being contracted under the ISDA, Cherokee Nation, 543 U.S. at 635 (citing § 450j-1(a)(3)(A)(i)) (hereinafter “direct CSCs”); and
- (c) non-recurring one-time “startup costs,” Cherokee Nation, 543 U.S. at 635 (citing § 450j-1(a)(5)) (hereinafter “start-up costs”).

The ISDA specifies that these various CSC amounts “shall be added” to an ISDA contract, 25 U.S.C. 450j-1(a)(2), and further declares that the amounts to be paid “shall include” direct CSCs and indirect CSCs, 25 U.S.C. § 450j-1(a)(3)(A). The ISDA further provides that “[t]he amount of funds required by [25 U.S.C. § 450j-1(a)] * * * (2) shall not be reduced by the Secretary in subsequent years” except in circumstances which ASNA alleges are not pertinent here. 25 U.S.C. §§ 450j-1(b) & (b)(2).

14. The Secretary’s failure to pay “contract support costs” as specified herein was contrary to ASNA’s statutory and contractual rights as articulated by the Supreme Court in Cherokee Nation v. Leavitt, and as further specified, inter alia, in:

- (a) ASNA’s contracts and annual funding agreements;

- (b) 25 U.S.C. §§ 450j-1(a)(2), 450j-1(a)(3), 450j-1(a)(5), 450j-1(b), 450j-1(d)(2), 450j-1(g) of Title I of the ISDA, as amended;
- (c) section 303(a)(6) of former Title III of the ISDA; and
- (d) 25 U.S.C. § 458aaa-7(c) & (d) of Title V of the ISDA.

15. In 2005 ASNA submitted the following contract damages claims to the Secretary involving the Secretary's failure to pay the full amounts of CSCs required by the ISDA and ASNA's contracts over a period of years:

- (a) A September 30, 2005 damages claim under ISDA Contract No. 243-96-6025, involving –
 - (i) IHS's unlawful failure to pay additional direct and indirect administrative CSCs, as confirmed in IHS's annual CSC shortfall and related "Queue" reports, and
 - (ii) IHS's unlawful failure to properly calculate the indirect administrative CSCs that ASNA was entitled to be paid under the ISDA, as explained in Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997),all during fiscal year 1996 and totaling \$2,301,631 (hereinafter **Claims 1 and 2**, respectively);
- (b) A September 30, 2005 damages claim under ISDA Contract No. 243-96-6025, involving –
 - (i) IHS's unlawful failure to pay additional direct and indirect administrative CSCs, as confirmed in IHS's annual CSC shortfall and related "Queue" reports, and
 - (ii) IHS's unlawful failure to properly calculate the indirect administrative CSCs that ASNA was entitled to be paid under the ISDA, as explained in Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997),all during fiscal year 1997 and totaling \$1,568,828 (hereinafter **Claims 3 and 4**, respectively);

(c) A September 30, 2005 damages claim under ISDA Compact No. 58G980054, involving –

(i) IHS's unlawful failure to pay additional direct and indirect administrative CSCs, as confirmed in IHS's annual CSC shortfall and related "Queue" reports, and

(ii) IHS's unlawful failure to properly calculate the indirect administrative CSCs that ASNA was entitled to be paid under the ISDA, as explained in Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997),

all during fiscal year 1998 and totaling \$1,008,622 (hereinafter **Claims 5 and 6**, respectively);

(d) A September 30, 2005 damages claim under ISDA Compact No. 58G980054, involving –

(i) IHS's unlawful failure to pay additional direct and indirect administrative CSCs, as confirmed in IHS's annual CSC shortfall and related "Queue" reports, and

(ii) IHS's unlawful failure to properly calculate the indirect administrative CSCs that ASNA was entitled to be paid under the ISDA, as explained in Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997),

all during fiscal year 1999 and totaling \$2,028,723 (hereinafter **Claims 7 and 8**, respectively); and

(e) A September 30, 2005 damages claim under ISDA Compact No. 58G980054, involving –

(i) IHS's unlawful failure to pay additional direct and indirect administrative CSCs, as confirmed in IHS's annual CSC shortfall and related "Queue" reports, and

(ii) IHS's unlawful failure to properly calculate the indirect administrative CSCs that ASNA was entitled to be paid under the ISDA, as explained in Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997),

all during fiscal year 2000 and totaling \$621,530 (hereinafter **Claims 9 and 10**,

respectively).

The total face amount of the claims so submitted was \$7,529,334.

16. By letter dated October 27, 2005, Senior Contracting Officer Burton J. Humphrey, IHS Alaska Area Native Health Service, advised ASNA that Claims 1 through 4 were under review and that a final decision would be issued on or before 180 days from October 27, 2005. By letter dated March 15, 2006, Senior Contracting Officer Burton J. Humphrey advised ASNA that Claims 1 through 4 remained under review and that a final decision would be issued on or before 180 days from March 15, 2006.

17. By letter dated November 8, 2005, IHS Director Grim advised ASNA that Claims 5 through 10 were under review and that a final decision would be issued on or before 180 days from November 8, 2005. By letter dated May 5, 2006, IHS Director Grim advised ASNA that Claims 5 through 10 were still under review and that a final decision would be rendered on or before another 180 days from the date of this second letter.

18. To date, no decisions from any contracting officer have ever been rendered on Claims 1 through 10.

19. On the dates specified in paragraph 15 of this Complaint, ASNA timely and properly submitted claims to the appropriate contracting officer for the Indian Health Service (IHS). To date the contracting officers responsible for each of the claims have failed to render any decisions on the claims, and in each instance the contracting officers have failed to act on the claims within a reasonable time.

V. CAUSES OF ACTION

FIRST CAUSE OF ACTION (General Contract Support Costs – Claims 1, 3, 5, 7 & 9)

20. ASNA realleges the preceding paragraphs of this Complaint as if fully set forth herein.

21. During each of fiscal years 1996 through 2000 the Secretary failed to meet his statutory and contractual obligations to ASNA by failing to pay to ASNA the full direct, indirect administrative and start-up CSCs the Secretary acknowledged ASNA was entitled to receive under the ISDA and ASNA's contracts, as reflected (*inter alia*) in the Secretary's various annual shortfall reports prepared in connection with the Secretary's recordkeeping and reporting requirements specified in 25 U.S.C. 450j-1(c), and related "Queue" reports.

22. The foregoing annual failures to pay are the subject of those portions of the claims described in subparagraphs 15(a) through (e) of this Complaint that are identified as **Claims 1, 3, 5, 7 & 9**.

23. The Secretary's annual failure to pay to ASNA the contract support costs as alleged in this First Cause of Action constitutes in each instance a separate breach of statutory rights and contractual rights.

24. In each year in which the Secretary breached his contractual and statutory obligations under the contracts identified in this Complaint as alleged in this First Cause of Action, sufficient appropriations were legally available to the Secretary to pay all amounts due and owing to ASNA under the rule of Cherokee Nation v. Leavitt, 543 U.S. at 637 & 641, and Ferris v. United States, 27 Ct. Cl. at 546.

25. In each instance in which the Secretary breached his contractual and statutory obligations under the contracts identified in this Complaint as alleged in this First Cause of Action, ASNA's contracts constituted binding legal obligations made in advance of appropriations, and such contracts were therefore legally binding without regard to subsequent appropriations.

26. Damages for each breach, as alleged in this First Cause of Action, are measured by the amounts required by law to be paid as CSCs (estimated at the time the claims described herein were filed as totaling \$7,032,713); the reasonably foreseeable damages ASNA suffered as a direct result of the Secretary's breach (including the higher amounts of CSCs the Secretary by law would have been required to pay to ASNA in subsequent years under the ISDA's anti-reduction provisions set forth in 25 U.S.C. § 450j-1(b)(2) and other applicable law and policy); reasonably foreseeable damages associated with any adverse carryforward adjustments; and such other reasonably foreseeable damages as shall be proven at trial.

**SECOND CAUSE OF ACTION
(Miscalculated Rate Claims – Claims 2, 4, 6, 8 & 10)**

27. ASNA realleges the preceding paragraphs of this Complaint as if fully set forth herein.

28. During each of fiscal years 1996 through 2000 the Secretary failed to meet his statutory and contractual obligations to ASNA by failing to pay ASNA the full amount of indirect administrative CSCs to which ASNA was entitled under the ISDA. In this Second Cause of Action ASNA alleges that IHS acted unlawfully by using, as a proxy for the determination of such administrative CSCs, the annual "indirect cost rate" assigned to ASNA by the DHHS

Division of Cost Allocation (or the average of such rates for all Tribal organizations). ASNA alleges that the “indirect cost rate” annually assigned to ASNA was to be used strictly for certain cost-recovery accounting purposes, under guidelines from the Office of Management and Budget (OMB) which caution that such rates are not to be used to determine a federal agency’s funding obligations under contract or grants. See, e.g., OMB Cir. A-122, 2 C.F.R. § 230.10(b) (“The principles deal with the subject of cost determination, and make no attempt to identify the circumstances or dictate the extent of agency and non-profit organization participation in the financing of a particular project.”) Nonetheless, each year IHS, by policy and practice, required that the amount of ASNA’s indirect administrative CSCs to be paid under the ISDA and ASNA’s contracts be determined by application of ASNA’s most recent “indirect cost rate” assigned to ASNA by the DHHS Division of Cost Allocation (or by application by IHS to ASNA of the average of such rates for all Tribal organizations). ASNA alleges that this practice was contrary to law, as specified in Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997), in connection with Bureau of Indian Affairs contracts issued under the identical provisions of the ISDA.

29. The foregoing annual failures to pay are the subject of those portions of the claims described in subparagraphs 15(a) through (e) of this Complaint that are identified as **Claims 2, 4, 6, 8 & 10.**

30. The Secretary’s annual failure to pay to ASNA the correctly calculated indirect administrative CSCs to which ASNA was entitled as alleged in this Second Cause of Action constitutes in each instance a separate breach of statutory rights and contractual rights.

31. In each year in which the Secretary breached his contractual and statutory

obligations under the contracts identified in this Complaint as alleged in this Second Cause of Action, sufficient appropriations were legally available to the Secretary to pay all amounts due and owing to ASNA under the rule of Cherokee Nation v. Leavitt, 543 U.S. at 637 & 641, and Ferris v. United States, 27 Ct. Cl. at 546.

32. In each instance in which the Secretary breached his contractual and statutory obligations under the contracts identified in this Complaint as alleged in this Second Cause of Action, ASNA's contracts constituted binding legal obligations made in advance of appropriations, and such contracts were therefore legally binding without regard to subsequent appropriations.

33. Damages for each breach, as alleged in this Second Cause of Action, are measured by the amounts required by law to be paid as indirect administrative CSCs (estimated at the time the claims described herein were filed as totaling \$496,620); the reasonably foreseeable damages ASNA suffered as a direct result of the Secretary's breach (including the higher amounts of CSCs the Secretary by law would have been required to pay to ASNA in subsequent years under the ISDA's anti-reduction provisions set forth in 25 U.S.C. § 450j-1(b)(2)) and other applicable law and policy); reasonably foreseeable damages associated with any adverse carryforward adjustments; and such other reasonably foreseeable damages as shall be proven at trial.

PRAYER FOR RELIEF

WHEREFORE, Arctic Slope Native Association, Ltd. prays that this Board grant the following relief:

- a. Multiple judgments for damages for the Secretary's breach of each contract in

each relevant year, as set forth in this Complaint, including damages measured by the amounts the Secretary failed in each instance to pay (estimated at the time the claims described herein were filed as totaling \$7,529,334); damages for the reasonably foreseeable consequences of the Secretary's failure to pay (including the higher amounts of CSCs the Secretary by law would have been required to pay to ASNA in subsequent years under the ISDA's anti-reduction provisions set forth in 25 U.S.C. § 450j-1(b)(2)) and other applicable law and policy had ASNA's contracts and statutory rights not been breached); reasonably foreseeable damages associated with any adverse carryforward adjustments; and such further damages as shall be proven at trial.

- b. Interest for one year from the payment due date for each payment the Secretary failed to make under each contract, as provided for under the Prompt Payment Act, 31 U.S.C. § 3901 et seq.,
- c. Interest under the Contract Disputes Act, 41 U.S.C. § 601 et seq. from the date of each claim until the date of payment;
- d. Costs and attorneys' fees incurred in pursuing this claim, including the appeal before this Board, as provided for under the Equal Access to Justice Act, 5 U.S.C. § 504, 28 U.S.C. § 2412, 25 U.S.C. § 450m-1(c), and other applicable law; and
- e. Such other monetary and equitable relief as this Board may find to be just.