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UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

FACSIMILE TRANSMISSION - TOTAL PAGES 30

May 8 2007

SUBJECT: Notice of docketing - CBCA 741-ISDA and 742-ISDA  
Chugachmiut v. Department of Health and Human Services  
Contract No. 243-88-0002

TO: Lloyd B. Miller, Esq. FAX 907-272-8332  
Melanie Baca Osborne, Esq.  
Sonosky, Chambers, Sachse, Miller & Munson, LLP  
900 West Fifth Avenue, Suite 700  
Anchorage, AK 99501

Barbara J. Hudson, Esq. FAX 301-480-2161  
IHS Branch Chief PH 301-443-0406  
Office of the General Counsel  
Indian Health Service  
Public Health Service  
Department of Health and Human Services  
Room 4A-53, Parklawn Bldg.  
5600 Fishers Lane  
Rockville, MD 20857

Charles Grim, D.D.S., M.H.S.A. FAX 301-443-4794  
Assistant Surgeon General  
Director  
Indian Health Service  
Public Health Service  
Department of Health and Human Services  
801 Thompson Ave. SU  
Rockville, MD 20852

NOTE: NEW CBCA RULES HAVE NOT YET BEEN ISSUED.

PH 202-606-8800, FAX 606-0019

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6th Floor, 1800 M Street, NW, Washington, DC 20036

Mailing Address: U.S. Postal Service  
1800 F Street NW, Washington, DC 20405

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**TO: Burt Humphrey, Contracting Officer  
Alaska Area Native Health Services  
Public Health Service  
Department of Health and Human Services  
4141 Ambassador Drive  
Anchorage, AK 99508-5928**

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**UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS**

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**NOTICE OF DOCKETING**

**CBCA 741-ISDA and 742-ISDA - CHUGACHMIUT v. DEPARTMENT OF HEALTH AND HUMAN SERVICES**

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May 8, 2007

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The Board has received your notice of appeal, which has been docketed as **CBCA 741-ISDA and 742-ISDA**. The appropriate docket number should be referenced in all future correspondence.

CBCA 741-ISDA - Appeal final decision of 2/6/07 - claim FY 1993; Cont. No. 243-88-0002  
CBCA 742-ISDA - Appeal final decision of 2/6/07 - claim FY 1994; Cont. No. 243-88-0002

Enclosed for respondent is a copy of the notices of appeal.

The Clerk's Office is located at 6th floor, 1800 M Street, N.W., Washington, DC 20036. Filings made in person or by courier should be sent to this location. The Board's mailing address is 1800 F Street, N.W., Washington, DC 20405. Filings made via the United States Postal Service should be sent to this address. The Office of the Clerk will receive all papers submitted for filing from 8:00 a.m. to 4:30 p.m. on each day that is not a Saturday, Sunday, or federal holiday. The Board's telephone number is: (202) 606-8800 and its facsimile number is: (202) 606-0019. The filing of a document by facsimile transmission occurs upon receipt by the Board of the entire printed submission

**Due to delays in delivery of U.S. Postal Service mail, please transmit responses by overnight delivery or fax.**

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This case has been assigned to Board Judge Candida S. Steel, who will initiate proceedings in the case. Judge Steel's telephone number is (202) 606-8817.



BEATRICE JONES  
Clerk of the Board

cc:

Lloyd B. Miller, Esq.

FAX 907-272-8332

Melanie Baca Osborne, Esq.

Sonosky, Chambers, Sachse, Miller & Munson, LLP

900 West Fifth Avenue, Suite 700

Anchorage, AK 99501

[government representative until notice of appearance entered]

Barbara J. Hudson, Esq.

FAX 301-480-2161

IHS Branch Chief

PH 301-443-0406

Office of the General Counsel

Indian Health Service

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Department of Health and Human Services

Room 4A-53, Parklawn Bldg.

5600 Fishers Lane

Rockville, MD 20857

enclosure - notice of appeal

Charles Grim, D.D.S., M.H.S.A.

FAX 301-443-4794

Assistant Surgeon General

Director

Indian Health Service

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enclosure - notice of appeal

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**Burt Humphrey, Contracting Officer  
Alaska Area Native Health Services  
Public Health Service  
Department of Health and Human Services  
4141 Ambassador Drive  
Anchorage, AK 99508-5928**

**U.S. Postal Service**

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May 4, 2007

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 ARTHUR LAZARUS, JR.  
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 KAY E. MAASSEN GOUWENS (AK)\*  
 MATTHEW S. JAFFE  
 AARON M. SCHUTT (AK)\*

\*NOT ADMITTED IN D.C.

Beatrice Jones, Clerk  
 Civilian Board of Contract Appeals  
 1800 M. Street N.W., 6<sup>th</sup> Floor  
 Washington, D.C. 20036

Re: Appeal of Chugachmiut

Dear Ms. Jones:

I enclose for filing an original and one copy of Chugachmiut's Protective Notice of Appeal and Request for a Stay (accompanied by Exhibits 1 and 2), Notice of Related Cases and Entry of Appearance. Additionally we are enclosing one extra copy of the documents so that they can be conformed and returned to us.

Pursuant to Judge Steel's standing order, we are including for Judge Steel a diskette containing an electronic version of the documents submitted for filing.

Sincerely,

SONOSKY, CHAMBERS, SACHSE,  
 MILLER & MUNSON, LLP

*Lloyd B. Miller*  
 Lloyd Benton Miller  
 Melanie Baca Osborne by DSA

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cc: Barbara Hudson (w/encl, excluding diskette)  
Jocelyn S. Beer (w/encl, excluding diskette)  
Secretary Michael Leavitt (w/encl, excluding diskette)  
Dr. Charles W. Grim (w/encl, excluding diskette)  
Burt Humphrey (w/encl, excluding diskette)

Enclosures: Protective Notice of Appeal and Request for Stay (original plus 1)  
Exhibits 1 and 2  
Notice of Related Cases (original plus 1)  
Entry of Appearance (original plus 1)  
Diskette with electronic version of above documents

87656.1

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008/030

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Melanie Baca Osborne, Esq.  
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CIVILIAN BOARD OF  
CONTRACT APPEALS

Attorneys for Contractor/Appellant

**CIVILIAN BOARD OF CONTRACT APPEALS**

CHUGACHMIUT )  
1840 S. Bragaw Street, Suite 110 )  
Anchorage, Alaska 99508 )

Appellant, )

vs. )

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

Appellees. )

CBCA Nos. \_\_\_\_\_ through \_\_\_\_\_

ISDA Contract No. 243-88-0002

**ENTRY OF APPEARANCE**

The law firm of Sonosky, Chambers, Sachse, Miller & Munson, LLP, hereby enters its appearance as attorneys for the Contractor-Appellant Chugachmiut, in the above-captioned matter.

05/08/2007 10:16 FAX 2028060019

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Respectfully submitted this 4<sup>th</sup> day of May 2007.

SONOSKY, CHAMBERS, SACHSE,  
MILLER & MUNSON, LLP

By: Lloyd B. Miller  
Lloyd B. Miller by DJJ  
D.C. Bar No. 317131  
AK Bar No. 7906040  
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05/08/2007 10:18 FAX 2028060019

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**CERTIFICATE OF SERVICE**

I hereby certify that I mailed, or caused to be mailed, a true and correct copy of the foregoing document by certified mail, return receipt requested, to the following parties of record this 4<sup>th</sup> day of May 2007:

Barbara Hudson, Esq.  
Jocelyn S. Beer, Esq.  
Office of General Counsel  
Public Health Division  
U.S. Department of Health  
and Human Services  
Parklawn Building, Room 4A53  
5600 Fishers Lane  
Rockville, Maryland 20857

Secretary Michael Leavitt  
U.S. Department of Health and  
Human Services  
200 Independence Avenue S.W.  
Washington, D.C. 20201

Dr. Charles W. Grim, Director  
U.S. Department of Health and  
Human Services  
801 Thompson Avenue, Room 440  
Rockville, Maryland 20842

Burt Humphrey  
Senior Contracting Officer  
Alaska Area Native Health Services  
4141 Ambassador Drive, Suite 300  
Anchorage, Alaska 99508-5928

Lloyd B. Miller  
by DJS

ENTRY OF APPEARANCE  
*Chugachmiut v. Leavitt, et al.*

Page 3 of 37655.1

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CONTRACT APPEALS

Attorneys for Contractor/Appellant

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1840 S. Bragaw Street, Suite 110 )  
Anchorage, Alaska 99508 )

Appellant, )

vs. )

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

Appellees. )

741-ISDA  
CBCA Nos. \_\_\_\_\_ through 742-ISDA  
ISDA Contract No. 243-88-0002

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

Chugachmiut, by and through its attorneys Sonosky, Chambers, Sachse, Miller & Munson, LLP, hereby appeals from February 6, 2007 denials by the U.S. Department of Health & Human Services, Alaska Area Native Health Services, Burt Humphrey, Senior Contracting Officer, attached hereto as Exhibits 1 and 2, of multiple "contract support cost" (CSC) damages claims which Chugachmiut 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"), as follows:

- (a) a September 28, 2006 damages claim under ISDA Contract No. 243-88-0002, in the amount of \$250,395, plus interest, for FY 1993; and
- (b) a September 28, 2006 damages claim under ISDA Contract No. 243-88-0002, in the amount of \$94,087, plus interest, for FY 1994.

The total face amount of the claims so submitted was \$344,482.00.

This appeal involves the failure of the Secretary of DHHS, through authority delegated to Senior Contracting Officer Burt Humphrey of the Alaska Area Health Services Office, to pay annually the full contract support costs to which Chugachmiut 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. Chugachmiut simultaneously with this Notice requests that the Board enter an Order staying all proceedings in this appeal pending (1) this Board's decision in *Arctic Slope Native Association, Ltd. v. Leavitt, et al.*, CBCA 189-ISDA and 289-ISDA through 297-ISDA and (2) the district court's resolution of the pending motion for class certification in *Pueblo of Zuni v. United States of America*, Case No. CV01-1046 WJ/WPL (argued April 23, 2007). 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), Chugachmiut intends to file a Complaint.

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Respectfully submitted this 4<sup>th</sup> day of May 2007.

SONOSKY, CHAMBERS, SACHSE,  
MILLER & MUNSON, LLP

By: Lloyd B. Miller by DJJ

Lloyd B. Miller

D.C. Bar No. 317131

AK Bar No. 7906040

Melanie Baca Osborne

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Telephone: 907-258-6377

Facsimile: 907-272-8332

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**CERTIFICATE OF SERVICE**

I hereby certify that I mailed, or caused to be mailed, a true and correct copy of the foregoing document by certified mail, return receipt requested, to the following parties of record this 4<sup>th</sup> day of May 2007:

Barbara Hudson, Esq.  
Jocelyn S. Beer, Esq.  
Office of General Counsel  
Public Health Division  
U.S. Department of Health  
and Human Services  
Parklawn Building, Room 4A53  
5600 Fishers Lane  
Rockville, Maryland 20857

Secretary Michael Leavitt  
U.S. Department of Health and  
Human Services  
200 Independence Avenue S.W.  
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Dr. Charles W. Grim, Director  
U.S. Department of Health and  
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Burt Humphrey  
Senior Contracting Officer  
Alaska Area Native Health Services  
4141 Ambassador Drive, Suite 300  
Anchorage, Alaska 99508-5928

Lloyd B. Miller  
by DJJ

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## DEPARTMENT OF HEALTH &amp; HUMAN SERVICES

Public Health Service

February 6, 2007

Alaska Area Native Health Services  
4141 Ambassador Drive  
Anchorage, Alaska 99508-5928

Patrick M. Anderson, Executive Director  
Chugachmiut  
1840 S. Bragaw Street, Suite 110  
Anchorage, AK 99508

Subject: Contract Disputes Act Claims for Contract Support Costs in FY  
1993 for Contract No. 243-88-0002

Dear Mr. Anderson:

On September 29, 2006, the Indian Health Service (IHS) received the September 28, 2006 request of the Chugachmiut for a contracting officer's decision under the Contract Disputes Act (CDA) concerning Chugachmiut's claim for additional contract support costs (CSC) for FY 1993. The request claims a total of \$250,395 pertaining to Contract No. 243-88-0002. By letter dated November 28, 2006, we notified Chugachmiut of our intent to issue a decision on its request within 180 days.

Based on the facts and law presented below, the subject claim of Chugachmiut is denied.

I. Description of Claim

Chugachmiut's claim for \$250,395 in additional CSC is comprised of two parts. First, Chugachmiut claims that IHS failed to pay the full amount of contract support costs (CSC), including indirect costs associated with management of the IHS programs.

Second, Chugachmiut alleges "IHS failed to include in the calculation of Chugachmiut contract support cost requirement the full indirect contract support costs associated with Chugachmiut contracts." According to the letter, "IHS did so by employing the same illegal calculation of Chugachmiut indirect cost requirements associated with this contract that was struck down by the Tenth Circuit in *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10<sup>th</sup> Cir. 1997)." Specifically, Chugachmiut claims IHS erred by failing "to adjust the indirect cost amount calculated by applying Chugachmiut indirect cost rate to account for dilution in IHS' responsibility to pay indirect contract support costs caused by the erroneous assumption that all agencies funding Chugachmiut contribute to Chugachmiut indirect cost pool at the full rate."

The claim does not cite what portions of the claimed amount accrue to the two parts of the claim. However, we note that the total claimed amount is from the Alaska Area FY 1993 shortfall report.

Exhibit 1  
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## II. Contract and Funding Agreement Provisions

After reviewing Contract No. 243-88-0002 we specifically considered the following provisions:

### Section G - Contract Administration Data: 1. PAYMENT

(A) **Limitation of Costs:** Subject to General Provision Clause 3 Limitation of Cost the total cost to the Government, including all direct and other costs for the performance of this contract, shall not exceed \$2,906,058.00 until and unless the Contractor is notified in writing by the Contracting Officer that this ceiling amount has been increased.

(B) 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 General Provision Clause 3 Limitation of Cost, General Provision Clause 4 Allowable Cost, and General Provision Clause 5 Negotiated Overhead Rates, if appropriate.

(E) **Indirect Costs:** Indirect costs during the period of this contract shall be reimbursed at rates established by agreement between the Contractor and the Comptroller, Region X, Department of Health and Human Services. No deviations from the established rate will be made without approval of the Comptroller, Region X, Department of Health and Human Services; as evidenced by a formal rate negotiation agreement.

Notwithstanding the foregoing provisions the Contractor shall, in the case of an upward adjustment of the overhead rate, comply with the requirements of General Provision Clause 3 Limitation of Cost and provide timely notifications to the Contracting Officer, when such increase in costs causes operation of that clause.

Additionally, Amendment #55, effective October 1, 1992, increased the contract value by \$2,385,699. The Amendment states that all other terms and conditions of this contract shall remain the same.

## III. Findings of Fact

IHS and Chugachmiut entered Contract No. 243-88-0002 (the Contract), effective October 1, 1987. The performance period for the contract was extended to September 30, 1993 by Amendment #55.

Amendment #55 provided \$2,385,699 in IHS' funds and Chugachmiut provided a budget for direct and indirect costs that matched the amount of Amendment #55; and for each subsequent Amendment for FY 93.

The Area FY 93 Advice of Allowance #17 dated September 30, 1993 does not separately breakout CSC. In FY 93 the CSC amounts were contained within several IHS sub-activity accounts and CSC did not have a separate accounting designation. However, the ending "tag" in IHS accounting numbers is known as an object class code and "25.85" refers to tribal indirect cost funding. The total funds carrying this designation per modification #55 is \$529,942. In the final FY 93 modification #68, the 25.85 designated amounts is \$538,559. The total FY 93 contract value was \$3,452,646.94 inclusive of CSC amounts. Total advance payments were \$3,265,888. The Chugachmiut Financial Status Report dated November 2, 1993 showed funds available as \$3,452,646.94, obligations of \$3,140,765.98 and an un-obligated balance of \$311,880.96.

The CSC tracking spreadsheet dated July 20, 1993 shows a total of \$554,009 in indirect CSC funding was made available for Chugachmiut's Title I agreement. An undated Office of Tribal Activities (OTA) CSC Data Report shows indirect CSC at \$559,135 and the difference of \$5,125 is accounted for by the addition of CSC funds by Amendment #66 on September 23, 1993. The OTA CSC Data Report also shows \$121,441 in direct CSC for FY 93.

The FY 1993 Alaska Area shortfall report utilized Chugachmiut's provisional rate of 34.7% and the final rate was 48%.

#### IV. Decision

Chugachmiut's claim is denied because the IHS has not breached any contractual duty to pay CSC funds beyond those already awarded. Chugachmiut and the IHS agreed upon payment of those funds agreed upon in the Contract and its Amendments. The award amounts were controlled by the Limitation of Costs Clause. Moreover, IHS paid the full amount promised under the contract. The claim provides no evidence that Chugachmiut had unfunded needs for indirect CSCs in FY 1993. The Chugachmiut claim must also be denied under the doctrine of laches. Finally, there is no evidence that IHS miscalculated the amount of IDC due under the Contract.

#### A. IHS Paid the Full Amount of CSC Required Under the Contract

Under the contract, the IHS paid the sum certain identified in each modification inclusive of direct and indirect costs. No sum certain of indirect costs was identified. The budgets provided for each modification match the amount of the award and are inclusive of all direct and indirect costs. Chugachmiut now asserts that "IHS failed to pay the full amount of Chugachmiut contract support cost requirement calculated pursuant to IHS policies, by applying an unlawful policy limiting the total amount that would be paid to Chugachmiut." We presume that "unlawful policy" is a reference to Cherokee Nation v. Leavitt, 125 S. Ct. 1172 (2005). In Cherokee, however, the Supreme Court was faced with a complaint that the agency failed to pay the amount agreed to in the contract. Contrarily, in the present claim IHS fulfilled its agreement to pay the sum certain identified in the contract

modifications for FY 93. Cherokee cannot be fairly read to require an upward adjustment in the amount IHS is contractually bound to pay.

Relying exclusively on the shortfall report, as Chugachmiut apparently did, is problematic because the report is a budget estimating tool, not a reflection of the amount owed under contract or compact. The estimated amount in the shortfall report can differ from the actual contractual amount for several reasons, including: (1) indirect rates used in the shortfall report are often provisional; (2) the shortfall report does not account for final adjustments to contract funding amounts; (3) indirect rate exclusionary amounts are estimates based upon approximated preliminary data; (4) determinations of the direct cost base for allocation of indirect costs change when calculated using final audited numbers; and, (5) the shortfall report assumes the tribe expended all IHS funds.

#### **B. The Claim Provides No Evidence of Unfunded Indirect Costs**

The claim provides no basis or supporting evidence for the amount of the claim. Because the claimed amount of \$250,395 is the same amount reported as shortfall by the IHS FY 93 shortfall report, we presume that the shortfall report is the source of the claimed amount.

As noted above, the IHS shortfall report is not a cost report. The shortfall report is appropriate for its intended purpose as a planning and budget estimating tool, however the report has limitations that generally make it an imprecise measure of actual indirect costs incurred by a contractor. The report is typically prepared and submitted to IHS Headquarters within 75 days following the end of the fiscal year. As a result, the report must rely on preliminary and un-audited data. Preliminary data means that the indirect rates used in the report may be provisional, there may be final adjustments to contract funding amounts, indirect rate exclusionary amounts can only be estimated with preliminary data, and determinations of the direct cost base for allocation of indirect costs may change based on final audited numbers.

The budget for the final FY 93 contract amount of \$3,452,647, at modification #68, is inclusive of direct and indirect costs. The contract amount was fully paid. The budget for modification #68 shows \$879,268 in indirect costs. The Chugachmiut FY 93 audit shows \$817,076 in indirect costs allocated to the IHS program. This provides no evidence of failure to recover indirect costs from the IHS award.

#### **C. The Claim is Barred by the Doctrine of Laches**

Your claim is denied because it is barred by the doctrine of laches, a defense which is available to the government in CDA cases. S.E.R. Jobs for Progress, Inc. v. United States, 759 F.2d 1 (Fed. Cir. 1985). Chugachmiut delayed thirteen years before asserting this claim, thus compromising IHS's ability to investigate, answer, or satisfy any claimed amounts. Based on the delay in filing the claim, IHS's ability to recover any evidence of the final rates has been severely compromised. The delay is unreasonable and results in prejudice to the agency, thereby satisfying the requirement for a laches defense. See La

