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CIVILIAN BOARD OF  
CONTRACT APPEALS

Attorneys for Contractor/Appellant

**CIVILIAN BOARD OF CONTRACT APPEALS**

CHOCTAW NATION OF OKLAHOMA )  
Drawer 1210 )  
Durant, Oklahoma 74702-1210 )  
 )  
Appellant, )  
vs. )  
 )  
MICHAEL O. LEAVITT, SECRETARY, )  
U.S. DEPARTMENT OF HEALTH AND )  
HUMAN SERVICES; ROBERT G. )  
McSWAIN, ACTING DIRECTOR, INDIAN )  
HEALTH SERVICE; UNITED STATES OF )  
AMERICA, )  
 )  
Respondents. )  
\_\_\_\_\_ )

CBCA Nos. \_\_\_\_\_ through \_\_\_\_\_  
Contract No. 246-94-0018 (FY 1994)

**PROTECTIVE NOTICE OF APPEAL  
AND UNOPPOSED REQUEST FOR A STAY**

Choctaw Nation of Oklahoma (“Choctaw Nation”), by and through its attorneys Sonosky, Chambers, Sachse, Endreson & Perry, LLP, hereby appeals from the October 26, 2007, denial by Ronda M. Longbrake, Senior Contracting Officer, DHHS, Oklahoma City Area Indian Health Service (attached hereto as Exhibit 1), of a January 18, 2007 “contract support cost” (CSC) damages claim under Contract No. 246-94-0018 in the amount of \$130,302, plus interest, for FY 1994, which

the Choctaw Nation properly and timely submitted under the Contract Disputes Act (41 U.S.C. §§ 601-612) (“CDA”) and the Indian Self-Determination and Education Assistance Act (25 U.S.C. §§ 450–458aaa-18) (“ISDA”).

This appeal involves the failure of the Secretary of DHHS, through authority delegated Robert G. McSwain, Acting Director of the Indian Health Service, to pay annually the full contract support costs to which the Choctaw Nation claims it is entitled by operation of law and by its contracts and compacts entered into pursuant to the ISDA.

The Board’s jurisdiction is invoked pursuant to 25 U.S.C. §§ 450m-1(a) & (d) of the ISDA and 41 U.S.C. §§ 606 & 607(d) of the CDA.

The Choctaw Nation simultaneously with this Notice requests that the Board enter an Order staying all proceedings in this appeal pending this Board’s decisions in *Arctic Slope Native Association, Ltd. v. Leavitt, et al.*, CBCA 190-ISDA, 289-ISDA through 297-ISDA; *Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians v. Indian Health Service, et al.*, CBCA 171-ISDA, 235-ISDA through 237-ISDA; and *Metlakatla Indian Community v. Indian Health Service, Dep’t of Health and Human Services*, CBCA 181-ISDA, 279-ISDA through 282-ISDA.

No later than 30 days from receipt of the Board’s notice of docketing or the expiration of any stay entered in this appeal, whichever is later, the Choctaw Nation intends to file a Complaint.

Appellant’s counsel has conferred with Respondents’ counsel and is authorized to state that Respondents do not oppose this request for a stay.

Respectfully submitted this 5 day of January 2008.

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**DEPARTMENT OF HEALTH & HUMAN SERVICES**

**Public Health Service**

**OCT 26 2007**

Oklahoma City Area Indian Health Service  
Five Corporate Plaza  
3625 NW 56th Street  
Oklahoma City, OK 73112-4519

By Certified Mail, Return Receipt Requested

Greg Pyle, Principal Chief  
Choctaw Nation of Oklahoma  
P.O. Drawer 1210  
Durant, OK 74702-1210

Subject: Contract Dispute for Contract No. 246-94-0018  
Contract Disputes Act Claim for Contract Support for 1994

Dear Chief Pyle:

The Indian Health Service (IHS) received your revised claim dated January 18, 2007 for contract support costs in the amount of \$130,302 under P.L. 93-638 contract no. 246-94-0018 for Fiscal Year 1994. The funding agreement started on April 1, 1994, therefore the funding amounts under consideration are for a nine month period ending December 31, 1994. By previous letters sent, the Choctaw Nation was notified that IHS was continuing to work on the claim. Your claim is denied for the following reasons.

**DESCRIPTION OF CLAIMS**

Your January 18, 2007 letter sets forth the following two claims. The first claim seeks recovery of alleged CSC shortfall for FY 1994. You claim that IHS failed to pay the Choctaw Nation the full amount of contract support cost needed to administer the contract. Your letter, supported by your certification, alleges that the amounts listed, which you characterize a shortfall claims, are due.

The second claim alleges that "IHS failed to adjust the indirect cost amount calculated by applying the Choctaw Nation's indirect cost rate to account for the dilution in IHS's responsibility to pay indirect contract support cost caused by the erroneous assumption (reflected in applicable OMB circulars concerning indirect cost rates) that all agencies funding the Choctaw Nation contribute to the Choctaw Nation's indirect cost pool at the full rate", in violation of its contractual and statutory obligations to the Choctaw Nation.

Your letter, supported by your certification, alleges that the amount due for CY94 is \$130,302, plus interest. However, your letter does not break down this figure, nor does it state how the Choctaw Nation calculated this figure, and does not provide any supporting documentation for this figure. 25 C.F.R.900.218(A)(1).

**CONTRACT TERMS AT ISSUE**

Contract 246-94-0018, effective April 1, 1994, provides, in part, as follows:

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**Choctaw Nation/CSC/IDC/Dispute -- Page 2****A. SECTION G -- Item 1. PAYMENT;****a. Limitation of Cost:**

Subject to Section I, General Provision Clause 3, Limitation of Cost, the total cost to the Government, including all direct and indirect costs for the performance of this contract shall not exceed \$16,025,827.00 until and unless the Contractor is notified in writing by the Contracting Officer that this ceiling amount has been increased.

It is estimated that the total cost to the Government for full performance of this contract will be \$16,025,827.00. Total funds that were available for payment and allotted to this contract were \$12,104,912. It is estimated that the funds allotted would cover performance through December 31, 1994. Any funds beyond the amount obligated were subject to the Availability of Funds for the Next Fiscal Year clause.

**b. Allowable Cost:**

The Contractor will be reimbursed for all costs incurred in the performance of this contract, claimed by the Contractor, and accepted by the Contracting Officer, in accordance with Section I, General Provision Clause 3, "Limitation of Cost", General Provision Clause 4, "Allowable Cost", and General Provision Clause 5, "Negotiated Overhead Rates" if appropriate.

- (1) This was an over-recovery. The period of performance for this contract is April 1, 1994-December 31, 1994.
- (2) Award Amount: \$16,025,827.00 (For the period April 1, 1994 - December 31, 1994)
- (3) Obligated Amount: \$12,104,912.00 (For the period April 1, 1994 - December 31, 1994)
- (4) Total Indirect Cost and Contract Support Cost paid - \$3,037,616.40

**FACTUAL AREAS OF AGREEMENT AND DISAGREEMENT****A. Claim 1**

Most of the allegations set forth in your letter are your characterizations of the rights and duties of the Choctaw Nation and the government under the Indian Self Determination Act (ISDA). These legal arguments are discussed in the Decision section of this letter.

The government disagrees with your allegation that the Choctaw Nation was underpaid \$130,302.00 for CSC and Indirect Cost for CY94. We cannot determine, because your letter does not break down the figure of \$130,302 plus interest that you are claiming, nor does it state how the Choctaw Nation calculated this figure, and you do not provide any supporting documentation.

Choctaw Nation/CSC/IDC/Dispute – Page 3

The Government considers the following facts pertinent to its decision on Claim 1:

IHS paid the Choctaw Nation \$3,037,616.40.00 in indirect costs and contract support costs under contract no. 246-94-0018.

B. Claim 2

The allegations set forth in support of claim 2 are your characterizations of the parties' rights and duties under the ISDA, not facts. These legal arguments will be discussed in the Decision section of this letter.

As a factual matter, you did not provide IHS with information to support your claim, such as any agreements with other federal agencies. You have provided no evidence that these other federal agencies failed to allow the Choctaw Nation to recover the indirect costs associated with these agreements. Also the Tribe did not have a negotiated rate that covered both IHS and non-IHS programs. Finally, you have provided no evidence that the Choctaw Nation would incur these indirect costs to support the IHS contract alone in the absence of the other federal programs.

Decision

A. Claim 1

Claim 1 is denied because IHS has not breached any contractual duty to pay CSC beyond those already awarded the Choctaw Nation. Our records reflect that IHS paid the Choctaw Nation all of the CSC required to be paid under the contract, and in fact, over-paid the CSC required to be paid. Therefore, there was no breach of contractual duty.

B. Claim 2

Your claims are barred by the doctrine of laches. You have provided no information in a timely manner to support your allegation that you were somehow harmed when IHS used your 1994 Indirect cost rate to calculate your need for indirect costs. Even if your claim were otherwise valid, IHS has no basis to award your claim. However, as discussed below, your claim is not valid.

Neither your Funding Agreement nor the ISDA requires IHS to adjust the indirect cost calculation to account for the failure of other Federal agencies to allow full indirect cost recovery. The Choctaw Nation never asked IHS to obtain, nor did IHS ever receive approval from the Choctaw Nation's cognizant agency to adjust the indirect cost rate.

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**Choctaw Nation/CSC/IDC/Dispute -- Page 4**

Even if the Funding Agreements permitted IHS to make the rate adjustment the Choctaw Nation now requests, IHS is not the Choctaw Nation's cognizant agency. It is not authorized to adjust rates negotiated under OMB Circular A-87, unless statutorily required.

The ISDA does not require IHS to adjust the indirect cost rate. Instead, IHS is statutorily barred from awarding indirect cost funding for any cost shared with any other federal program. Although 25 U.S.C. 450j-1(d)(1) prohibits using shortfalls in indirect cost funding by other federal, state, or other agencies as the basis for theoretical over-recoveries or other adverse adjustments of any future years' indirect cost rates, it is clear from the legislative history that this provision does not address "rate dilution" of the sort that you appear to be claiming. Instead, this provision addresses the situation where the tribal contractor, unable to collect indirect costs from other federal agencies, incurred fewer indirect costs than had been predicted by the rate. When this "theoretical over-recovery" was carried forward, the result was a lower indirect cost rate. See S. Rep. 100-274 at 32.

Despite the legislative history, the Court of Appeals for the Tenth Circuit held that 25 U.S.C. 450j-1(d)(2) was ambiguous and that the tribal contractor's interpretation that it also prohibited rate dilution was plausible. Ramah Navajo Chapter, Inc. v. Lujan, 112F.3d 1455, 1461-62(10<sup>th</sup> Cir. 1997). The court did not rule that the use of OMB Circular A-87 was per se illegal, nor did the court make any ruling with respect to IHS, which was not a party to the case. However, Congress promptly acted to remove ambiguity in 25 U.S.C. 450j-1(e)(2) and to ensure that the court's decision would not apply to IHS. It amended the ISDA to provide as follows:

That, heretofore and hereafter and notwithstanding any other provision of law, funds available to the Indian Health Service in this Act or any other Act for Indian self-determination or self-governance contract or grant support costs may be expended only for costs directly attributable to contracts, grants, and compacts pursuant to the Indian Self-Determination Act and no funds appropriated by this or any other Act shall be available for any contract support costs or indirect costs associated with any contract, grant, cooperative agreement, self-governance compact, or funding agreement entered into between an Indian tribe or tribal organization and any entity other than the Indian Health Service.

Omnibus Consolidated and Emergency Supplemental Appropriation Act of 1999, Pub.L.105-277, §101, 112 Stat. 2681, 2681-280 (1998) (codified at 25 U.S.C. §450j-2).

As far as can be determined from your January 18, 2007 letter, you are claiming that your indirect cost pool would not change if other Federal programs were added or subtracted from the direct cost base. Even if IHS accepted this factual premise, IHS cannot use its funds to pay indirect costs that are "associated with" any other Federal program. This is so even if the other Federal program does not allow for the recovery of the full indirect cost associated with it. Any other Federal programs in the Choctaw Nation's direct cost base do incur indirect costs that are allocable to them, independent of whether their governing statutes permit recovery. For this reason, IHS acted properly when it used the Choctaw Nation's indirect cost rate agreement, calculated under OMB Circular A-87, to calculate the indirect cost need associated with the IHS program.

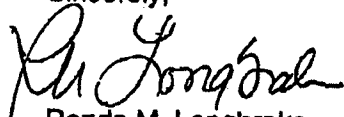
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**Choctaw Nation/CSC/IDC/Dispute-Page 5****Appeal Rights**

This is a final decision. You may appeal this decision to the Civilian Board of Contract Appeals, 1800 F Street, N.W., Washington, D.C. 20405. If you decide to appeal, you shall, within 90 days from the date you receive this decision, mail, or otherwise furnish written notice to the CBCA and provide a copy to the individual from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, and refer to the decision and contract number.

Sincerely,



Ronda M. Longbrake  
Senior Contracting Officer

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 Donald J. Simon, Esq.  
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Attorneys for Contractor/Appellant

**CIVILIAN BOARD OF CONTRACT APPEALS**

CHOCTAW NATION OF OKLAHOMA	)	
Drawer 1210	)	
Durant, Oklahoma 74702-1210	)	
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Appellant,	)	CBCA Nos. _____ through _____
vs.	)	
	)	Contract No. 246-94-0018 (FY 1994)
MICHAEL O. LEAVITT, SECRETARY,	)	
U.S. DEPARTMENT OF HEALTH AND	)	
HUMAN SERVICES; ROBERT G.	)	
McSWAIN, ACTING DIRECTOR, INDIAN	)	
HEALTH SERVICE; UNITED STATES OF	)	
AMERICA,	)	
	)	
Respondents.	)	
_____	)	

**ORDER GRANTING UNOPPOSED MOTION TO STAY PROCEEDINGS**

Appellant's Unopposed Motion to Stay Proceedings is hereby GRANTED. This stay shall expire 60 days after the issuance of this Board's decisions on the currently pending motions filed in *Arctic Slope Native Association, Ltd. v. Leavitt, et al.*, CBCA 190-ISDA, 289-ISDA through 297-ISDA; *Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians v. Indian Health Service, et al.*, CBCA 171-ISDA, 235-ISDA through 237-ISDA; and *Metlakatla Indian Community v. Indian*

*Health Service, Dep't of Health and Human Services, CBCA 181-ISD, 279-ISDA through 282-ISDA.*

SO ORDERED this \_\_\_\_\_ day of \_\_\_\_\_ 2008.

\_\_\_\_\_  
JUDGE

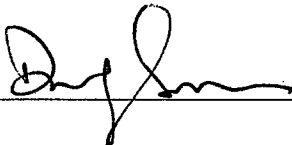
**CERTIFICATE OF SERVICE**

I hereby certify that I mailed, or caused to be mailed, a true and correct copy of the foregoing **PROTECTIVE NOTICE OF APPEAL AND UNOPPOSED REQUEST FOR A STAY** and proposed **ORDER** by certified mail, return receipt requested, to the following parties of record this 8<sup>th</sup> day of January 2008:

Robert G. McSwain  
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