

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
Bristol Bay Area Health Corporation,	)	DATE: March 27, 1992
Appellant,	)	
- v. -	)	Docket No. C-423
Indian Health Service,	)	Decision No. CR185
Appellee.	)	

DECISION

This case is before me on a request for hearing filed by Appellant, Bristol Bay Area Health Corporation (BBAHC), challenging a decision dated June 28, 1991 by Appellee, Indian Health Service (IHS), declining Appellant's request for modification of Contract No. 243-88-0008. IHS's stated ground for this declination was that under the Indian Self-Determination and Education Assistance Act (Act), Pub. L. 93-638, as amended, 25 U.S.C. § 450 et seq., "the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract." Id at section 450f(a)(2)(C). On July 26, 1991, BBAHC appealed the declination pursuant to section 450f(b)(3) of the Act.

This case was originally assigned to Administrative Law Judge (ALJ) Joseph K. Riotto for hearing and decision. Judge Riotto held a prehearing telephone conference in this case on August 9, 1991. During this conference, the parties agreed that 1) the issues involved were solely legal and 2) the case could be decided based on written submissions without the need for an in-person evidentiary hearing. Both parties submitted briefs and responses. On December 2, 1991, BBAHC requested that the ALJ hear in-person oral argument in Alaska. On December 13, 1991, this case was reassigned to me. Oral argument was heard on February 6, 1992 in Anchorage, Alaska.

Based on the record, and on applicable law, I find in favor of Appellee, IHS.

### ISSUE

The issue in this case is whether IHS's refusal to modify the subject contract was in compliance with applicable statutory and regulatory criteria.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings and Conclusions 1 - 25 are undisputed. See J. S. Facts 1 - 10.<sup>1</sup>

1. IHS is an agency within the Public Health Service of the U.S. Department of Health and Human Services (DHHS). IHS provides health services for American Indian and Alaska Native people living on or near federal Indian reservations. IHS administers its program directly or through contracts with Indian tribal organizations under the Act, or with other Indian contractors under the Buy-Indian Act, 25 U.S.C. § 47.

2. The Alaska Area Native Health Service (AANHS) is one of 12 IHS Area Offices. AANHS is responsible for health services provided through various IHS programs to IHS beneficiaries living in the State of Alaska. BBAHC and its member native villages are served by AANHS.

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<sup>1</sup> Citations to the record in this decision are as follows:

Joint Statement of Facts	J.S. Facts
IHS Brief	IHS Br. (page)
IHS Response Brief	IHS R. Br. (page)
BBAHC Brief	BBAHC Br. (page)
BBAHC Exhibits	BBAHC Ex. (number)/(page)
BBAHC Response Brief	BBAHC R. Br. (page)
Oral Argument Transcript	Tr. (page)
Findings of Fact and Conclusions of Law	FFCL (number)

3. BBAHC is a non-profit corporation incorporated under Alaska law to provide health services in the Bristol Bay region of Alaska.
4. BBAHC is a "tribal organization" within the meaning of section 4(1) of the Act, 25 U.S.C. § 450b(1).
5. BBAHC's service area consists of 32 Alaska Native villages, which are "Indian tribes" within the meaning of section 4(e) of the Act, 25 U.S.C. § 450b(e). There are approximately 4,380 Alaska Natives in this service area, which covers approximately 46,573 square miles -- an area approximately the size of the State of Ohio.
6. Under the Act, upon the request of an Indian tribe, the Secretary of the DHHS is directed to contract with a tribal organization designated by the requesting tribe(s), to plan, conduct and administer programs or portions thereof enumerated in subsection 102(a)(1)(A) - (E) of the Act, 25 U.S.C. § 450f(a)(1)(A) - (E).
7. Under section 102(a)(2) of the Act, the Secretary of DHHS may decline to enter a contract, or decline a requested modification to a contract, only for one of the following reasons: (A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory; (B) adequate protection of trust resources is not assured; or (C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract. 25 U.S.C. § 450f(a)(2)(A) - (C).
8. Under authorization from villages in the Bristol Bay service area, BBAHC has negotiated and performed a series of self-determination contracts with AANHS for many years.
9. Since 1980, BBAHC and IHS have contracted for BBAHC to occupy and operate the hospital, living quarters and health services program for IHS beneficiaries, and for non-Natives on a fee-for-service basis, at the federal hospital compound at Kanakanak, Alaska. The Kanakanak service unit is a tribal-operated service unit.
10. The Kanakanak Hospital compound is connected by road with the village of Dillingham, Alaska, approximately 5.5 miles away, and with the village of Aleknagik, Alaska, approximately 25 miles away. The Kanakanak compound is inaccessible by road from any other location, including Anchorage, 325 air-miles away.

11. All of the quarters on the Kanakanak compound are federally-owned real property as defined at 41 C.F.R. 101-47.103-12.
12. BBAHC, by letter dated June 21, 1989, proposed to AANHS that Contract No. 243-88-0008 be modified. The requested modification would have provided more specificity regarding the administrative, operational, and maintenance functions to be performed by BBAHC with regard to the federal quarters located on the Kanakanak Hospital compound. Specifically with regard to this appeal, the modification would also have authorized BBAHC to perform the rent-setting function for these quarters using Dillingham as the nearest "established community" on which to base the rental and utility rates for the Kanakanak compound.
13. Substantial agreement was eventually reached on each of BBAHC's objectives in its proposed contract modification, with the exception of the issue of whether BBAHC could perform the rent-setting function for the federal quarters at the Kanakanak compound using Dillingham, rather than Anchorage, as the nearest "established community".
14. The only quarters-related function that BBAHC does not presently perform is rent-setting. The parties agree that this function is contractible, under appropriate conditions.
15. At 5 U.S.C. § 5911, Congress authorized the President of the United States to prescribe regulations governing the provision, occupancy and availability of federal quarters and facilities, and to determine their rates and charges.
16. The authority of the President under 5 U.S.C. § 5911(f) to prescribe regulations was delegated to the Director of the Office of Management and Budget (OMB) by section 9(1) of Executive Order 11609, 36 Fed. Reg. 13747 (July 22, 1971).
17. Pursuant to this rulemaking authority, OMB published Circular A-45, "Policy Governing Charges for Rental Quarters and Related Facilities" in final form at 49 Fed. Reg. 13777 (April 6, 1984).
18. Circular A-45, pursuant to 5 U.S.C. § 5911 and 5 U.S.C. § 5536 (which statute provides that federal employees whose pay and allowances are fixed by statute or regulation may not receive additional pay and allowances for any service or duty unless specifically

authorized by law) sets forth the following principles: 1) rental rates and charges for Government quarters and other facilities will be based upon their reasonable value to the employee; 2) reasonable value is determined by the rule of equivalence, that charges for rent and related facilities should be set at levels equal to those for comparable private housing located in the same area (i.e. rents are to be comparable with those in the nearest "established community"); 3) an established community is ordinarily the nearest population center having a year-round population of 1,500 or more (5,000 in Alaska, given that State's "unique characteristics" 49 Fed. Reg. 13778)), provided that it has minimum essential medical services; and 4) rents and other charges may not be set so as to provide a housing subsidy, serve as an inducement in the recruitment or retention of employees, or encourage occupancy of existing government housing.

19. As of the 1980 decennial census, Anchorage was the nearest established community to Kanakanak having a year-round population of 5,000 or more.

20. Pursuant to section 7(e)(5) of Circular A-45, exceptions to its requirements will be permitted, "only upon written request in those very unusual circumstances when it is demonstrated to the Office of Management and Budget that the application of the provisions of this Circular will not result in a rental rate equivalent to the reasonable value of the quarters to the occupant [emphasis added]".

21. On August 17, 1989, BBAHC petitioned IHS to request an exception from OMB from the "established community" provision of Circular A-45 to permit BBAHC to use Dillingham, rather than Anchorage, as the nearest "established community" for the purpose of calculating equivalent rental and utility rates, amenities and isolation adjustments for the Kanakanak quarters.

22. On November 16, 1989, IHS submitted a request for this exception to OMB.

23. On June 11, 1991, OMB responded, concluding that an exception was not warranted. OMB stated, "it has not been conclusively demonstrated that application of the Circular will result in rental rates that are not equivalent to the value of the quarters."

24. By letter dated June 28, 1991, AANHS declined the BBAHC proposed contract modification, on the statutory ground that the "proposed project or function cannot be

properly maintained by the proposed contract." 25 U.S.C. § 450f(a)(2)(C).

25. By letter dated July 26, 1991, BBAHC appealed this declination decision.

26. IHS has the burden of proof to show cause for declination. 42 C.F.R. § 36.208(a)(3).

27. The contracting authority and declination provisions of section 102 of the Indian Self-Determination Act, 25 U.S.C. § 450f, do not supersede 5 U.S.C. § 5911 or OMB Circular A-45.

28. While the Secretary is directed to enter into self-determination contracts with tribal organizations, no authority exists to support the proposition that the Secretary can enter into contracts which he has no authority to administer.

29. The parties agree that OMB Circular A-45 is a substantive rule, issued pursuant to a specific delegation of rulemaking authority, and it implements that authority through procedures which determine how rents are to be set for federal quarters. BBAHC R. Br. 1.

30. Dillingham, having a year-round population of 2,017 as of the unofficial 1990 census, is not an "established community" as defined in Circular A-45.

31. Pursuant to section 7(e)(5) of Circular A-45, OMB expressly reserved to itself the right to grant exceptions to the Circular's requirements.

32. 25 U.S.C. § 450j(f) does not provide independent authority for IHS to waive Circular A-45's established community requirement.

33. IHS is bound by OMB's decision declining to grant an exception from the established community requirement.

34. IHS cannot contract out to others a power, role, or function that it does not possess, nor can IHS authorize anyone to disregard the law.

35. Application or waiver of circular A-45 is solely within OMB's jurisdiction.

36. The Secretary of DHHS has no discretion to ignore OMB's rent-setting comparability rules, and he does not have the option, through the exercise of his contracting

authority, of empowering BBAHC to act in violation of such rules.

37. IHS has no authority to review or look behind the OMB determination not to grant a waiver or assess its validity. Further, an ALJ in a hearing held pursuant to section 450f(a)(3) of the Act has no authority to pass judgment on the adequacy of OMB's fact finding or interpretation of the law.

38. IHS's declination decision was in accordance with applicable statutes and regulations. BBAHC's contract modification was in conflict with OMB's determination not to grant a waiver of the "established community" standard provision of Circular A-45. IHS was bound by that determination and had no authority to review or question the underlying factual or legal conclusions of OMB. IHS, therefore, had no choice but to decline this contract modification. FFCL 1 - 37.

#### RATIONALE

The only issue in this case is whether IHS's refusal to modify the contract to allow BBAHC to set rental rates for federal quarters at the Kanakanak compound using Dillingham, rather than Anchorage, as the nearest "established community," is lawful.

BBAHC argues generally that: 1) IHS has broad legal authority under the Act to review and make an independent analysis of the facts underlying OMB's denial that Dillingham can be used as the "established community" for purposes of setting rental rates at the Kanakanak hospital compound; and 2) such authority can be exercised despite BBAHC's acknowledgment that it has no greater contractual rights under the Act than the IHS whom otherwise would exercise such authority.

Specifically, BBAHC argued in its briefs and at oral argument: 1) IHS's decision refusing BBAHC's proposal to modify the contract did not comport with the statutory criteria for declining contracts; 2) rents for privately owned residential real property in Anchorage are low because of a glut of housing and a downturn in the local economy and are not comparable to the cost of housing in Dillingham; 3) Kanakanak health care personnel who occupy government housing are paying artificially low rents because the rents are keyed to Anchorage and as a result such individuals are being subsidized; 4) OMB's ruling that there was no reason to waive the rent setting rules in Circular A-45 (because it had not been proven that

they resulted in rents being at variance with actual values), was without factual support and also violated 5 U.S.C. § 5536 in that it resulted in a de facto subsidy; 5) Circular A-45 only provides that, "An established community is ordinarily the nearest population center having a year-round population of 1,500 or more (5,000 in Alaska)"; 6) BBAHC believes that this is not an ordinary case, that Congress did not mean to direct IHS to enter into illegal contracts and that under section 102 of the Act, Congress did not mean to direct IHS to enter into contracts which, by some other provision of law, would be illegal. Tr. 26; 7) OMB has not produced an interpretation, but has simply denied the exception request, and that a reading of the Act and the Circular together, permits the Secretary to interpret the law to determine whether the use of Dillingham to establish rents on the Kananak compound is lawful and whether it would, in fact, eliminate existing violations of the Act (Tr. 33); and 8) while BBAHC is not asking me to review the validity of any statute or the legality of the Circular, it states that to permit IHS to "hide behind" OMB's ruling and to not allow BBAHC to "...challenge the specific conclusions reached by OMB..." renders meaningless IHS's obligation to make a reasoned decision applying the relevant statutes and the declination criteria listed in the Act, and likewise nullifies the hearing and appeal rights guaranteed by law.

In response, IHS states that: 1) OMB Circular A-45 is a substantive government-wide regulation having the force and effect of law; 2) such regulation governs the rental rates of federal quarters, including those at the Kananak hospital compound; 3) IHS is bound by OMB's determination of such rates; and 4) nothing exists in the Act which gives authority to IHS to waive the application of Circular A-45 to BBAHC.

Having considered the arguments of the parties, I am persuaded by the applicable law that the principles of self determination set forth in the Act do not clothe me with authority to review, much less overrule, a lawful determination by OMB relating to rental rates on federal property. OMB, by statute and implementing regulation, has exclusive jurisdiction over such rates and its decisions are binding, without the right of appeal, on all government agencies. Nor can BBAHC have greater contractual rights than IHS, which is subject to the exclusive jurisdiction of OMB in relation to the establishment of rental rates on federal property.

The Secretary of DHHS is obliged by the Act, with the limited exceptions set forth in subsection 102(a)(2)(A)

(C) of the Act, 25 U.S.C. § 450f(a)(2)(A) - (C), to contract with Indian tribes, Alaska natives, and tribal organizations, upon their request, in order that such entities be permitted to take over the functions previously performed by the Secretary to benefit Indian tribes and Alaska natives. The Secretary cannot, however, contract out to others a power, role, or function that he himself does not possess, nor can he authorize anyone to disregard the law.

Pursuant to 5 U.S.C. § 5911, the President is authorized to prescribe regulations governing rates and charges regarding the provision of federal living quarters and related facilities. The statute's language and legislative history indicate that it applies not only to quarters furnished to federal employees, but also to those provided to persons such as government contractors - a category which encompasses BBAHC. S. Rep. No. 829, 88th Cong., 2d Sess. 6; 5 U.S.C. § 5911(d). The President delegated this power to OMB. OMB then promulgated Circular A-45, which set forth rules applicable to the entire executive branch of government. BBAHC agrees that Circular A-45 constitutes valid substantive law.

OMB has explicit statutory authority to formulate policy regarding the rent setting function. With regard to the rent-setting function, OMB has retained for itself the jurisdiction concerning applications for waivers of the established community requirement. This authority was upheld in the case of Yosemite Tenants Association v. Clark, 582 F. Supp 1342 (E.D. Calif. 1984), where the Court held that rent setting procedures are not matters of agency discretion and that regulatory guidelines must be followed. Thus, the application or waiver of Circular A-45 is a matter solely within OMB's jurisdiction.

While under the Act the Secretary of DHHS has been directed to enter into self-determination contracts with Indian tribes and Alaska natives, this authority is only to enter into contracts for programs which the Secretary himself is authorized to administer. Here, since the Secretary (and through the Secretary, IHS) is without authority to waive the provisions of Circular A-45, IHS could not accept a contract modification from BBHAC that was not in compliance with the "established community" provision of Circular A-45.

Thus, regardless of whether there is merit to BBAHC's contention that OMB's ruling on rental rates was made without reference to the facts and has the effect of subsidizing certain Kanakanak personnel, BBAHC has not

shown that IHS has authority to look behind OMB's decision or to assess its validity. In essence, BBAHC proposed a contract modification (utilization of Dillingham instead of Anchorage as the "established community" under Circular A-45 for purposes of establishing rental rates at the Kanakanak hospital compound) which contravened a lawful determination by OMB that Anchorage was the proper "established community". BBAHC's insistence on using Dillingham to establish rental rates, despite a refusal by OMB to grant a waiver for use of such community, made such contract modification unlawful. Thus, the IHS properly relied on applicable statutes and regulations when it declined to accept BBAHC's modification. BBAHC has failed to raise any valid objection to IHS's declination determination.<sup>2</sup>

#### CONCLUSION

Based on the undisputed facts and the law, I conclude that IHS properly concluded that BBAHC was prohibited by law from using Dillingham as the "established community" for purposes of setting rental rates at the Kanakanak hospital compound. BBAHC and IHS were bound by OMB's refusal to waive the "established community" standard in Circular A-45 to permit use of Dillingham instead of Anchorage. OMB, by law, has exclusive authority to set rental rates for federal property, including BBAHC's facility in Dillingham, Alaska. Therefore, I find

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<sup>2</sup> BBAHC, through this appeal of IHS's declination of its contract modification, is attempting to obtain a change or exception to the "established community" definition as it relates to the rental rates at the Kanakanak hospital compound. This is not the proper forum to achieve such a result. OMB has recently sought comment on proposed revisions to Circular A-45. See, the proposed revision to OMB Circular A-45, issued by OMB on November 22, 1991, at 56 Fed. Reg. 58935. This revision did not change the 5,000 population requirement for an established community in Alaska. BBAHC is commenting on this during the Notice and Comment period, and this would appear to be the appropriate means for OMB to consider BBAHC's concerns.

that IHS's declination of BBAHC's contract modification request pursuant to section 450f(2)(C) of the Act was valid and in conformity with applicable regulatory criteria.

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Edward D. Steinman  
Administrative Law Judge