



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Original

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Received

12/22/2006

December 22, 2006

By Fax and Mail: (703) 235-1281

The Honorable Candida S. Steel  
Chief Administrative Judge  
Interior Board of Contract Appeals  
801 North Quincy Street, Suite 300  
Arlington, Virginia 22203

Re: Appeals of the Council of Athabascan Tribal Governments,  
IBCA Nos. 4857-2006 to 4861-2006

Dear Judge Steel:

Please find enclosed Appellee's Answer and Certificate of Service. Pursuant to the Board's rules, a diskette is enclosed with an electronic copy of the Answer in Word Perfect format.

Please contact the undersigned counsel if you have any questions or perceive any problem.

Respectfully submitted,

Jocelyn S. Beer  
Counsel for the Government Appellee

enclosures

cc: Geoffrey D. Strommer  
Stephen D. Osborne  
Counsel for Appellant  
(w/o diskette)

**UNITED STATES DEPARTMENT OF THE INTERIOR  
OFFICE OF HEARING AND APPEALS**

Interior Board of Contract Appeals  
801 N. Quincy St., Suite 300  
Arlington, VA 22203

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	)	
	)	IBCA 4857-2006
COUNCIL OF ATHABASCAN TRIBAL	)	IBCA 4858-2006
GOVERNMENTS,	)	IBCA 4859-2006
	)	IBCA 4860-2006
Appellant,	)	IBCA 4861-2006
v.	)	
	)	
INDIAN HEALTH SERVICE, Dr. Charles Grim,	)	
Director,	)	
	)	
Appellee.	)	

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ANSWER

Appellee Indian Health Service (IHS) answers the Complaint of Appellant Council of Athabascan Tribal Governments (CATG) as follows:

First Defense

Appellant's purported claims for fiscal years 1996, 1997, and 1998 under Contract 243-96-6008 are barred and the Board lacks jurisdiction because Appellant failed to present the claims to the IHS Contracting Officer within the six year period mandated by the Contract Disputes Act. 41 U.S.C. § 605(a).

Second Defense

Appellant fails to state a claim upon which relief may be granted because IHS fully performed under Contract 243-96-6008 for FY 1996, 1998, 1999, and 2000 and under Compact 58G000064 for FY 2000.

IHS answers the numbered paragraphs of Appellant's Complaint as follows:

1. The first sentence is admitted. The second and third sentences are denied, and the Board is referred to 25 U.S.C. 450m-1(d) and the Contract Disputes Act for a full and accurate statement of their contents.

2. The first (including parenthetical), second, and third sentences are admitted. The fourth sentence is denied, except to admit that before December 2006, no decision on the 1998 or 1999 claims was sent to CATG. The fifth sentence is Appellant's characterization of the CDA, which does not require a response but is denied, should a response be required, and the Board is referred to 41 U.S.C. 605(c)(3) for a full and accurate statement of its contents. The sixth sentence is denied, and the Board is referred to 41 U.S.C. § 605(c)(5) and 25 C.F.R. § 900.224 for a full and accurate statement of their contents. The seventh sentence is denied, and the Board is referred to the Supreme Court's decision in Cherokee v. Leavitt, 543 U.S. 631 (2005), for a full and accurate statement of its contents. The eighth sentence is denied. The ninth sentence is denied. Footnote 3 to the ninth sentence is Appellant's characterization of its action, to which no response is required, but should a response be required, it is denied.

3. The first sentence of this paragraph is denied except to admit that Appellant entered into Contract No. 243-96-6008 and incorporated annual funding agreements (AFAs) with IHS and did provide some health care services to eligible individuals as specified in those agreements during fiscal years (FY) 1996-2000, as authorized by the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. 450-450n, and the Board is referred to the ISDEAA for a full and accurate statement of its contents. The second sentence of this paragraph is denied except to admit that, in addition to Contract No. 243-96-6008, Appellant also agreed to

provide services under the Alaska Tribal Health Compact (ATHC) and an incorporated AFA, as authorized by Title III of the ISDEAA, and the Board is referred to Title III (found at 25 U.S.C. § 450f Note (1994)) for a full and accurate statement of its contents.

4. The first sentence is denied, except to admit that the ISDEAA authorizes tribes and tribal organizations to contract to administer programs, functions, services, or activities that the Secretary would otherwise provide to American Indians and Alaska Natives pursuant to federal law, and that Appellant CATG entered into Contract 243-96-6008 and Compact 58G000064 with the IHS as a tribal organization. The second and third sentences and footnote 4 are denied, and the Board is referred to Section 106(a) (codified as 25 U.S.C. § 450j-1(a)), 25 U.S.C. § 450f Note (1994); the Contract, and the Fiscal Year 2000 AFA for a full and accurate statement of their contents.

5. The fifth paragraph is denied, except to admit that under the ISDEAA, allowable contract support costs may include start-up costs, indirect costs, and direct costs, and the Board is referred to 25 U.S.C. 450j-1(a)(2), (3), and (5) for a full and accurate statement of their contents.

6. The sixth paragraph is denied, and the Board is referred to IHS Circular 96-04 for a full and accurate statement of its contents.

7. The seventh paragraph is denied, and the Board is referred to IHS Circular 96-04 for a full and accurate statement of its contents.

8. The eighth paragraph is denied, and the Board is referred to IHS Circular 96-04 for a full and accurate statement of its contents.

9. The first sentence is denied. The second sentence is denied. The third sentence purports to be a quotation from 25 U.S.C. 450j-1(b)(2), to which no response is required, beyond

noting that Appellant has inserted the words “including CSC,” and the Board is referred to 25 U.S.C. 450j-1(b)(2) for a full and accurate statement of its contents.

10. This paragraph is denied, and the Board is referred to Contract 243-96-6008 and the Alaska Tribal Health Compact (ATHC) for a full and accurate statement of their contents.

11. The first sentence is denied. The second sentence denied except to admit that IHS Circular 96-04 was signed by Michael Trujillo, the Director of IHS at that time, and that it set out policy guidance on CSC funding. The third sentence is denied except to admit that the quotation is accurate, and the Board is referred to IHS Circular 96-04 for a full and accurate statement of its contents. The fourth sentence is denied, except to admit that the quotation is accurate and the Board is referred to IHS Circular 96-04 for a full and accurate statement of its contents.

12. This paragraph is denied, except to admit that the parties agreed to follow IHS Circular 96-04 in several of their agreements, including the FY 2000 AFA, and the Board is referred to the FY 2000 AFA for a full and accurate statement of its contents.

13. This paragraph is Appellant’s characterization of the Supreme Court’s decision in Cherokee v. Leavitt, 543 U.S. 631 (2005), which requires no response but is denied, should a response be required, and the Board is referred to the Court’s opinion for a full and accurate statement of its contents.

14. The first and second sentences of this paragraph are denied. The third sentence is denied except to admit that IHS prepares shortfall reports pursuant to 25 U.S.C. 450j-1(c) as a budget tool for the Congress, and the Board is referred to 25 U.S.C. 450j-1(c) for a full and accurate statement of its contents. The fourth sentence is denied except to admit that each Area Office prepares a report that compares the amounts awarded with the tribe’s total CSC need, as

reported by the tribe and estimated by IHS under the applicable IHS circular, within three months after the close of the relevant fiscal year. The fifth sentence is denied except to admit that, despite the varying forms of the shortfall report, the area office prepares them by using the most current information the tribe has provided the area office about its need for indirect costs (which may incorporate the tribe's indirect cost rate, if the tribe has such a rate) and its need for direct contract support costs to estimate the tribe's total CSC need, and the area office then compares this estimate with the amount awarded.

15. This paragraph (including the chart and accompanying footnotes) is denied, except to admit that the shortfall reports estimated a shortfall for CATG, and the Board is referred to the shortfall reports for a full and accurate statement of their contents.

16. The first sentence of this paragraph is denied, except to admit that IHS maintained a separate list of CSC requests from tribal contractors that had assumed, or planned to assume, new or expanded PFSAs from IHS during FY 1996-1998. The second sentence is denied except to admit that CSC funding for new and expanded contracts was paid in part from the Indian Self-Determination (ISD) Fund for FY 1996-1998. The third sentence is denied, except to admit that during FY 1995, the requests placed on the ISD priority list exceeded the amounts appropriated by Congress to the ISD fund. The fourth sentence is denied, except to admit that the agency distributed the ISD fund on first-come first served system, commonly known as the ISD "queue." The fifth sentence is denied, and the Board is referred to IHS Circular 96-04 for a full and accurate statement of its contents.

17. The first sentence of this paragraph denied except to admit that Appellant assumed new PFSAs in FY 1997 and submitted a request for additional CSC from the ISD Fund

to support those new PFSAs. The second sentence is denied, except to admit that the Area Office negotiated Appellant's request for additional CSC and forwarded the request, and that the amounts listed in Table 2 appear in the ISD Queue attached as Appendix C. The third sentence is denied, except to admit that the figures listed include figures for indirect cost funding requested for both the program amount and the direct contract support costs listed in the document. The fourth sentence is denied, except to admit that the reports IHS prepared to estimate the need for CSC in FY 1997 and 1998 did not include projections of direct contract support cost need associated with the administration of newly assumed or expanded programs, nor the indirect costs a tribe might incur on those direct contract support costs. The fifth and sixth sentences are Appellant's characterization of its claim, to which no response is required but should a response be required, is denied. Footnote seven is denied, and the Board is referred to IHS Circular 96-04 for a full and accurate statement of its contents.

18. The first sentence of this paragraph is denied. The second sentence is denied, except to admit that IHS discontinued use of the ISD queue in 1999.

19. The first sentence of this paragraph is Appellant's characterization of its claim, to which no response is required, but if a response should be required, denied. The second sentence is denied, except to admit that the report IHS prepared to estimate the need for CSC in FY 1998 did not include a projection of direct contract support cost need associated with the administration of newly assumed or expanded programs, nor the indirect costs tribes might incur on those direct contract support costs. The third sentence is denied, except to admit that the Alaska Area report only estimated the need for CSC for ongoing programs, as reflected by

column C. The fourth sentence is denied, except to admit that during FY 1999, IHS started reporting estimated shortfalls of CSC for all programs in one document.

20. This paragraph is denied, except to admit that Congress enacted “not to exceed” language capping the amount of funds the agency legally could use for contract support costs, and the Board is referred to the cited appropriations acts for a full and accurate statement of their contents.

21. This paragraph is denied.

22. The first sentence of this paragraph is denied, except to admit that the amount of appropriated funding legally available to IHS to use for CSC increased from FY 1998 to FY 1999, and from FY 1999 to FY 2000. The second sentence is denied except to admit that the exception set forth in ISDA section 106(b)(2)(A) (codified as 25 U.S.C. 450j-1(b)(2)(A)) would not apply to FY 1999 or 2000. The third sentence is denied. The fourth sentence is denied, except to admit that the ISDA, Contract 243-96-6008, and Circular 96-04 provide that the amount of funds due under 25 U.S.C. 450j-1(a) shall not be reduced from the amount IHS paid in the previous year unless permitted by 25 U.S.C. 450j-1(b), and the Board is referred to 25 U.S.C. 450j-1(b), Contract 243-96-6008 and its incorporated AFAs, and Circular 96-04 for a full and accurate statement of their contents.

23. The first sentence of this paragraph is denied, except to admit that IHS received letters dated September 2, 2005, in which Appellant requested additional amounts of CSC. The second sentence is denied.

24. The first sentence of this paragraph is Appellant’s characterization of its claims, to which no response is required. The second sentence is denied, and the Board is referred to the

Cherokee Nation decision for a full and accurate statement of its holding. The third sentence is denied, except to admit that amounts were listed for CATG on the shortfall estimates and the ISD queue list. The fourth and fifth sentences are denied.

25. This paragraph is denied.

26. IHS's responses to paragraphs 1-25 are restated and incorporated herein.

27. This paragraph is denied, except to admit that IHS listed a shortfall of \$463,411 in its report for FY 1997.

28. IHS's responses to paragraphs 1-27 are restated and incorporated herein.

29. This paragraph is denied except to admit that IHS listed a shortfall of \$552,998 in its report for FY 1998, and that a request for \$443,653 was listed on the ISD queue for CATG as of September 30, 1998.

30. IHS's responses to paragraphs 1-29 are restated and incorporated herein.

31. The first and second sentences in this paragraph are legal conclusions, to which no response is required, but if a response should be required, they are denied. The third sentence is denied, except to admit that the amount IHS estimated as Appellant's total need in the FY 1998 shortfall report decreased from the amount IHS estimated as Appellant's total need in the FY 1997 report. The fourth sentence is denied. The fifth sentence is denied except to admit that IHS paid CATG \$461,074 in CSC under its FY 1998 ISDA contract. The sixth sentence is Appellant's request for relief, to which no response is required, but should a response be required, it is denied.

32. IHS's responses to paragraph 1-31 are restated and incorporated herein.

33. The first and second sentences in this paragraph are legal conclusions, to which no response is required, but if a response should be required, they are denied. The third sentence is denied, except to admit that the amount IHS estimated as Appellant's total CSC need in the FY 1999 shortfall report decreased from the amount IHS estimated as Appellant's total CSC need in the FY 1998 report. The fourth sentence is denied. The fifth sentence is denied except to admit that IHS paid CATG \$841,835 in CSC under its FY 1999 ISDA contract. The sixth sentence is Appellant's request for relief, to which no response is required, but should a response be required, it is denied.

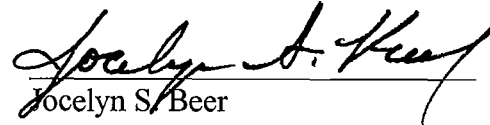
34. IHS's responses to paragraphs 1-33 are restated and incorporated herein.

35. The first sentence of this paragraph is denied, except to admit that the amount IHS estimated as Appellant's total CSC need in FY 2000 was not less than the amount so estimated for FY 1999. The second sentence is a legal conclusion, to which no response is required, but should a response be required, it is denied. The third sentence is denied, except to admit that IHS paid Appellant \$876,946 in CSC in FY 2000. The fourth sentence is Appellant's request for relief, to which no response is required, but should a response be required, it is denied.

36. This paragraph consists of Appellant's prayer for relief, to which no response is required, but should a response be required, it is denied.

Further, IHS specifically denies all allegations in the Complaint not otherwise answered herein.

Respectfully submitted,



Jocelyn S. Beer  
U.S. Department of Health &  
Human Services  
Office of the General Counsel,  
Public Health Division

Counsel for Government Appellee

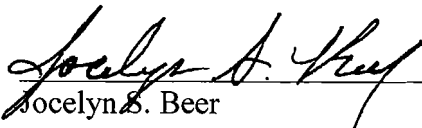
Dated: December 22, 2006

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2006, I caused a copy of the foregoing Answer to be served upon counsel for Appellant by first class mail and facsimile addressed to:

Geoffrey D. Strommer  
Stephen D. Osborne  
Hobbs, Straus, Dean & Walker, LLP  
806 SW Broadway, Suite 900  
Portland, OR 97205

Executed at Rockville, Maryland, on December 22, 2006.



Jocelyn S. Beer  
U.S. Department of Health & Human Services  
Office of the General Counsel