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Attorneys for Contractor/Appellant

INTERIOR BOARD OF CONTRACT APPEALS

| | | |
|--------------------------------|---|--------------------------------|
| SOUTHCENTRAL FOUNDATION |) | IBCA Nos. _____ through _____ |
| 4501 Diplomacy Drive |) | |
| Anchorage, Alaska 99508 |) | ISDA Compact No. ISG950031-01 |
| |) | ISDA Contract No. 58U950001-01 |
| Appellant, |) | ISDA Contract No. 243-89-0012 |
| vs. |) | ISDA Contract No. 243-95-6000 |
| |) | ISDA Compact No. ISG950031-02 |
| MICHAEL O. LEAVITT, SECRETARY, |) | ISDA Compact No. 58G-950031-01 |
| U.S. DEPARTMENT OF HEALTH AND |) | ISDA Compact No. 58G-950031-02 |
| HUMAN SERVICES; CHARLES GRIM, |) | ISDA Compact No. 58G-950031-03 |
| DIRECTOR, INDIAN HEALTH |) | ISDA Compact No. 58G-950031-04 |
| SERVICE; UNITED STATES OF |) | |
| AMERICA |) | |
| |) | |
| Appellees. |) | |
| _____ |) | |

NOTICE OF APPEAL

The Southcentral Foundation, by and through its attorneys Sonosky, Chambers, Sachse, Miller & Munson, LLP, hereby appeals from the denial of U.S. Department of Health & Human Services, Public Health Service, Burton J. Humphrey, Senior Contracting Officer, Alaska Area Native Health Service, attached hereto as Exhibit 1, and the denials of the Indian Health Service

Director Charles Grim, DDS,¹ of multiple “contract support cost” (CSC) damages claims which the Southcentral Foundation 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 30, 2005 damages claim under ISDA Compact No. ISG950031-01, in the amount of \$762,699, plus interest, for FY 1995;
- (b) a September 30, 2005 damages claim under ISDA Contracts Nos. 243-95-6000, 58U950001-01, and 243-89-0012, in the amount of \$762,699, plus interest, for FY 1995;
- (c) a September 30, 2005 damages claim under ISDA Compact No. ISG950031-02, in the amount of \$1,483,652, plus interest, for FY 1996;
- (d) a September 30, 2005 damages claim under ISDA Compact No. 58G-950031-01 in the amount of \$2,305,622, plus interest, for FY 1997;
- (e) a September 30, 2005 damages claim under ISDA Compact No. 58G-950031-02 in the amount of \$4,815,902, plus interest, for FY 1998;
- (f) a September 30, 2005 damages claim under ISDA Compact No. 58G-950031-03 in the amount of \$2,967,773, plus interest, for FY 1999 and;
- (g) a September 29, 2006 damages claim under ISDA Compact No. 58G-950031-04 in the amount of \$6,066,228, plus interest, for FY 2000.

The total face amount of the claims so submitted was \$19,164,575.

¹ To the extent these damage claims were not the subject of the denial attached hereto, the Southcentral Foundation appeals from the Contracting Officer’s inaction, deemed by operation of law to be denials. 41 U.S.C. § 605(c)(5).

This appeal involves the failure of the Secretary of DHHS, through authority delegated to the Director of IHS, to properly calculate and to pay annually the full contract support costs to which the Southcentral Foundation 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, the Southcentral Foundation shall file a Complaint as permitted by 43 C.F.R. § 4.107(a).

Respectfully submitted this 4th day of December 2006.

SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON, LLP

By: */s/ Lloyd B. Miller by DJS* _____

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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 4th day of December 2006:

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

Barbara Hudson, 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

Burton J. Humphrey
Senior Contracting Officer
Alaska Area Native Health Service
4141 Ambassador Drive, Suite 300
Anchorage, Alaska 99508

/s/ Donald J. Simon
Donald J. Simon



DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

September 7, 2006

Alaska Area Native Health Services
4141 Ambassador Drive Suite 300
Anchorage, Alaska 99508-5928Lee Olson, Vice President, Finance
Southcentral Foundation
4501 Diplomacy Drive
Anchorage, AK 99508

Subject: Contract Disputes Act Claim for:
Contract No. 243-95-6000
(February 1, 1995 – December 31, 1995)
Contract #58U950001-01
(October 1, 1994 – January 31, 1995)
Contract No. 243-89-0012
(October 1, 1988 – December 31, 1994)

Dear Mr. Olson:

The Indian Health Service (IHS) received your letter dated September 30, 2005, claiming that direct and indirect contract support costs (CSC) in the amount of \$762,699 are owed to Southcentral Foundation (SCF) for Fiscal and Calendar Years 1995 (FY '95). By letter dated May 5, 2006, we notified you that we would answer the claim no later than November 1, 2006. Your claim is denied for the following reasons.

Description of Claims

Your September 30, 2005, letter sets forth a claim that the "IHS failed to meet its contractual and statutory obligations when it failed to pay the full amount of Southcentral Foundation'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 Southcentral Foundation." Your letter, supported by your certification, alleges that \$762,699, plus interest, is due to SCF. The SCF claim amount was determined by using the IHS CSC Shortfall Report for FY '95. However, your claim does not specify a specific amount of CSC underpaid for each of the three contracts included in your claim. Nor does your claim allocate specific amounts for indirect costs and direct contract support costs.

Compact Terms at Issue

The SCF's' Title III Compact (Title III Compact), effective October 1, 1994, provides, in part, as follows:

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Article III § 1 – Consolidation. ...To the extent a program, activity, function, or service included within a contract or grant entered into pursuant to §§ 102 or 103 of the Indian Self-Determination and Education Assistance Act, as amended, is included within an Annual Funding Agreement, that contract or grant shall be modified or terminated as appropriate. The parties' obligations shall be governed by this Compact and all funds previously obligated under contracts or grants (including carry-over funds) will be re-obligated to the Co-Signer under the applicable Annual Funding Agreement. Such terminated contracts shall be identified by contract number in each Annual Funding Agreement.

CY 1995 AFA, effective October 1, 1994, provides, in part, as follows:

Section 11 – Consolidation of Contracts. The following contract shall be amended or terminated, as appropriate, to transfer applicable contract funds into this Annual Funding Agreement for programs, activities, functions, services, materials, and facilities provided by Southcentral Foundation: P.L. 96-638 Contract #243-89-0012, as modified.

Contract Terms at Issue

SCF's Title I Modification No. Fifty-Three of Contract #243-89-0012 (Contract # 243-89-0012), effective January 1, 1994 provides, in part, as follows:

A. The Contract is modified to incorporate Calendar Year 1994 funds into the Contract in the amount of \$2,292,794.00 to cover the period January 1, 1994 through December 31, 1994. Funds shall be utilized in accordance with revised Contractor prepared budget. Reimbursement shall be subject to Section I, Contract Clauses, Page 56, Item 2, "Availability of Funds".

SCF's Contract #243-89-0012 provides, in part, as follows:

1.E. Indirect Costs: No indirect costs shall be paid under this contract.

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SCF's' Title I Contract #243-95-6000 (Contract # 243-95-6000), effective February 1, 1995 provides, in part, as follows:

(b)4. FUNDING AMOUNT: Subject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement incorporated by reference in subsection (f)(2). Such amount shall not be less than the applicable amount determined pursuant to section 106(a) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j-1).

(b)5. LIMITATION OF COSTS The Contractor shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds awarded under this Contract. If, at any time, the Contractor has reason to believe that the total amount required for performance of this contract or a specific activity conducted under this contract would be greater than the amount of funds awarded under this contract, the Contractor shall provide reasonable notice to the appropriate Secretary. If the appropriate Secretary does not take such action as may be necessary to increase the amount of funds awarded under this contract, the Contractor may suspend performance of the contract until such time as additional funds are awarded.

(b)15.C.(2) AMOUNT OF FUNDS: The total amount of funds to be paid under this contract pursuant to section 106(a) shall be determined in an annual funding agreement entered into between the Secretary and the Contractor, which shall be incorporated into this contract.

(b)15.C.(3) CONTRACTED PROGRAMS: Subject to the availability of appropriated funds, the Contractor shall administer the programs, services, functions, and activities identified in this contract and funded through the annual funding agreement under subsection (f)(2).

F.(2) ANNUAL FUNDING AGREEMENT:

(A) IN GENERAL: The annual funding agreement under this contract shall only contain –

- (i) terms that identify the programs, services, functions, and activities to be performed or administered, the general budget category assigned, the funds to be provided, and the time and method of payment; ...

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(B) **INCORPORATION BY REFERENCE:** The annual funding agreement is hereby incorporated in its entirety in this contract and attached to this contract as attachment 2.

CY 1995 AFA for Contract # 243-95-6000, effective February 1, 1995, provides, in part, as follows:

2(A) The Indian Health Service shall provide the Southcentral Foundation the amount of \$430,647.00 in lump sum payment in accordance with Article II, Section 6 of the Contract. The payment shall be made by wire transfer. Accounting and appropriations data for such payments are as follows:

Mental Health (R)

7550390 5-39159.63 J593061 861 25.82 \$19,313.34

Alcohol (R)

7550390 5-39159.64 j594061 839 25.82 \$411,333.66
\$430,647.00

2.(B) Subject to Area and Contractor negotiations and Congressional appropriation, an additional sum may be added to this Annual Funding Agreement for Southcentral Foundation under ISDM 92-2 or its successor. The amount shall be based upon Southcentral Foundation's administrative and tribal management costs and applicable law and may be added to this Agreement as soon as available through appropriations.

Amendment #1: added \$136,132.00 in CSC.

Amendment #2: added \$161,493 in CSC.

Amendment #2-A: added \$137,168 in CSC.

Factual Areas of Agreement and Disagreement

Most of the allegations set forth in your letter are your characterizations of the rights and duties of SCF and the IHS under the Indian Self-Determination Act (ISDA). These legal arguments are discussed in the Decision section of this letter.

The IHS disagrees with your allegation that SCF was underpaid \$762,699 for CSC for CY1995.

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The IHS considers the following facts pertinent to its decision on your claim:

- Contract 243-89-0012 was no longer in effect during FY 1995.
- IHS paid SCF \$434,793 in CSC in FY 1995 for Contract #243-95-6000.
- 58U950001-01 is a grant, and there is no authority to provide CSC.
- SCF agreed to use ISDM 92-2.
- SCF signed an agreement to settle all FY '95 CSC issues.
- SCF signed an agreement to settle all FY 1995 area and headquarters tribal shares CSC issues.
- SCF did not have an indirect cost rate for FY 1995.

As a factual matter, you did not provide the IHS with information to support your claim. You have provided no evidence that application of ISDM 92-2 for the distribution of CSC harmed SCF. The IHS does not have this information and, therefore, cannot state whether it agrees or disagrees with any factual assertions related to this claim.

Decision

Your claim is denied. First, your claim is denied because SCF and the IHS entered an agreement, titled "Resolution of FY 1995 Contract Support Costs", to resolve all FY '95 CSC issues. The agreement was signed by Michel Lincoln, Deputy Director of the IHS on July 3, 1995 and Katherine Grosdidier, Executive Director of SCF on July 6, 1995. Paragraph #3 states the following:

To resolve outstanding issues with regard to payment of contract support costs (CSC) for FY 1995 and to avoid possible litigation with regard to payment of such costs based on the FY 1995 Annual Funding Agreement (AFA), the IHS agrees to pay in settlement \$130,881 to Southcentral Foundation.

Paragraph #8 of the agreement states the following:

By signing this agreement, the parties waive any right to file suit or otherwise seek review of any matter raised with respect to payment of CSC listed in the FY 1995 AFAs. The parties also waive any right to claims for attorney fees or interest related to such payments.

Paragraph #9 of the agreement states the following:

This agreement sets forth the entire agreement between the parties

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relating to the claims for CSC and fully supersedes any and all prior agreements or understandings between the parties pertaining to the subject matter hereof.

Therefore, SCF has released the IHS of any claims pertaining to the payment of CSC in FY '95.

Your claim, as it pertains to the payment of CSC for area or headquarters tribal shares, also is denied because SCF released the IHS from any liability for those CSC in FY '95. The SCF and the IHS entered an agreement to resolve CSC on area and headquarters tribal shares for FYs 1995, 1996, and 1997. The agreement was signed by Michael Trujillo, Director of the IHS on July 22, 1996 and Katherine Grosdidier on June 14, 1996. Paragraph #3 states the following:

To resolve outstanding issues with regard to payment of contract support costs (CSC) on area and headquarters tribal shares for fiscal years 1995 and 1996, to resolve anticipated issues with regard to the payment of such costs for FY 1997, and to avoid possible litigation with regard to payment of such costs, the IHS and the Southcentral Foundation agree as follows:

A) FY 1996 Payment – the IHS will pay the Southcentral Foundation \$19,874 by September 30, 1996 from FY 1996 Indian Self-Determination (ISDA) Fund. Such payment is based upon FY 1996 area and headquarters tribal shares and represents a portion of the tribe's contract support costs on area and headquarters tribal shares.

SCF's FY 1997 AFA included the payment of the \$19,874 non-recurring headquarter tribal share CSC. The Compact Award Supplement dated December 30, 1996, added the full amount of CSC due in FY 1997, thus paying IHS' commitment of \$19,874 under the agreement. Paragraph #4 states the following:

Upon payment of FY 1997 contract support on area and headquarters tribal shares, as described in 3 above, the Southcentral Foundation waives any right to file suit or otherwise seek review of any matter raised with respect to payment of contract support costs on area and headquarters tribal shares listed in the FY 1995, FY 1996, or FY 1997 annual funding agreements. Upon payment as described in paragraph 3 above, the Southcentral Foundation also waives any right to claims for attorney fees or interest related to such payments.

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You did not provide the IHS with information to support your claim, nor did you specify what type of CSC is owed. Therefore, any claim for area or headquarters tribal shares is covered under this agreement. Therefore, SCF has released the IHS of any claims pertaining to the payment of area or headquarters tribal shares CSC in FY 1995.

Your claim also is denied because SCF failed to specify what portion of the \$762,699 allegedly owed by IHS arises under this claim, as opposed to your claim pertaining to Compact ISG950031-01. 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 IHS with information explaining or supporting your claim. Since you have failed to provide this information, IHS is unable to determine whether it agrees or disagrees with any factual assertions related to this claim

Your claim for Contract # 243-89-0012 also is denied because the IHS was not obligated to pay any CSC on this contract because it was replaced by Compact # ISG950031-01 on January 1, 1995. This contract only received \$22,500 in FY 1995 funds. Also, the contract, §1.E states that "no indirect costs will be paid."

Your claim for Contract # 243-95-6000 is also denied because the IHS has not breached any contractual duty to pay any funds agreed upon in the CY '95 AFA. The Tribe and the IHS agreed to pay those funds contained in the AFA. The FY '95 AFA for Contract 243-95-6000, §2.(A) requires the IHS to pay a \$430,647 in a lump sum payment. Amendment # 1 paid SCF \$430,647 in a lump sum payment. Section 2(B) states that, "an additional sum may (emphasis added) be added to this Annual Funding Agreement for Southcentral Foundation under ISDM 92-2 or its successor." The AFA did not obligate the IHS to pay SCF any additional funds beyond the lump sum payment agreed upon in paragraph 2(A). However, the IHS did pay SCF an additional \$434,793 in CSC. Amendment #1 paid SCF \$136,132 in CSC. Amendment #2 paid SCF \$161,493 in CSC. Amendment No. 2-A paid SCF \$137,168 in CSC. Thus, SCF received all funds that IHS agreed to pay in the CY '95 AFA for Contract No. 243-95-6000.

Your claim also is denied because, as discussed above, you have provided no information to support your allegation that you were somehow harmed by the use of ISDM 92-2. The IHS paid to SCF all the CSC that was available to it in CY 1995. SCF has provided no evidence to support its allegation that was underpaid CSC in CY '95. SCF's claim is based upon the Shortfall Report. The Shortfall Report is a report to Congress and a budget estimating tool used by the IHS. It does not provide sums certain of the amount of CSC due to each tribe or tribal organization.

Your claim for the Residential Treatment Center Grant #58U65001-01, referred to in your letter

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as Contract # 58U950001-01, is denied. The CSC requirements of the ISDA do not apply to grants.

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 yours,



Burton J. Humphrey
Senior Contracting Officer
Alaska Area Native Health Service

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