

COPY

FILED
UNITED STATES DISTRICT COURT
IN THE UNITED STATES DISTRICT COURT ALBUQUERQUE, NEW MEXICO
DISTRICT OF NEW MEXICO

AUG - 5 2002

RAMAH NAVAJO CHAPTER,
OGLALA SIOUX TRIBE, and FUEBLO
OF ZUNI, for themselves and on behalf
of a class of persons similarly situated,

Robert J. Marshall
CLERK

Plaintiffs,

vs.

No. CIV 90-0957 LH/WWD ACE

GALE NORTON, Secretary of the
Interior, in her official capacity,
UNITED STATES DEPARTMENT OF
INTERIOR, NEIL McCALEB, Assistant
Secretary of Interior for Indian Affairs,
in his official capacity, EARL DEVANEY,
Inspector General, in his official capacity,
and UNITED STATES OF AMERICA,

Defendants.

SECOND STIPULATED ORDER
TO IMPLEMENT BENCHMARKING METHODOLOGY

The Parties, by and through counsel, in an attempt to clarify the previous stipulated Order Regarding Equitable Relief to Implement Benchmarking Methodology of June 1, 2001 (June 1st Order) (Docket No. 557), hereby agree as follows:

WHEREAS, Paragraph 5 of the June 1st Order directed that "Benchmarking" be applied to the indirect cost rate determinations and agreements for FY 2001 and FY 2002 for recognized Native American organizations (contractors) under the Indian Self-Determination and Education Assistance Act, as amended, 25 U.S.C. §§ 450 et seq.;

WHEREAS, pursuant to Paragraph 7 of the June 1st Order, the Benchmarking methodology is to be carried out during the ordinary rate adjustment negotiations that for FY

2001 and FY 2002 will occur after FY 2001 and FY 2002, based upon the respective audited or other financial data submitted by the tribal contractors. (See, Exhibit A to the June 1st Order, page 7, paragraph 2);

WHEREAS, the General Accounting Office (GAO) Report of June 1999, entitled *Indian Self-Determination Act, Shortfalls in Indian Contract Support Costs Need to be Assessed*, discussed internal regional inconsistencies that existed with respect to the OIG's interpretation of OMB Circular A-87 or ASMBC-10 (see, pp. 48-49, Attachment A) in calculating the indirect cost rates. This Court's orders of September 21, 1999 (Docket No. 336), October 5, 2000 (Docket No. 475), and paragraph 3 of the June 1st Order permitted the OIG to correct those internal inconsistencies. Nothing in the June 1st Order or previous orders was to be construed as the Court's approval of the substance of such a correction, and the Class and Class members reserved and continue to reserve the right to challenge the legality or propriety of any such corrections;

WHEREAS, the OIG corrected the above referenced internal inconsistencies by directing its Western Region Audit Office in Sacramento to apply the methodology previously used by the Eastern Region Audit Office in Arlington to compute the carry forward adjustment for fixed with carry forward indirect cost rates; and

WHEREAS, the Benchmarking methodology set forth in the June 1st Order applies to two types of indirect cost rates, the provisional/final rate and the fixed with carry forward rate.

NOW THEREFORE, the Court clarifies its June 1st Order as follows:

1. The June 1st Order requires that the adjustments to indirect cost rates resulting from the benchmarking will "occur after FY 2001 and FY 2002." This time frame allows

contractors to submit cost and revenue information necessary either to finalize provisional indirect cost rates or to compute the carry forward adjustment for fixed with carry forward rates.

2. For tribal contractors who use provisional/final indirect cost rates, the benchmarking adjustment will be applied to the calculation of the final rates for FYs 2001 and 2002. Final rate proposals, under OMB Circular A-87, are to be submitted six months after the close of the fiscal year to which the provisional rate applies. The government will negotiate final rates for FY 2001 and 2002 upon submittal of the final rate proposal by contractors.

3. For tribal contractors with fixed carry forward rates, the benchmarking adjustment will be factored into the carry forward adjustment applied to the rates negotiated for FY 2003 and FY 2004, using actual data from FY 2001 and FY 2002.

4. As provided in Exhibit A of the June 1st Order, the data to be inserted in Columns B-F for the calculations shown in Column G [Col. B/Cols. (C+D+E+F)] shall be based on the data used in the negotiated provisional or fixed with carry forward rate calculation. For Column K, the data to be used will be the actual indirect cost recoveries from federal agencies other than Bureau of Indian Affairs and Indian Health Service reported by the contractors in their single audit report or other financial information.

5. Neither Party, including any individual class member, waives their respective claims or defenses regarding contractors' indirect costs or contract support by implementation of this Order or by entering into indirect cost rate agreements pursuant to this Order. The Parties may continue their discussions and negotiations on issues relating to carry forward adjustments and related rate calculation issues.

6. The Office of Inspector General will publish this Order in its entirety on its web site at <http://www.oig.doi.gov/icps/icphome.html>. Class Counsel will send this Order to each known class member.

7. The June 1st Order is to remain in full force and effect to the extent that it does not conflict with this Order.

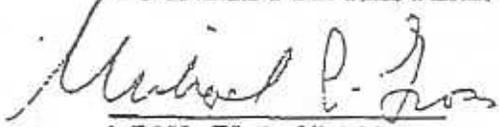
SO ORDERED.

DATED: AUG - 2 2002

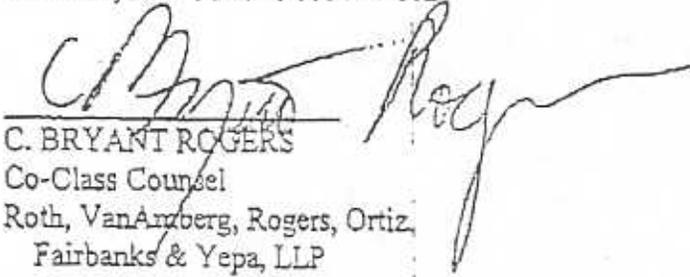
C. LEROY HANSEN
THE HONORABLE C. LEROY HANSEN
UNITED STATES DISTRICT JUDGE

SUBMITTED BY:

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United States General Accounting Office

GAO

Report to Congressional Committees

ATTACHMENT 'A'

June 1999

INDIAN SELF-DETERMINATION ACT

Shortfalls in Indian Contract Support Costs Need to Be Addressed



GAO

Accountability * Integrity * Reliability

Chapter 4
Federal Policies and Practices for Paying
Contract Support Costs Are Inconsistent

February 24, 1999, in testimony before the U.S. House of Representatives' Committee on Resources, the Assistant Secretary for Indian Affairs stated that BIA is reexamining its position on direct contract support costs and "will evaluate tribal requests for payment of certain direct costs." Other Interior officials have pointed out that because the Congress has capped BIA's annual appropriations for contract support costs at less than full funding since 1994, recognizing an additional category of contract support costs may not result in any additional funding to the tribes. Instead, it would only increase the amount of the shortfall, unless the Congress provided additional funding. Estimates of direct contract support costs for BIA's programs have ranged between about \$10 million and about \$30 million annually.

Inconsistencies in Calculating and Using Indirect Cost Rates

Inconsistencies exist in the calculation of indirect cost rates by Interior's Office of Inspector General and in the use of certain types of rates by BIA and IHS. Since 1992, two regional offices within Interior's Office of Inspector General, the primary office responsible for negotiating indirect cost rates with tribes, have calculated adjustments to indirect cost rates differently. Under certain circumstances, tribes receive higher indirect cost rates under the Western Region's calculation method than they would receive under the Eastern Region's method. Furthermore, for one particular type of indirect cost rate, BIA and IHS are not applying the rate correctly. That is, when a provisional-final rate is used and funding has been provided based on the provisional rate, BIA and IHS are not later adjusting the contract funding as necessary to reflect the final rate.

Interior's Office of Inspector General Uses Two Different Calculation Methods

Since 1992, a significant difference has existed between how the Western and Eastern Regions of Interior's Office of Inspector General have calculated the carryforward adjustment for tribes with "fixed with carryforward" indirect cost rates. Most tribes have a "fixed with carryforward" type of indirect cost rate, which means that the rate is fixed during the year that it is used; after that year has ended and the actual costs have been audited, the rate is recalculated based on the actual costs. If the fixed rate was too high or too low, an adjustment is made to the next year's rate. Through that adjustment, referred to as the "carryforward" adjustment, any overpayment in indirect costs can be recovered.

While the Eastern Region of Interior's Office of Inspector General requires that all overpayments be recovered through a carryforward adjustment, in certain circumstances, the Western Region allows an overpayment in

indirect costs from one agency to be used to offset an underpayment from another agency. According to officials in the Office of Inspector General, the Western Region's method of calculating indirect cost rates produces higher rates than the Eastern Region's method.

Although the Western Region's method helps tribes, it is contrary to Interior's legal opinions. In a 1990 decision, its Office of the Solicitor determined that one agency's funds could not be used to offset deficits in funding from another agency. Interior's Office of Inspector General is aware of the different calculation methods and would like to standardize the process; however, it cannot do so at this time, as any changes to the current process require federal court approval. In its recent decision on the Office of Inspector General's method to calculate indirect cost rates, the United States Court of Appeals for the Tenth Circuit ruled that the method was invalid.³ Subsequently, court orders were issued allowing the resumption of the negotiation of indirect cost rates for fiscal years 1998 and 1999 under the system in place prior to the Tenth Circuit decision. According to the Inspector General's Office of General Counsel, the orders prevent the Office of Inspector General from changing the process of negotiating indirect cost rates without the approval of the District Court.

BIA and IHS Are Not Making Necessary Adjustments for Provisional-Final Indirect Cost Rates

When tribes use a provisional-final rate, BIA or IHS must determine whether an overpayment was made, and if so, recover it. The Office of Inspector General does not adjust the indirect cost rate, as it does with the fixed with carryforward type of rate, to recover any overpayments. The funding agencies should use the provisional indirect cost rate to determine a tribe's initial funding for indirect costs. Usually, 2 years later, a final rate will be issued based on a tribe's actual audited costs. The final rate may be the same as, higher, or lower than the provisional rate. If the final rate is higher, then the tribe's funding for indirect costs would have increased and if the final rate is lower, then the tribe's funding for indirect costs would have decreased, in which case an overpayment may have occurred. Several of the BIA and IHS area office officials we talked to during our review told us that they were not making funding adjustments when the final indirect cost rates were issued for tribes using provisional-final indirect cost rates.

For example, if a tribe with an IHS direct funding base of \$1 million had a provisional rate of 25 percent, the tribe would receive \$250,000 in funding for indirect costs allocated to IHS' programs for that fiscal year. If that

³Ranah Navajo Chapter v. Lujan, 112 F. 3d 1455 (10th Cir. 1997).