UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COOK INLET TRIBAL COUNCIL, Plaintiff, v. CHRISTOPHER MANDREGAN, JR., Area Director, Indian Health Service, Alaska Area Office, and SYLVIA MATHEWS BURWELL, Secretary, Department of Health & Human Services, and UNITED STATES OF AMERICA, Defendants.	)	Case No.: 1:14-cv-1835-EGS

MOTION FOR ATTORNEY'S FEES AND COSTS
PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT

Cook Inlet Tribal Council (CITC) respectfully moves for an award of attorney's fees in the amount of $75,141.56 and an award of costs in the amount of $3,590.92 pursuant to subsection (d)(1)(A) of the Equal Access to Justice Act, 28 U.S.C. § 2412 (EAJA).

As discussed further herein, CITC is a prevailing party under § 2412(d)(1)(A); CITC is eligible to receive an award under § 2412(d)(2)(B); the requested fees are supported by an itemized statement prepared in conformity with § 2412(d)(2)(B); and the government's position was not substantially justified under § 2412(d)(1)(B). *See generally Scarborough v Principi*, 124 S. Ct. 1856, (2004) (setting forth elements under the EAJA).

ARGUMENT

A. CITC IS A PREVAILING PARTY UNDER § 2412(d)(1)(A).

In this action CITC challenged the action of the Indian Health Service (IHS) in declining to award CITC certain facilities support costs claimed under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 5301 *et seq.* (ISDEAA), in connection with CITC's 2014 contract. In its Memorandum Opinion entered November 7, 2018 (ECF No. 39), this Court agreed with CITC that IHS's action was unlawful, vacated IHS's decision, remanded the matter to IHS for further proceedings, and directed the Clerk to close the case. *Id*. at 39. Under these circumstances, CITC is a "prevailing party" within the meaning of § 2412(d)(1)(A).

B. CITC IS ELIGIBLE TO RECEIVE AN AWARD UNDER § 2412(d)(2)(B).

Section 2412(d)(2)(B) provides that "an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3))[,] exempt from taxation under section 501(a) of such Code," is eligible to seek an award under EAJA "regardless of the net worth of such organization." As alleged in the Complaint and admitted in the Answer, CITC is such an organization. Compl., Docket No. 1, ¶ 5; Answer, Docket No. 7 ¶ 5. Accordingly, CITC is eligible to receive an EAJA award in this action.

C. THE REQUESTED FEES ARE SUPPORTED BY AN ITEMIZED ACCOUNT OF TIME SPENT, COMPUTED AT THE COST-OF-LIVING-ADJUSTED RATE ADDRESSED IN § 2412(d)(2)(A).

Accompanying this Motion is a Declaration of Lloyd B. Miller attesting to the accuracy of an itemized statement of all fees and costs incurred by counsel in prosecuting this action. Ex. 1 (Decl.); Ex. 2 (Statement of Fees); Ex. 3 (Statement of Costs). The Miller Declaration also includes a table computing the annual hourly rates for years 2014 through 2018, which applies the

cost-of-living rate adjustment to the 1996 EAJA statutory hourly rate of $125 as instructed by this Circuit in *Haselwander v. McHugh*, 797 F.3d 1, 4 (D.C. Cir. 2015) (*per curiam*).

Congress in 1996 amended the EAJA to set a revised base hourly rate of $125. 28 U.S.C. § 2412(d)(2)(A); *see* also *Haselwander*, 797 F.3d at 3 (discussing amendment). In doing so Congress also authorized courts to employ a "cost of living" adjusted rate. In *Wilkett v. Interstate Commerce Commission*, 844 F.2d 867, 876 (D.C. Cir. 1988), this Circuit noted that "the cost of living adjustment is available in routine cases" (while noting that other adjustments to the base rate are not routinely made). *See Doe v. Rumsfeld*, 501 F.Supp.2d 186, 192 (D.D.C. 2007) (Sullivan, J.) (awarding cost of living adjustment without special justification). Such an adjustment is certainly appropriate here, given that 22 years have passed since the statutory base rate was set. *See GasPlus, L.L.C. v. U.S. Dept. of Interior*, 593 F.Supp.2d 80, 90-1 (D.D.C. 2009) ("The statutory cap was set over ten years ago, in 1996. As a result, 'courts routinely approve cost-of-living adjustments.'" (quoting *Role Models*, 353 F.3d at 969)); *Porter v. Astrue*, 999 F.Supp.2d 35, 38 (D.D.C. 2013) ("Courts have often found that an increase in the statutory cap is warranted where the cost of living has increased relative to the cap."); *id*. at 39 (using "the regional CPI in calculating the fees owed to Plaintiff").

D. THE GOVERNMENT'S POSITION WAS NOT SUBSTANTIALLY JUSTIFIED UNDER § 2412(d)(1)(B).

As this Court has observed, "[t]he EAJA provides that a prevailing party in a non-tort suit against the United States is entitled to fees and expenses unless the government's position was 'substantially justified.' 28 U.S.C. § 2412(d)(1)(A). The Supreme Court has held that a position is substantially justified 'if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact.'" *Doe v. Rumsfeld*, 501 F.Supp.2d 186, 189 (D.D.C. 2007 (Sullivan, J.) (quoting *Pierce v. Underwood*, 487 U.S. 552, 556 (1988)). "'[T]he hallmark of the substantial

justification test is reasonableness.'" *Id*. (quoting *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 967 (D.C. Cir. 2004)).

Although the applicant carries the burden to establish prevailing party status, eligibility, and appropriate fees, *see Scarborough*, 541 U.S. at 408, the same is not the case when it comes to substantial justification, where to meet the EAJA's requirements the applicant need only "'allege'" that the government's position was not substantially justified. *Id*. (quoting § 2412(d)(1)(B)). On this last issue, "[t]he government bears the burden of establishing that its position was substantially justified." *Doe*, 501 F.Supp.2d at 189 (citing *F.J. Vollmer Co., Inc. v. Magaw*, 102 F.3d 591, 595 (D.C. Cir. 1996)). "Moreover, the government must demonstrate the reasonableness of both the agency's actions as well as its litigation position." *Id*. (citing *Role Models*, 353 F.3d at 967).

The government cannot carry its burden in this case.

This Court's Memorandum Opinion explains that, while some of the statutory provisions at issue were ambiguous, the ISDEAA's mandatory rule of construction, both on its face and as construed in *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 194 (2012), demanded that IHS resolve that ambiguity in CITC's favor. Mem. Op. at 8. Moreover, the Court found IHS's treatment of CITC's facility costs to be:

- inconsistent with IHS's treatment of CITC's training and certification costs (Mem. Op. at 22);
- inconsistent with the IHS Manual's treatment of facility support costs and other contract support costs (Mem. Op. at 23-4, 27-9, 33-4);
- inconsistent with the ISDEAA's 1994 amendment directing that contract support costs are available if a cost otherwise funded is "insufficient . . . for prudent management of the contract" (Mem. Op. at 29, 30 (twice quoting S. Rep. No. 103-374, at 9 (1994)));
- inconsistent with IHS's own admissions in the litigation (Mem. Op at 30-31);
- unsupported by anything in the agency record (Mem. Op. at 31-2);

- inconsistent with IHS's published regulations (Mem. Op. at 34-5); and
- inconsistent with the ISDEAA's 'non-duplication' provision which only has meaning if IHS is wrong in asserting that a given category of costs may not be funded both from the Secretarial amount and from contract support costs (Mem. Op. at 35 (discussing 25 U.S.C. § 5325(a)(3)(A)).

In sum, the Court's opinion reflects that this dispute was not even a close call. This is particularly evident given the Court's frequent reliance on another case IHS lost in this Court involving facility costs, *Maniilaq Ass'n v. Burwell*, 72 F.Supp. 3d 227 (D.D.C. 2014). *See* Mem. Op. at 10, 11, 26, 29, 34, 35, 36 (citing *Maniilaq*).

Under these circumstances, it is fair to conclude that IHS's position in the administrative proceedings and on appeal to this Court was not "substantially justified." To the contrary, it was unreasonable, internally inconsistent, and at odds with the statutory command—reiterated by the Supreme Court in *Ramah* and by this Court in *Maniilaq*—to interpret all provisions of the ISDEAA in favor of tribal contractors like CITC (a command repeated in IHS's own regulations, *see* 25 C.F.R. §§ 900.3(a)(5), 900.3(b)(11)).

CONCLUSION

For the foregoing reasons, CITC respectfully requests that this Honorable Court award CITC $75,141.56 in fees and $3,590.92 in costs pursuant to the provisions of 28 U.S.C. § 2412(d)(1)(A) of the EAJA.

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Respectfully submitted this 29th day of November 2018.

SONOSKY, CHAMBERS, SACHSE,
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s/ Lloyd B. Miller

By: _____

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