

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Request for Review by)
Unicom, Inc. of Decision of)
Universal Service Administrator)

Docket Nos. 96-45 and 97-21

To: The Commission

SUPPLEMENT TO PETITION FOR REVIEW

Unicom, Inc. ("Unicom"), by its counsel, hereby supplements its Petition for Review in the above-captioned matter. In particular, the Supplement supplies a copy of a letter received by the Native Village of Hooper Bay from the Alaska Area Native Health Service ("AANHS"). The letter is in response to the Village's claim filed with the AANHS on January 22, 2002, a copy of which was previously furnished to the Commission on January 29.

Respectfully submitted,

UNICOM, INC.

By: 

William K. Keane

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June 20, 2002

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LANDYE BENNETT
BLUMSTEIN LLP

June 10, 2002

Patrick Lake, President
Native Village of Hooper Bay
Box 69
Hooper Bay, Alaska 99604

Re: Native Village of Hooper Bay Claim

Dear Mr. Lake,

We received your letter of January 22, 2002 addressed to Debbie Mojarro in which the Native Village of Hooper Bay ("the Village") has asserted a claim pursuant to the regulations set forth at 25 C.F.R. § 900.218 et seq., which governs claims against the federal government under the Contract Disputes Act ("CDA"). 41 U.S.C. § 604 et seq. In this claim, we understand that the Village takes the position that the Alaska Area Native Health Service ("AANHS") is obligated to enforce Article V, Section 2 of the Alaska Tribal Health Compact ("ATHC") against the Yukon-Kuskokwim Health Corporation ("YKHC") for its alleged failure to comply with this section. Article V, Section 2 of the ATHC states that the Co-Signers to the ATHC "will comply with the Indian and Alaska Native preference provisions of sections 7(b) and 7(c) of the ISDEAA."¹

¹ Section 7(b) and (c) of the ISDEAA provides that:

(b) Preference requirements for wages and grants

Any contract, subcontract, grant, or subgrant pursuant to this subchapter, the Act of April 16, 1934 (48 Stat. 596), as amended [25 U.S.C.A. § 452 et seq.], or any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians, shall require that to the greatest extent feasible--

(1) preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians; and

(2) preference in the award of subcontracts and subgrants in connection with the administration of such contracts or grants shall be given to Indian organizations and to Indian-owned economic enterprises as defined in

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The Village alleges that YKHC violated Article V, Section 2 of the ATHC when it awarded a telecommunications service contract to General Communications, Inc. ("GCI") and failed to comply with a request from Unicom Inc., a "Native-owned telecommunications company operating in the Yukon-Kuskokwim delta region," for information concerning the contract when YKHC solicited bids. Your letter states that "Unicom, Inc. is a subsidiary of United Utilities, Inc., which is owned by the Sea Lion Corporation, the Native Corporation for Hooper Bay." Your letter does not state what connection the Native Village of Hooper Bay or its tribal members has with the Sea Lion Corporation.

In your letter, you further state that "under 25 C.F.R. § 90.218(a)(2)&(3), the relief Hooper Bay seeks is as follows: (1) A determination that the telemedicine contract between YKHC and GCI is a subcontract under the ATHC; (2) An interpretation that Article V, Section 2 of the ATHC required YKHC to afford Native preferences in the procurement of the telemedicine contract awarded to GCI; (3) A determination that Native preference is also required under the Telecommunications Act, because it is an Act authorizing Federal contracts with or grants to Indian organizations for the benefit of Indians; (4) A determination that YKHC has violated its own procurement policies and the Indian preference provisions of the ATHC; and (5) Reassumption of the telemedicine functions of the YKHC compact as permitted under 25 C.F.R. § 900.248-.256 unless YKHC affords Indian preference and reduces the cost of the telemedicine contract. As such, this is not a request for monetary damages or for any amount due from the federal government under 25 C.F.R. § 900.220."

While the AANHS sympathizes with your situation as described in your letter, we have no authority under the ATHC, the Indian Self Determination and Education Assistance Act, as amended ("the ISDEAA") or the CDA to intercede on the Village's behalf. As we explain in the discussion below, the Village cannot assert a claim under the CDA because the Village is not a party to the ATHC. Further, the ISDEAA does not give the Indian Health Service the authority to resolve disputes between the Co-Signers

section 1452 of this title.

(c) Self-determination contract

Notwithstanding subsections (a) and (b) of this section, with respect to any self-determination contract, or portion of a self-determination contract, that is intended to benefit one tribe, the tribal employment or contract preference laws adopted by such tribe shall govern with respect to the administration of the contract or portion of the contract.

25 U.S.C. 450e(b).

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based upon alleged violations of the provisions of the ATHC. Such authority cannot be created by a contractual agreement when it does not already exist in the statute.

1. The Village's Claim Under the Contract Disputes Act.

The Village relies on the regulations set forth at 25 C.F.R. Part 900, Subpart N as authority for making a claim under the Contract Disputes Act (CDA). However, your claim does not comply with the requirements of the CDA or these regulations. Both the CDA and the regulations you rely on explicitly state that only "contractors" may assert claims against the Federal government. 43 U.S.C. § 605; 25 C.F.R. 900.220(c). A claim under the CDA must be a "written demand by one of the contracting parties." 25 C.F. R. § 900.218 (a).

You assert that the Village "is a Signatory Tribe and Tribal Co-Signer to the Alaska Tribal Health Compact ("ATHC") pursuant to tribal resolution No. 94-28." Such resolutions are required under the ISDEAA for a tribal organization to provide services to another tribe pursuant to a Self Governance compact. 25 U.S.C. § 450f(a)(1). However, we do not agree that the Village is a Co-Signer to the ATHC or a contracting party for the purpose of asserting a claim against the federal government under the CDA. On the contrary, YKHC is the Co-Signer to the ATHC and the contractual agreement set forth in the compact is between the Federal government and the tribal organizations that sign the compact. The Village's resolution allows YKHC to provide programs, functions, services and activities that would otherwise have been provided by the IHS to the Village. The resolution does not make the Village a Co-Signer to the ATHC.

Further, the ATHC describes a "signatory tribe" to the compact as follows:

WHEREAS, it is the intent of certain Alaska Native Tribes to collectively enter into a single Compact with the Secretary. To carry out that intent, such Tribes (hereafter referred to as signatory Tribes) enter into this Compact either by individual signature or by means of a delegation of signature authority as authorized by resolution of the Tribal government. Such resolutions are attached as Exhibit "A".

See "Alaska Tribal Health Compact," at 6, enclosed. Instead of entering into a compact or contract directly with the IHS, the Village chose to participate in a Self Governance program by delegating to YKHC, through the means of a resolution, its right under the ISDEAA to contract directly with the government. The ISDEAA supports this distinction in contractual relationships. For example, Section 503(2) of Title V of the ISDEAA would allow the Village to withdraw its delegation from YKHC and then enter into the ATHC and a funding agreement directly with the federal government under 25 U.S.C. 458aaa-5(g). 25 U.S.C. § 458aaa-2. The Village would then become a "contractor" for the purposes of the CDA with respect to its individual funding agreement and the ATHC once it signed the compact. In the present circumstances, the

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Village may have a cause of action against YKHC as a third party beneficiary of the ATHC based upon the resolution the Village gave YKHC. But the Village's resolution does not create a privity of contract with the federal government for CDA purposes.

The Interior Board of Contract Appeals, the tribunal that has jurisdiction over contractor appeals from Indian Self Determination contracts under the CDA, has held that only parties who have contracted with the federal government may assert a claim under the CDA. 25 U.S.C. § 450m-1(d). See Appeal of the Superior Timber Co., Inc., (IBCA August 14, 2000) at 41 and fn 12 ("[t]he fact that one may be a third party beneficiary of another's contract with the Government is not the equivalent of being a 'contractor under a contract . . . with the Government'") and EAJA Application of SCL Materials and Equipment Co., (IBCA September 18, 1998) at 4 ("[c]ontractors are entitled to appeal only if they are in privity of contract with the Government . . . subcontractors cannot file either direct contract claims against the Government under the Contract Disputes Act or Contract Disputes Act Appeals to a board of contract appeals.") enclosed. The Federal Circuit Court of Appeals has held likewise. E.R. Mitchell Construction Co. v. Danzig, 175 F.3d 1369, 1370 (Fed Cir 1999); Erickson Air Crane Co. of Washington, Inc. v. United States, 731 F.2d 810, 812 (Fed Cir 1980) citing United States v. Johnson Controls, 713 F.2d 1541, 1550-52 (Fed Cir 1983) ("[t]he government consents to be sued only by those with whom it has privity of contract, which it does not have with subcontractors.").

Moreover, federal regulations state that a claim against the federal government under the CDA must either be for monetary damages, adjustment or interpretation of the contract terms, or any other claim relating to the contract. 25 C.F.R. § 900.218. Your letter states that your claim "is not a request for monetary damages or for any amount due from the federal government under 25 C.F.R. 900.220." Nor is the relief you request a claim relating to the ATHC under 25 C.F.R. 900.218(3). Nothing in the ATHC requires that the AANHS rescind any part of a Co-Signer's funding agreement for an alleged failure on the part of that Co-Signer to adhere to the native preference requirement in Article V, Section 2 of the ATHC. Such a remedy would have to be explicitly agreed upon by all of the parties to a contract as well as supported by law. Since the Village has no privity of contract with the IHS, it has no standing to request an adjustment or interpretation of Article V, Section 2 of the ATHC. Therefore, the Village has no basis for asserting a CDA claim under these regulations.

As already explained, the Village may have a cause of action against YKHC to which it gave a resolution in accordance with the ISDEAA. However, such an action is made even more problematic if the Village does not have some type of ownership relationship with the Sea Lion Corporation.

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2. The Indian Self Determination and Education Assistance Act and the ATHC:

The ATHC is a compact entered into by YKHC and a number of other tribal organizations, referred to in the ATHC as "Co-signers," located in Alaska under the authority of Title V of the ISDEAA, Public Law 106-260, which governs tribes participating in the Self Governance program. 25 U.S.C. § 458aaa et seq. As already stated, the Village is not a Co-signer to the ATHC and has no privity of contract with the government for purposes of making a claim under the CDA.

Even if the Village was a Co-Signer to the ATHC, its cause of action would be against its fellow Co-signer, YKHC, not the federal government. First, the federal government was not the party alleged to have breached the ATHC and, second, the Indian Health Service has no authority under the ISDEAA or any other statute to resolve disputes between Co-Signers of the ATHC due to alleged violations of the compact's provisions.

The federal government fulfilled its obligations under the ISDEAA by requiring that YKHC agree to giving preference to Native Americans in hiring and contracting in accordance with Section 7(b) of the ISDEAA. 25 U.S.C. 450e(b). Because YKHC was entering into subcontracts under its own procurement system, it had the obligation under the ISDEAA to give the preference. Thus, YKHC is allegedly the breaching party, not the IHS.

There is nothing in the statute, regulations at Subpart N of Part 900, the ATHC or the funding agreement with YKHC which gives the IHS the right to resolve this dispute between the Village and YKHC. Section 507 of Title V, entitled "Provisions relating to the Secretary," gives no authority to the government to resolve such disputes. 25 U.S.C. § 458aaa-6. Whether or not the Village could assert a claim against YKHC as a third party beneficiary of the compact or funding agreement is not an issue for the IHS contracting officer to resolve under the CDA and its implementing regulations.

Furthermore, federal case law precludes the IHS from taking such action without explicit statutory authority. It is an established doctrine of federal administrative law that an agency cannot exceed the authority granted to it by the enabling statute. Michigan Dep't of Environmental Quality v. E.P.A. and Navajo Nation, 268 F.3d 1075, 1081- 82, 1087 (D.C. Cir. 2001) ("[I]f there is no statute conferring authority, a federal agency has none."), citing Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988) and United States v. Mead Corp., 533 U.S. 218, 121 S.Ct. 2164, 2171, 150 L.Ed.2d 292 (2000) ("[w]e hold that administrative implementation of a particular statutory provision qualifies for Chevron deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law...."); Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837,

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843-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Nothing in the ISDEAA gives the Indian Health Service the authority to resolve disputes between Co-Signers that are solely based upon alleged breaches of the compact by other Co-Signers.

Nor can the IHS reassume YKHC's funding agreement based on the alleged breach as you suggest. Title V of the ISDEAA provides the Indian Health Service with limited recourse against tribal organizations that violate the terms of their compacts. Section 507(a)(2) of Title V lays out a very high standard for the Federal government to meet before it may reassume a Self Governance tribe's funding agreement.² 25 U.S.C.A. § 458aaa-6(a)(2). The circumstances you describe in your letter do not appear to meet the threshold requirements for rescission of YKHC's funding agreement.

² Section 507 of Title V of the ISDEAA states:

(2) REASSUMPTION.--

(A) IN GENERAL.--Compacts or funding agreements negotiated between the Secretary and an Indian tribe shall include a provision authorizing the Secretary to reassume operation of a program, service, function, or activity (or portions thereof) and associated funding if there is a specific finding relative to that program, service, function, or activity (or portion thereof) of--

(i) imminent endangerment of the public health caused by an act or omission of the Indian tribe, and the imminent endangerment arises out of a failure to carry out the compact or funding agreement; or

(ii) gross mismanagement with respect to funds transferred to a tribe by a compact or funding agreement, as determined by the Secretary in consultation with the Inspector General, as appropriate.

25 USCA § 458aaa-6(a)(2).

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3. Conclusion:

For the reason explained above, the Village does not meet the requirements to assert a claim under the CDA or its corresponding regulations at 25 C.F.R. § 900.218 et seq. Consequently, no contracting officer's decision will be forthcoming. Should you have any questions, please contact Kathleen Bradley-Nader, Assistant Regional Council, at (206) 615-2275.

Sincerely,

ORIGINAL SIGNED BY
CHRISTOPHER MANDREGAN JR.

Christopher Mandregan, Jr., MPH
Director
Alaska Area Native Health Service

cc: David S. Case, Esq. ✓
Attorney for the Village of Hooper Bay

Duke McCloud
Branch Chief, Public Health Service Division
Office of the General Counsel

CERTIFICATE OF SERVICE

I, Yvette Morgan, hereby certify that the foregoing "Supplement to Petition for Review" was served this 20th day of June, 2002, by depositing a true copy thereof with the United States Postal Service, first class postage prepaid, addressed to:

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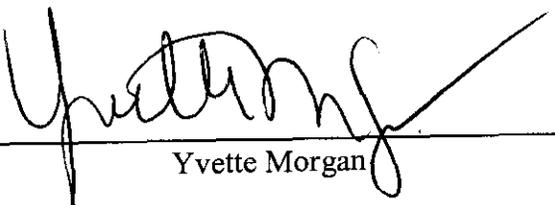
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