

THE GENERAL SERVICES ADMINISTRATION  
CIVILIAN BOARD OF CONTRACT APPEALS

ARCTIC SLOPE NATIVE ASSOCIATION,  
LTD.

Appellant,

v.

INDIAN HEALTH SERVICE; UNITED  
STATES DEPARTMENT OF HEALTH  
AND HUMAN SERVICES

Appellees.

CBCA 190-ISDA through 297-ISDA  
(IBCA 4794-4803-2006)

**STATEMENT OF GENUINE ISSUES**

Appellee Indian Health Service (IHS) by its undersigned counsel, submits the following statement of genuine issues pursuant to Board Rule 8(g)(3), in response to Appellant's Statement of Uncontested Facts. The numbered paragraphs herein correspond with the numbered paragraphs in Appellant's submission.

**A. Initial Contracting History.**

3. IHS provides the following clarifications for Paragraph 3 of Appellant's Uncontested Statement of Facts. IHS agrees that it advised Arctic Slope Native Association Ltd. (ASNA) that \$500,000 could be made available in FY1996 on a non-recurring basis for contract support costs (CSC). However, contrary to ASNA's assertion, the cited portions of the Appeal Record (AR 3 at 73, 80-81) do not indicate that IHS "requested that ASNA prepare a budget for this \$500,000 amount." As submitted in the attached Declaration of Duff Pfanner, it was common practice for the contractor to develop a budget based upon the negotiated amount of

funding. Moreover, 42 C.F.R. 900.8(h) requires a proposal to include “[t]he amount of funds requested.” Therefore, though a request may have come from IHS, and though that request would have been consistent with regulatory requirements, IHS does not view this distinction as materially relevant. Regarding the last sentence in the 3rd paragraph, as indicated by Duff Pfanner, the Alaska Area Office would not have used the term “legally available” to describe CSC funds in the context of negotiations.

4. As provided in the Declaration of Duff Pfanner, the 2nd sentence in Paragraph 4 of ASNA’s Uncontested Statement of Facts, which reads as follows, is erroneous: “The amount of contract support costs so calculated was based on an indirect-like rate of 32%.” The amount of CSC calculated was not based on an "indirect-like rate" of 32%. IHS did not negotiate indirect rates with ASNA. IHS classified its Contract Support Cost funding as direct CSC and indirect-like CSC, regardless of whether an indirect rate existed. If IHS negotiated indirect like costs, that funding could be classified as "indirect", but would be provided lump sum and not pursuant to a rate. ASNA did not have a rate in FY 1996. Proposed costs for ASNA’s so called “annualized” amount of funding were based on the schedule at Tab 3, page 65 & 66 of the appeal file.

Based on its proposed costs, ASNA calculated what the indirect rate might be and, according to Mr. Pfanner’s Declaration, intended to use the information to negotiate a rate with the Department of Health and Human Services Division of Cost Allocation (DCA). Appendix D of ASNA’s *Documents in Support of the Proposal to Operate PHS Barrow Hospital*, entitled, “Indirect Cost Proposal”, provides a brief background of ASNA’s pursuit of a rate, stating in part:

ASNA was incorporated as a nonprofit human service organization in 1972, it remained inactive until 1991 when it negotiated a contract with the Bureau of Indian Affairs (BIA) to provide BIA services to the communities of the Arctic Slope. It did not negotiate an indirect cost rate as part of its BIA proposal but rather chose to negotiate lump sum for contract support costs directly from the BIA. Since the initial contract from the BIA, ASNA has received several additional grants and contracts from other federal agencies, and the North Slope Borough, the local government. In addition, ASNA is also pursuing a contract to support hospital operations from the NSB in addition to the funding received from the IHS. The additional complexity and scope of the ASNA operations have indicated that a formal indirect cost rate would be appropriate at this time.

AR 27 at 109.

Appendix D of ASNA's *Documents in Support of the Proposal to Operate PHS Barrow Hospital*, entitled, "Indirect Cost Proposal", further states:

Because ASNA expects its indirect rates to be somewhat volatile for the first year or two of operations, ASNA is requesting a Provision/Final indirect cost rate.

AR 27 at 109.

ASNA's first provisional/final indirect cost rate with DCA was not effective until FY 2000. AR 18 at 1-7. The lack of a rate provisional/final rate is a material issue in this Appeal because ASNA has submitted claims alleging a miscalculation of a rate it did not have. For example, in FY 1998, ASNA's claims money damages because "IHS failed to adjust the indirect cost amount calculated by applying the Arctic Slope Native Association, Ltd.'s indirect cost rate to account for the dilution in IHS's responsibility to pay indirect contract support costs caused by the erroneous assumption (reflected in applicable OMB circulars concerning indirect cost rates) that all agencies funding the Arctic Slope Native Association, Ltd. contribute to the Arctic Slope Native Association, Ltd.'s indirect cost pool at the full rate." AR 2 at 12. Contract Dispute Act letters for FY 1996, FY 1997, and FY 1999 contain similar claims for a miscalculated rate, though ASNA did not have a rate for those years.

35. \_\_\_ The last sentence in Paragraph 35 of ASNA’s Uncontested Statement of Facts, which reads as follows, is inaccurate: “Neither of the amounts specified in this paragraph was specifically mentioned in the Compact or the FY 1998 Annual Funding Agreement.” \$1,636,833 in indirect and direct CSC was added pursuant to Amendment #2 of the FY98 Annual Funding Agreement. AR 29 at 16. According to the Appeal Record, this amendment was signed by Eben Hopson on August 28, 1998. AR 29 at 16.

To the extent ASNA does not view the amendments to the Annual Funding Agreement as being part of the Annual Funding Agreement, there is a material fact at issue. The amount promised by IHS in amendments to the Annual Funding Agreement are part of the Annual Funding Agreement. IHS’s obligation to provide funding, as noted in paragraph 26 of ASNA’s Statement of Uncontested Facts, is determined by the amounts specified in the Annual Funding Agreement:

The FY 1998 Alaska Tribal Health Compact, in part, provided that “[s]ubject only to the appropriation of funds by the Congress of the United States and to adjustments pursuant to § 106(b) of the [ISDA], the Secretary shall provide the total amounts specified in the Annual Funding Agreements.”

Under the ISDA, the parties are to agree to the amount of funds to be provided in an Annual Funding Agreement. If IHS provides less than this amount, then, as happened in *Cherokee Nation*, it may be held liable for breach of contract. However, in this case, unlike in *Cherokee Nation*, it is undisputed that IHS paid the full amount set forth in the Annual Funding Agreements, including the amendments.

44. \_\_\_ The last sentence in paragraph 44 of ASNA’s Statement of Uncontested Facts, which reads as follows, is inaccurate: “None of the amounts specified in the preceding twos

paragraphs was specified in the FY 1999 Annual Funding Agreement.” Elsewhere in paragraphs 43 and 44, ASNA acknowledges that the “specified amounts” were identified in amendments to the FY 1999 Annual Funding Agreement. Those amendments are part of the FY 1999 Annual Funding Agreement.

Thus, this is a material issue for the same reasons identified in the response to Paragraph 35.

**IHS Practices.**

69. IHS disagrees with the assertion in Paragraph 69 of ASNA’s Uncontested Statement of Facts that Mr. Olson “has no direct or indirect interest in these proceedings”. Mr. Olson, as the Vice President, Finance, for the Southcentral Foundation (SCF) submitted and certified Contract Disputes Act claims over contract support costs for SCF on September 30, 2005 (the same day as ASNA). These claim letters were similar to ASNA’s claim letters. For example, in the FY 1998 claim letter, Mr. Olson, included the following third paragraph in Southcentral Foundation’s claim:

Southcentral Foundation asserts that IHS failed to meet its contractual and statutory obligations when it failed to pay the full amount of Southcentral Foundation’s contract support cost requirement, calculated pursuant to IHS’s policies, by applying an unlawful policy limiting the total amount that would be paid to Southcentral Foundation.

Attached as AR Tab 44.

This is virtually the same claim as ASNA’s first claim in its FY 1998 claim letter, also found in the third paragraph:

The Arctic Slope Native Association, Ltd. asserts that IHS failed to meet its contractual and statutory obligations in two ways. First, IHS failed to pay the full amount of the Arctic Slope Native Association, Ltd’s contract support cost

requirement calculated pursuant to IHS's policies, by applying an unlawful policy limiting the total amount that would be paid to Arctic Slope Native Association, Ltd.

AR 1 at 1-2.

Moreover, the Board's Order to Stay Proceedings in SCF's Appeal referenced this Appeal and noted that it had similar legal issues. See Order, attached as AR Tab 45. Therefore, IHS believes Mr. Olson, acting on behalf of SCF, has a substantial indirect interest in the outcome of this proceeding.

The following statement from Mr. Olson in Paragraph 69 is unclear:

It is my understanding that when IHS signed a contract with a Tribal contractor, it was agreeing to pay the full amount of the contractor's CSC requirement subject only to available appropriations.

The statement is loaded with terms whose meanings are fundamentally in dispute in this Appeal. For example, to the extent the "full amount" of CSC is those costs that are agreed upon in a Tribe's Annual Funding Agreement, then IHS may concur with the statement. However, to the extent ASNA incorporates this statement to suggest that IHS agreed to pay the amounts claimed by ASNA in this Appeal, IHS disagrees with the statement. If the "full amount" were the sum total of the amounts identified in ASNA's claim letters plus the amount IHS already paid, IHS would have been obligated to pay the following totals to ASNA for the years at issue:

\$2,805,886 in FY 1996

\$2,234,388 in FY 1997

\$3,145,455 in FY 1998

\$3,322,404 in FY 1999

\$3,680,121 in FY 2000.

Such sum totals have no basis in fact, and are not found in: (1) ASNA's Annual Funding Agreements, which are unambiguously identify the amounts IHS contractually promised to pay; (2) any other documents in the Appeal Record except for ASNA's claim letters, or (3) in any other evidence ASNA has submitted in this Appeal.<sup>1</sup> Moreover, the parties have opposing legal interpretations regarding what appropriations were "available" to pay CSC in years where Congress imposed a cap. Additionally, without the opportunity to conduct discovery, IHS can neither confirm or dispute that this statement accurately reflects Mr. Olson's understanding, nor determine whether this statement is at all relevant to the facts at issue in this Appeal.

70. The following statement quoting Mr. Hopson in paragraph 70 is unclear:

Mr. Hopson's understanding was 'that IHS and ASNA agreed that ASNA was entitled to be paid its full contract support cost requirement, at least so long as funds to pay that requirement were available to IHS.'

If the "full contract support cost requirement", reiterated several times elsewhere in Paragraph 70, is the sum totals of the amounts identified in ASNA's claim letters plus the amounts IHS actually paid, IHS disputes that statement for the reasons specified in Paragraph 69 of this document. Moreover, the parties have opposing legal interpretations regarding what funds were "available" to pay CSC in years where Congress imposed a cap. Additionally, without the opportunity to conduct discovery, IHS can neither confirm or dispute that this statement accurately reflects Mr. Hopson's understanding.

97. The statement in Paragraph 97, alleging Mr. Hopson's understanding of the

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<sup>1</sup> The FY 1999 and FY 2000 totals are similar to the amounts listed on the FY 1999 and FY 2000 Shortfall Reports. AR 17 at 4. However, the FY 1999 Short Fall Report amount was calculated with an IDC rate that ASNA did not actually have in FY 1999. The FY 2000 Short Fall Report lists the 42% provisional rate from FY 2000. ASNA's final approved rate for FY 2000 was 36%. AR 19 at 4.

reconciliation agreements, provides in part, “[a]t no time in the reconciliation did IHS ask us to waive, release, or in any other manner address contract support cost issues, nor would we have agreed to waive or release such claims given the pending litigation.” Without the opportunity to conduct discovery, IHS cannot confirm or dispute that the statement in Paragraph 97 accurately reflect Mr. Hopson’s understanding of the reconciliation statements that he signed in 2001. AR 25 at 14-15.

However, the substance of the statement is inconsistent with the unambiguous terms of the reconciliations. For example, the FY 1998 -FY 2000 reconciliation provides “([t]his agreement excludes any claim on the disputed FY 98 Medicare/Medicaid funding for ASNA.payments made against the AFA.)”, but otherwise indicates “**[t]he final (net) amount due ASNA for the two-year period is \$209,089.**” AR 25 at 42.

The statement is also at odds with the claim Mr. Hopson certified for additional funds in FY 1996 and FY 1997, spurring the reconciliations. AR 25 at 44. Specifically, ASNA’s claim for FY 1996 and FY 1997 states, ”ASNA asserts that the Indian Health Service has failed to provide payments due under contracts and compact entered into with ASNA for FY96 and FY97” and also includes a listing for a “final contract amount” of \$1,774,179 in FY 1996 and \$3,203,181 in FY 1997. AR 25 at 44. The final contract amounts listed by ASNA’s claim included the CSC paid to ASNA in those years.

The statement is also inconsistent with Mr. Hopson’s letter of January 29, 2001 which provides in part, “[w]e have received reconciliation worksheets for the years in question and are satisfied that the settlement offered by the Alaska Area Office to close this claim fairly represents *amounts owed* to ASNA, Ltd.” AR 25 at 51 (emphasis added). Finally, the January 8, 2007

Declaration by Sharon Miller indicates the parties entered in the reconciliation agreements for all payments due under the Annual Funding Agreements. See Attachment D to IHS's January 11, 2007 Brief in Opposition to Appellant's Motion for Summary Judgment and in Support of Appellee's Motion for Summary Judgment .

Respectfully submitted this 31st day of October 2007.

For Appellees:

S/ Sean Dooley

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