ADAMAS CONSTRUCTION
& DEVELOPMENT SERVICES PLLC

Mr. Gary Fahlstedt

Assistant Regional Council
DPHHS/OGC Region VIII
Bryon Rodgers Federal Building
1961 Stout Street, room 08-148
Denver, CO 80294

Re: Arbitration Demand on Behalf of ADAMAS Construction, PLLC

Dear Mr. Gary Fahlstedt:

This is a response to your letter dated October 12, 2018, regarding our demand that (IHS) participate in arbitration of a dispute between ADAMAS Construction and Indian Health Services, rather than between the NCUC and ADAMAS.

Your previous response was sent to our arbitration attorney, J. Andrew Pearson, indicating that IHS will not participate in arbitration. After this refusal we hired additional council, Christopher J Gallus, who specializes in Federal litigation, to file a complaint in 9th District Federal Claims Court.

Based on conversations with our attorney, he agrees with our plan, to send you this final correspondence, in an attempt to avoid costly litigation, that we are confident will result in a favorable ruling in our behalf. Chris is familiar with my experience with contract law and general legal knowledge and he agrees, you and I should communicate directly, with supplemental support from him, as it may help resolve this issue and minimize costs.

First, some clarification on a couple of points;

- We do not claim to be entitled to arbitration based on the "MOA", only, we will refer you the "Fixed Price Agreement/s" and "General Provision" Between IHS and the NCUC. This is a federal procurement contract, rather than, a "cooperative agreement."
- The MOA you reference is not between the NCUC and the IHS, rather it is between The Northern Cheyenne Tribe and Indian Health Services (IHS)
- Our argument is not simply that we have privity then argue an alternative with a claim of third party beneficiary, rather, our arguments is, we do in fact have privity, we have an expressed and implied-in-fact contract, we can plead sufficient facts of a potential

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- breach of good faith and fair dealing under the expressed or implied contract to raise the right to relief above a speculative level to allow us to move forward on a claim the contracting officer violated 48 C.F.R. § 1.602-2, because s/he failed to, ensure that contractors receive impartial, fair, and equitable treatment (see Threshold Techs., Inc. v. United States, 117 Fed. Cl. 681, 2014 U.S. Claims LEXIS 886), and at the very least we have a third party beneficiary claim.

Second, in defense of your position that we are not entitled enforce arbitration provisions, you make the arguments; (1) *Untied States v. Johnson Controls INC,* prevents ADAMAS or a subcontractor from bring direct claim against the Government without privity under the CDA, (2) *Winter v. FloorPro, Inc and JGB Enters, Inc. v. USA*, prevents ADAMAS or subcontractors from bringing suit based on a third party beneficiary claim under the Contracts Dispute Act, (3) ADAMAS lacks privity.

RE: US v. Johnson Controls

You are partially correct,

Generally, subcontractors cannot sue the Government, under the CDA, directly due to a lack of privity with the United States. *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1551 (Fed. Cir. 1983). It is settled law in this circuit, however, that an intended third-party beneficiary of a government contract may sue under the Tucker Act. *Flexfab, LLC v. United States*, 62 Fed. Cl. 139, 144-45 (2004); [**32] *Erikson v. United States*, 12 Cl. Ct. 754, 757 (1987); *Hebah v. United States*, 192 Ct.Cl. 785, 792, 428 F.2d 1334, 1339 (1970); *Maneely v. United States*, 68 Ct. Cl. 623, 629 (1929).

I am glad you bring up, *JGB Enters, Inc. v. United States,* according to JGB, the government conceded, that a person is a third party beneficiary, if the contracting officer could have or should have reasonably know that the payments were intended to directly benefit the subcontractor. We have emails from the contracting officers with IHS indicating they knew payments were for the direct benefit of ADAMAS construction. We also have two separate occasion where IHS contracting officers made an expressed and implied contract and knew the contracted price was to go to and directly benefit ADAMAS. As we will be bringing our claim under both the CDA and the Tucker Act, we feel your argument with Johnson v. US, falls short and we could easily proceed with our claim.

RE: Winter v. FloorPro Inc

Again, you are partially correct, yet misapply this case, as our claim is not only a third-party beneficiary claim.

The court, in Winter v. FloorPro Inc., did in fact reject the third-party beneficiary claim, noting that the CDA, does not permit appeal by anyone who is not a party to a government contract.

I will also draw your attention to the courts discussion of the case in *Winter v. FloorPro,* specifically, that the court found; "While the facts in *D & H* are similar to those in the present case, D & H differs in one critical respect. The subcontractor in *D & H* invoked the Court of Federal Claims's jurisdiction under subsection (a)(1) of the Tucker Act, 28 U.S.C. § 1491, not under the CDA. Complaint at 1, *D & H Distrib. Co. v. United States*, No. 93-381C (Fed. Cl. Nov. 30, 1995); *see also* Brief for D & H Distributing Co. at v, *D & H Distrib. Co. v. United States*, 102 F.3d 542 (Fed. Cir. 1996) (No. 96-5063) ("The United States Court of Federal Claims had jurisdiction pursuant to 28 U.S.C. § 1491(a)(1).").

Moreover, the grant of jurisdiction in subsection (a)(1) of the Tucker Act is broader than the jurisdiction under the CDA. *See* 28 U.S.C. § 1491(a)(1) ("The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States . . . ." [**15]). Although privity has generally been required for suits brought under the Tucker Act, *see Merritt v. United States*, 267 U.S. 338, 340, 45 S. Ct. 278, 69 L. Ed. 643, 61 Ct. Cl. 1019 (1925), the Tucker Act's privity requirement is separate and distinct from the CDA's statutory requirement that only "contractors" may appeal to agency boards of contract appeals. Thus, while the Court of Federal Claims's jurisdiction under subsection (a)(1) of the Tucker Act and the Board's jurisdiction over appeals under the CDA each generally require individuals seeking relief to be in privity of contract with the government, the two waivers of sovereign immunity are not identical.

As far as you being unaware of any contrary president that would allow a subcontractor to bring direct claim against the government, I will again draw your attention to, Threshold Techs., Inc. v. United States, 117 Fed. Cl. 681, 2014 U.S. Claims LEXIS 886.

As we plan to file under the CDA and the Tucker Act, and for Breach of good faith and dealing by the contacting officer in violation of 48 C.F.R. § 1.602-2, again, your argument seems to fall short.

Finally, the main arguments in support of our claim to bring action under the CDA and Tucker act, as well as entitled to enforce the arbitration provisions of the contracts with IHS, (1) IHS Contracting officers created both expressed and implied contracts with ADAMAS construction, (2) Adamas is an intended third party Beneficiary, (3) ADAMAS does in fact have privity of contract with the united states by and through the contracting officers and their supervisors of Indian Health Services.

RE: IHS Created Expressed and Implied-in-fact Contracts

I think the best way to avoid argument on this issue, is to use the same standards of review the court would to determine if in fact either an expressed or implied contract was created. The 9th circuit seems to very clear, that in order to have an expressed or implied contract there must be (a) an offer, (b) acceptance, (c) consideration (d) an officer capable of contracting the US government.

It is well established doctrine in this circuit, the elements of an expressed contract are the same as with an implied contract, as such proving one should also prove the other.

The elements of a binding **contract** with the United States are identical for **express** and implied-in-fact **contracts**. See Night Vision Corp. v. United States, 469 F.3d 1369, 1375 (Fed. Cir. 2006) "The elements of an implied-in-fact [**35] **contract** are the same as those of an oral **express contract**."), cert. denied, 550 U.S. 934, 127 S. Ct. 2252, 167 L. Ed. 2d 1090 (2007); Hanlin v. United States, 316 F.3d at 1328 ("Thus, the requirements for an implied-in-fact **contract** are the same as for an **express contract**; only the nature of the evidence differs."); City of Cincinnati v. United States, 153 F.3d at 1377 ("Like an **express contract**, an implied-in-fact **contract** requires '(1) mutuality of intent to **contract**; (2) consideration; and, (3) lack of ambiguity in offer and acceptance.' . . . When the United States is a party, a fourth requirement is added: The government representative whose conduct is relied upon must have actual authority to bind the government in **contract**." (quoting City of El Centro v. United States, 922 F.2d 816, 820 (Fed. Cir. 1990)); Trauma Serv. Grp. v. United States, 104 F.3d at 1325; Russell Corp. v. United States, 210 Ct. Cl. at 608-09); Huntington Promotional & Supply, LLC v. United States, 114 Fed. Cl. at 767 "The elements are the same for an **express** or implied-in-fact **contract** . . ."); Vargas v. United States, 114 Fed. Cl. at 233; Prairie County, Montana v. United States, 113 Fed. Cl. 194, 202 (2013); Mastrolia v. United States, 91 Fed. Cl. 369, 384 (2010) (citing Flexfab, L.L.C. v. United States, 424 F.3d at 1265).

"A party alleging either an **express** or implied-in-fact **contract** with the government 'must show a mutual intent to **contract** including an offer, an acceptance, and consideration.'" Bank of Guam v. United States, 578 F.3d at 1326 (quoting Trauma Serv. Grp. v. United States, 104 F.3d at 1325); see also Chattler v. United States, 632 F.3d 1324, 1330 (Fed. Cir.) (citing Trauma Serv. Grp. v. United States, 104 F.3d at 1325), reh'g en banc denied (Fed. Cir. 2011); Hanlin v. United States, 316 F.3d 1325, 1328 (Fed. Cir. 2003) (citing City of Cincinnati v. United States, 153 F.3d 1375, 1377 (Fed. Cir. 1998)); Total Med. Mgmt., Inc. v. United States, 104 F.3d 1314, 1319 (Fed. Cir.) "The requirements for a valid **contract** with the United States are: a mutual intent to **contract** including offer, acceptance, and consideration; and authority on the part of the government representative who entered or ratified the agreement to

bind the United States in **contract**.") (citations omitted), reh'g denied and en banc suggestion declined (Fed. Cir.), cert. denied, 522 U.S. 857, 118 S. Ct. 156, 139 L. Ed. 2d 101 (1997); Huntington Promotional & Supply, LLC v. United States, 114 Fed. Cl. 760, 767 (2014); Eden Isle Marina, Inc. v. United States, 113 Fed. Cl. 372, 492 (2013); Council for Tribal Emp't Rights v. United States, 112 Fed. Cl. 231, 243 (2013).

The prime contractor(NCUC) and the government(IHS) modified their contract twice,

1. On, June 21st 2018, contracting officers with IHS and NCUC contacted, Nathan Pierce with ADAMAS, and OFFERED to make ADAMAS the primary contractor in charge of two projects that are in fact federal contracts, Sewer mainline camera and cleaning and the Sludge Removal Projects, ADAMAS ACCEPTED this offer, evidenced by the email sent to all parties, with the understanding that as CONSIDERATION for this agreement, all payments and the agreed upon contract price stated in the fixed price agreement, would go to and directly benefit ADAMAS the "contractor". This was at the very least an expressed contract and the actions of all parties after the agreement further evidences this fact. We also know that through the discovery process we can show the government intended to create this expressed and implied agreement. Jim White is a contracting officer with IHS who signed the Fixed contract between NCUC and the United States Government and agreed to the changes. (Email Attached) If this does not convince you I will also draw attention to;

2. The government and Prime modified the contract both expressed and implied to make ADAMAS the primary beneficiary of the contract as detailed by Dion Killsback in his email to me on . (previously sent to you) In his email Dion, details the expressed and implied agreement, that contracting officer Jim White, in the presence of his supervior, Burke Helmer, made an OFFER for a "Settled agreement", that we ACCEPTED, for the CONSIDERATION of 2/3rd of the contract price, and as previously noted with the mutual agreement of officer capable of contracting the Untied States government. We anticipate, through the discovery process, IHS meeting notes, emails project logs and notes etc., we can further prove the government fully intended to create an expressed implied and third party beneficiary contract with ADAMAS.

Cleary, we have satisfied all four requirements for the court to accept our claim of an expressed and implied contract, as such we have standing to being claim or suit against the government.

RE: Third party Beneficiary

The Legal Standard for Third-Party Beneficiary

Third-party beneficiaries of a contract to which the United States is a party may assert a claim against the United States in accordance with the law governing third-party claims. *Roedler v. N. States Power Co.*, 255 F.3d 1347, 1351 (Fed. Cir. 2001).

Applying the federal common law that governs the contracts of the United States, and taking note that a contract with the United States is to be construed and the rights and duties of the parties determined by application of the same principles of law as if the contract were between private individuals, the Court applies the principles of third-party beneficiary law as developed in the common law and explained by precedent. *Id.* at 1351-52 (citations omitted).

The test to determine third-party beneficiary status is whether the contract reflects the express or implied intention [**37] of the contracting parties to benefit the third-party. *Montana v. United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997). "One way to ascertain such intent is to ask whether the beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him." *Id.* at 1273-74 (citing RESTATEMENT (SECOND) OF CONTRACTS § 302(1)(b) cmt. d); *Frank & Breslow, LLP v. United States*, 43 Fed. Cl. 65, 67 (1999) ("The test for a third party beneficiary relationship . . . is one of reasonable reliance"). Despite the Government's many arguments to the contrary, this is an objective test. *See* *Firestone Tire & Rubber Co. v. United States*, 195 Ct. Cl. 21, 444 F.2d 547, 551 (1971); *ITT Arctic Servs., Inc. v. United States*, 207 Ct. Cl. 743, 524 F.2d 680, 684 (1975).

" The intended beneficiary need not be specifically or individually identified in the contract, but must fall within a class clearly intended to be benefitted thereby." *Montana*, 124 F.3d at 1273. "The court carefully **[*332]** must distinguish between incidental and indirect beneficiaries [**38] and direct beneficiaries, only the latter of which qualifies for third-party beneficiary status." *Guardsman Elevator Co. v. United States*, 50 Fed. Cl. 577, 582 (2001) (citing *Schuerman v. United States*, 30 Fed. Cl. 420, 433 (1994)); *see also* *German Alliance Insurance Co. v. Home Water Supply Co.*, 226 U.S. 220, 230, 57 L. Ed. 195, 33 S. Ct. 32 (1912). Whether a plaintiff is a third-party beneficiary is a mixed question of law and fact. *Guardsman*, 50 Fed. Cl. at 582 (citing *Glass v. United States*, 258 F.3d 1349, 1353 (Fed. Cir. 2001)). "When the intent to benefit the third party is not expressly stated in the contract, evidence thereof may be adduced." *Roedler*, 255 F.3d at 1352.

We have the adduced evidence included.

n the case of a contract in which the promisee (Capital City) provides goods or services to the promisor (the Government), it has long been settled that a clause providing for the promisor to pay the proceeds of the contract to a third party (JGB) is enforceable by the third party where the payment is intended to satisfy a present or future liability of the promisee to the third party. *D&H Distrib.*, 102 F.3d at 546-47. [**39] The third-party beneficiary in that situation has traditionally been referred to as a "creditor beneficiary" and has been accorded full rights to sue under the original contract. *Id.* at 547 (citing 4 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 787 (1951); 3 E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 10.2 (1990); 2 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS §§ 361-64, 381 (Walter H.E. Jaeger ed., 3d ed. 1959)). The same principle would apply if the payment clause provided that a portion of the proceeds were to be paid to the promisee and a portion to the third party. *Id.* Where a contract's remittance clause was changed to give a subcontractor control over contract payments from the Government, the Federal Circuit and the Court of Federal Claims have held that the subcontractors qualified as third-

party beneficiaries with the right to recover directly from the Government. *See* *D&H Distrib.*, 102 F.3d at 547-58; *Riviera Finance of Texas, Inc. v. United States*, 58 Fed. Cl. 528, 532 (2003); *Norwest*, 37 Fed. Cl. at 610.

Clearly, we can pass the test to proceed under a third-party beneficiary theory and as we will be filing under both the CDA and the Tucker act, we will have standing to bring a claim or suit against the government.

RE: Privity of Contract

It is well established in this circuit that "a sub-contractor in privity with the government is covered by the CDA (formerly 41 U.S.C. §§ 601-613 (2000) et seq., and finding of privity is synonymous with finding that there is expressed or implied contact/s between the government and the Sub-Contractor. As you can see from the above arguments, we have not one, but two expressed or implied contracts with IHS, as such finding of privity is synonymous, we therefore have privity with the government.

Based on the above-mentioned facts, I feel we will be able to easily convince the courts to hear our case, and rule favorably granting us the relief we request. All the legal analysis in this letter was conducted by me alone, without the help of Chris or Andrew, I am confident that if I can come to these legal conclusions as a layman, the legal professionals on our team will have little to no problem pursuing this case to a favorable outcome.

Please let me know by close of business on Wednesday, February 20th 2019, if IHS is 1.) willing to issue ADAMAS a check for both the sewer camera and cleaning and sludge removal projects, for the full contract amount, to include interest, damages and attorney fees, or; 2.) IHS is willing to participate and agree to arbitration. If I do not hear back from you, we will file our complaint on Friday, Feb 22nd 2019.

Respectfully submitted for your consideration.

Sincerely,

Nathan Pierce

Gmail

ADAMAS CONSTRUCTION And DEVELOPMENT SERVICES PLLC
<adamas.mt.406@gmail.com>

Lame Deer Projects

4 messages

ADAMAS CONSTRUCTION And DEVELOPMENT SERVICES PLLC Thu, Jun 21, 2018 at 9:38 PM
<adamas.mt.406@gmail.com>
To: Sheri Bement <bement.sheri@gmail.com>, "Courtney, James (IHS/BIL)" <James.Courtney@ihs.gov>, "White, Jim (IHS/BIL)" <Jim.White@ihs.gov>, Dion Killsback <dkillsback77@gmail.com>, Doris Limberhand <d_lhand@yahoo.com>, "Allen, Quentin B (IHS/BIL)" <Quentin.Allen@ihs.gov>, doris.ncuc@gmail.com

Good Evening,

I appreciate everyone's willingness to work towards the compromise that we all agreed to, in order to keep these projects on track, for benefit of the Lame Deer Community and the Northern Cheyenne Nation.

As per this afternoons phone conversation, between NCUC, IHS/SFC & ADAMAS, this email is written confirmation of Adamas Construction agreeing to the following:

1. NCUC - Sheri Bement will be taking over the project management and responsibilities of the scattered site projects. ADAMAS Construction will be reimbursed for payroll paid to NCUC employees for Julie Rodgers project and Supervision time spent by Nathan Pierce on this project. NCUC will call ADAMAS if needed for scattered site projects.
2. ADAMAS - Nathan Pierce will be the project manager for the Sludge removal project with the understanding that NO NCUC equipment and or staff will be used for this project, at the request of NCUC. ADAMAS will use their employees only and reserves the right to hire other labor if needed, from the Northern Cheyenne TERO office.
3. ADAMAS - Nathan Pierce will be Project Manager and responsible for the Lame Deer Sewer and Camera Cleaning project. ADAMAS agrees to use NCUC employees Jace Frank Backbone, and Loy (last name unknown) at the request of NCUC. NCUC agrees that while NCUC employees are working for ADAMAS they will follow the directives of Nathan Pierce and ADAMAS. If NCUC employees fail to do their Job responsibilities or follow the directives of Nathan Pierce or ADAMAS, they will be sent back to NCUC for disciplinary actions. ADAMAS will not be allowed to use any NCUC equipment for this work, per NCUC's request.

One request that we have, is that we do a change order for the removal or cutting of the Cattails, this is a duty that falls under the regular maintenance requirements for the lagoons, however they have not been cut this year and obstruct the working area of the pond?? We have the equipment on site to perform this task.

Please send email confirmation if you agree.

Best Regards,

--
Nathan Pierce - Owner/General Manager

ADAMAS Construction & Development Services PLLC
PH: 1-406-697-3022
EMAIL: ADAMAS.MT.406@GMAIL.COM
CONTRACTOR REGISTRATION# 228703

~ Building the Future with the Enviroment in Mind ~

Gmail ADAMAS CONSTRUCTION And DEVELOPMENT SERVICES PLLC <adamas.mt.406@gmail.com>

Payments

Dion Killsback <dkillsback77@gmail.com> Fri, Aug 24, 2018 at 4:52 PM
To: ADAMAS CONSTRUCTION And DEVELOPMENT SERVICES PLLC <adamas.mt.406@gmail.com>
Cc: Doris Limberhand <d_lhand@yahoo.com>, "White, Jim (IHS/BIL)" <Jim.White@ihs.gov>, Jace <voaxaa@hotmail.com>

Mr. Pierce,

Thank you for your email. I am the attorney for the Northern Cheyenne Utilities Commission. I do not have an attorney-client relationship with ADAMAS Construction, nor have I held myself out to represent ADAMAS Construction either directly or indirectly. I have informed you that the NCUC is responsible for the performance of the sludge removal and ADAMAS Construction, as a sub-contractor, I represented the NCUC's interest in trying to complete the project and subsequently engaged in attempting to resolve the calculation of overall sludge removal on NCUC and ADAMAS Construction's behalf. It is in this context and only in this context I represented both NCUC and ADAMAS Construction met with Indian Health Service on August 21, 2018 in an attempt to salvage the sludge removal project for Lame Deer Lagoon.

However, the Indian Health Service has recommended to cancel the contract for the sludge removal. The NCUC has cancelled the contract. Upon the cancellation it was understood that ADAMAS Construction would complete the application of the remaining stored sludge; and that ADAMAS Construction would provide documentation of the volume of application to NCUC in order to process payment.

Indian Health Service and NCUC and ADAMAS Construction have agreed to a settlement of the sludge removal at 600,000 gallons or approximately 2/3 of the overall contract, where ADAMAS Construction will be compensated accordingly. Was Agreed to

In order to process your payment there are several things that must occur: 1) application of sludge should be completed; 2) the documentation to support your work should also be completed; 3) NCUC and IHS will review the work completed and supporting documentation; 4) once both NCUC and IHS have been satisfied with the submissions from ADAMAS Construction a waiver and release of claims will be need to be executed by you; 5) payment will be processed, minus any costs associated. Not Agreed to

Error on His Part

The Northern Cheyenne Tribe, the President, Administrator and Tribal Council do not have any authority to process payment or expedite the process outlined above. Allegations and statements that go beyond the sludge removal work are not relevant for processing this payment, and if anything only complicate matters for NCUC and may actually cause delay in the processing of payment.

I am not authorized to provide you legal advice as I am not your attorney. However, based on your statement upon leaving the meeting on August 21, 2018 you indicated that you would be seeking legal counsel. I have therefore, instructed the NCUC staff to refrain from contacting you and ask that you also refrain from NCUC and direct all communication to my office.

ADAMAS Construction is no longer a consultant and is no longer a contractor of NCUC. ADAMAS Construction is not authorized to speak, work or represent in any manner on behalf of the NCUC. Other than the completion of the application of remaining sludge in your storage facilities, this is the only work authorized by NCUC for ADAMAS Construction to complete.

Thank you for your attention to this matter in advance.

Dion Killsback, Esq.

Killsback Law PLLC

Attorney at Law
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Mobile: (406) 672-4779
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[Quoted text hidden]

DEPARTMENT OF HEALTH & HUMAN SERVICES

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DATE October 12, 2018

TOTAL NUMBER OF PAGES (INCLUDING THIS COVER PAGE) 3

PLEASE DELIVER THIS TRANSMISSION IMMEDIATELY TO:

NAME: J Andrew Person
Garlington Lohn Robinson, PLLP
350 Ryman Street
Missoula, Montana 59807-7909

TELEPHONE: 406-523-2500

FAX: 406-523-2595

FROM: Gary Fahlstedt, OGC/Region VIII

REMARKS:

Response to your letter of October 4, 2018.

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the General Counsel

Region VIII
Byron Rodgers Federal Building
1961 Stout Street, Room 08-148
Denver, Colorado 80294
Telephone (303) 844-7803

Via Facsimile Transmission and Regular Mail

October 12, 2018

J. Andrew Person
Garlington Lohn Robinson, PLLP
350 Ryman Street
P.O. Box 7909
Missoula, Montana 59807-7909

Re: Arbitration Demand on Behalf of ADAMAS Construction, PLLP

Dear Mr. Person:

This will respond to your letter of October 4, 2018 regarding your demand that the Indian Health Service (IHS) participate in the arbitration of a dispute between your client, ADAMAS Construction PLLP (ADAMAS), and the Northern Cheyenne Utilities Commission (NCUC). You predicate your demand on an "MOA Disputes" provision contained in a "Memorandum of Agreement" (MOA) between the IHS and the NCUC.[1]

We wrote to you on September 26, 2018 advising that, since there is no privity between ADAMAS and the IHS, the IHS declines to agree to participate in the arbitration. In your letter of October 4, 2018, you make two arguments in defense of your position that ADAMAS is entitled to enforce the arbitration provision (i.e., the "MOA Disputes" provision) in the MOA between the IHS and NCUC. First, you argue that the amount of involvement of ADAMAS in communications and activities regarding the project is sufficient to establish privity. Second, you argue, in the alternative, that ADAMAS is an intended third-party beneficiary of the agreement between the IHS and NCUC thereby entitling it to invoke and enforce provisions in that agreement.

The general rule is that a subcontractor cannot bring a direct claim against the Government because a subcontractor is not in privity with the Government. *United States v. Johnson Controls, Inc.*, 713 F2d 1341, 1548 (Fed. Cir. 1983) (noting that it is "a well-entrenched rule that a subcontractor cannot bring a direct appeal against the government.").[2] In *Johnson,* despite the fact that all

[1] It should be noted that the MOA between the IHS and NCUC is not a federal procurement contract, but rather, is a "cooperative agreement." See 31 U.S.C. § 6305.

[2] The court in *Johnson* noted that there are two exceptions to the general rule. The first exception permits a subcontractor to submit a claim on behalf of the prime contractor. The court referred to this as the "sponsorship approach." *Johnson* at 1550. This exception permits a subcontractor to bring a claim on behalf of, and in the name of, the prime contractor. This requires that the prime contractor "sponsor" the claim by both authorizing and certifying it.

subcontracts were subject to government prior approval and that "the government retained a great deal of control over the actions of [the prime contractor] in its dealings with the subcontractors," the Federal Circuit concluded that this was insufficient to establish privity. *Id.*, 1550. The court then went on to hold that Johnson's claims as a subcontractor must be dismissed. The court based its decision on the fact that "direct subcontract appeals are not authorized by the contract documents." *Id.*, 1556. As in Johnson, in the instant matter there is also no contract provision authorizing direct subcontract claims or appeals. In fact, the MOA specifically requires that bidders for subcontracts be notified that the subcontract "is not a federal contract," thereby avoiding any mistaken impression that a subcontract could establish any privity with the Federal Government. Consequently, the IHS concludes that, despite the involvement of both IHS and ADAMAS in communications and activities related to the project, there is no privity between them.

With regard to your second argument—that ADAMAS is an intended third party beneficiary of the MOA and is therefore able to demand arbitration under the MOA disputes provision—a similar argument was considered by the Federal Circuit in *Winter v. FloorPro, Inc*, (570 F.3d 1367, Fed. Cir. 2009). The court in *Winter* rejected the third-party beneficiary argument noting that the Contract Disputes Act, which is a limited waiver of sovereign immunity permitting contract claims against the Federal Government, "does not permit appeals by anyone who is not a 'party to a Government contract other than the Government,'" and that "this includes subcontractors that are third-party beneficiaries of the prime contract." *Id.*, 1371. See also *JGB Enters, Inc. v. United States*, 63 Fed.Cl. 319, 330-3 (2004) (third-party beneficiary subcontractors are not "contractors" within the meaning of the Contract Disputes Act). We are not aware of any contrary precedent permitting a subcontractor to a federal contract, or to a federal cooperative agreement, to bring a direct suit or claim against the Government based on the subcontractor's status as a third-party beneficiary.

Based on the foregoing, the IHS will not agree to participate as a party in an arbitration with ADAMAS related to the agreement between the IHS and NCUC. However, the IHS would be available to provide testimony and/or relevant documents pursuant to a proper subpoena and request in accordance with the requirements of 45 CFR Part 2.

Sincerely,

Gary Fahlstedt

Gary Fahlstedt
Assistant Regional Counsel
Department of Health and Human Services
Office of the General Counsel, Region VIII

cc: Luke Vanderwagen, OGC/PHD
Burke Helmer, P.E., Billings Area IHS/SFC

The second exception requires that the prime contractor be an agent of the Government when issuing subcontracts. *Johnson,* 1549-50. Neither exception is applicable here.

> either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

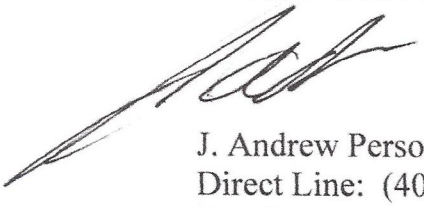
Id. *See also Ludwig v. Spoklie*, 280 Mont. 315, 319, 930 P.2d 56, 59 (1996).

At a minimum, ADAMAS was an intended beneficiary of the written Contracts. If you have reason to believe this is not the case, please provide notice to us of the factual basis for that opinion at your earliest convenience.

Thank you.

Very truly yours,

GARLINGTON, LOHN & ROBINSON, PLLP



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