

Lloyd Benton Miller, Esq.
 Melanie Baca Osborne, Esq.
 Sonosky, Chambers, Sachse,
 Miller & Munson, LLP
 900 West Fifth Avenue, Suite 700
 Anchorage, Alaska 99501
 Telephone: (907) 258-6377
 Facsimile: (907) 272-8332

Attorneys for Contractor/Appellant

CIVILIAN BOARD OF CONTRACT APPEALS

KODIAK AREA NATIVE ASSOCIATION)	
3449 Rezanof Drive East)	
Kodiak, Alaska 99615)	
)	
Appellant,)	CBCA Nos. _____ through _____
vs.)	
)	ISDA Compact No. 58G950027
MICHAEL O. LEAVITT, SECRETARY,)	
U.S. DEPARTMENT OF HEALTH AND)	
HUMAN SERVICES; CHARLES GRIM,)	
DIRECTOR, INDIAN HEALTH)	
SERVICE; UNITED STATES OF)	
AMERICA)	
)	
Appellees.)	
_____)	

NOTICE OF APPEAL

The Kodiak Area Native Association (“KANA”) by and through its attorneys Sonosky, Chambers, Sachse, Miller & Munson, LLP, hereby appeal from the October 25, 2006 denials by the U.S. Department of Health & Human Services, Director Dr. Charles Grim, DDS, of the Indian Health Service (IHS) of the U.S. Department of Health & Human Services (DHHS), attached hereto as Exhibits 1 through 8, of multiple “contract support cost” (CSC) damages

claims which KANA 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 27, 2005 damages claim under ISDA Compact No. 58G950027, in the amount of \$213,105, plus interest, for FY 1996;
- (b) a September 27, 2005 damages claim under ISDA Compact No. 58G950027, in the amount of \$196,890, plus interest, for FY 1997;
- (c) a September 27, 2005 damages claim under ISDA Compact No. 58G950027, in the amount of \$115,268, plus interest, for FY 1998;
- (d) a September 27, 2005 damages claim under ISDA Compact No. 58G950027, in the amount of \$201,693, plus interest, for FY 1999;
- (e) a September 27, 2005 damages claim under ISDA Compact No. 58G950027, in the amount of \$140,646, plus interest, for FY 2000;
- (f) a September 27, 2005 damages claim under ISDA Compact No. 58G950027, in the amount of \$85,238, plus interest, for FY 2001;
- (g) a September 27, 2005 damages claim under ISDA Compact No. 58G950027, in the amount of \$63,695, plus interest, for FY 2003; and
- (h) a September 27, 2005 damages claim under ISDA Compact No. 58G950027, in the amount of \$253,428, plus interest, for FY 2004.

The total face amount of the claims so submitted was \$1,269,963.

This appeal involves the failure of the Secretary of DHHS, through authority delegated to the Director of IHS, to pay annually the full contract support costs to which KANA 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. No later than 30 days from receipt of the Board's notice of docketing, KANA intends to file a Complaint as permitted by 48 C.F.R. § 6101.7(b).

Respectfully submitted this 22nd day of January 2007.

SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON, LLP

By: 

Lloyd B. Miller
D.C. Bar No. 317131
AK Bar No. 7906040
Melanie Baca Osborne
AK Bar No. 9911068

900 West Fifth Avenue, Suite 700
Anchorage, Alaska 99501-2029
Telephone: 907-258-6377
Facsimile: 907-272-8332


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 22nd day of January 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


Lindy O. Bockhorst



DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

OCT 25 2006

Indian Health Service
Rockville MD 20852

By Certified Mail, Return Receipt Requested

Ms. Rita L. Stevens
President
Kodiak Area Native Association
3449 Rezanof Drive East
Kodiak, AK 99615

**Subject: Contract Disputes Act Claims for Compact No. 58G950027
Contract Support Costs for Fiscal Year 1996
(October 1, 1995, through September 30, 1996)**

Dear President Stevens:

The Indian Health Service (IHS) received your letter dated September 27, 2005, claiming indirect and direct contract support costs (CSC) are owed to Kodiak Area Native Association (Tribe) for fiscal year (FY) 1996 in the amount of \$213,105. By letter dated November 1, 2005, we notified you that we would answer the claim by April 28, 2006. At that time, we informed you that your claim required additional consideration and indicated that we would provide an answer by October 25, 2006. The Tribe's claim is denied for the following reasons.

Description of Claims

Your September 27, 2005, letter sets forth two claims for FY 1996. First, you claim that the "IHS failed to pay the full amount of the Kodiak Area Native Association'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 Kodiak Area Native Association."

Second, you allege that the "IHS failed to adjust the indirect cost amount calculated by applying the Kodiak Area Native Association'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 Kodiak Area Native Association contribute to the Kodiak Area Native Association's indirect cost pool at the full rate," thereby "violat[ing] its contractual and statutory obligations to the Kodiak Area Native Association."

Your September 27, 2005, letter, supported by your certification, claims that the additional amount owed the Tribe for FY 1996 is \$213,105. However, neither the certification nor any other documentation was submitted to breakdown the figure between the two asserted claims or

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to support the amount. We have not received a response to our request for clarification, which was dated November 23, 2005.

Factual Areas of Agreement and Disagreement

Most of the allegations set forth in your letter are your characterizations of the rights and duties of the Tribe and the IHS under the Indian Self-Determination and Education Assistance Act (ISDEAA). The Decision section of this letter discusses those arguments. This section addresses the underlying factual allegations in your claims.

A. Claim 1

You have failed to specify what portion of the \$213,105 allegedly owed by the IHS arises under this claim, as opposed to your second claim. Under the Contract Disputes Act, a contracting party presenting a claim must ask for “payment of a specific sum of money under the contract.” 25 C.F.R. § 900.218(a)(1).

In addition, you have failed to provide the IHS with information explaining or supporting your claim. Since you have failed to provide this information, the IHS is unable to determine whether it agrees or disagrees with any factual assertions related to this claim.

B. Claim 2

You have failed to specify what portion of the \$213,105 allegedly owed by the IHS arises under this claim, as opposed to your first claim. Under the Contract Disputes Act, a contracting party presenting a claim must ask for “payment of a specific sum of money under the contract.” 25 C.F.R. § 900.218(a)(1).

In addition, you have failed to provide the IHS with information explaining or supporting your claim, such as agreements with other Federal agencies that do not allow the Tribe to recover indirect costs associated with those agreements or evidence that the IHS is solely responsible for these indirect costs because the Tribe incurs them regardless of the other Federal programs. Since you have failed to provide this information, the IHS is unable to determine whether it agrees or disagrees with any factual assertions related to this claim.

Decision

A. Claim 1

The first claim for FY 1996 is denied because it is barred for failure to meet the statutory requirements of the Contract Disputes Act. First, the claim is barred by the applicable statute of

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limitations. In 1994, Congress amended the Contract Disputes Act to require submission of all claims within 6 years of the date of accrual. 41 U.S.C. § 605(a). Article III, Section 2 of the Compact states that the total funds to be paid under the Compact are to be determined in Annual Funding Agreements (AFA). The AFA relevant to FY 1996 expired on September 30, 1996, at the close of the fiscal year. The claim for FY 1996 accrued at that time. You submitted your claim on September 27, 2005, which was 9 years after accrual and 3 years past the statute of limitations. The claim also fails to meet the statutory requirement that it specify the amount of funds attributable to the claim.

Although the Tribe's claim for FY 1996 is barred by the statute of limitations, your claim is also denied because the Tribe has failed to demonstrate how the IHS underpaid its CSC for FY 1996. Although the Shortfall Report shows a shortfall of \$116,744 for FY 1996, this is unreliable for determining whether the IHS met its contractual obligation to pay CSC to a Tribe. The IHS compiles this Report as an estimate for congressional consideration in the appropriations process and not as a representation of its contractual obligations. The Shortfall Report can be inaccurate for determining the IHS's contractual obligation because, among other reasons, they: (a) often use provisional indirect rates; (b) do not account for adjustments to the contract rates; (c) estimate direct cost base and indirect rate amounts based on preliminary, rather than final, year-end data; and (d) assume all IHS funds were expended. In addition, the FY 1996 Shortfall Report included projected calculations of CSC need for 1997.

B. Claim 2

The second claim is also denied. First, as discussed above, your claim does not meet the requirements of the Contract Disputes Act because you have not specified what portion of the \$213,105 in your letter are funds due under this claim. Second, as already explained, your claim regarding FY 1996 is barred by the statute of limitations. Third, as stated above, you provided no information to support your allegation that you were harmed when the IHS used your final negotiated indirect cost rates to calculate your indirect cost need. Without information demonstrating this harm, the IHS has no basis to award your claim. However, as discussed below, your claim is not valid.

Neither your Compact nor the ISDEAA requires the IHS to adjust the indirect cost calculation to account for the failure of other Federal agencies to allow full indirect cost recovery. The Tribe never asked the IHS to obtain, nor did the IHS ever receive, approval from the Tribe's cognizant agency to adjust the indirect cost rate. Even if the Compact permitted the IHS to make the rate adjustment the Tribe now requests, the IHS is not the Tribe's cognizant agency, and therefore, it is not authorized to adjust rates negotiated under Office of Management and Budget (OMB) Circular A-87, unless statutorily required.

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The ISDEAA does not require the IHS to adjust the indirect cost rate. Instead, the IHS is statutorily barred from awarding indirect cost funding for any cost allocable to another 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 you appear to be alleging. 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 (1987), reprinted in 1988 U.S.C.C.A.N. 2620, 2651.

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 the statute also prohibited rate dilution was plausible. Ramah Navajo Chapter, Inc. v. Lujan, 112 F.3d 1455, 1461-62 (10th Cir. 1997). Importantly, however, the Ramah 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 the IHS, which was not a party to the case.

As a result of the Ramah decision, 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 the IHS. It amended the ISDEAA 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 Appropriations Act of 1999, Pub. L. 105-277, § 101(e), 112 Stat. 2681 (1998) (codified at 25 U.S.C. § 450j-2). As far as can be determined from your September 27, 2005, 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, and therefore, the IHS should provide funding for all of your indirect costs even if other Federal programs contribute to your direct cost base. If the IHS accepted the factual premise that the Tribe's indirect cost pool is fixed, the statutory amendment still precludes the IHS from using its funds to pay indirect costs "associated with" any other Federal program. This is so even if the other Federal program does not allow for the recovery of the indirect costs associated with it.

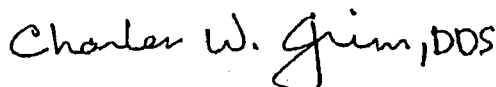
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Any other Federal programs in the Tribe's direct cost base incur indirect costs allocable to them, independent of whether their governing statutes permit recovery. For this reason, the IHS acted properly when it used the Tribe's indirect cost rate 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), United States Department of Interior, 801 North Quincy Street, Arlington, Virginia, 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 United States Court of Federal Claims or in the United States District Court within 12 months of the date you receive this notice.

Sincerely yours,



Charles W. Grim, D.D.S., M.H.S.A.
Assistant Surgeon General
Director



DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Indian Health Service
Rockville MD 20852

OCT 25 2006

By Certified Mail, Return Receipt Requested

Ms. Rita L. Stevens
President
Kodiak Area Native Association
3449 Rezanof Drive East
Kodiak, Alaska 99615

**Subject: Contract Disputes Act Claims for Compact No. 58G950027
Contract Support Costs for Fiscal Year 1997
(October 1, 1996, through September 30, 1997)**

Dear President. Stevens:

The Indian Health Service (IHS) received your letter dated September 27, 2005, claiming indirect and direct contract support costs (CSC) are owed to Kodiak Area Native Association (Tribe) for fiscal year (FY) 1997, in the amount of \$196,890. By letter dated November 1, 2005, we notified you that we would answer the claim by April 28, 2006. At that time, we informed you that your claim required additional consideration and indicated that we would provide an answer by October 25, 2006. The Tribe's claim is denied for the following reasons.

Description of Claims

Your September 27, 2005, letter sets forth two claims for FY 1997. First, you claim that the "IHS failed to pay the full amount of the Kodiak Area Native Association'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 Kodiak Area Native Association."

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Page 2 – Ms. Rita L. Stevens

to support the amount. We have not received a response to our request for clarification, which was dated November 23, 2005.

Compact and Annual Funding Agreement, Terms at Issue

We have reviewed the Alaska Tribal Health Compact, amended and restated October 1, 1996, and your Annual Funding Agreement (AFA) for FY 1997. The Compact provides, in pertinent part, as follows:

Article II, Section 3 – Funding Amount

Subject only to the appropriation of funds by the Congress of the United States and to adjustments pursuant to § 106(b) of the Indian Self-Determination and Education Assistance Act [25 U.S.C. § 450j-1(b)], as amended, the Secretary shall provide the total amounts specified in the Annual Funding Agreements.

Article III, Section 2 – Amount of Funds

The total amount of funds covered by the consolidation and redesign provided for in Section 1 of this Article that the Secretary shall make available to the Co-Signers shall be determined in accordance with § 303(a)(6) of Title III¹ and shall be set forth in the respective Annual Funding Agreements between the Secretary and each Co-Signer.

The AFA for FY 1997 provides, in pertinent part, as follows:

Section 4(a) — Amounts Available in Fiscal Year 1997

Section 4(a) includes a table summarizing the amounts of funding available in FY 1997, referring to Appendix B for a breakdown of the available funding.²

¹ Section 303(a)(6), now repealed, provided that the AFAs “shall . . . provide for payment . . . of funds from one or more programs, services, functions, or activities in an amount equal to that which the tribe would have been eligible to receive under contracts and grants under this Act [Pub. L. 93-638], including direct program costs and indirect costs, and for any funds which are specifically related to the provision by the Secretaries of services and benefits to the tribe and its members.” See 25 U.S.C. § 450f note (1994), repealed by Tribal Self-Governance Amendments of 2000, Pub. L. 106-260, § 10, 114 Stat. 734.

² The table also includes additional funds for CSC associated with tribal shares, in the amount of \$209,381. These funds were to be paid in accordance with a settlement agreement between the IHS and the Tribe for FYs 1995 through 1997, which was finalized on April 2, 1996. Pursuant to the agreement, the funds allotted for CSC on tribal shares are included in the Appendix to the AFA, both in the Table at page 12 and in Appendix C. Appendix C indicates that the additional CSC on tribal shares will be paid from the Indian Self-Determination (ISD) fund in the amount of \$209,381. Our records show payment for this amount from the ISD fund

