

UNITED STATES GENERAL SERVICES ADMINISTRATION
CIVILIAN BOARD OF CONTRACT APPEALS

ARCTIC SLOPE NATIVE ASSOCIATION,
LTD.

Appellant,

MICHAEL O. LEAVITT, SECRETARY, U.S.
DEPARTMENT OF HEALTH AND HUMAN
SERVICES; CHARLES GRIM, DIRECTOR,
INDIAN HEALTH SERVICE; UNITED
STATES OF AMERICA

Appellees.

IBCA Nos. 4794-4803/06

ISDA Contract No. 243-96-6025

ISDA Compact No. 58G980054

REPLY MEMORANDUM IN SUPPORT OF THE INDIAN HEALTH SERVICE'S
MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Summary judgment for the Indian Health Service (IHS) is proper because IHS has no further contractual obligation to the Arctic Slope Native Association Ltd. (ASNA) under its fiscal year (FY) 1996-2000 contracts under the Indian Self-Determination and Education Assistance Act (ISDA), codified as amended at 25 U.S.C. §§ 450-450n; 25 USC §§ 458aaa-458aaa-17.¹ Under the ISDA, the parties negotiated a specific amount that IHS promised to pay ASNA each year, including administrative overhead costs, known as contract support costs (CSC). ASNA agreed to provide services for these amounts, and IHS paid these amounts to ASNA. Now, more than five years after

¹ IHS understands that ASNA has amended its complaint to include a charge of lack of good faith and fair dealing. While IHS maintains that ASNA cannot sustain its burden of proof on this issue, further briefing may be necessary with respect to this cause of action because it has not been briefed by the parties at all.

the close of the last contract period, ASNA requests that the Civilian Board of Contract Appeals order IHS to pay additional CSC.

With respect to the Annual Funding Agreements (AFAs) at issue, ASNA essentially raises two primary arguments: (1) ASNA's agreements with IHS call for additional funding to the extent appropriations were available; and (2) if ASNA's agreements did not call for additional funding, then the agreements were illegal, and ASNA is entitled to additional CSC. With respect to the reconciliations, ASNA raises similar arguments: (1) the reconciliations applied only to the "Secretarial" amount; and (2) if the reconciliations applied to all funding, then ASNA was mistaken as to their effect. None of ASNA's four arguments has any basis in law or fact for creating liability where none exists. First, ASNA's characterization of its contracts is incorrect. Second, contrary to ASNA's argument, nothing in the ISDA establishes a statutory right to a specific amount for CSC or to a specific calculation formula; instead, the ISDA requires that the parties negotiate CSC. The Supreme Court in Cherokee Nation of Oklahoma v Leavitt, 543 U.S. 631 (2005), did not require IHS to pay CSC above and beyond its contractual promise. Rather, the Court simply held IHS to its contractual promises, holding that a contract is a contract even when entered pursuant to the ISDA. Third, the reconciliations unambiguously include all funding for the fiscal years in question, including CSC. Finally, by continuing to sign its Annual Funding Agreements (AFAs) and, later the reconciliations, instead of challenging the amount it now believes it was due for FY 1996 through FY 2000, ASNA has long since waived any right to set them aside as "illegal".

Simply stated: IHS has no further contractual obligation; there is no basis in law or fact to increase IHS's liability under the contracts; and ASNA affirmed the propriety of such agreements by continuing to renegotiate its AFAs from 1996 to 2000 and by signing reconciliations which closed

out the years in question.

ARGUMENT

I. THE BOARD MUST CONSTRUE EACH CONTRACT ACCORDING TO ITS FOUR CORNERS

The ISDA creates only a duty on the part of the Secretary to enter into a contract after receiving an acceptable proposal. The duty of the Secretary to pay CSC results only from the terms of a fully executed contract. As discussed in IHS's cross-motion for summary judgment, each of the AFAs at issue in this appeal sets forth a specific amount to be paid, and the parties agreed that those amounts were paid. See Brief in Opposition to Appellant's Motion for Partial Summary Judgment and in Support of Appellee's Motion for Summary Judgment (IHS Brief) at 11-15. ASNA would have this Board supplement the AFAs with additional inconsistent (and non-existent) terms to effectively read specific and unambiguous provisions out of the AFAs (while asserting itself that the terms are unambiguous). ASNA's contracts are unambiguous and do not incorporate the obligations ASNA ascribes to them. A contract is a contract, and ASNA cannot avoid its contractual commitments.

A. Fiscal Years 1996 and 1997.

In both FY 1996 and FY 1997, the parties negotiated and agreed that IHS would pay a specific sum for CSC. In FY 1996, IHS committed to paying ASNA \$504,255 in CSC under the AFA. In FY 1997, IHS committed to paying ASNA \$665,560 in CSC under the AFA. ASNA asserts that the contract terms are not ambiguous, and IHS agreed to pay more than the above referenced amounts. ASNA's Memorandum in Opposition to Appellee's Motion for Summary Judgment (ASNA's Opp.) at 13-14 n. 8. Instead of referring to specific contract provisions to support this contention, ASNA repeatedly invokes extrinsic evidence. ASNA's Opp. at 2-6. The

terms of ASNA's agreements for FY 1996-1997 are clear and unambiguous and "must be given their plain and ordinary meaning, and [the Board] may not resort to extrinsic evidence to interpret them."

Appeals of Thomas Creek Lumber and Log Company, IBCA No. 3917R, 2006 WL 2037324 (IBCA July 20, 2006) (citing Coast Federal Bank v. United States, 323 F.3d 1035, 1038 (Fed. Cir. 2003)).

The Board must limit its review to the "four corners" of ASNA's contracts.

ASNA makes several inaccurate and misleading statements with respect to the amounts promised in each fiscal year. First, ASNA claims that for FY 1996, its "annualized CSC requirement to operate IHS's Barrow Hospital under ASNA's new contract was \$2,301,842 (not \$504,255)." ASNA fails to acknowledge that it did not operate the program for all of FY 1996, or that \$480,961 of that amount was identified by ASNA as non-recurring start up costs, something which is not "annualized" under the ISDA, but only paid once. ASNA assumed operation of Barrow Hospital under a phased transition for only a portion of FY 1996, not an entire fiscal year. Furthermore, ASNA itself "provided a contract support budget within the \$500,000 for all contract support costs for FY 96." Appeal File Tab 3, page 81. Therefore, providing additional funding to ASNA for FY 1996 (above specific contracted and paid amounts) would produce a windfall that would not accurately reflect contract support costs incurred for the operation of Barrow Hospital. W i t h respect to FY 1997, the parties agreed upon specific sums at the outset of the fiscal year, and IHS made an initial payment of \$500,000. As noted in ASNA's Proposal, ASNA developed a plan that "would be sustainable through FY 1997 at the level of contract support cost" offered in FY 1996. Appeal File Tab 3, page 68. ASNA nevertheless requested additional funds during performance, and

asserts now that no additional CSC was paid in FY 1997. See ASNA's Opp. at 4.² This assertion is incorrect. IHS set aside \$163,085 in additional CSC funding shortly after receiving ASNA's request. See Appeal File Tab 13, page 5. Eventually, \$165,560 was obligated to ASNA's FY 1997 AFA under Amendment Number 10. Appeal File Tab 4, page 8. In total, IHS paid \$665,560 under the FY 1997 AFA. Moreover, as with amounts paid in FY 1996, this amount was reasonable and in accordance with IHS's contractual commitment and the ISDA. The burden is on ASNA to prove otherwise; a burden which they have not sustained.

B. Fiscal Years 1998, 1999, and 2000.

In FY 1998, when the appropriation cap was put in place, and thereafter, IHS legally allocated the CSC earmark to pay legitimate CSC obligations in accordance with applicable Federal law. Federal law prohibited IHS from allocating additional funds for CSC in FY 1998, FY 1999, and FY 2000.³ See Babbitt v. Oglala Sioux, 194 F.3d 1374 (Fed. Cir. 1999). Despite this, ASNA seeks additional CSC funding for FY 1998, FY 1999, and FY 2000. Although ASNA is not entitled to any additional funding under its contracts, awarding additional funds to ASNA would violate the appropriations cap.

² Inexplicably, ASNA now claims \$1,568,828 for FY 1997 with no explanation as to how that amount was derived. However, in its April 14, 1997 request for additional funding, ASNA projected a potential shortfall of only \$516,448. See Appeal File Tab 13, page 2. ASNA refers to "equipment acquisitions" in its April 14, 1997 request. ASNA had already requested funding for "equipment acquisitions" as a part of its one-time start up costs, and would receive \$437,511 to reimburse these costs in FY 1998. See Appeal File Book 2, Tab 29, page 26. To the extent ASNA's request concerned the same equipment acquisitions, there is no evidence that these costs were not met by IHS's subsequent payment of \$437,511.

³ ASNA erroneously believes it was paid CSC with non-ISD "CHEF" funds in FY 1998. This confusion may arise because catastrophic health emergency funds (CHEF) and ISD funds are paid from the same Treasury account, 75x0390. Regardless, the Appeal File shows that ISD funds were used to pay FY 1998 ISD payment. Appeal File Book 2, Tab 29, page 26.

II. ASNA'S CLAIM TO CSC UNDER THE ISDA IS DEFINED BY THE TERMS OF ITS ANNUAL FUNDING AGREEMENTS.

As IHS stated throughout its Brief in Opposition to Appellant's Motion for Partial Summary Judgment and in Support of Appellee's Motion for Summary Judgment, IHS and ASNA are bound by the agreements they entered. IHS has no further obligation under the agreements it signed with ASNA. This position is not a "newly minted" argument, nor is it precluded by the ISDA, Cherokee Nation, or the IBCA's decision in Appeal of Seldovia Village Tribe, IBCA 3862-3863/97, 2003 WL 22422891 (IBCA October 20, 2003). See ASNA's Opp. at 6.

A. The Indian Self-Determination and Education Assistance Act.

When ASNA finally does refer to specific contract provisions, it simply restates the requirements of the ISDA. ASNA's Opp. at 6-10. The ISDA does not preclude IHS's position. The ISDA permits payment of those CSC that are reasonable in light of the activities to be conducted. See 25 U.S.C. § 450j-1(a)(2). ASNA's Contract 243-96-6025 states in Article III, section 2, that the Government will make available the total amount specified in the AFA. Appeal File Tab 3 at 42. IHS did pay the total amounts specified in ANSA's AFAs.

While ASNA claims that the ISDA "provides that a tribal contractor is entitled to have the full amount of funds added to its contract", nothing in the ISDA mandates payment of any specific amount of CSC. ASNA's Opp. at 10. Nothing in the ISDA includes a specific amount or a specific formula for determining the necessary and appropriate funding levels for any particular contract. The ISDA creates only a duty on the part of the Secretary to enter into a contract when he receives an acceptable proposal. 25 U.S.C. 450f(a)(1)(A).

Nor do the amounts included on shortfall reports create a basis for liability, despite ASNA's contentions. The shortfall reports are unaudited estimates that IHS is required to report to Congress

yearly. 25 U.S.C. § 450j-1(c). The reports are not updated after submission, and IHS has never viewed the shortfall reports as imposing any contractual liability. However, with respect to ASNA's estimated CSC need specifically, the shortfall reports contain numerous errors and are unreliable.⁴ Nevertheless, none of the AFAs at issue imposes liability on IHS for additional amounts listed on the shortfall reports, regardless of whether appropriations were available.

B. The Supreme Court's Decision in Cherokee Nation.

Cherokee Nation also supports IHS's position. To begin with, the facts in this Appeal differ fundamentally from the facts in Cherokee Nation. In Cherokee Nation, the Supreme Court "focused attention on whether the Government was liable for CSC on individual contracts." Pueblo of Zuni v. United States, NO. CV 01-1046 WJWPL, 2006 WL 3788824, at *2, 12 (D.N.M. Oct. 11, 2006).

Unlike ASNA, which did not have an indirect cost rate in most of the fiscal years at issue in this Appeal, the tribe in Cherokee Nation entered into an AFA for FY 1994 with IHS that expressly provided for the payment of indirect CSC based on the application of an indirect cost rate to its direct cost base. Appeals of Cherokee Nation of Oklahoma, IBCA No. 3877-3879, at 6. That direct cost base grew when programs were added to the annual funding agreement by amendment. Id. at 6-7. The amendments provided for additional CSC to be paid pursuant to the AFA. Id. at 6-7. Cherokee claimed the total amount due under the AFA as amended was \$3,467,580. Id. at 7. IHS paid \$1,399,377, resulting in a claim for breach of contract. Id.⁵

⁴ For example, the FY 1998 shortfall report omits \$500,000 paid to ASNA in non-recurring CSC. See Appeal File Tab 17, page 3. The FY 1999 shortfall report references a 42% indirect cost rate that ASNA did not actually have (ASNA's first final indirect cost rate was approved in FY 2000 at 36%). See Appeal File Tab 17, page 4.

⁵ This was less than the original amount listed in the FY 1994 AFA before the amendments, which was \$1,460,198. Cherokee Nation, Joint Appendix, vol. 1, at 237, reprinted at 2004 WL 2326784 (Jun. 18, 2004).

Before the Interior Board of Contract Appeals (Board), IHS asserted only one reason for not paying Cherokee the amount called for in the AFA: IHS's belief that its duty to pay CSC was subject to the availability of sufficient CSC appropriations to pay all tribes without reprogramming funds for CSC that would take funds from health programs serving other tribes. Id. at 8-9. The Board had bifurcated the proceedings into liability and quantum, id. at 5, and the parties later stipulated to quantum. Thompson v. Cherokee Nation, 334 F.3d 1075, 1084 (Fed. Cir. 2003). The only question before the Board was the viability of the Government's appropriations defense.

ASNA, referring to Cherokee Nation's FY 1997 AFA (which was litigated successfully by IHS in the Tenth Circuit), misleadingly asserts that "the understatement of CSCs on the face of some contracts did not bar recovery in Cherokee III". ASNA omits portions of the 1997 AFA which show that there was no agreed upon sum certain specified at all in Cherokee Nation's 1997 AFA. See Cherokee Nation 1997 AFA n. 19 (Attached as Appeal File Tab 32, page 8-9). This was noted by the court in Cherokee Nation v. United States, 190 F. Supp. 2d 1248, 1255 (E.D. Okla. 2001) ("Defendants argue plaintiffs are not actually seeking money damages resulting from a breach of their contracts, but rather are requesting additional contract support funding to which they are allegedly entitled under their contracts and the ISDA."). Because IHS prevailed before the district court on its "subject to the availability of appropriations" defense, the district court never reached the issue of what was promised under the contract. Id. at 1256 ("While it is not entirely clear what specific money damages plaintiffs are seeking in this action, this court finds this lawsuit centers around how much the defendants possibly owe in alleged damages to plaintiffs for failure to fulfill the terms of their contracts."). IHS again prevailed with this argument before the Tenth Circuit without reaching the issue of quantum in Cherokee Nation of Oklahoma v. Thompson, 311 F.3d

1054 (10th Cir. 2002). By the time the case reached the Supreme Court, the only argument before the Court in Cherokee Nation was the appropriations defense.

In consolidating all of the cases, the only question before the Supreme Court was the viability of the Government's appropriations defense. The Supreme Court framed the issue as follows:

The Government does not deny that it promised to pay the relevant contract support costs. Nor does it deny that it failed to pay. Its sole defense consists of the argument that it is legally bound by its promises, if, and only if, Congress appropriated sufficient funds, and that, in this instance, Congress failed to do so.

Cherokee Nation, 543 U.S. at 636. The Court did not address any issue concerning the amount of funds promised under the terms of the AFA. The Supreme Court concluded that an ISDA contract was as binding as an ordinary procurement contract. Cherokee Nation, 543 U.S. at 639. Contrary to ASNA's assertions, Cherokee Nation did not address whether a contractor can challenge the amount of funding or a specific funding formula to which it agreed under a contract.

C. The IBCA's Decision in Seldovia

ASNA is also incorrect in arguing that the language in the contracts did not matter in Seldovia. Seldovia was decided before the Supreme Court held in Cherokee Nation that ISDA contracts should be treated as ordinary procurement contracts.⁶ As the Board noted, the AFAs at issue in Seldovia contained language which acknowledged a dispute at the outset: "The parties have not agreed on the amounts to be paid or the method and process for calculation and payment of contract support costs under the AFA." Id. As such, the Board was unable to conclude that the

⁶ Contrary to Seldovia, the government does not "benefit" from awarding less CSC because it would award the funds to another tribal contractor. See IHS Circular 96-04 at 13-14, Appeal File Tab 20 at 13-14.

parties agreed to IHS policies in place at the time.⁷ This Board should not follow Seldovia in this case because the decision in Seldovia is neither persuasive nor applicable.⁸ Here, it is undeniable that the parties agreed to specific sums under the contract, reached through negotiation.

III. ASNA HAS WAIVED ANY RIGHT TO CHALLENGE THE LEGALITY OF ITS CONTRACTS.

As discussed above, IHS complied with the terms of its agreements with ASNA, and these agreements, including the subsequent reconciliations, were consistent with the ISDA. ASNA, for the first time, would now set these all of these agreements aside, claiming that they are contrary to law. ASNA's Opp. at 10. When a government contractor believes that the Government has violated a statute by including improper terms or conditions in a government contract, the contractor cannot simply accept the contract and continue contract performance, without protest, and then hope to recover six to ten years later, as ASNA argues should occur in this case.

Even if ASNA could show that it entered an “illegal” contract, ASNA waived any claim that any contract term was invalid when it failed to raise the problem prior to execution, and performance, of the contract. See Whittaker Elec. Sys. v. Dalton, 124 F.3d 1443, 1446 (Fed. Cir. 1997) ("The doctrine of waiver precludes a contractor from challenging the validity of a contract . . . where it fails to raise the problem prior to execution, or even prior to litigation."); E. Walters & Co. v. United States, 576 F.2d 362, 368 (Cl. Ct. 1978) (finding that the contractor waived its claim

⁷ Similarly, Shoshone-Bannock Tribes of Fort Hall Reservation v. Leavitt, 408 F.Supp.2d 1073 (D.Or. 2005) (Order vacated by Amended Final Order and Judgment issued Jan. 18, 2007), involved dispute over the level of CSC funding offered. The tribe raised objections prior to entering into the contract using the available pre-award appeal process. See 25 C.F.R. § 900.150.

⁸ Moreover, ASNA appears to be unaware that the Board’s decision with respect to attorney fees in In re Seldovia Village Tribe, No. 3862,05-2 B.C.A.163,729, 2005 WL 1805664 (July 26, 2005) has been vacated. See Order Attached as Appeal File Tab 33.

that the contract violated the regulation by consciously choosing to "fully perform the contract as if there were contemporaneous agreement of the parties on the proper interpretation of the [regulation]"); Hermes Consol., Inc. v. United States, 58 Fed. Cl. 409, 417 (2003) (finding waiver when, inter alia, the contractor bid "over and over" on solicitations containing the same clauses that it challenged as illegal), rev'd on other grounds sub nom., Tesoro Haw. Corp. v. United States, 405 F.3d 1339 (Fed. Cir. 2005). In this instance, ASNA repeatedly signed annual funding agreements without once utilizing the available pre-award, judicial review procedure to challenge the legality of the Secretary's CSC funding offers.⁹ Evidence of intent to waive a statutory or regulatory right is found in (a) declining pre-award remedies, (b) signing a contract, (c) performing the contract, and (d) accepting funds under the contract. See Aleutian Constructors v. United States, 24 Cl. Ct. 372, 384 (1991) ("Continuance of the contract is the most common and clearest case of waiver."); Appeal of USD Techs., Inc., ASBCA No. 31305, 1987 WL 40766 (Mar. 12, 1987) ("In the realm of Government contracts, absent mistake or duress . . . few things signify knowing and intentional conduct more than does the execution of a bilateral modification."), aff'd without opinion, (Fed. Cir. 1988). Therefore, ASNA has waived any claims for additional funding based on the Secretary's alleged non-compliance with the law.

The few instances cited by ASNA where courts have declined to apply waiver or estoppel are distinguishable. In those cases, not only did the contract term violate the law, but the contractor carefully protected its rights near the time it executed the contract or the government behaved

⁹ ASNA did use the threat of pre-award litigation against the Government during contract negotiations in FY 1996. See Appeal File Book 2, Tab 28, page 6-8. Moreover, there was no reluctance on ASNA's part to file contract claims for unpaid amounts under the AFAs. Clearly, ASNA knew how to challenge the validity of its contracts.

egregiously. See Beta Systems, Inc. v. United States, 838 F.2d 1179, 1185-86 (Fed. Cir. 1988) (the court permitted reformation based on mutual mistake regarding contract terms that violated the Federal Acquisition Regulation (FAR)); Chris Berg, Inc. v. United States, 426 F.2d 314, 317 (Ct. Cl. 1970) (holding that reformation was permitted because the agency violated Defense Acquisition Regulations which would have permitted the contractor to reform its initial bid); MAPCO Alaska Petroleum Inc. v. United States, 27 Fed. Cl. 405, 416 (1992), abrogated on other grounds by Tesoro Haw. Corp. v. United States, 405 F.3d 1339 (Fed. Cir. 2005) (holding that the Government may not benefit from a contract provision in violation of the FAR). In Hermes, the Court of Federal Claims explained that waiver was not applied in the aforementioned cases because the contractors in those cases complained about the alleged invalidity of the contracts at the contract formation, or, at the very least, at an early stage in the history of the conflict. See Hermes, 58 Fed. Cl. at 413 ("The key factual distinction between Beta Sys., Inc., Chris Berg, and Whittaker, E. Walters & Co., [and] AT & T V, as well as the case at bar, is that in the former cases the contractors either complained during contract formation or, at the very least, at an early stage in the history of the conflict.") (citation and internal quotation marks omitted). Here, although ASNA asserts that it had no choice but to accept the CSC amount offered by IHS, ASNA did have the right to challenge the amount offered by pursuing a declination appeal under 25 U.S.C. § 450f(b). See ASNA's Opp. at 3. It repeatedly chose not to pursue such an appeal. The ISDA also provides that if ASNA did not have sufficient funds to perform under the agreement, it could suspend performance upon notice to the Government. 25 U.S.C. § 450l(c), section (b)(5). However, ASNA never provided any such notice. Instead, it continued to enter into the agreements with IHS that it now claims are illegal. That is not the approach urged by the above referenced cases, or the decisions in Cherokee Nation, Seldovia, and

Shoshone-Bannock.

ASNA's reliance on Seldovia for this argument is particularly misplaced. In Seldovia, the Board did not discuss authoritative Federal Circuit decisions such as Whittaker and E. Walters & Co., supra. Instead, the Board cited to MAPCO, supra, a 1992 decision of the Court of Federal Claims, which has since been called into doubt by another judge of that Court. See Hermes, 58 Fed. Cl. at 412 (explaining that it was troubled by the court's waiver decision in MAPCO as inconsistent with Federal Circuit precedent). The Board also cited to Beta Systems, 838 F.2d 1179. However, as discussed above, Beta Systems (like Seldovia) involved prompt action on the part of the contractor. Beta Systems, 838 F.2d at 1184. Moreover, the Beta Systems decision on waiver is based on mutual mistake. Id. at 1185. The court held that the risk of mutual mistake does not fall solely on the contractor. Id. Here, there is no allegation of mutual mistake.

The other cases cited by ASNA do not support its case. Barrett Refining Corp. v. United States, 242 F.3d 1055 (Fed. Cir. 2001), did not consider the waiver issue because the government did not seek to enforce the contract provision. Instead, it concerned the measure of damages under an implied in fact contract. Id. at 1064. LaBarge Products, Inc. v. West, 46 F.3d 1547 (Fed. Cir. 1995), involved conduct related to the bidding process that was blatantly improper – leaking the contractor's bid amounts to a competitor – and promptly challenged by the contractor. In this case, the government's conduct during negotiations was based on its belief that it could not contract for more funds than it believed to be "available" for CSC. None of the Cherokee cases concerned how much the government must offer at negotiations. See Pueblo of Zuni, 2006 WL 3788824, at *12 (tribe overreaching when it characterized Cherokee Nation as striking down IHS CSC policy). Instead, ASNA entered into contracts and reconciliations which were legal, and IHS complied with

them. ASNA cannot now set them aside.

IV. THE RECONCILIATIONS ARE BINDING AND CONCLUSIVE WITH RESPECT TO ALL PAYMENTS UNDER THE AFAS.

Although the Reconciliations are unambiguous and clearly apply to all funding awarded under the AFAs at issue, ASNA attempts to challenge them by invoking the contract defenses of mutual assent, mistake, and fraud. Not only are these defenses not supported or credible, ASNA is estopped from making such allegations. Therefore, by virtue of the reconciliations settling all years at issue in this Appeal, no further payment is due to ASNA.¹⁰ Summary Judgment in favor of IHS in this Appeal is thus appropriate with respect to the issue of liability.

ASNA argues that the reconciliations are not binding with respect to all funds under the AFAs because there was no mutual assent. ASNA further argues that the final accounting was only intended to encompass the "Secretarial amount of funding". This conclusion is objectively at odds with the plain language of the reconciliations and the claim letters that spurred them. In the FY 1996-1997 reconciliation, the parties agreed that the "**[t]he final (net) amount due ASNA for the two-year period is \$523,578.**" Appeal File Tab 25, page 15. The settlement further required ASNA to withdraw its FY 1996 and FY 1997 claims for additional funding. In the FY 1998-2000 reconciliation, the parties agreed that "**[t]he final net amount due ASNA for the three year period is \$209,089.**" Appeal File Tab 25, page 14. Nowhere does the language in the reconciliations purport to limit settlement to the "Secretarial amount". Nor do ASNA's own claim letters support this

¹⁰ ASNA repeatedly refers to the reconciliations as a (deficient) form of release. See e.g. ASNA's Opp. at 22. IHS has not argued the doctrine of release because the doctrines of accord and satisfaction and account stated more accurately describe the reconciliations in question. Nevertheless, all of these doctrines similarly prevent a claim from being actionable.

position. For example, ASNA's undated September 2000 claim letter for FY 1996 and FY 1997 lists respectively, "final contract amount(s)" of \$1,774,179 and \$3,203,181. Appeal File Tab 24, page 17. In FY 1996, the final contract amendment lists the exact same total of \$1,774,179. Appeal File Tab 3, page 105. This amount includes payments made for CSC. Similarly, in FY 1997, the \$3,203,181 claimed by ASNA in its dispute letter clearly includes the CSC payments made by IHS during FY 1997. Appeal File Tab 4, page 15. Without question, the reconciliations unambiguously encompass all funding due to ASNA under the FY 1996-2000 AFAs, with the exception of Medicare/Medicaid reimbursements in FY 1998. Just as the Medicare/Medicaid reimbursements were expressly reserved, so too could the parties have reserved CSC. The parties did not do so. ASNA's claims to the contrary are incorrect.

Nevertheless, under its theory of mistake, ANSA argues that "it is plain that ASNA would never have agreed to the reconciliation if it understood the account also included such items as fiscal year 1997's claim for over \$1.65 million." ASNA's Opp. at 23. ASNA does not have a viable claim for \$1.65 million in FY 1997 under any theory.¹¹ Rather, ASNA's FY 1997 is clearly based on its own ill advised, and now time barred, attempt to pursue a windfall based on the Supreme Court's Cherokee Nation decision. Even if ASNA's contention is taken as true, it amounts to a unilateral mistake which may not overcome the binding nature of the reconciliations. See City of Lawrenceville v. Ricoh Electronics, Inc., 370 F.Supp.2d 1328, 1331 (N.D.Ga. 2005), aff'd, 174 Fed. Appx. 491 (11th Cir. 2006) ("Where a mistake in a contract or account is unilateral, the contract or account may only be reformed where fraud or inequitable conduct by the other party induces the

¹¹ ASNA offers no explanation as to how its claim for FY 1997 rose from \$1.57 million to \$1.65 million.

mistake.”). Simple arithmetical errors, which are not present here, may permit reformation. See Reich v. Youghioghney and Ohio Coal Co., 858 F.Supp. 1381, 1389 (S.D.Ohio 1994) (“[A]n *arithmetical error* in computing the account balance, such as the mistake made by the claims examiner in the instant case, does not discharge the debt previously due.”) (emphasis added).

ASNA offers several conclusory affidavits purporting to show that ANSA only intended to reconcile a portion of amounts paid under the AFAs in question.¹² ASNA's affidavits are not sufficient to oppose a motion for summary judgment supported by an account stated. See First Commodity Traders, Inc. v. Heinold Commodities, Inc., 766 F.2d 1007, 1011 (7th Cir.1985) ("A court will not open an account stated absent a showing of fraud, omission or mistake....Conclusory statements in affidavits opposing a motion for summary judgment are not sufficient to raise a genuine issue of material fact.") (citations omitted). Additionally, ASNA acknowledges that the reconciliations were "intended to square the 'contract amounts' against the 'cash receipts.'" ASNA's Opp. at 21. ASNA should not be allowed to challenge legally binding reconciliations on the grounds of mistake, when it was clear that the reconciliations applied to all funds, and by its own reckoning, ASNA simply failed to ascertain their impact. See 1A C.J.S. Account Stated § 47 (“A party will not be allowed to impeach an account stated, on the ground of fraud or mistake, if he assented to it with full knowledge of the facts and circumstances attending it, or if, with ample means of knowledge at hand, he failed to ascertain the facts.”)

Consistent with its usual tactics, ASNA again raises unsubstantiated allegations of fraud against IHS and IHS employees. Rule 9(b) of the Federal Rules of Civil Procedure requires that "the

¹² Most unusually, ASNA’s counsel has submitted an affidavit in support of this question. Procedurally, IHS questions the extent that such an affidavit may be admissible, and, if it is, whether counsel has waived attorney-client privilege with respect to the matters at issue.

circumstances constituting fraud or mistake shall be stated with particularity.” ASNA has not stated anything with particularity. ASNA simply portrays the ongoing CSC litigation at the time as so one sided that the only conclusion to be reached is that "the inequity and potential fraud [was] palpable." If this contention were true, no reasonable person would have relied on IHS’s representations. Moreover, contrary to ASNA's one sided claims, the D.C. Circuit, in Ramah Navajo School Bd., Inc. v. Babbitt, 87 F.3d 1338 (D.C. Cir.1996), had limited contract support costs to a cap, and the Federal Circuit would follow, reversing this Board. See Babbitt v. Oglala Sioux, 194 F.3d 1374 (Fed. Cir. 1999). These decisions remain good law.

Finally, by failing to contest the validity of the reconciliations until this Appeal, ASNA is estopped from challenging their conclusiveness. See generally, Leather Mfrs.' Nat. Bank v. Morgan, 117 U.S. 96, 108 (1886) (“[P]arties to a stated account may be estopped by their conduct from questioning its conclusiveness.”). By issuing payments to close out the AFAs in question, the Government expected and relied upon ASNA to honor its contractual commitments, including the reconciliations it signed. “Simple fairness dictates that a party should not sit on its hands. Undue delay taints the reliability of evidence and robs memory and thus veracity from witnesses. And significant harm may be the product of long delays particularly when one party justifiably relied on the expected and legally enforceable promises and performances of the other.” Hermes, 58 Fed.Cl. at 416.

CONCLUSION

For the first time, ASNA explains why it believes that IHS did not fully perform under the AFAs at issue in this Appeal. ASNA's contentions are unsupported and ultimately, not credible. Thus, ASNA argues in the alternative that it should either recover more funding under Cherokee

Nation or that it entered into agreements with IHS that were contrary to the ISDA. ASNA is mistaken. The ISDA and Cherokee Nation do not mandate a specific amount of CSC, or even require using a formula to calculate CSC. Rather, the ISDA requires the parties to negotiate the CSC amount and Cherokee Nation provides that such an agreement is as binding as any other government contract. To the extent ASNA wishes to challenge how those agreements were formed after it repeatedly signed and performed them, and then reconciled them, it is many years too late. Therefore, Summary Judgment in IHS's favor is appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Indian Health Service's Reply Memorandum in Support of the Indian Health Service's Motion for Summary Judgment was sent via email and mail this 22nd day of February, 2007 to:

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