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INTERIOR BOARD OF CONTRACT APPEALS

ASSINIBOINE AND SIOUX TRIBES OF)
 THE FORT PECK RESERVATION)
 P.O. Box 1027)
 Poplar, Montana 59255)

Appellants,)

vs.)

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. _____ through _____

ISDA Contract No. 244-94-0018 (effective
 Oct. 1, 1994 through September 30, 1995)

PROTECTIVE NOTICE OF APPEAL AND REQUEST FOR A STAY

The Assiniboine and Sioux Tribes of the Fort Peck Reservation (“the Tribes”), by and through its attorneys Sonosky, Chambers, Sachse, Miller & Munson, LLP, hereby appeal from the decision of U.S. Department of Health & Human Services, Indian Health Service Senior

Contracting Officer Jerry L. Black dated May 31, 2006, attached hereto as Exhibit 1, related to the Tribes' claim under Contract Number 244-94-0018, for contract year 1995 (October 1, 1994 through September 30, 1995). This appeal asserts that the Appellees are liable for money damages due to the non-payment of certain "contract support costs" associated with contracts entered into pursuant to the Indian Self-Determination Act, 25 U.S.C. § 450 et seq., between the Indian Health Service and the Tribes.

The same issues involved in this appeal are pending before the United States District Court for the District of New Mexico in a putative class action entitled Pueblo of Zuni v. United States of America, Case No. CV 01-1046 WJ/WPL. A Motion for Class Certification and for Approval of Class Notice (Dkt. No. 280) is pending before the New Mexico District Court. The Tribes are a putative class member in the Zuni case. Thus, the disposition of the Motion for Class Certification affects whether the Tribes will proceed with this appeal. The Tribes file this Notice as a protective Notice of Appeal, preserving the right of the Tribes to proceed in this forum if a class action is not certified in Zuni.

Given the pendency of the class certification motion in the Zuni matter, the most efficient course of action is to stay this litigation.

For the foregoing reasons, Appellants Assiniboine and Sioux Tribes of the Fort Peck Reservation respectfully request that this appeal be docketed and that Appellants' request for a stay be granted.

Respectfully submitted this 30th day of August 2006.

SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON, LLP

By: 

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CERTIFICATE OF SERVICE

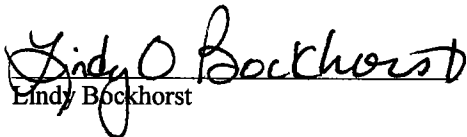
I hereby certify that I mailed, or caused to be mailed, a true and correct copy of the foregoing document by certified mail, return receipt requested, to the following parties of record this 30th day of August 2006:

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

Dr. Charles W. Grim, Director
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DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service
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Our Reference: OAS/CCB

MAY 31 2006

Mr. John Morales, Chairman
Fort Peck Tribal Executive Board
P.O. Box 1027
Poplar, Montana 59255

Subject: Contract Dispute for Contract Number 244-94-0018
Contract Support Costs for Contract year 1995
(October 1, 1994 through September 30, 1995)

RECEIVED
EXECUTIVE SECRETARIAT
INDIAN HEALTH SERVICE
2006 JUN - 6 P 3:00

Dear Chairman Morales:

The Indian Health Service (IHS) received your claim dated September 29, 2005, for direct and indirect contract support costs (CSC) in the amount of \$20,110.00 for Contract Year 1995 (FY-95). By letter dated November 16, 2005, we notified you that we would answer your claim no later than March 1, 2006. Due to new information received from you on February 1, 2006 indicating the Tribe was submitting a "Revised" CDA claim, the IHS did not have an opportunity to adequately review and make a final decision by March 1, 2006. We notified you on February 23, 2006 that we would answer your claim on or before May 31, 2006. Your claim is denied for the following reasons:

Description of Claims

Your September 29, 2005 and February 1, 2006 letters set forth two claims. The first claim alleges "IHS failed to pay the full amount of the Tribes contract support cost requirement calculated pursuant to IHS's policies, by applying an unlawful policy limiting the total amount that would be paid to the Fort Peck Tribes".

The second claim alleges that "IHS failed to adjust the indirect cost amount, calculated by applying the Fort Peck Tribes' 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 Fort Peck Tribes contribute to the Tribes' indirect cost pool at the full rate," in violation of its contractual and statutory obligations to the Fort Peck Tribes.

Your letter, supported by your certification, alleges that the amount due for FY-95 is \$20,110.00, plus interest. However, your letter does not break down this figure between the two claims, does not state how the Tribes calculated this figure, does not break down this figure between the seven different contracts identified in your letter and does not provide any supporting documentation for this figure.

Contract Terms at Issue

Contract 244-94-0018, effective October 1, 1993, provides, in part as follows:

SECTION G – CONTRACT ADMINISTRATION DATA

Section G.1.B Allowable Costs: 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 Provisions Clause 3, Limitation of Costs; General Provisions Clause 4, Allowable Costs; and General Provisions Clause 5, Negotiated Overhead Rates, if appropriate.

Section G.1.D Direct Costs: The Contractor will be reimbursed for all costs as described in this Section incurred directly and specifically in the performance of this contract, claimed by the Contractor and accepted by the Contracting Officer.

Section G.1.E Indirect Costs: The allowable indirect costs under this contract shall be established in accordance with the procedures set forth in General Provision Clause 5, Negotiated Overhead Rates.

Beginning on the effective date of this contract, indirect costs shall be reimbursed at the fixed carry-forward rate of 22.8 percent of the direct costs chargeable to this contract. (As noted below, this rate was subsequently changed to 17.7 percent and this change was incorporated into the contract by bilateral modification number eleven (11)).

Section G.1.A Limitation of Cost: Subject to 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 \$2,147,329.00 until and unless the Contractor is notified in writing by the Contracting Officer that this ceiling amount has been increased.*

In addition, at the time of initial award, Section G.5 of the contract, entitled "Accounting and Appropriation Data", indicated that the funding amounts available to the Contractor for FY-95 of this contract were \$41,664.00 in direct CSC and \$145,543.00 in indirect CSC funding. In addition, the informational budget the Tribes prepared for the contract and appended to the contract proposal, provides an estimate of \$145,543.00 for indirect cost expenditures. At the time of award, the indirect CSC was calculated using the approved FY-94 IDC Rate of 22.8%. This was subsequently changed and recalculated using the approved FY-1995 fixed carry-forward IDC rate of 17.7%. This change was incorporated into the contract through bilateral modification – specifically, modification number eleven (11).

Additional modifications were issued affecting the direct and indirect CSC amounts. Modification number twelve (12) was executed to increase the direct CSC funding by \$451.00, increasing the total direct CSC to \$42,115.00. Additionally, modification numbers nine (9) and twelve (12) were executed to increase the indirect CSC funding by \$24,119.00 and \$54,585.00 respectively and modification number (11) was executed to decrease the indirect CSC by \$50,134.00, resulting from the reduced IDC rate noted above. The cumulative result of these modifications increased the total indirect CSC amount to \$174,113.00.

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 Tribes 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 Tribes were underpaid \$20,110.00 for CSC for FY-95.

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

Under contract number 244-94-0018, IHS paid the Fort Peck Tribes a total of \$42,115.00 in direct CSC and \$174,113.00 in indirect CSC funding in fiscal year 1995.

The Tribes' informational budget, attached to the FY-95 contract proposal, shows an estimate of \$145,543.00 for indirect cost expenditures.

The Tribes' indirect rate agreement with Department of the Interior Office of the Inspector General dated April 16, 1996, set forth a fixed carryforward indirect cost rate of 17.7% for fiscal year (FY) 1995 (October 1, 1994 through September 30, 1995).

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 Fort Peck Tribes to recover the indirect costs associated with these agreements. Finally, you have provided no evidence that the Tribes would incur these indirect costs to support the IHS contract alone in the absence of the other federal programs. IHS does not have this information and, therefore, cannot state whether it agrees or disagrees with any factual assertions related to this claim.¹

¹ Your claim letter was accompanied only by a copy of the IHS Shortfall Report, which had previously been provided to you by this office and which has no relevance to claim #2.

DECISION

A. Claim 1

Claim 1 is denied because IHS has not breached any contractual duty to pay CSC beyond those amounts already awarded the Tribes. Section C (c), Page 3, of the Contract Number 244-94-0018 states that the total funds to be paid would be determined in the contract. Section G.5 of the contract indicated at the time of award, that \$41,664.00 in direct CSC and \$145,543.00 in indirect CSC funding was available for the Fort Peck Tribes. Following multiple contract modifications as outlined above, these amounts were increased to \$42,115.00 in direct CSC funding and \$174,113.00 in indirect CSC funding. Our records reflect that IHS paid the Fort Peck Tribes these amounts and, consequently, that IHS paid all of the CSC required to be paid under the contract.²

Moreover, your claim is denied because it was filed nearly ten (10) years after it accrued. This is over four (4) years more than the time permitted under the current statute of limitations for bringing claims against the Government under the Contract Disputes Act. 41 U.S.C. § 605(a). Consequently, Claim 1 is barred by the doctrine of laches.

B. Claim 2

Your claim letter does not identify a specific amount claimed under claim number 2. With regard to claim 2, therefore, your letter fails to constitute a cognizable claim under the Contract Disputes Act (CDA). Both the Federal Acquisition Regulation (FAR) and the Indian Self-Determination Act regulations, require that a CDA claim for monetary relief specify the amount of the claim. Both regulations are codified in the Code of Federal Regulations (CFR). The FAR provision defines a claim as follows:

- *Code of Federal Regulations 48 CFR 2.101: "Claim means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract."*

Emphasis added.

² This conclusion is consistent with that of your Tribal auditor who indicated in a submission to the IHS dated August 26, 1997, that based upon final audit figures for fiscal years 1994 and 1995, the Tribes were fully reimbursed for the indirect costs the Tribes incurred in those fiscal years. (See letter from Tribal auditor, Richard A. Wiens, of CHMS, P.C., to Mr. Jerry Zitur of the Billings Area Office, IHS, dated August 26, 1997).

Similarly, the Indian Self-Determination Act regulations define a claim as follows:

- *Code of Federal Regulations at 25 CFR 900.218: (a) A claim is a written demand by one of the contracting parties, asking for one or more of the following:*
 - (1) *Payment of a specific sum of money under the contract;*
 - (2) *Adjustment or interpretation of contract terms; or*
 - (3) *Any other claim relating to the contract.*

Emphasis added.

Because claim number 2 clearly seeks monetary relief rather than adjustment or interpretation of a contract term or provision or other type of relief, it must state a sum certain in order to constitute a cognizable claim.

Claim number 2 is also denied because it was filed nearly ten (10) years after it accrued. Again, this is over four (4) years more than the time permitted under the current statute of limitations for bringing claims against the Government under the Contract Disputes Act. 41 U.S.C. § 605(a). Consequently, this claim is also barred by the doctrine of laches. In addition, as discussed above, you have provided no information to support your allegation that you were somehow harmed when IHS used your 1995 indirect cost rate to calculate your need for indirect costs. Therefore, 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 contract 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 Tribes never asked IHS to obtain, nor did IHS ever receive, approval from the Tribes' cognizant agency to adjust the indirect cost rate. Even if the contract permitted IHS to make the rate adjustment the Tribes now request, IHS is not the Tribes' 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 associated 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, 112 F.3d 1455, 1461-62 (10th 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, in any event, Congress promptly acted to remove any ambiguity in 25 U.S.C. 450j-1(d)(2) and to ensure that the court's decision would not apply to IHS. Specifically, 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.

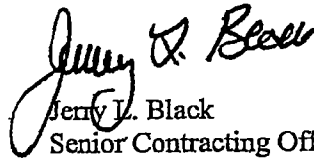
Pub. L. 105-277, Section 101(e) (1998), codified at 25 U.S.C. 450j-2.

As far as can be determined from your September 30, 2005 and February 1, 2006 letters, 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 the IHS accepted this factual premise, as noted above, the IHS is prohibited by statute from using 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 costs associated with it. Any other federal programs in the Tribe's direct cost base do incur indirect costs that are allocable to them independent of whether their governing statutes permit recovery of such costs by the Tribes. For this reason, IHS acted properly when it used the Tribes' indirect cost rate agreement, calculated under OMB Circular A-87, to calculate the indirect cost need associated with the IHS program.

Appeal Rights

This is a final decision. You may appeal this decision to the Interior Board of Contract Appeals (IBCA), U.S. Department of the Interior, 801 North Quincy Street, Arlington, VA 22203. 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 IBCA 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. Instead of appealing to the IBCA, you may bring an action in the U.S. Court of Federal Claims or in the United States District Court within 12 months of the date you receive this notice.

Sincerely,


Jerry L. Black
Senior Contracting Officer

cc: Policy Analyst, Policy Liaison Team/DRA/OMS/IHS, Twinbrook Metro Plaza-
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