

Geoffrey D. Strommer, Esq.
OSB# 93110
Starla Kay Roels, Esq.
OSB # 96262
Hobbs, Straus, Dean & Walker, LLP
851 S.W. 6th Avenue, Suite 1650
Portland, OR 97204

Joseph H. Webster, Esq.
Hobbs, Straus, Dean & Walker, LLP
2120 L St., NW., Suite 700
DC # 448458
Attorneys for Plaintiff Shoalwater Bay Indian Tribe

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

SHOALWATER BAY INDIAN TRIBE,)	Civil No. _____
)	
PLAINTIFF,)	COMPLAINT
)	
v.)	
)	
TOMMY G. THOMPSON, in his official)	
capacity as Secretary of the United States)	
Department of Health and Human Services;)	
MICHAEL H. TRUJILLO, in his official)	
capacity as Director of the Indian Health Service,)	
and DONI WILDER, in her official capacity as)	
Director of the Portland Area Office of the Indian)	
Health Service, the U.S. DEPARTMENT OF)	
HEALTH AND HUMAN SERVICES, and the)	
UNITED STATES OF AMERICA,)	
)	
DEFENDANTS.)	

COMPLAINT

The Plaintiff, for its cause of action against the Defendants named above, alleges as follows:

INTRODUCTION

1. This is a civil action for breach of contract damages based on the Defendants' violation of the terms of contracts entered into under the Indian Self-Determination and Education Assistance Act (ISDEAA), P.L. 93-638, as amended, 25 U.S.C. §§ 450 et seq. In these contracts, the Defendants promised to pay the Plaintiff additional contract support funds associated with new program assumptions pursuant to the provisions of Indian Health Service (IHS) Circular 96-04. Based on these contracts, the Plaintiff should have been paid approximately \$130,349 in additional contract support funds in FY 1999. The Plaintiff seeks this amount, plus applicable interest.

2. Under the ISDEAA, the Plaintiff had a right to begin receiving its contract support costs in FY 1996, when it began operating the additional programs for the government. This amount would have been recurring in subsequent years under the ISDEAA and IHS Circular 96-04. However, the Plaintiff exercised forbearance between FY 1996 and FY 1999 based on the Defendant's promise to pay the Plaintiff in accordance with IHS Circular 96-04. Since the Defendant breached this promise, the Plaintiff is entitled to receive the total amount of contract support costs associated with the new assumptions that it would have been paid in FY 1996 - FY 1999, which totals approximately \$505,148. The Plaintiff seeks this amount, plus applicable interest.

3. As a matter of government contract law, a contract provision that is inconsistent with applicable law does not extinguish a contractor's statutory right to full funding. In the instant case, any contract provision that purports to limit a tribal contractor to less than its full contract support requirement is contrary to the ISDEAA. Thus, to the extent that the Plaintiff is not able to recover under Claims 1 and 2, it is entitled to the full amount of contract support costs

that it should have received for the period FY 1996 to FY 1999. This amount includes the contract support costs that the Plaintiff should have received for the additional programs, as well as shortfalls in its negotiated contract support requirements for ongoing programs. This amount totals approximately \$706,852. The Plaintiff seeks this amount, plus applicable interest.

PARTIES

4. The Plaintiff is the Shoalwater Bay Indian Tribe (Shoalwater Bay or Tribe), which is an Indian tribe as defined in the ISDEAA, 25 U.S.C. § 450b(e). Shoalwater Bay provides comprehensive health care to its tribal members and other eligible IHS beneficiaries in its service area in accordance with the terms of contracts negotiated under the ISDEAA.

5. Defendant Tommy G. Thompson is the Secretary of the United States Department of Health and Human Services (DHHS). Defendant Michael H. Trujillo is the Director of the IHS. Defendant Doni Wilder is the Director of the Portland Area Office of the IHS. These defendants are officers and employees of the United States and have direct or delegated statutory duties for carrying out the ISDEAA. The contracts were negotiated with the Portland Area Office and signed on behalf of Director Trujillo and the IHS under statutory authority delegated by the Secretary of the DHHS. All of these Defendants are sued in their official capacities. Defendant U.S. Department of Health and Human Services is the federal department that administers the programs at issue on behalf of the defendant United States of America, which also has a trust relationship with the Shoalwater Bay Indian Tribe. The Defendants are hereinafter referred to collectively as "the Secretary" or "IHS."

JURISDICTION AND VENUE

6. This court has jurisdiction under 25 U.S.C. § 450m-1 (actions for claims for money damages arising under contracts authorized by the ISDEAA); 28 U.S.C. § 1331 (federal question); and 28 U.S.C. § 1362 (actions brought by Indian tribes).

7. Venue is proper under 28 U.S.C. § 1391(e), since this action is brought in the district where a substantial part of the events or omissions giving rise to the claims set forth in this complaint occurred. This venue is also where the Portland Area Office of the IHS (where the contracts at issue were negotiated) is located.

FACTS

A. The Indian Self-Determination and Education Assistance Act.

8. Under the ISDEAA, Indian tribes are entitled to step into the shoes of the Secretary of the DHHS to take over administration of federal health programs that would normally be provided by the government to the tribes. The transfer of these programs is accomplished through contracts and Annual Funding Agreements (AFA) between the Secretary and a tribe under Title I of the ISDEAA (25 U.S.C. §§ 450f-450n) or through compacts and AFAs under the self-governance program in Title V of the ISDEAA (25 U.S.C. §§ 458aaa-458aaa-18).¹ An AFA negotiated pursuant to a contract or compact determine the actual level of funding to be received by the contractor each year for the operation of the health programs. Contracts, compacts and AFAs are legally binding contracts between tribal contractors and the United States government.

¹ Public Law 106-260 recently enacted Title V to make permanent the Title III self-governance demonstration program (25 U.S.C. § 450f note), which was repealed. Title III compacts and AFAs were grandfathered into Title V. 25 U.S.C. §§ 458aaa-3(c), 458aaa-4(f).

9. The ISDEAA requires the Secretary to provide program funding in an amount no less than what the Secretary would have spent had he retained operation of the program. 25 U.S.C. § 450j-1(a)(1). Additionally, the ISDEAA requires that the Secretary add to the contract the full amount of the tribal contractor's reasonable administrative overhead costs, which are called contract support costs, to operate the federal program. See 25 U.S.C. §§ 450j-1(a)(2), (a)(3), (a)(5); 450j-1(d)(2); 450j-1(g) and 450f note.

10. Contract support costs required under the ISDEAA include funds for the following: (a) "indirect costs" for a share of the administrative overhead associated with all of a tribe's programs; (b) "direct costs" for annually recurring overhead costs directly associated with the IHS programs covered by a contract or compact; and (c) "start-up" costs associated with the initial transfer of an IHS program to a tribe.

11. Based on procedures established by the Secretary, as set forth in IHS Circular 96-04, the reasonable amount of indirect contract support costs the Secretary must add to a tribe's contract is generally determined by the annual negotiation of an Indirect Cost Agreement between the tribal contractor and the DHHS Office of Cost Allocation (or the Department of the Interior Office of the Inspector General). The negotiated Indirect Cost Agreement is incorporated into an AFA. Direct contract support costs and start-up costs are generally negotiated directly between the tribe and the agency. These amounts are also added to the AFA.

B. IHS Contract Support Policy Guidelines.

12. In 1992, the IHS began to use an unpromulgated internal agency guideline (ISDM 92-2) to determine and allocate "contract support funds for all Public Law (P.L.) 93-638 contracts." ISDM 92-2, § 2, p. 2. Despite the full funding requirements of the ISDEAA, this

guideline set up a priority payment system under which tribal contractors with new or expanded contracts would be paid their negotiated amount of contract support based on a priority list linked to the date funds were requested. This priority system became known as the "queue." Id. at §§ 4(C)(1), (4), pp. 4-5.

13. A tribal contractor's place on the queue was determined by the request date and funding was paid on a first come, first served basis (from the top of the list downward until funds were exhausted). Id. Thus, when a tribal contractor was put on the queue, it would receive contract support funding for a program once the agency determined that contract support funds were available.

14. Under IHS Circular 96-04, when the tribal contractor was paid, it received funds only for the contract year in which it received the payment—not for previous contract years (unless it was in the queue for one-time start-up funds, which are paid for the first year of operation). The contractor was to continue receiving funding for contract support costs in subsequent years because the funds are treated as recurring once paid (so long as the funds are justified based on the contractor's current contract support requirement and were not intended to be one-time costs awarded only for the year of start-up).

15. In 1996, IHS Circular 96-04 superseded ISDM 92-2. The new circular retained the queue system and confirmed that contract support "for new and expanded programs will be funded at 100 percent of the approved amount on a first come first served basis." IHS Circular 96-04, § 4(A)(4)(a)(ii), p. 10. The new circular also stated, "[T]ribes on the priority list [the queue] will remain on the priority list and be considered in priority order when funding is made available by appropriation or reprogramming." Id.

16. IHS Circular 96-04 remained in place until January 20, 2000, when it was superceded by IHS Circular 2000-01. The new circular abolished the queue in favor of a system where payments of contract support for new and expanded contracts are tied to the contractor's overall level of shortfall in contract support funding.

17. In 1999, Congress appropriated an additional \$35 million based on the queue list compiled pursuant to IHS Circular 96-04. These funds were available to satisfy the IHS' obligations under IHS Circular 96-04.

18. Even though the IHS did not supercede or suspend IHS Circular 96-04 until January 2000, the IHS disregarded that circular in FY 1999. Rather than distribute a \$35 million congressional increase in contract support funding for FY 1999 based on the queue list provided for in IHS Circular 96-04, the IHS instead distributed the funds using a methodology that resulted in some tribal contractors near the top of the queue (such as Shoalwater Bay) receiving no part of the distribution, while some tribes near the bottom of the queue had their requests fully funded.

C. Shoalwater Bay's ISDEAA Contracts with the IHS.

19. In 1995, Shoalwater Bay negotiated a contract and AFA with the Portland Area Office of the IHS authorizing the Tribe to operate health care programs under Title I of the ISDEAA for FY 1996 and FY 1997. The contract and AFA were signed by officials of the Portland Area Office of the IHS and went into effect on October 1, 1995. On October 1, 1997, the IHS and the Tribe entered a new contract and AFA for FY 1998 that were likewise signed by officials of the Portland Area Office of the IHS. Among other provisions, these contracts and AFAs committed the IHS to transfer responsibility over the majority of the programs, functions,

services and activities, and corresponding funding, of the Portland Area Office and IHS Headquarters to the Tribe.

20. Under the ISDEAA, the IHS was required to add the full amount of negotiated contract support costs associated with these additional programs to the Tribe's contract and was required to pay such amounts to the extent that funds were legally available.

21. The Tribe submitted two requests for additional contract support costs associated with these additional programs - #98-17 and #96-53. Based upon these requests and the AFA, the Tribe is entitled to direct contract support for each year of \$54,591, plus one-time start-up costs of \$23,500. Under the AFA the Tribe is also entitled to indirect contract support costs based upon its applicable negotiated Indirect Cost Rates: FY 1996 - 43.8 percent; FY 1997 - 49 percent; FY 1998 - 36.7 percent; and FY 1999 - 37.5 percent.

22. In FY 1996 and FY 1997 the IHS had more than adequate funds available in its lump-sum appropriation to fully fund the Tribe's contract support requirements. The Interior and Related Agency Appropriations Acts for FY 1996 and FY 1997 contained no earmark, "cap" or other limitation so as to restrict the IHS' ability to pay the contract debts of the United States, including contract support costs for ISDEAA contracts, and the IHS was therefore under a duty to pay 100 percent of the Tribe's negotiated contract support requirements for those years.

23. Nevertheless, the IHS claimed that only funds recommended by Congress for the ISD Fund were available to pay queue requests under IHS Circular 96-04. Rather than immediately exercising its rights to full funding of the contract support associated with these new programs, the Tribe exercised forbearance in reliance upon the IHS' contractual commitment in the AFAs for FY 1996 - FY 1998 to pay the Tribe its contract support costs pursuant to IHS Circular 96-04 (the queue system).

24. In FY 1998, Congress enacted appropriation language seeking to cap the total amount of funds available for contract support costs. Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub.L. 105-277, H.R. 4328, Sec. 314, 112 Stat. 2681-333 (Oct. 21, 1998). However, this appropriation provision did not impact the Tribe's rights under the ISDEAA to have its contract support requirements fully funded.

25. For FY 1999, the Shoalwater Bay Tribe negotiated a compact and AFA under Title III of the ISDEAA with the Portland Area Office of the IHS, which went into effect on October 1, 1998. The compact and AFA were signed on behalf of Dr. Trujillo for the Secretary of the DHHS on August 26, 1998. Section 3(G) of the FY 1999 AFA specified that the Tribe was entitled to receive \$226,858 of contract support funding, and reaffirmed that such funding "shall be paid by the Secretary to the Tribe in accordance with IHS Circular 96-04." This amount was later reduced to \$169,057 by agreement of the parties.

D. FY 1999 Distribution of Contract Support Funds.

26. During all of FY 1999 (and until January 20, 2000), IHS policy on distributing contract support funds was prescribed by IHS Circular 96-04, the provisions of which were incorporated by reference in the AFAs between the IHS and Shoalwater Bay for FY 1996 - FY 1999.

27. In FY 1999, Congress appropriated a \$35 million increase for contract support costs.

28. Despite the large funding increase and the IHS' renewed commitment in the

FY 1999 AFA that the Tribe's contract support payment "shall" be distributed in accordance with IHS Circular 96-04, the IHS elected to disregard this contractual commitment. Without rescinding IHS Circular 96-04, the IHS instituted a wholly different distribution process for FY 1999. Under this new methodology, only tribal contractors below a certain percentage level of overall contract support funding received funding, regardless of their place on the queue. As a result of this change, Shoalwater Bay did not receive funding for any portion of its pending queue requests, notwithstanding that the IHS had already received the benefits of the agreement by not having to pay full contract support costs from FY 1996-FY 1999.

29. If the IHS had complied with the provisions of IHS Circular 96-04 in FY 1999, as it had agreed with the Tribe that it would do, the Tribe's queue amount (\$130,349) would have been fully funded.

E. Contract Dispute Proceeding.

30. In accordance with the ISDEAA, 25 U.S.C. § 450m-1, and the Contract Disputes Act (CDA), 41 U.S.C. §§ 601 et seq., Shoalwater Bay filed the above claims with the IHS on September 14, 1999. (Attachment 1). The IHS rejected all of these claims in a decision signed by Director Trujillo on July 21, 2000. (Attachment 2).

31. In its decision, the IHS unilaterally and improperly recalculated the amount of funds to which the Tribe would have been due from the queue. According to the IHS, the Tribe would only have been entitled to \$59,817 for its two queue requests had the agency complied with the parties' agreement. However, the IHS took the position that it was not bound to pay even this amount of contract support costs in accordance with IHS Circular 96-04. The IHS also asserted that no funds are available for contract support amounts not paid in FY 1996 - FY 1999.

32. The Contract Disputes Act claims filed by the Shoalwater Bay Tribe with the IHS were calculated using an indirect cost rate of 49% from FY 1996. However, after the Tribe filed its Contract Disputes Act claims, it received correspondence from the Office of the Inspector General, Department of the Interior, stating that the Tribe's indirect cost rate for FY 1999 was changed to 37.5 percent and its indirect cost rate for FY 1998 was changed to 36.7 percent. This change is reflected in the IHS' decision of July 21, 2000, and is not disputed by the Tribe.

33. This action is filed within 12 months of the IHS decision and thus is timely under the CDA, 41 U.S.C. § 609, which is applicable to Contract Disputes Act contract claims under the ISDEAA. 25 U.S.C.

§ 450m-1(d).

CAUSES OF ACTION

CLAIM 1

34. The allegations in Paragraphs 1-33 are incorporated herein by reference.

35. Beginning in FY 1996, by agreement of the parties, the Tribe was placed on the queue for payment of contract support costs under IHS Circular 96-04. This commitment was specifically reaffirmed in the FY 1999 AFA, which states that such funding "shall be paid by the Secretary to the Tribe in accordance with IHS Circular 96-04."

36. In FY 1999, Congress increased funding for contract support by \$35 million, all of which was available to fund programs listed on the queue. Such funds, the majority of which the IHS allocated to the ISD Fund, were more than adequate to reach and fully fund the Tribe's contract support request pending on the queue.

37. By failing to pay the Tribe its pending queue request in accordance with its contractual obligation to distribute contract support funds to the Tribe under IHS Circular 96-04, the IHS breached its contract with the Tribe.

38. Because the IHS breached its contractual obligation to pay the Tribe \$130,349 in additional contract support costs in FY 1999, the Tribe is entitled to a judgment for damages in the amount of \$130,349, plus applicable interest.

CLAIM 2

39. The allegations in Paragraphs 1-38 are incorporated herein by reference.

40. The Tribe entered into ISDEAA contracts and AFAs with the IHS in FY 1996 - FY 1999. As stated above, these contracts provided that the IHS would pay the contract support costs required under the ISDEAA in accordance with the queue system set forth in IHS Circular 96-04.

41. Though the Tribe was immediately entitled to the full amount of contract support costs due to it under the ISDEAA, the Tribe exercised forbearance in claiming such sums based on the IHS' commitment in the AFAs to abide by IHS Circular 96-04 in paying contract support costs to the Tribe.

42. The IHS did not pay the Tribe its contract support costs in accordance with IHS Circular 96-04 in FY 1999, despite having adequate funds to do so, which resulted in the Tribe receiving no funding for its pending queue requests.

43. Because the IHS breached its agreement to pay the Tribe using IHS Circular 96-04, the Tribe is entitled to receive the total amount of contract support costs that it would have

been paid in FY 1996 - FY 1999 based upon the new program assumptions, which totals approximately \$505,148.

44. The Tribe is thus entitled to a judgment for damages in the amount of approximately \$505,148, plus applicable interest.

CLAIM 3

45. The allegations in Paragraphs 1-44 are incorporated herein by reference.

46. As a matter of government contract law, a contract provision that is not authorized by applicable law is unenforceable. See, e.g., Barrett Refining Corp. v. United States, 42 Fed. Cl. 128 (Fed. Cl. 1998); MAPCO Alaska Petroleum, Inc. v. United States, 27 Fed. Cl. 405 (Fed. Cl. 1992):

47. The ISDEAA imposes a mandatory duty on the Secretary to add to the Tribe's contract the full amount of contract support costs associated with all of the programs transferred to the Tribe under the contracts, compact and AFAs. See 25 U.S.C. §§ 450j-1(a)(2), (a)(3), (a)(5); 450j-1(d)(2); 450j-1(g) and 450f note. Thus, any contract provision that purports to limit the Tribe to less than its full contract support requirement is contrary to the ISDEAA and cannot be enforced to the Tribe's detriment.

48. For the period FY 1996 - FY 1999 the Tribe received approximately \$706,852 less than its negotiated contract support requirement. This amount includes both the amounts that the Tribe should have been paid in FY 1996 - FY 1999 based upon its queue requests, as well as shortfalls in the amount of contract support costs it received for other ongoing IHS programs. By failing to fully fund the Tribe's contract support requirements, the IHS violated the ISDEAA and its contracts with the Tribe.

