

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

SAGINAW CHIPPEWA INDIAN
TRIBE OF MICHIGAN,

Plaintiff,

v.

SYLVIA MATHEWS BURWELL, in
her official capacity as Secretary of
Health and Human Services, YVETTE
ROUBIDEAUX, in her official capacity
as Director of the Indian Health Service,
and the UNITED STATES OF
AMERICA,

Defendants.

Case No.: _____

Complaint

The Saginaw Chippewa Indian Tribe of Michigan complains and alleges as follows:

I. Introduction

1. This is a suit against the United States for breach of contract and statute by the Indian Health Service (“IHS”), an agency of the Department of Health and Human Services (“HHS”) (collectively “Defendants”). The Saginaw Chippewa Indian Tribe of Michigan (“Tribe”) seeks money damages under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450 – 458ddd-2 (“ISDEAA”) and the Contract Disputes Act, 41 U.S.C. §§ 7101 – 7109 (“CDA”)

for the Defendants' continued and repeated violation of the Tribe's contractual and statutory right to the payment of full contract support costs ("CSC") for fiscal year 2006.

2. Defendants paid only a portion of the CSC owed the Tribe under its contract and annual funding agreement ("AFA"), due to their misapplication of federal contracting and appropriations law. Defendants underfunded the Tribe's contract and AFA each year because, it rationalized, Congress had imposed a spending cap on aggregate CSC spending for all ISDEAA contracts. This resulted in significant shortfalls to tribes. IHS subsequently calculated this shortfall for fiscal year 2006 and reported the information to Congress.

3. The Supreme Court found the Defendants' practice of underfunding CSC unlawful and the Defendants are responsible for fully funding ISDEAA contracts—including *all* of the required CSC—regardless of any congressionally imposed cap on CSC spending. *Salazar v. Ramah Navajo Chapter*, 567 U.S. ___, 132 S. Ct. 2181 (2012), and *Arctic Slope Native Ass'n Ltd. v. Sebelius*, No. 11-83, 2012 WL 2368663 (U.S. June 25, 2012), on remand *Arctic Slope Native Ass'n Ltd. v. Sebelius*, No. 2010-1013, 2012 WL 3599217 (Fed. Cir. Aug. 22, 2012) ("Arctic Slope II").

4. Defendants also improperly failed to adjust the indirect cost rate used by the Secretary of the HHS ("Secretary") to calculate the Tribe's indirect contract

support cost requirement, and that adjustment was necessary to lawfully calculate the full indirect costs associated with carrying out the programs contracted by the Secretary to the Tribe.

II. Jurisdiction and Venue

5. This case arises under an ISDEAA contract between the United States and the Tribe for the operation of Indian health programs. This Court has subject-matter jurisdiction under the ISDEAA and, as applicable, the CDA. *See* 25 U.S.C. § 450m-1(a) and 41 U.S.C. § 7104(b).

6. On or about September 30, 2012, the Tribe sent a letter to the Bemidji Area IHS requesting a contracting officer's decision on the Tribe's fiscal year 2006 CSC claim.

7. The IHS contracting officer denied the Tribe's fiscal year 2006 claim in a letter dated February 10, 2014, which the Tribe received on the same day via facsimile ("the 2006 denial letter"). The Tribe has filed this action within twelve months of receiving the 2006 denial letter, as required by the CDA. Thus, the Tribe has exhausted its administrative remedies, 41 U.S.C. §§ 7104(b), and its appeal is timely filed.

8. Venue is proper because the Tribe's reservation and tribal headquarters are located in Isabella County, Michigan.

III. Parties

9. The Saginaw Chippewa Indian Tribe of Michigan (“Tribe”) is a federally recognized Indian tribe with its tribal headquarters in Mt. Pleasant, Michigan. The Tribe meets the definition of “Tribe” as that term is defined by the ISDEAA. *See* U.S.C. § 450b(e).

10. Defendant United States is a party to every ISDEAA contract, including the Tribe’s. *See* 25 U.S.C. § 450l(c), Model Agreement § 1(a)(1).

11. Defendant Sylvia Mathews Burwell, sued in her official capacity, is the Secretary of Health and Human Services and is charged by law with the responsibility of implementing the ISDEAA, and other health laws benefiting Indians, on behalf of the United States. 25 U.S.C. § 450f(a)(1); 25 U.S.C. § 450b(i); and 42 U.S.C. § 2001.

12. Defendant Yvette Roubideaux, sued in her official capacity, is the Director of the IHS, the agency within HHS charged by law with the responsibility for implementing the ISDEAA, and other health laws benefiting Indians.

IV. Facts and General Allegations

13. Under the ISDEAA, Indian tribes are authorized to administer programs and provide services that would otherwise be undertaken by the federal government. By contract, a tribe agrees to provide such services and the federal government

agrees to provide funds to cover both direct program requirements and contract support costs.

14. The Tribe and IHS entered into an ISDEAA contract covering fiscal year 2006 (Contract No.: 239-01-0002), under which the Tribe promised to provide health care programs and services, and IHS promised to provide funding as required by the ISDEAA and in the contract and AFA.

15. The ISDEAA requires that the contract include the amount “not less than the appropriate Secretary would have otherwise provided for the operation of the program” (“Secretarial amount”). 25 U.S.C. § 450j-1(a)(1).

16. In addition to the Secretarial amount, the ISDEAA requires that the Secretary pay a contracting tribe CSC of various categories, 25 U.S.C. §§ 450j(a)(2), (3), & (5), and further requires at 25 U.S.C. § 450j-1(g) that “upon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under [25 U.S.C. § 450j-1(a)]”

17. The general categories of CSC that the Tribe is entitled to under the ISDEAA include:

- (a) indirect costs—costs incurred for a common purpose benefiting more than one program, function, service, or activity, such as administrative and overhead costs, *see* 25 U.S.C. § 450j-1(a)(2);
- (b) direct costs—expenses directly attributable to a certain program, function, service, or activity but not captured in either the indirect cost

CSC or the Secretarial amount, such as insurance or other expenses the Secretary would not have incurred (*e.g.*, the government is self-insured, it does not incur insurance costs), *see id.* § 450j-1(a)(3)(A); and

- (c) start-up costs—the initial costs for planning, preparing for, and assuming the operation of a new or expanded program, function, service, or activity, *see id.* § 450j-1(a)(5)-(6).

18. The ISDEAA requires that all CSC amounts “shall be added” to an ISDEAA contract. 25 U.S.C. § 450j-1(a)(2). The ISDEAA further provides that “[t]he amount of funds required by [25 U.S.C. § 450j-1(a)] . . . (2) shall not be reduced by the Secretary in subsequent years,” except in circumstances that are not present here (such as completion of a contracted project). 25 U.S.C. § 450j-1(b)(2).

19. Notwithstanding Defendants’ obligation to pay the full amount of CSC in fiscal year 2006, the IHS underpaid CSC to the Tribe—and the IHS’s own reports confirm this underpayment.

20. During fiscal year 2006, the IHS calculated and paid CSC associated with ISDEAA contracts under a succession of Indian Self-Determination Memoranda, IHS Circulars, and the IHS Manual (collectively “IHS Manual”). The IHS Manual explains how CSC requirements are determined. IHS calculated the contract-support-cost requirement associated with the Tribe’s contract under the IHS Manual.

21. Under the IHS Manual, IHS “determine[s]” a “contract support cost requirement” before making a contract award. *See* IHM § 6-3.1.E.5. The IHS

does this by calculating both the contractor's indirect contract support costs and direct contract support costs; by reviewing those costs against the Secretarial amount to eliminate any duplicative costs; and by then setting the net amount as the contractor's "contract support cost requirement." This becomes the amount that IHS is obligated to pay under the contract.

22. Indirect contract support costs represent the bulk of the contract support cost requirement. The IHS Manual instructs how IHS will determine indirect contract support cost requirements in any given year. And IHS used the IHS Manual to calculate the Tribe's indirect contract support cost requirement for its fiscal year 2006 contract.

23. With respect to fiscal year 2006, the Manual instructs IHS to determine the contract's indirect contract support cost requirement "by applying the negotiated [indirect cost] rate(s) to the appropriate direct cost base." IHM § 6-3.2.E.1. In doing so, the IHS uses the contractor's most recent indirect cost rate so long as it is not "more than three years old." *Id.* The product of these calculations is the contractor's indirect contract support cost requirement. This is the process that IHS used to calculate the Tribe's indirect contract support cost requirement in fiscal year 2006.

24. The IHS Manual also instructs that direct contract support costs are negotiated according to detailed guidelines set forth in the IHS Manual and its

Appendix. IHM § 6-3.2.D. Once negotiated, direct contract support costs are paid on a recurring basis, IHM §§ 6-3.2.D and 6-3.2.D.2, meaning that they do “not require annual rejustification to the Secretary.” IHM §6-3.1.E.12. Once negotiated, direct contract support costs are increased “by the amount needed to increase prior year [direct contract support cost] funding by the National OMB non-medical inflation rate” IHM § 6-3.3.B.2.

25. The IHS Manual provides a final step in connection with the determination of a Tribe’s contract support costs requirement, concerning duplicative costs. In this last step, all costs are reviewed for duplication to verify that the determined contract support costs do not duplicate contract funds being paid to a contracting tribe as part of the Secretarial amount. IHM § 6-3.2.B. At the end of this process, “[t]his adjusted CSC requirement is the Section 106(a)(2) amount that the awardee is eligible to receive” *Id.* This adjusted CSC requirement is the contract amount for CSC (both direct and indirect) to be paid by IHS to the contracting tribe.

26. The Tribe’s contract under the ISDEAA requires that the Tribe be paid no less than the full amount of the Tribe’s CSC requirement as determined under the IHS Manual.

27. During fiscal year 2006, the Secretary failed to pay the full amount of the Tribe’s CSC requirement. The Secretary’s failure is contrary to the Tribe’s

statutory and contractual rights under the ISDEAA and as affirmed by the Supreme Court in *Ramah* and *Arctic Slope II*.

28. The ISDEAA requires the IHS to submit to Congress an annual report on the implementation of the ISDEAA, including in relevant part:

* * *

- (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 contractor for the fiscal year for which the report is being submitted;

* * *

25 U.S.C. § 450j-1(c). The shortfall report for fiscal year 2006 shows that the IHS underpaid the Tribe by \$122,391.

29. The shortfall described above was exacerbated by IHS's failure to adjust the Tribe's indirect cost rate to account for systematic miscalculations on the part of the Department of the Interior's National Business Center ("NBC"), the federal agency that calculates the Tribe's single, government-wide indirect cost rate. The NBC follows OMB Circular A-87 that states that indirect cost rates are calculated by dividing the indirect cost pool by the total amount of direct cost base funding for all programs the Tribe carries out, not just IHS programs.

30. Often, other federal or state funders pay little or no indirect costs. NBC's inclusion of these programs in the direct cost base inflates the denominator of the ratemaking equation, resulting in a lower indirect cost rate.

31. IHS used, as an automatic proxy, the unadjusted annual indirect cost rate assigned to the Tribe by the NBC. But the NBC rate is to be used strictly for certain cost-recovery accounting purposes, and the applicable OMB guidelines caution that such rates are *not* to be used to determine a federal agency's funding obligations under contracts or grants. *See, e.g.*, OMB Cir. A-87, 2 C.F.R. § 225.20 ("The principles are for determining allowable costs only. They are not intended to identify the circumstances or to dictate the extent of Federal and governmental unit participation in the financing of a particular Federal award.")

32. But nonetheless, in fiscal year 2006, IHS required that the amount of the Tribe's indirect CSC to be paid under the ISDEAA, its contract, and AFA be determined by applying the Tribe's most recent indirect cost rate assigned to the Tribe by the DOI and NBC.

33. Exclusion of non-paying agencies from the indirect cost base would have produced a correct rate entitling the Tribe to additional indirect cost funding of approximately \$64,674.

34. On or about September 30, 2012, the Tribe presented its contract damages claim to the Bemidji Area IHS for fiscal year 2006 for failure to pay the full amount of CSC required by the ISDEAA, including:

- (a) IHS's unlawful failure to pay additional direct and indirect administrative CSC, as confirmed in the IHS's annual CSC shortfall report; and
- (b) IHS's unlawful failure to properly calculate the indirect administrative CSC that the Tribe was entitled to be paid under the ISDEAA.

V. Causes of Action

First Cause of Action (Failure to Pay Required Contract Support Costs)

35. The Tribe incorporates all previous allegations of fact and law into this Cause of Action.

36. During fiscal year 2006, the Secretary failed to meet her statutory and contractual obligations to the Tribe by failing to pay the Tribe's full contract support cost requirement regarding the Tribe's ISDEAA contract.

37. The government is liable to the Tribe for the unpaid amount of the Tribe's full contract support cost requirement, together with accrued interest, attorneys' fees, and costs, as set forth below.

Second Cause of Action (Miscalculated Rate Claim)

38. The Tribe incorporates all previous allegations of fact and law into this Cause of Action.

39. During fiscal year 2006, the Secretary failed to meet her statutory and contractual obligations to the Tribe by failing to pay the Tribe the full amount of indirect CSC by unlawfully using an artificially low indirect cost rate to calculate the Tribe's CSC.

40. The government is liable to the Tribe for the amounts the Secretary would have paid had the Secretary not failed to adjust the indirect cost rate used to calculate the Tribe's indirect contract support cost requirement associated with carrying out the Secretary's programs under contract, together with accrued interest, attorneys' fees, and cost.

VI. Prayer for Relief

41. The Tribe requests from this Court the following relief:

- (a) A judgment for damages for the Secretary's breach of the fiscal year 2006 ISDEAA contract, for failure to pay contract support costs and related damages, as set forth in more detail in this Complaint;
- (b) A judgment for damages for the Secretary's miscalculation of indirect costs rate for fiscal year 2006 in an amount to be determined by the proof;
- (c) Interest on these claims under the Contract Disputes Act, 41 U.S.C. §§ 7101-7109, and the Prompt Payment Act, 31 U.S.C. §§ 3901-3907;
- (d) Costs and attorneys' fees incurred in pursuing this claim as provided under the Equal Access to Justice Act, 5 U.S.C. § 504; 25 U.S.C. § 450m-1(c); and other applicable law; and
- (e) Such other monetary, declaratory, and equitable relief as this court may find to be just.

Respectfully submitted this 9th day of February 2015.

Jacobson, Magnuson, Anderson
& Halloran, P.C.

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