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CIVILIAN BOARD OF
CONTRACT APPEALS

Civilian Board of Contract Appeals
1800 F Street, N.W
Washington, D.C. 20405

Contractor: Mt. Sanford Tribal Consortium
P.O. Box 357
Gakona, AK 99586

Contracts: Contract No. 243-93-0002 (FY 1995); Contract No. 243-96-6011 (FY 1996 and FY 1997); and Annual Funding Agreements between Mount Sanford Tribal Consortium and the Indian Health Service, U.S. Department of Health and Human Services

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

NOTICE OF APPEAL

The Mount Sanford Tribal Consortium ("MSTC") appeals to the Civilian Board of Contract Appeals ("CBCA") from the attached decisions of Burt Humphrey, Senior Contracting Officer, of the Indian Health Service ("IHS") in the Department of Health and Human Services. During the years at issue, MSTC provided health care programs and services pursuant to the above-referenced agreements under the Indian Self-Determination and Education Assistance Act ("ISDEAA"), Pub. L. 93-638 as amended, 25 U.S.C. § 450 *et seq.* Post-award disputes arising from ISDEAA agreements are heard pursuant to the Contract Disputes Act ("CDA"), except that all administrative appeals relating to such contracts are heard by the CBCA. 25 U.S.C. § 450m-1(d); Pub. L. No. 109-163 § 847(c), 119 Stat. 3136, 3392 (Jan. 6, 2006) (providing that references to former agency boards of

appeal, such as that to the Interior Board of Contract Appeals in the ISDEAA, "shall be treated as referring to the Civilian Board of Contract Appeals").

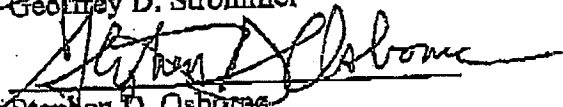
In letters dated September 13, 2005, MSTC requested a contracting officer's decision pursuant to the CDA, 41 U.S.C. § 605, on claims for unpaid contract support costs under its ISDEAA agreements for FYs 1995-1997. See Complaint Exhibit 1. The letter for each year presented two distinct CSC claims: (1) a "shortfall" claim alleging that the IHS had failed to pay MSTC its full CSC need, as required by law, even by the IHS's own calculations; and (2) a "miscalculation" claim alleging that the IHS miscalculated MSTC's indirect cost rate, further exacerbating the CSC shortfall. Only the shortfall claims are at issue in this appeal.

In letters dated February 6, 2007 and received by MSTC on February 12, 2007, the IHS contracting officer denied the claims for each year. See Complaint Exhibit 2. MSTC now appeals the IHS decisions on the shortfall claims to this Board within 90 days of receiving them. Therefore this Board has jurisdiction over the appeals under the CDA and Section 110 of the ISDEAA. 41 U.S.C. § 606; 25 U.S.C. § 450m-1(d).

The factual and legal basis of these claims is set forth more fully in the attached Complaint, submitted along with this notice.

Respectfully Submitted,


Geoffrey D. Strommer


Stephen D. Osborne

HOBBS, STRAUS, DEAN & WALKER, LLP
806 SW Broadway, Suite 900
Portland, OR 97205
(503) 242-1745

May 3, 2007

NOTICE OF APPEAL

UNITED STATES GENERAL SERVICES ADMINISTRATION
CIVILIAN BOARD OF CONTRACT APPEALS

1800 F Street, N.W.
Washington, D.C. 20405

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CIVILIAN BOARD OF
CONTRACT APPEALS
CBCA No. _____

MOUNT SANFORD TRIBAL CONSORNIUM,

Appellant,

v.

INDIAN HEALTH SERVICE, DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

Appellee.

COMPLAINT

This is an appeal by the Mount Sanford Tribal Consortium ("MSTC"), a tribal organization representing two federally recognized Indian Tribes in Alaska: Christochina and Mentasta Lake. MSTC operates public health facilities and provides public health services to tribal members and other beneficiaries pursuant to its 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").

MSTC appeals the denial by the IHS of MSTC's claims for unpaid contract support costs ("CSC") owed to MSTC under the ISDEAA and its contract and annual funding agreements ("AFAs") for fiscal years ("FYs") 1995-1997.

JURISDICTION

1. Contract disputes under the ISDEAA are to be resolved in accordance with Section 110 of that Act. 25 U.S.C. § 450m-1; Title I Model Agreement between Mt.

Sanford Tribal Consortium and United States of American Secretary of the Department of Health and Human Services ("Contract") § 12.B. 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(d) further provides that all administrative appeals relating to ISDEAA contracts shall be heard by the Interior Board of Contract Appeals, which has been superseded by this Board. *Id.*¹

2. On September 13, 2005, MSTC faxed and mailed the IHS letters requesting a contracting officer's decision on CSC claims for FY 1995-1997. *See* Exhibit 1 (MSTC claim letters). The letter for each year presented two separate CSC claims: (1) a "shortfall" claim alleging that the IHS had failed to pay MSTC its full CSC need, as required by law, even by the IHS's own calculations; and (2) a "miscalculation" claim alleging that the IHS miscalculated MSTC's indirect cost (IDC) rate, further exacerbating the CSC shortfall.

3. In a letter dated February 6, 2007, and received by MSTC on February 12, 2007, the IHS contracting officer denied MSTC's claims for FY 1995-1997. *See* Exhibit 2 (IHS denial letters). MSTC appealed the IHS decisions to this Board within 90 days of receiving them. Therefore this Board has jurisdiction over this appeal under the CDA and Section 110 of the ISDEAA. 41 U.S.C. § 606; 25 U.S.C. § 450m-1(d). This appeal involves only the "shortfall" claims, not the "miscalculation" claims.

¹ Section 847 of the National Defense Authorization Act for Fiscal Year 2006 abolished the Interior Board of Contract Appeals—along with every other contract appeals board except for those of the Armed Services, the Postal Service, and the Tennessee Valley Administration—and established in their place the Civilian Board of Contract Appeals (CBCA). Pub. L. No. 109-163 § 847, 119 Stat. 3136, 3394-95 (Jan. 6, 2006). The statute provides that any reference in the laws of the United States to contract appeals boards other than the three listed above "shall be treated as referring to the Civilian Board of Contract Appeals." *Id.* § 847(e).

STATEMENT OF FACTS

4. During all of the years at issue in this appeal, FYs 1995-1997, MSTC provided health care services to eligible individuals pursuant to agreements entered into with the Secretary of the Department of Health and Human Services ("Secretary") and the IHS under Title I of the ISDEAA, 25 U.S.C. § 450 *et seq.*

5. The ISDEAA authorizes MSTC 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 MSTC two types of funding under Section 106(a) of the ISDEAA: (1) "program" funds, 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).²

6. 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* 25 U.S.C. §

² 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").

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 ("DCSC"), expenses directly attributable to a certain PFSA but not captured in either 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).

7. In order to provide the same level of programs and services that the Secretary would otherwise have been obligated to provide, MSTC must receive full CSC funding, as required by the ISDEAA. See 25 U.S.C. § 450j-1(g) (upon approval of contract, "the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under section 106(a)" (emphasis added)). Without full CSC funding, MSTC must use program dollars or other tribal resources to cover administrative and overhead expenses, in contravention of Congress's intent.

8. MSTC's agreements with the Secretary require payment of CSC in accordance with section 106(a) of the ISDEAA. See Contract § 4 (funding amount "shall not be less than the applicable amount determined pursuant to section 106(a) of the [ISDEAA]").

9. 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 fiscal year ("FY") 1994 through FY

1997 when Congress appropriated a lump sum for the IHS without earmarking an amount for CSC.

10. However, the IHS took no such action. Instead the agency vastly underpaid CSC to MSTC, as documented in the CSC "shortfall reports." The shortfall reports are prepared by the IHS in compliance with ISDEAA section 106(e), 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).

11. 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 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 DCSC requirement equals the total CSC requirement; the total CSC requirement minus the total CSC paid by the IHS equals the CSC shortfall.

12. According to the shortfall reports, MSTC suffered significant CSC shortfalls in FYs 1995-1997. See Exhibit 3. The shortfalls documented in the reports are summarized in the following table:

Table 1. Shortfall Summary

FY	Total Requirement (\$)	Total Paid (\$)	Shortfall (\$)
1995	233,287	182,306	50,981
1996	208,036	163,543	44,493
1997	206,818	182,306	24,512

13. The amounts claimed in the Tribe's requests for a contracting officer's decision, and in this appeal, derive from the IHS's own calculations, as documented in the shortfall reports. Exhibit 3.³

14. Based on its conclusion that IHS should have paid it the proper amounts of CSC, MSTC presented claims for its unpaid CSC in letters to the IHS dated September 13, 2005. See Exhibit 1. The IHS denied those claims, see Exhibit 2, and MSTC appealed within 90 days of receiving the denial letters, so this Board has jurisdiction over the appeals. 41 U.S.C. § 606.

CLAIMS

15. 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 MSTC less than its full

³ In addition to the shortfall reports, the IHS in the relevant years maintained a separate list of CSC owed, but not paid, to tribal contractors that had assumed new and expanded programs, the so-called "queues." See IHS Circular No. 96-04 § 4.A(4)a(ii). Beginning in FY 1995, MSTC assumed new and expanded PFSAs, including alcohol and drug abuse and Emergency Medical Services, and submitted a request for additional CSC associated with those PFSAs. Rather than fund these requests in accordance with section 106(a) and *Cherokee Nation*, the IHS relegated them to the queue, where they languished for over two years. See ISD Quene (Sept. 17, 1997) (listing \$12,685 and \$194,039 as unpaid CSC associated with expansions designated File # 95-19 and 95-21, respectively). To the extent that the evidence shows that IHS failed to pay MSTC its full CSC on these new and expanded PFSAs in FYs 1995, 1996 and 1997, and these additional shortfalls are not captured in the shortfall reports, MSTC will ask this Board to enlarge the quantum of its award.

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CSC requirement in FYs 1995-1997, as acknowledged in the IHS shortfall reports. In doing so, the IHS breached its agreements with MSTC and violated the ISDEAA's requirement of full payment from available appropriations, as affirmed by the Supreme Court in *Cherokee Nation*. MSTC's claim for the "lump-sum" years FY 1995-1997 is indistinguishable from the claims at issue in *Cherokee Nation*.

FY 1995

16. Paragraphs 1 through 15 are realleged and incorporated herein.
17. As indicated in the IHS's own shortfall report, MSTC's total CSC requirement for ongoing programs in FY 1997 was \$233,287, yet the IHS paid only \$182,306, for a reported shortfall of \$50,981. Exhibit 3 at 1. Therefore, MSTC asserts a claim under the ISDEAA and the FY 1995 contract for \$50,981.

FY 1996

18. Paragraphs 1 through 17 are realleged and incorporated herein.
19. As indicated in the IHS's own shortfall report, MSTC's total CSC requirement for ongoing programs in FY 1996 was \$208,036, yet the IHS paid only \$163,543, for a reported shortfall of \$44,493. Exhibit 3 at 2-3. Therefore, MSTC asserts a claim under the ISDEAA and the FY 1996 contract for \$44,493.

FY 1997

20. Paragraphs 1 through 19 are realleged and incorporated herein.
21. As indicated in the IHS's own shortfall report, MSTC's total CSC requirement for ongoing programs in FY 1997 was \$206,818, yet the IHS paid only \$182,306, for a reported shortfall of \$24,512. Exhibit 3 at 4. Therefore, MSTC asserts a claim under the ISDEAA and the FY 1997 contract for \$24,512.

PRAYER FOR RELIEF

22. MSTC therefore requests the following relief:

A. That this Board award MSTC \$119,986 in damages for unpaid CSC, as summarized in the following table, plus such additional amounts as the proof may show⁴:

Table 4. Claim Summary

FY	Amount (\$)
1995	50,981
1996	44,493
1997	24,512
Total	119,986

B. That this Board order the payment of interest on these claims pursuant to the CDA, 41 U.S.C. § 611, and the Prompt Payment Act, Chapter 39 of Title 31 United States Code;

C. That this Board award MSTC its attorney fees and expenses pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504 and 25 U.S.C. § 450m-1(c); and

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⁴ As discussed in note 3 above, MSTC requests that the damages award be augmented to include the amounts, if any, that the IHS failed to pay to support the new and expanded PFSAs assumed in FY 1995 and apparently carried on without CSC funding through FY 1997.

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D. That this Board award MSTC such other and further relief as the Board
deems appropriate.

Respectfully Submitted,



Geoffrey D. Strommer, Counsel of Record



Stephen D. Osborne, Counsel

HOBBS, STRAUS, DEAN & WALKER, LLP
806 SW Broadway, Suite 900
Portland, OR 97205
(503) 242-1745

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