

NOTICE OF APPEALDATE
09/21/2007OMB APPROVAL NO.
3090-0221

TO: Civilian Board of Contract Appeals

I/We hereby appeal the final decision of Burt Humphrey issued 06/15/2007
(Name of Contracting Officer) (Date)
 in connection with a dispute under Contract No. 243-93-0010. This contract was awarded 10/01/1995
(Date)
 for operation of Indian Health Service programs, functions, services and activities
(Type of commodity, service, or construction)
 by DHHS, Indian Health Service, Alaska Area Native Health Services, Anchorage, Alaska
(Name of agency and organizational unit) (City and State)

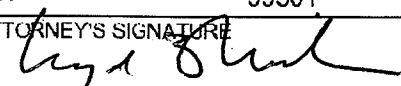
1. DESCRIBE THE NATURE OF THE DISPUTE INVOLVED IN THE FINAL DECISION AND ANY OTHER CIRCUMSTANCES GIVING RISE TO THIS APPEAL:

See the attached correspondence:

- a. Letter dated September 28, 2005 from SEARHC to Dr. Grim; and
- b. Letter dated June 15, 2007 from Burt Humphrey to SEARHC and received June 25, 2007.

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

Appeal from the denial of fiscal year 1996 contract support cost damage claims which SEARHC properly and timely submitted under the Contract Disputes Act (41 U.S.C. §§ 601-612) and the Indian Self-Determination and Education Assistance Act (25 U.S.C. §§ 450-458aaa-18).

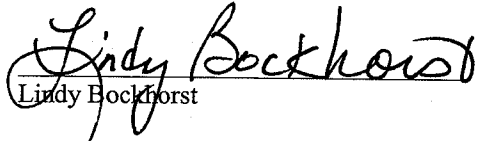
APPELLANT			ATTORNEY FOR APPELLANT		
NAME Southeast Alaska Regional Health Consortium			NAME Lloyd Benton Miller		
TITLE			FIRM Sonosky, Chambers, Sachse, Miller & Munson, LLP		
STREET 3245 Hospital Drive			STREET 900 West Fifth Avenue, Suite 700		
CITY Juneau			CITY Anchorage		
STATE AK	ZIP CODE 99801	TELEPHONE NUMBER (907)463-4000	STATE AK	ZIP CODE 99501	TELEPHONE NUMBER (907)258-6377
APPELLANT'S SIGNATURE			ATTORNEY'S SIGNATURE 		


D.C. Bar No. 317131
 AK Bar No. 7906040
 GSA 2465 (REV. 6/2007)

CERTIFICATE OF SERVICE

On this 21st day of September, 2007,
I hereby certify that I mailed, or caused to be mailed,
a true and correct copy of the **NOTICE OF APPEAL**
by U.S. first class mail to:

Burt Humphrey
Senior Contracting Officer
Alaska Area Native Health Services
4141 Ambassador Drive
Anchorage, Alaska 99508-5928


Lindy Bockhorst



SOUTH EAST ALASKA REGIONAL HEALTH CONSORTIUM
3245 HOSPITAL DR • JUNEAU, ALASKA 99801 • (907) 463-4000 • FAX: (907) 463-4075

September 28, 2005

Via Certified U.S. Mail

RECEIVED
EXECUTIVE SECRETARIAT
INDIAN HEALTH SERVICE
2005 SEP 30 A 9 23

Charles W. Grim, D.D.S., M.H.S.A.
Director, Indian Health Service
Parklawn Building
5600 Fishers Lane, Room 6A-05
Rockville, MD 20852

Re: Contract Disputes Act claim for contract support costs due in FY1996

Dear Dr. Grim:

The Southeast Alaska Regional Health Consortium hereby claims the right to immediate payment of \$1,616,482.00, plus interest, due and owing to the Southeast Alaska Regional Health Consortium under the provisions of the above-referenced contract, as amended, in effect between the parties for fiscal year 1996 ("covered year"). This claim is submitted pursuant to the provisions of the Contract Disputes Act, 41 U.S.C. § 601 *et seq.* and §§ 110(a) and (d) of the Indian Self-Determination and Education Assistance Act, as amended (ISDA), for all damages arising out of the failure of the Indian Health Service to pay full contract support costs (including indirect costs and direct contract support costs).

The Southeast Alaska Regional Health Consortium's contracts and contract amendments, the Southeast Alaska Regional Health Consortium's funding agreements, the Southeast Alaska Regional Health Consortium's indirect cost agreements and the Indian Self-Determination and Education Assistance Act during the covered year obligated the United States to pay the Southeast Alaska Regional Health Consortium no less than the full amount of contract support costs, including indirect costs and direct contract support costs, associated with the Southeast Alaska Regional Health Consortium's operation of the Indian Health Service programs, functions, services and activities operated by the Southeast Alaska Regional Health Consortium under the foregoing contract, as amended.

Charles W. Grim, D.D.S., M.H.S.A.

September 28, 2005

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The Southeast Alaska Regional Health Consortium asserts that IHS failed to meet its contractual and statutory obligations in two ways. First, IHS failed to pay the full amount of the Southeast Alaska Regional Health Consortium'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 Southeast Alaska Regional Health Consortium's.

Second, by the application of IHS's policies, IHS failed to include in the calculation of Southeast Alaska Regional Health Consortium's contract support cost requirement the full indirect contract support costs associated with the Southeast Alaska Regional Health Consortium's contracts. IHS did so by employing the same illegal calculation of the Southeast Alaska Regional Health Consortium'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 cost amount calculated by applying the Southeast Alaska Regional Health Consortium'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 Southeast Alaska Regional Health Consortium contribute to the Southeast Alaska Regional Health Consortium's indirect cost pool at the full rate. By failing to make a further adjustment, IHS violated its contractual and statutory obligations to Southeast Alaska Regional Health Consortium's.¹

This claim seeks, without limitation, all damages arising out of IHS's failure to pay full contract support costs as required by the ISDA and the Southeast Alaska Regional Health Consortium's contracts. This claim is supported by the originals of all contracts, contract modifications, funding agreements, amendments thereto, and indirect cost rate agreements, all of which are in the custody of the Government.

¹To explain this element further, this claim includes a claim for damages for the shortfalls in payment of indirect costs associated with the Southeast Alaska Regional Health Consortium's ISDA contracts arising from IHS's use or incorporation of a method, based upon OASC-10 and OMB Circular A-87, for determining indirect cost rates which in each year: (a) included funding provided by certain agencies other than IHS and the BIA in the direct cost base, resulting in (b) a lower indirect cost rate which was then © applied to the IHS's portion of the direct cost base, resulting in (d) a determination of an IHS indirect contract support cost entitlement which was lower in amount than required by the ISDA because (e) the agencies wrongfully included in the direct cost base did not fully pay, and were known not to fully pay, supplemental indirect costs.

Charles W. Grim, D.D.S., M.H.S.A.
September 28, 2005
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Please recall that, under the terms of the Prompt Payment Act, 31 U.S.C. § 611 and the Contract Disputes Act, interest is accruing on the amount due.

Sincerely,

Southeast Alaska Regional Health Consortium

By: *Kenneth Brewer*
Kenneth Brewer
President and Chief Executive Officer

cc: James Armbrust
Lead Negotiator, Alaska Area

CERTIFICATION OF CONTRACT DISPUTES ACT CLAIMS

I, Kenneth Brewer, President and Chief Executive Officer of the Southeast Alaska Regional Health Consortium, hereby certify as follows on behalf of the Southeast Alaska Regional Health Consortium:

1. The above claim is made in good faith;
2. The supporting data are accurate and complete to the best of my knowledge;
3. The amount requested accurately reflects the adjustment for which the Southeast Alaska Regional Health Consortium believes the Government is liable; and
4. I have been duly authorized to certify this claim on behalf of the Southeast Alaska Regional Health Consortium.

DATED this 28 day of September, 2005

Southeast Alaska Regional Health Consortium

By:

Kenneth Brewer
Kenneth Brewer
President and Chief Executive Officer



June 15, 2007

Alaska Area Native Health Services
4141 Ambassador Drive
Anchorage, Alaska 99508-5928

Mr. Mark Gorman, Acting President/CEO
SouthEast Alaska Regional Health Consortium
3245 Hospital Drive
Juneau, AK 99801



Subject: Contract Dispute for Contract No. 243-93-0010 Contract Support Costs for Fiscal Year 1996 (October 1, 1995-September 30, 1996)

Dear Mr. Gorman:

This is in response to the SouthEast Alaska Regional Health Consortium (SEARHC) letter dated September 28, 2005, requesting a contracting officer's decision under the Contract Disputes Act (CDA) for fiscal year (FY) 1996. SEARHC claims it is entitled to an additional \$1,616,482 in contract support costs (CSCs), plus interest. Your request was received on September 30, 2005, by the Director of the Indian Health Service (IHS). The IHS notified SEARHC by multiple letters that it required more time to research and answer the CDA claims. Based on the facts and law presented below, the Title I aspect of the FY 1996 claim is denied.

I. Description of Claims

The SEARHC claims, dated October 28, 2005, allege that the IHS paid less than its full CSC and requests an adjustment of \$1,616,482. The SEARHC claims were unaccompanied by supporting documentation. The "FY 96" claims did not cite the agreements from which the claims arise. We note that SEARHC had a FY 96 Title I contract 243-96-6006 and a Title III compact #58G950017. The compact was for general health services and the contract was for a youth alcohol treatment program.

Your claim letter of September 28, 2005, states your claim for FY 96 is actually made in "two ways." First, SEARHC alleges the "IHS failed to pay the full amount of the Southeast Alaska Regional Health Consortium 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 Southeast Alaska Regional Health Consortium." According to your January 30, 2006, letter of explanation regarding the claim, the amount for the FY 96 "underpayment claim" is \$1,087,127. This letter will respond to the portion of the underpayment claim against contract 243-96-6006 (calculated as \$20,140). The IHS will respond in a separate letter to the Title III aspect of the FY 96 underpayment claim (calculated as \$1,066,987).

Second, SEARHC alleges the "IHS failed to include in the calculation of Southeast Alaska Regional Health Consortium's contract support cost requirement the full indirect contract support costs associated with the Southeast Alaska Regional Health

Consortium's contracts. IHS did so by employing the same illegal calculation of the Southeast Alaska Regional Health Consortium'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 Southeast Alaska Regional Health Consortium'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 Southeast Alaska Regional Health Consortium contribute to the Southeast Alaska Regional Health Consortium's indirect cost pool at the full rate."

SEARHC claims it was unable to calculate exactly how much higher its indirect cost rate should have been, because of a lack of necessary records and resources, so it estimated a two percent underpayment "based on an evaluation of the miscalculation amounts in the Ramah Navajo settlement." As stated in the January 30, 2006, claim explanation, by multiplying the total IHS program amount by two percent, SEARHC determined it is entitled to an additional payment of \$529,355 in CSCs for FY 96. This letter will respond to the portion of the miscalculation claim against contract 243-96-6006 (calculated as \$14,000). The IHS will respond in a separate letter to the Title III aspect of the FY 96 miscalculation claim (calculated as \$515,355).

II. Contract Provisions

After reviewing Contract No. 243-96-6006 we specifically considered the following provisions:

Terms, Provisions, and Conditions:

Section 5:

Limitation of Cost: 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.

Annual Funding Agreement

This Annual Funding Agreement, dated October 1, 1995, is entered into by the Southeast Alaska Regional Health Consortium (Raven's Way) and the United States of America, Department of Health and Human Services,

Indian Health Service, in accordance with and pursuant to the Agreement, dated October 1, 1995, between Southeast Alaska Regional Health Consortium (Raven's Way) and the Indian Health Service under the provisions of Title I of the Indian Self-Determination Act, as amended, (hereinafter the "Contract").

2. (A) The Indian Health Service shall provide the Southeast Alaska Regional Health Consortium (Raven's Way) the amount of \$748,644.00 in one lump sum payment in accordance with Article II, Section 6 of the Contract. The payment shall be made on October 10, 1995.

(B) For the period (date) to (date), the Contractor shall be reimbursed for indirect costs using a fixed with carry-forward rate of 21.1%. This indirect cost rate shall be applied against direct salaries and wages.

3. This Agreement shall become effective on October 1, 1995 and shall expire on September 30, 1996.

III. Findings of Fact

The IHS received this claim on September 30, 2005.

Area Advice of Allowance #18, dated October 29, 1996, showed that \$7,715,327 in CSC and \$23,924 in Environmental Health CSC was made available to SEARHC in FY 96, for total CSCs of \$7,739,251. FY 96 CSC increased over the final FY 95 CSC amount by \$639,869 per the tribal share settlement agreement. \$7,551,249 in CSC was obligated to the compact and \$188,002 in CSC to contract 243-96-6006.

The initial FY 96 AFA for the contract cited a CSC recurring amount of \$48,644. Amendment #1 added \$139,358 in non-recurring CSC and was effective on October 26, 1995. The FY 96 AFA, together with its amendments, provided a total of \$188,002 in CSC.

According to SEARHC's FY 96 audit there remained \$4,812,382 in unexpended funds at year end. Calculations based on the allocation of indirect costs per the FY 96 audit indicate that unexpended CSC funds may have subtotaled \$1,832,676. The FY 96 claim for \$1,616,482 does not reflect an off-set for unexpended CSC funding.

IV. Decision

SEARHC's FY 96 Title I underpayment and miscalculation claims are denied because: SEARHC's claims are barred by the CDA's statute of limitations; the IHS paid SEARHC the CSC amount listed in the contract AFA for FY 96; and there is no evidence that IHS miscalculated the amount of IDC due under the AFA.

A. SEARHC Failed to Meet the Statute of Limitations

SEARHC's claims are denied because they were filed more than six years after the date they accrued, in violation of the six-year statute of limitations in the Contract Disputes Act. 41 U.S.C. § 605(a). Specifically, the claims would have accrued on October 1, 1996, but were not received by the contracting officer until September 30, 2005, nine years after the claims would have accrued and three years past the statute of limitations.

B. IHS Paid SEARHC for Contract Support Costs under the FY 1996 AFA

The SEARHC underpayment claim is also denied because the IHS has not breached any contractual duty to pay CSC funds beyond those already awarded to SEARHC. IHS paid SEARHC all of the CSC that it agreed to pay in the FY 96 AFA as outlined in the findings of fact, above. IHS did not breach the contract.

SEARHC now asserts that "IHS failed to pay the full amount of contract support cost requirements calculated pursuant to IHS policies, by applying an unlawful policy limiting the total amount that would be paid to SEARHC." We presume that "unlawful policy" is a reference to Cherokee Nation v. Leavitt, 125 S. Ct. 1172 (2005). In Cherokee, however, the Supreme Court was faced with a complaint that the agency failed to pay the amount agreed to in the contract. Contrarily, in the present claim IHS fulfilled its agreement to pay the sum certain identified in the Compact AFA for FY 96. Cherokee cannot be fairly read to require an upward adjustment in the amount IHS in contractually bound to pay.

SEARHC's claim relied in part on the IHS shortfall report. This is problematic because the report is a budget estimating tool, not a reflection of the amount owed under contract or compact. The estimated amount in the shortfall report can differ from the actual contractual amount for several reasons, including: (1) indirect rates used in the shortfall report are often provisional; (2) the shortfall report does not account for final adjustments to contract funding amounts; (3) indirect rate exclusionary amounts are estimates based upon approximated preliminary data; (4) determinations of the direct cost base for allocation of indirect costs change when calculated using final audited numbers; and, (5) the shortfall report assumes the tribe expended all IHS funds.

The 1996 shortfall report estimate for SEARHC assumed all IHS funds were expended. However, the FY 96 audit documents \$4,812,382 in unexpended funds. This is just one example showing why the shortfall report cannot be used to establish the contractual obligation of the IHS for FY 96.

C. IHS Did Not Miscalculate SEARHC's Indirect Cost Rate

Finally, contrary to your miscalculation claim, Ramah does not dictate a recalculation of SEARHC's IDC rate. IHS is statutorily barred from awarding indirect cost funding for any cost allocable to any other federal program. Although 25 U.S.C. 450j-1(d)(1)

