

<b>NOTICE OF APPEAL</b>	DATE 01/23/2008	OMB APPROVAL NO. 3090-0221
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TO: Civilian Board of Contract Appeals


I/We hereby appeal the final decision of Robert G. McSwain issued 10/26/2007,  
(Name of Contracting Officer) (Date)  
in connection with a dispute under Contract No. 58G980055. This contract was awarded 10/01/1998  
(Date)  
for provision of contract health care services  
(Type of commodity, service, or construction)  
by Ketchikan Indian Community, Ketchikan, Alaska  
(Name of agency and organizational unit) (City and State)

1. DESCRIBE THE NATURE OF THE DISPUTE INVOLVED IN THE FINAL DECISION AND ANY OTHER CIRCUMSTANCES GIVING RISE TO THIS APPEAL:

See attached contracting officer's decision, dated 10/26/07, per CBCA Rule 2(a)(1).

2. DESCRIBE THE RELIEF WHICH YOU SEEK INCLUDING AN ESTIMATE OF THE AMOUNT OF MONEY IN CONTROVERSY, IF ANY, AND IF KNOWN:

Award of additional contract support costs in the amount of \$698,614 plus interest.

APPELLANT			ATTORNEY FOR APPELLANT		
NAME Ketchikan Indian Community			NAME Stephen V. Quesenberry		
TITLE			FIRM Karshmer & Associates		
STREET 2960 Tongass Avenue			STREET 2150 Shattuck Ave., Suite 725		
CITY Ketchikan			CITY Berkeley		
STATE AK	ZIP CODE 99901	TELEPHONE NUMBER (907)225-5158	STATE CA	ZIP CODE 94704	TELEPHONE NUMBER (510)841-5056
APPELLANT'S SIGNATURE			ATTORNEY'S SIGNATURE 		



OCT 26 2007

By Certified Mail, Return Receipt Requested

Mr. Richard Jackson  
President  
Ketchikan Indian Community  
2960 Tongass Avenue  
Ketchikan, AK 99901-5742

**Subject: Contract Disputes Act Claim for Compact No. 58G980055  
Contract Support Costs for the Ketchikan Indian Community  
for Fiscal Year 1999**

Dear Mr. Jackson:

On October 11, 2005, the Indian Health Service (IHS) received the claims of the Ketchikan Indian Community (KIC) requesting additional contract support costs (CSC) for fiscal year (FY) 1999. The IHS notified the KIC by multiple letters that it required more time to research and answer the Contract Disputes Act (CDA) claims. Based on the facts and law presented below, the FY 1999 claims are now denied.

#### **I. Description of Claim**

The KIC claim letter, dated September 30, 2005, alleges that the IHS paid less than its full CSC and requests an adjustment of \$698,614. The claim letter was unaccompanied by supporting documentation. As stated in the claim letter, your claim for FY 1999 is made in "two ways." In reality, the KIC presented two claims.

First, the KIC alleges that the, "IHS failed to pay the full amount of the Ketchikan Indian Community'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 the Ketchikan Indian Community." The amount of the underpayment claim, as a portion of the total claim, is not specified. A November 23, 2005, letter from the IHS to the KIC requesting supporting documentation and clarification of the claims has gone unanswered.

Second, the KIC alleges:

IHS failed to include in the calculation of the Ketchikan Indian Community's contract support cost requirement the full indirect contract support costs associated with the Ketchikan Indian Community's contracts. IHS did so by employing the same illegal calculation of the Ketchikan Indian Community's 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 (10th Cir. 1997). Specifically, IHS failed to adjust the indirect amount calculated by applying the Ketchikan Indian Community'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 Ketchikan Indian Community contribute to the Ketchikan Indian Community's indirect cost pool at the full rate.

The amount of the miscalculation claim, as a portion of the total claim, is not specified. Again, the November 23, 2005, letter from the IHS to the KIC requesting supporting documentation and clarification of the claims has gone unanswered.

## **II. Contracts, Compact, and Annual Funding Agreement (AFA) Provisions**

After reviewing Compact No. 58G980055 and the applicable AFA, we specifically considered the following provisions, among others:

### **Relevant Provisions of the 1999 Compact**

Article I, Section 1 states:

The Director of the Indian Health Services by signing this Compact commits the Secretary to the extent and within the scope of the Secretary's delegation of authority to enter into compacts and Annual Funding Agreements pursuant to Title III or as otherwise authorized.

### **Compact, Article III, Section 2 – Amount of Funds:**

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

### **Relevant Provisions of the 1999 AFA, effective October 1, 1998**

#### **Section 1 – Obligations of the Indian Health Service**

(B) ... This Annual Funding Agreement ... obligates the Indian Health Service ... to provide funding and services identified herein and as provided in the Alaska Tribal Health Compact ... between the Ketchikan Indian Community (KIC) ... and the United States in Fiscal Year 1999.

#### **Section 4 - Amounts Available in Fiscal Year 1999**

(a). Recurring Base: \$3,146,903; non-recurring funding: \$476,651; Area tribal shares: \$121,182; Headquarters Tribal Shares: \$84,298; Program Formula Equipment Replacement: \$13,296; Contract Support on tribal shares TBD.

Footnote 2/ Non-recurring funds represent contract support costs associated with the direct recurring base, which are funded on a non-recurring basis.

Footnote 5/ The amount of contract support for indirect costs on tribal shares will be calculated so as to avoid duplicative costs in accordance with IHS policies presently in effect and will be added to this agreement by addendum and paid in accordance with Section 106(a)(2) when available.

(B) Pursuant to section 106(a)(2) of the Indian Self-Determination and Education Assistance Act, as amended, KIC shall receive contract support as defined in sections 106(a)(2) and (3). As stated in section 106(a)(2), KIC shall receive contract support only for costs that are not normally carried out by the Secretary in direct operations of the program or are provided by the Secretary in support of the contracted program from resources other than those under contract. The parties acknowledge that the Indian Health Service intends to pay contract support costs according to IHS Circular 96-4. Nothing in this provision shall be interpreted to waive the Co-Signers right to be paid the contract support costs to which it is entitled in accordance with Section 106(a)(2) of the Indian Self-Determination and Education Assistance Act. The date of request for the purposes of determining the priority date under ISD Circular 96-04 for payment of contract support on program funds and Tribal shares identified in this Agreement shall be July 2, 1996.

#### Section 6 – Adjustments

A) Due to Congressional Actions. The Parties to this Agreement recognize that the total amount of the funding in this Agreement is subject to adjustment due to Congressional action in appropriations Acts or other law affecting availability of funds to the Indian Health Service and Health and Human Services. Upon enactment of any such Act or law, the amount of funding provided to KIC in this Agreement shall be adjusted as necessary, after KIC has been notified of such pending action and subject to any rights which KIC may have under this Agreement, the Compact, or the law.

The FY 1999 AFA called for \$918,278 in CSC at page 7 of Appendix "A" Financial Summary for the Annual Funding Agreement. CSC increases were provided by Amendment No. 2, dated April 16, 1999, for \$490,591 and Amendment 3, dated June 15, 1999, for \$1 and Amendment No. 6, dated September 30, 1999, for \$219,987. The initial AFA together with its amendments

promised to pay a total of \$1,628,857 in CSC.

### **III. Findings of Fact**

The FY 1999 AFA was effective from October 1, 1998, and continued until September 30, 1999.

The IHS received the subject claims on October 11, 2005.

The IHS made \$1,628,857 in CSC available to the KIC per the FY 1999 Advice of Allowance No. 10, dated September 21, 1999. Award of these funds was confirmed by the FY 1999 Self-Governance Payment Summary Report, dated September 30, 1999.

### **IV. Decision**

The KIC's claims are denied for the following reasons: the KIC's underpayment and miscalculation claims are barred by the CDA's statute of limitations; the claims exceed the congressional cap; the KIC's underpayment claim is denied because the IHS paid the KIC the CSC amount specified in the AFA for FY 1999; and, the miscalculation claim is barred because there is no evidence that the IHS miscalculated the amount of indirect costs (IDC) due under the AFA.

#### **A. The KIC Failed to Meet the Statute of Limitations**

The KIC's underpayment and miscalculation claims are denied because they were filed more than 6 years after the date they accrued, in violation of the 6-year statute of limitations in the CDA. 41 United States Code (U.S.C.) § 605(a). Specifically, the claims would have accrued on September 30, 1999, and the statute of limitations period expired on September 30, 2005. The claims were not received by the contracting officer until October 11, 2005, more than 6 years after the claims would have accrued and 11 days past the statute of limitations.

**B. The Claims Exceed the Congressional Cap**

The FY 1999 underpayment and miscalculation claims under the AFA are also denied because, although the Indian Self-Determination and Education Assistance Act (ISDEAA) states that Tribes are to be paid "contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management." 25 U.S.C. 450j-1(a)(2). Congress mandated that the "provision of funds [for CSC] is subject to the availability of appropriations." 25 U.S.C. 450j-1(b). The KIC's Compact and the AFA incorporate this express condition by making payment of CSC subject to the availability of appropriations and statutory restrictions imposed by Congress. See, e.g., § 6(a) of the AFA; Title II, section 3 of the Compact. Beginning in FY 1998, Congress enacted a statutory limit on the amount of the IHS appropriation available for CSC. See Public Law (P.L.) 105-83, 111 Stat. 1543, 1583 (FY 1998 Appropriations Act); P.L. 105-277, 112 Stat. 2681, 2681-279 (FY 1999 Appropriations Act); P.L. 106-113, 113 Stat. 1501, 1501A-182 (FY 2000 Appropriations Act); P.L. 106-291, 114 Stat. 922, 978-79 (FY 2001 Appropriations Act); P.L. 107-63, 115 Stat. 414, 456 (FY 2002 Appropriations Act); P.L. 108-7, 117 Stat. 11, 261 (FY 2003 Appropriations Act); P.L. 108-108, 117 Stat. 1241, 1293 (FY 2004 Appropriations Act).

The KIC's claims for FY 1999 CSC under the AFA are subject to Congress' express limitations on the amount of the IHS appropriation that could be used for CSC. This meant that the IHS could not use other funds to pay CSC, even though the overall need nationwide for CSC in FY 1999 exceeded the capped amount. Therefore, pursuant to the IHS policy developed in consultation with Tribes and Tribal organizations, the IHS distributed all of its CSC appropriation to Tribes and Tribal organizations, including the KIC.

Moreover, "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organizations." 25 U.S.C. 450j-1(b). To make additional CSC funds available to the KIC would naturally require the reduction of funds associated with the programs serving other Tribes. Thus, even if the KIC's claims were otherwise valid, no funds are available to pay its claims.

Further, the statutory limit on CSC funds negates the premise of the FY 1999 claim. Even if the IHS had used funds other than CSC to pay CSC costs in FY 1999, which it did not, the statutory restriction imposed in FY 1999 would have prohibited the use of such funds to pay CSC in FY 1999.

**C. The IHS Paid the KIC for CSC Under the FY 1999 AFA.**

The KIC underpayment claim is also denied because the IHS did not breach any contractual duty to pay CSC funds beyond those already awarded to the KIC. The IHS paid the KIC all of the CSC it agreed to pay in the FY 1999 AFA and did not otherwise breach the Compact. Award of the CSC amount promised in the AFA and its Amendments was confirmed by the FY 1999 Self-

Governance Payment Summary Report dated September 30, 1999.

**D. The IHS Did Not Miscalculate the KIC's IDC Rate**

In addition, contrary to the miscalculation claim, Ramah does not dictate a recalculation of the KIC's IDC rate. The IHS is statutorily barred from awarding IDC funding for any cost allocable to any other Federal program. Although 25 U.S.C. 450j-1(d)(1) prohibits using shortfalls in IDC funding by other Federal or State agencies as the basis for theoretical over-recoveries or other adverse adjustments of any future years' IDC rates, it is clear from the legislative history that this provision does not address "rate dilution" as the KIC alleges. Instead, this provision addresses the situation where the Tribal contractor, unable to collect IDC from other Federal agencies, incurred lower IDC than had been predicted by the rate. When this "theoretical over-recovery" was carried forward, the result was a lower IDC 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) prohibited rate dilution, even if caused by the failure of another agency to pay indirect CSC. Ramah Navajo Chapter, Inc. v. Lujan, 112 F.3d 1455, 1461-62 (10th Cir. 1997). More importantly, however, the Ramah court did not rule that the use of Office of Management and Budget (OMB) Circular A-87 to calculate IDC rates was *per se* illegal, nor did the court make any ruling with respect to the IHS, which was not a party to the case.

It is also instructive that 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.

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

For these reasons, the IHS cannot use its funds to pay IDC 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 IDC associated with it. Any other Federal programs in the KIC's direct cost base do incur IDC that are allocable to them independent of whether their governing statutes permit recovery. Therefore, the IHS acted properly when it used the KIC's IDC rate agreement,

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calculated under OMB Circular A-87, to calculate the IDC need associated with the IHS program.


Moreover, the KIC's reliance on Ramah, without any factual support, is misguided. The KIC did not provide the IHS with any information to support its claim that the IHS "divided the total IDC pool by the total direct program base, regardless of the level of IDC funding, if any, that particular programs paid[.]"

For the reasons stated above, the KIC's underpayment and miscalculation claims are denied.

#### V. Appeal Rights

This is a final decision. You may appeal this decision to the Civilian Board of Contract Appeals (CBCA), which is located at 1800 M Street, NW, 6th Floor, Washington, D.C. 20036. The mailing address for the CBCA is 1800 F Street, NW, Washington, D.C. 20405. The phone number of the Office for the Clerk of the CBCA is (202) 606-8800 and the facsimile number is (202) 606-0019. 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 Compact number. Instead of appealing to the CBCA, 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 yours,



Robert G. McSwain  
Acting Director

cc: Christopher Mandregan, Jr., Director, Alaska Area Native Health Service  
Scott Driggs, Office of the General Counsel, Region X