

**INTERIOR BOARD OF CONTRACT APPEALS**

801 N. Quincy Street  
Arlington, VA 22203

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METLAKATLA INDIAN COMMUNITY, )

Appellant )

v. )

INDIAN HEALTH SERVICE, )  
Dr. Charles W. Grim, Director )

Appellee )  
\_\_\_\_\_

IBCA No. \_\_\_\_\_

**COMPLAINT**

This is an appeal by the Metlakatla Indian Community ("Community"), a federally recognized Indian tribe that operates public health facilities and provides public health services to its members and other beneficiaries pursuant to agreements with the Indian Health Service ("IHS") under the Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, as amended, 25 U.S.C. § 450 *et seq.* ("ISDEAA").

The Community appeals the denial by the IHS of the Community's claims for unpaid contract support costs ("CSC") owed to the Community under the ISDEAA and Contract Number 248-88-0184 and 243-95-6001 for FY 1995,<sup>1</sup> Contract Number 243-95-6001 for FY 1996, and the Alaska Tribal Health Compact ("ATHC") and annual funding agreements ("AFAs") for FY 1997-1999.

<sup>1</sup> In the middle of FY 1995, effective April 1, 1995, Community's contract was amended to reflect the terms of the Model Agreement mandated by the Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413 (Oct. 25, 1994), 25 U.S.C. § 450*l*.

## JURISDICTION

1. The agreement in each of the relevant years states that disputes will be resolved in accordance with Section 110 of the ISDEAA. *E.g.* ATHC Art. II, § 10(a). Section 110, in turn, provides that the Contract Disputes Act ("CDA"), 41 U.S.C. § 601 *et seq.*, shall apply. 25 U.S.C. § 450m-1(d). Section 110 further provides that "all administrative appeals relating to [ISDEAA] contracts shall be heard by the Interior Board of Contract Appeals." *Id.*

2. Under the CDA, the agency's failure to respond within a reasonable time means that the claims are deemed denied. 41 U.S.C. § 605(c)(3), (5). On June 30, 2005, the Community mailed the IHS letters requesting a contracting officer's decision on CSC claims for FY 1995-1999. (The letters are attached as Exhibit A.) On November 1, 2005, well after the 60-day response period dictated by the CDA, the IHS sent the Community a letter stating that the agency "anticipate[d]" a decision on the FY 1997-1999 claims within 120 days of the date of the letter, or by about March 1, 2006. This date has come and gone without an IHS decision. On October 27, 2005, the IHS sent a separate letter to the Community stating it would issue a decision on the FY 1995 and 1996 claims within 180 days, then on March 15, 2006 the IHS sent a second letter saying that the IHS "anticipates" a decision on the same claims within another 180 days. The IHS has already had over ten months to decide these simple contract claims. The claim amounts are derived from the IHS's own records, as detailed below, and the central legal issue has been decided by the U.S. Supreme Court. *See Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005). The IHS has not issued a decision on these claims within a reasonable time, so they are ripe for appeal to this Board under the CDA and Section 110 of the ISDEAA.

COMPLAINT

- 2 -

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## STATEMENT OF FACTS

3. During all of the years at issue in this appeal, FYs 1995-1999, the Community provided health care services pursuant to agreements entered into with the Secretary of the Department of Health and Human Services ("Secretary") and the IHS under Title I (FY 1995-1996) and Title III (FY 1997-1999) of the ISDEAA.

4. The ISDEAA authorizes the Community and other tribes and tribal organizations to assume responsibility to provide programs, functions, services and activities ("PFSAs") that the Secretary would otherwise be obligated to provide. In return, the Secretary must provide the Community two types of funding under Section 106(a) of the ISDEAA: (1) "program" funds (or the amount the Secretary would have provided for the PFSAs had the IHS retained responsibility for them, *see* 25 U.S.C. § 450j-1(a)(1),

sometimes called the "Secretarial amount" or the "106(a)(1) amount"); and (2) "contract support costs" (the reasonable administrative and overhead costs associated with carrying out the PFSAs, *see id.* § 450j-1(a)(2) and (3)).<sup>2</sup> *See also* FY 1997 AFA § 4(B) ("Metlakatla shall receive contract support as defined in sections 106(a)(2) and (3)" of the ISDEAA); FY 1998 AFA § 4(C) (same); FY 1999 AFA § 4(C) (same).

<sup>2</sup> Section 106(a)(2) of the ISDEAA mandates as follows:

(2) There shall be added [to the 106(a)(1) amount] 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, but which—

(A) normally are not carried on by the respective Secretary in his direct operation of the program; or

(B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

25 U.S.C. § 450j-1(a)(2). *See also id.* § 450f note (1996) (providing, in Section 303(a)(6) of Title III, that tribes performing Title III agreements must receive "an amount equal to that which the tribe would have been eligible to receive under contracts and grants under this Act [Public Law 93-638], including direct program costs and indirect costs").

5. There are three types of CSC: (1) start-up costs, which are one-time costs to plan, prepare for and assume operation of a new or expanded PFSA, *see id.* § 450j-1(a)(5) & (6); (2) indirect costs ("IDC"), costs incurred for a common or joint purpose benefiting more than one PFSA, such as administrative and overhead costs, *see id.* § 450j-1(a)(2); and (3) direct CSC, expenses directly attributable to a certain PFSA but not captured in the IDC pool or the 106(a)(1) amount, such as workers compensation insurance or other expenses the Secretary would not have incurred because, for example, the government is self-insured, *see id.* § 450j-1(a)(3)(A).

6. Direct CSC is "recurring" to both the IHS Area Office and tribes, meaning amounts do not need to be re-justified by the tribe for each year of the Agreement. IHS Circular 96-04 §§ 4.A(4) (page 9) and 4.A(4)b (page 12).

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7. Indirect CSC (IDC) is recurring to the Area Offices, *id.* § 4.A(4)b and, provided they are justified in subsequent years, must be paid to the Community at the prior year level unless that level exceeds 100% of the Tribe's needs. *Id.* § 4.A(4)b and c.

8. Designation of direct and indirect CSC funds as recurring (either to the Community or to the Area) is significant because the agency paid recurring funds at the previous year's level (at a minimum) unless that level would exceed 100% of the tribe's need as required by the Circular. *Id.* § 4.A(4)b and c.

9. Under the ISDEAA, the amount of CSC paid to a tribe may not be reduced from year to year unless the Community's need drops or one of five narrow exceptions applies. Section 106(b)(2) of the ISDEAA states that the amount of funds required by subsection (a), including CSC, "shall not be reduced by the Secretary in subsequent years except pursuant to –

- (A) a reduction in appropriations from the previous fiscal year for the program or function to be contracted;
- (B) a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution;
- (C) a tribal authorization;
- (D) a change in the amount of pass-through funds needed under a contract; or
- (E) completion of a contracted project activity or program."

25 U.S.C. 450j-1(b)(2).

10. The ATHC incorporates this stable-funding provision and conditions, as do the Community's AFAs for FY 1998 and 1999. ATHC Art. II, § 12(a) ("future funding of the Co-Signer's successor Annual Funding Agreements shall only be reduced pursuant to the provisions of § 106(b) of the [ISDEAA]," subject to adjustments in accordance with reallocation decisions of the Co-Signers); FY 1998 AFA § 4(A) (funding amounts "subject to reductions only in accordance with Section 106 of [the ISDEAA] during the term of this Agreement or thereafter"); FY 1999 AFA § 4(A) (same).

11. IHS Circular 96-04 also incorporates the statutory stable-funding requirement and conditions. The Circular, signed by Michael Trujillo, the Director of the IHS, was binding on and rigidly adhered to by the agency, and sets out detailed guidance on contract support cost funding methodology. In relevant part, the Circular provides that, "Prior year funds provided for indirect CSC to each awardee, if justified in subsequent years, shall not be reduced by the IHS, except as authorized in section 106(b) of the [ISDEAA]." IHS Circular 96-04 § 4.A(4)c. The Circular does not make this commitment subject to availability, rather it makes clear that an "Awardee should expect to receive these funds continuously, only if they continue to be justified for at least the same amount or greater amount." *Id.*

12. Circular 96-04 provided the CSC distribution methodology governing the Community's contracts from FY 1997 through FY 1999. See 1999 AFA § 4(C) ("The parties acknowledge that the Indian Health Service intends to pay contract support costs according to IHS Circular 96-4.").

13. On March 1, 2005, the U.S. Supreme Court held that the amounts "available" under section 106(a) to pay tribes the full CSC due under their contracts include the agency's entire unrestricted lump-sum appropriation. *Cherokee Nation v. Leavitt*, 543 U.S. 631, 642-43 (2005). Thus the IHS should have reprogrammed funds to pay tribal contractors the full CSC due under their contracts for FY 1994 through FY 1997 when Congress appropriated a lump sum for the IHS without earmarking an amount for CSC.

14. However, the IHS took no such action. Instead the agency generated the CSC "shortfall reports." The shortfall reports are spreadsheets prepared by the IHS in compliance with ISDEAA section 106(c), which requires that the agency submit to Congress an annual report on the implementation of the ISDEAA, including:

- (1) an accounting of the total amounts of funds provided for each program and the budget activity for direct program costs and contract support costs of tribal organizations under self-determination;
- (2) an accounting of any deficiency in funds needed to provide required contract support costs to all contractors for the fiscal year for which the report is being submitted....

25 U.S.C. § 450j-1(c). Each IHS Area Office, including the Alaska Area, prepares a shortfall report that shows how much, if at all, each tribe and tribal organization in the Area was underpaid in CSC for the fiscal year. The form of the shortfall report spreadsheet has varied somewhat over the years, but the essential information reflected in the report that is used to calculate the shortfalls has remained the same: the IDC requirement (program base times negotiated IDC rate) plus the direct CSC requirement equals the total CSC

requirement; the total CSC requirement minus the total CSC paid by the IHS equals the CSC shortfall.<sup>3</sup>

15. According to the shortfall reports, the Community suffered significant CSC shortfalls in FYs 1995-1999. *See Exhibit B.*

16. In addition to the shortfall reports, in the relevant years the IHS maintained a separate list of CSC owed, but not paid, to tribal contractors that had assumed new and expanded programs. Under the IHS policy in effect during those years, CSC funding for new and expanded contracts was paid from the Indian Self-Determination ("ISD") Fund. Despite \$1 billion-plus lump-sum appropriations, the amounts the IHS allocated to the ISD Fund were always inadequate to fund all tribal contractors' CSC needs associated with new and expanded contracts. Rather than fully fund the ISD Fund, the agency's inadequate allocation was distributed on a first-come, first-served system that became known as the ISD "queue," in which tribes lined up to receive their ISD requests. Under agency policy, ISD requests were prioritized based on date of receipt. IHS Circular No. 96-04 § 4.A(4)a(ii).

17. Beginning in FY 1997, the Community assumed new and expanded PFSAs and submitted a request for additional CSC associated with those PFSAs. After negotiating the additional CSC amounts and ensuring that the costs were "reasonable, necessary and not duplicative," IHS Circular No. 96-04 § 4.A(4)a(iv), the Area Office forwarded the request to IHS headquarters and the following amounts were placed on the queue: \$63,535 for one-time start-up costs, \$24,230 in recurring direct CSC, and \$36,789 in IDC. Exhibit C, ISD

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<sup>3</sup> For example, in FY 1995, the Community had a direct cost base of \$1,754,372 and an IDC rate of 26.9% for a total IDC requirement of \$471,926. The IDC funding "available," however, totaled only \$357,735, resulting in an IDC shortfall of \$114,191. Exhibit B at 1 (FY 1995 shortfall report). Direct CSC is assumed to have been fully paid in that year.

Queue #99-1, line 89. In 1999, the IHS abolished the queue, and these amounts were never paid to the Community.

18. The IHS's failure to pay the proper amount of CSC in FY 1997 hurt the Community not only in that year but in subsequent ones. The Community's recurring prior year indirect and direct CSC base for purposes of the stable-funding provisions in section 106(b) of the ISDEAA, Article II, § 12(a) of the Compact, and section 4(A) of the AFAs, as of FY 1997 was \$619,851.<sup>4</sup> Had the IHS paid this full amount in FY 1997, as it was required to do under the rule of *Cherokee Nation*, the IHS would have been required to pay and in fact would have paid at least that same amount in FY 1998 and 1999 under IHS Circular 96-04 and Section 106(b) of the ISDEAA, provided that amount did not exceed the Community's total need during those years.

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19. In FY 1998 and 1999, Congress included language in the appropriations bills providing that total CSC payments by the agency were "not to exceed" a certain specified amount.<sup>5</sup>

20. However, appropriations for CSC increased in both FY 1998 and FY 1999.<sup>6</sup> As a result, appropriations were not reduced in a way to permit IHS to invoke the section 106(b)(2)(A) exception. Nor did any other 106(b) exception to the stable-funding rule apply in those years. The ISDEAA and the Community's contracts and Circular 96-04 make clear

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<sup>4</sup> As detailed above, the Community's total CSC requirement for FY 1997 was \$683,386, but \$63,535 of that were one-time startup costs.

<sup>5</sup> E.g., Dep't of the Interior & Related Agencies Appropriations Act, Pub. L. No. 105-83, 111 Stat. 1543, 1582-83 (1997) (providing that, in FY 1998, "not to exceed \$168,702,000 shall be for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts or grants or compacts").

<sup>6</sup> See *id.* (appropriating \$168,702,000 for CSC for ongoing contracts in FY 1998, a \$7.98 million increase over FY 1997); P.L. 105-277 (\$203,781,000 in FY 1999, a \$35 million increase).

that CSC funds "shall not be reduced" from year to year unless one of those five narrow exceptions applies.

21. Based on its conclusion that IHS could have and should have paid it the proper amounts of CSC, the Community presented claims for its unpaid CSC in letters to the IHS dated June 30, 2005. The IHS has not issued a decision on the claims within a reasonable time, so they are deemed denied.

### CLAIMS

22. The Community presents related claims. In *Cherokee Nation*, the Supreme Court held that the IHS should have reprogrammed funds from its unrestricted lump-sum appropriation to pay tribal contractors the full CSC due under their contracts. The IHS paid the Community less than its full CSC requirement in FY 1995-1997, as acknowledged in the IHS shortfall reports and queue lists. In doing so, the IHS breached its agreements with the Community and violated the ISDEAA's requirement of full payment from available appropriations, as affirmed by the Supreme Court in *Cherokee Nation*. The Community's claims for the "lump-sum" years, FY 1995-1997, are indistinguishable from those at issue in *Cherokee Nation*.

23. Had the Community been paid properly in those lump-sum years, it would have increased the Community's recurring prior year direct and indirect CSC base, which would have been paid in subsequent years. The Community's claims for FY 1998 and 1999 are based on the ISDEAA stable-funding requirement under section 106(b), incorporated into the ATHC and the AFAs, and IHS Circular 96-04. The statute and circular provide that the agency may not reduce funding from prior years except in specific narrow circumstances that did not exist in this case.

#### FY 1995

24. Paragraphs 1 through 21 are realleged and incorporated herein.

25. As indicated in the IHS's own shortfall report, the Community's total CSC requirement for FY 1995 was \$471,926, yet the IHS paid only \$357,735. Therefore, the Community asserts a claim under the ISDEAA and Article II, section 4 of the FY 1995 contract for the difference, **\$114,191**.

#### FY 1996

26. Paragraphs 1 through 22 are realleged and incorporated herein.

27. As indicated in the IHS's own shortfall report, the Community's total CSC requirement for FY 1996 was \$513,367, yet the IHS paid only \$357,735. Therefore, the Community asserts a claim under the ISDEAA and Article II, section 4 of the FY 1996 contract for the difference, **\$155,632**.

#### FY 1997

28. Paragraphs 1 through 25 are realleged and incorporated herein.

29. As indicated in the IHS's own shortfall report, the Community's total CSC requirement for FY 1997 associated with ongoing PFSAs was \$588,715. In addition, the agency's ISD Queue #99-1 shows that the Community incurred additional CSC associated with the assumption of new and expanded PFSAs in FY 1997: \$63,535 for startup costs, \$24,230 for direct CSC, and \$6906 for IDC on the DCSC (at the negotiated rate of 28.5%). Adding the queue CSC to that related to ongoing PFSAs yields a total CSC requirement of \$683,386. The IHS paid only \$357,735. Therefore, the Community asserts a claim under the ISDEAA and section 4(B) of the FY 1997 AFA for the difference, **\$325,651**.<sup>7</sup>

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<sup>7</sup> In its letter to the contracting officer requesting payment on the FY 1997 claim, the Community requested \$262,116, inadvertently omitting \$63,535 in unpaid startup costs for that year.

#### FY 1998

30. Paragraphs 1 through 27 are realleged and incorporated herein.

31. The Community's total CSC requirement, including shortfalls associated with ongoing PFSAs and those related to new and expanded PFSAs in the queue, increased in FY 1998, and none of the section 106(b) exceptions to the stable-funding requirement applied. Had the IHS complied with the rule of *Cherokee Nation* and paid the Community the proper amount in FY 1997, \$619,851 (excluding one-time startup costs), the IHS would have been legally obligated to pay at least that much in FY 1998. But in FY 1998, the IHS paid only \$485,084. Therefore, the Community asserts a claim under the ISDEAA and section 4 of the FY 1998 AFA for **\$134,767**.

#### FY 1999

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32. Paragraphs 1 through 29 are realleged and incorporated herein.

33. The Community's total CSC requirement increased in FY 1999, and none of the section 106(b) exceptions to the stable-funding requirement obtained. Had the IHS complied with the rule of *Cherokee Nation* and paid the Community the proper amount in FY 1997, \$619,851 (excluding one-time startup costs), the IHS would have been legally obligated to pay at least that much in FY 1998 and again in FY 1999. But in FY 1999, the IHS paid only \$500,422. Therefore, the Community asserts a claim under the ISDEAA and section 4 of the FY 1999 AFA for **\$119,429**.

#### PRAYER FOR RELIEF

34. The Tribe therefore requests the following relief:

