UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS
GRANTED AS TO CBCA 190-ISDA AND CBCA 289-ISDA THROUGH 293-ISDA
AND DENIED AS TO CBCA 294-ISDA THROUGH 297-ISDA: July 28, 2008

CBCA 190-ISDA, 289-ISDA, 290-ISDA, 291-ISDA, 292-ISDA,
293-ISDA, 294-ISDA, 295-ISDA, 296-ISDA, 297-ISDA

ARCTIC SLOPE NATIVE ASSOCIATION, LTD.,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Lloyd Benton Miller and Donald J. Simon of Sonosky, Chambers, Sachse, Miller & Munson, LLP, Anchorage, AK, counsel for Appellant.

Sean Dooley, Office of the General Counsel, Department of Health and Human Services, Rockville, MD, counsel for Respondent.

Before Board Judges **HYATT**, **DeGRAFF**, and **STEEL**.

STEEL, Board Judge.

For all the years at issue in these appeals, the Arctic Slope Native Association, Ltd. (ASNA) provided health care services to its members under self-determination contracts or compacts with the Department of Health and Human Services (HHS) Indian Health Service (IHS), pursuant to the Indian Self-Determination and Education Assistance Act (ISDA or Act), Pub. L. No. 93-638, codified as amended at 25 U.S.C. §§ 450, *et seq.* (2000). ASNA seeks additional amounts of indirect contract support cost (CSC) funding from IHS under

ISDA contracts and compacts for fiscal years (FYs) 1996 through 2000. IHS moves to dismiss the appeals.

Background

In 1975, Congress enacted the ISDA to encourage Indian self-government by allowing the transfer of certain federal programs operated by the Federal Government, including health care services programs, to tribal governments and other tribal organizations by way of contracts. The amount of contract funds provided to the tribes was the same as the amount IHS would have provided if it had continued to operate the programs. This amount is known as the "Secretarial amount" or "tribal shares." 25 U.S.C. § 450j-l(a). The Secretarial amount, however, included only the funds IHS would have provided directly to operate the programs. It did not include funds for additional administrative costs the tribes incurred in running the programs, but which IHS would not have incurred, such as the cost of annual financial audits, liability insurance, personnel systems, and financial management and procurement systems. S. Rep. No. 100-274, at 8-9 (1987).

In 1988, Congress amended the ISDA to authorize IHS to negotiate additional instruments, self-governance "compacts," with a selected number of tribes. Pub. L. No. 100-472, tit. II, § 201(a), (b)(1), 102 Stat. 2288, 2289 (1988); *see* 25 U.S.C. § 450f note (repealed by Pub. L. No. 106-260, § 10, 114 Stat. 711, 734 (2000)). Under this more flexible Tribal Self-Governance Demonstration Project, the selected tribes were given the option of entering into either contracts or compacts[1] with IHS to perform certain programs, functions, services, or activities (PFSAs) which IHS had operated for Indian tribes and their members. If a tribe and IHS entered into a compact, they also entered into annual funding agreements (AFAs).

The 1988 amendments also provided for funding for the additional administrative costs which tribes incurred in running health services programs. The statute as amended provides that there shall be added to the Secretarial amount contract support costs "which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management." 25 U.S.C. § 450j-l(a)(2). These amounts are for "costs which normally are not carried on by the respective Secretary in his direct operation of the program; or . . . are provided by the Secretary in support of the contracted program from resources other than those under contract." *Id.*

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[1] For the purposes of this decision, there are no significant differences between contracts and compacts.

There are three categories of CSC: start-up costs, indirect costs (IDC), and direct costs. Start-up costs are one-time costs necessary to plan, prepare for, and assume operation of a new or expanded PFSA, such as the start-up costs for a new clinic. Indirect costs are those costs incurred for a common or joint purpose, but benefiting more than one PFSA, such as administrative and overhead costs. Direct CSC are expenses which are directly attributable to a certain PFSA but which are not captured in either the Secretarial amount or indirect costs, such as workers' compensation insurance, which the Secretary would not have incurred if the agency were operating the program. 25 U.S.C. § 450j-1(a).

The provision of funds for CSC is "subject to the availability of appropriations," notwithstanding any other provision in the ISDA, and IHS is not required to reduce funding for one tribe to make funds available to another tribe or tribal organization. 25 U.S.C. § 450j-1(b).

From one fiscal year to the next, IHS cannot reduce the Secretarial amount and the CSC it provides except pursuant to:

> (A) a reduction in appropriations from the previous fiscal year for the program or function to be contracted;
> (B) a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution;
> (C) a tribal authorization;
> (D) a change in the amount of pass-through funds needed under a contract; or
> (E) completion of a contracted project activity or program.

25 U.S.C. § 450j-l(b)(2).

IHS is required to prepare annual reports for Congress regarding the implementation of the ISDA. Among other things, these reports include an accounting of any deficiency in the funds needed to provide contractors with CSC. 25 U.S.C. § 450j-l(c). The reports which set out the deficiencies in funds needed to provide CSC are known as "shortfall reports." 25 U.S.C. § 450j-1(c), (d).

For FYs 1996 through 1998, Congress set aside $7.5 million of IHS's appropriated funds into the Indian Self-Determination (ISD) fund which were to be used for the transitional costs of new or expanded tribal programs. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-189 (1996); Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009-12 (1996); Department of the Interior and Related Agencies Appropriations Act, 1998,

Pub. L. No. 105-83, 111 Stat. 1543, 1582 (1997). In connection with the ISD fund, IHS developed a policy for funding CSC for new or expanded programs. IHS established a priority list, called the "queue," and funded CSC for new or expanded programs on a first-come, first-served basis, as determined by the date on which IHS received a tribe's request for funding. *See, e.g.*, IHS Circular No. 96-04, § 4.A(4)(a)(ii). Thus, IHS would fund the first request it received for funding CSC for a new or expanded program, then it would fund the next request it received, and it would continue funding CSC requests until the ISD funds were exhausted for a fiscal year. Requests not funded during one fiscal year moved up the queue to be paid when the next fiscal year's funds were distributed. Appeal File, Exhibit 4-19, Indian Self-Determination Memorandum (ISDM) 92-2 ¶ 4-C(1), at 4.

One of the 1988 amendments to the ISDA provided that the Contract Disputes Act (CDA) "shall apply to self-determination contracts." 25 U.S.C. § 450m-1(d). In 1994, Congress amended the Contract Disputes Act to include a six-year time limit for presenting a claim to the contracting officer (often an awarding official in the ISDA context):

> All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. . . . Each claim by a contractor against the government relating to a contract and each claim by the government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim. The preceding sentence does not apply to a claim by the government against a contractor that is based on a claim by the contractor involving fraud.

41 U.S.C. § 605(a).

Findings of Fact

In January 1996, ASNA began operating the Samuel Simmonds Memorial Hospital and associated programs, functions, and services in Barrow, Alaska, under contract 243-96-6025 with IHS. The "Alaska Tribal Health Compact between Certain Alaska Native Tribes and the United States of America" (ATHC) and related negotiated AFAs authorized thirteen Alaskan tribes to operate health care programs. From October 1, 1997, to the present, ASNA has operated the Barrow Service Unit as a member of the ATHC. Complaint ¶ 6.

On September 30, 2005 ASNA submitted and the awarding official received claims for each of the fiscal years 1996 through 2000 for (1) additional direct and indirect administrative CSC, as confirmed in IHS's annual CSC shortfall and related queue reports, and (2) additional indirect CSCs calculated in accordance with the decision in *Ramah Navajo*

Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997). Complaint ¶ 15. The amounts claimed for each fiscal year, based on the shortfall report and *Ramah* recalculations, are $2,301,631 for FY 1996, $1,568,828 for FY 1997, $1,008,622 for FY 1998, $2,028,723 for FY 1999, and $621,530 for FY 2000, for a total of $7,529,334.

The awarding official did not issue decisions on these claims. They are therefore deemed denied. 41 U.S.C. § 605(c)(5). Appeals were filed with the Department of the Interior Board of Contract Appeals on August 23, 2006, and docketed as cases IBCA 4794-4803/2006. On January 6, 2007, the Department of the Interior Board of Contract Appeals was merged with other civilian agency boards into the Civilian Board of Contract Appeals (CBCA), where the cases were docketed as described below. Pub. L. No. 109-163, § 847, 119 Stat. 3136 (2006).

Discussion

In their briefs, the parties make a great many arguments, all of which we carefully considered. Due to the manner in which we resolve the issues before us, it is not necessary for us to address each of the arguments they raised in order to resolve the motion to dismiss. As explained below, we lack subject matter jurisdiction to consider the FY 1996, FY 1997, and FY 1998 claims. We possess subject matter jurisdiction to consider the FY 1999 and FY 2000 claims and we cannot dismiss them for failure to state a claim upon which relief can be granted. Therefore, we grant the motion to dismiss in part.

FY 1996 - FY 1998 (CBCA 190-ISDA and 289-ISDA - 293-ISDA)

IHS moves to dismiss the FY 1996 through FY 1998 claims for lack of subject matter jurisdiction because ASNA failed to submit the claims to the awarding official within six years after they accrued, as required by section 605(a) of the CDA. Respondent's Motion to Dismiss at 8-12. In resolving IHS's motion, we assume all well-pled factual allegations are true and find all reasonable inferences in favor of the non-moving party. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007) (stating that decisions on such motions to dismiss rest "on the assumption that all the allegations in the complaint are true"); *Leider v. United States*, 301 F.3d 1290, 1295 (Fed. Cir. 2002); *Gould Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991); *Kawa v. United States*, 77 Fed. Cl. 294, 298 (2007); *Barth v. United States*, 28 Fed. Cl. 512, 514 (1993).

The FY 1996 claims accrued on the last day of the fiscal year, which was September 30, 1996, since appellant could expect no further payments for the fiscal year after this date. Similarly, the FY 1997 claims accrued on September 30, 1997, and the FY 1998

claims accrued on September 30, 1998. ASNA submitted its claims for these three fiscal years to the awarding official on September 30, 2005. ASNA contends the six-year time limit was met, because the time limit was either equitably or legally tolled. Memorandum in Opposition to Respondent's Motion to Dismiss at 27-33.

Tolling, whether equitable or legal, is a concept which applies to statutes of limitation. If a court (or a board) possesses jurisdiction to consider a claim, the claim must be filed before the limitations period expires or else it becomes unenforceable. A time limit for filing suit can be suspended, in effect, based upon equitable considerations, *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), or based upon legal considerations, *Stone Container Corp. v. United States*, 229 F.3d 1345, 1354 (Fed. Cir. 2000). If the applicable statute is tolled for a sufficient period, the time limit for filing suit is met.

Section 605(a) does not contain a statute of limitations which imposes a time limit for filing suit. Rather, it imposes a time limit which this Board's precedent establishes is a prerequisite to our jurisdiction. *Greenlee Construction, Inc. v. General Services Administration*, CBCA 416, 07-1 BCA ¶ 33,514; *accord*, *Gray Personnel, Inc*., ASBCA 54652, 06-2 BCA ¶ 33,378; *see also Pueblo of Zuni v. United States*, 467 F. Supp. 2d 1099 (D.N.M. 2006). As *Gray Personnel* explained:

> Under the CDA, there are two prerequisites to an appeal to the Board or to the United States Court of Federal Claims:
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> > Those prerequisites are (1) that the contractor must have submitted a proper CDA claim to the contracting officer requesting a decision, . . . [41 U.S.C.] § 605(a), and (2) that the contracting officer must either have issued a decision on the claim, . . . § 609(a), or have failed to issue a final decision within the required time period, . . . § 605(c)(5).
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> *England v. Sherman R. Smoot Corp*., 388 F.3d 844, 852 (Fed. Cir. 2004). If a contractor has not submitted a proper claim, the contracting officer does not have the authority to issue a decision:
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> > The Act . . . denies the contracting officer the authority to issue a decision at the instance of a contractor until a contract "claim" in writing has been properly submitted to him for a decision. § 605(a). Absent this "claim", no "decision" is possible – and, hence, no basis for jurisdiction . . . .

> *Paragon Energy Corp. v. United States*, 645 F.2d 966, 971 (Ct. Cl. 1981). Thus, "[i]t is well established that without . . . a formal claim and final decision by the contracting officer, there can be no appeal . . . under the CDA. It is a jurisdictional requirement." *Milmark Services, Inc. v. United States*, 231 Ct. Cl. 954, 956 (1982).
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> Section 605(a) as implemented by FAR subpart 33.2, Disputes and Appeals, is the key provision in determining whether there is a proper or formal claim for purposes of the CDA. *See, e.g.*, *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc) (definition of a claim); *Transamerica Insurance Corp. v. United States*, 973 F.2d 1572, 1576 (Fed. Cir. 1992) (requirement that a claim be submitted for a decision). [The Federal Acquisition Streamlining Act] added the six-year requirement to this key provision, rather than, for example, to 41 U.S.C. §§ 606 or 609, establishing filing periods at the boards and the United States Court of Federal Claims. We conclude, in view of the placement of the six-year provision in § 605(a), that the requirement that a claim be submitted within six years after its accrual, like the other requirements in that section, is jurisdictional. *Accord Axion Corp. v. United States*, 68 Fed. Cl. 468, 480 (2005).

Gray Personnel, Inc., 06-2 BCA at 165,474-75; *cf. John R. Sand & Gravel Co. v. United States,* 128 S. Ct. 750 (2008).

ASNA's failure to submit its FY 1996 through FY 1998 claims to the awarding official within six years after they accrued, as required by section 605(a) of the CDA, deprived this Board of jurisdiction to consider the claims. We cannot suspend the running of the six-year time limit any more than we could suspend the requirements, also found in section 605, that a claim must be submitted to the contracting officer, that a claim must be submitted in writing, and that a claim in excess of $100,000 must be certified. In the absence of a claim which meets all the requirements of section 605, we lack jurisdiction to consider an appeal.

We grant the motion to dismiss the FY 1996, FY 1997, and FY 1998 claims for lack of subject matter jurisdiction because ASNA failed to submit these claims to the awarding official within six years after they accrued, as required by section 605(a) of the CDA.

FY 1999 (CBCA 294-ISDA and 295-ISDA)

The FY 1999 claims accrued on the last day of the fiscal year, which was September 30, 1999. ASNA submitted these claims to the awarding official on September 30, 2005. We have jurisdiction to consider these claims because ASNA submitted them to the awarding official within six years after they accrued, as required by section 605(a) of the CDA. IHS argues that ASNA fails to state a claim upon which relief can be granted because in FY 1999, Congress limited the amount of money which IHS had available to fund CSC. Respondent's Motion to Dismiss at 12-13.

We agree with IHS that Congress restricted the funds available for CSC in FY 1999. The requirement to fund CSC is subject to the availability of appropriations, notwithstanding any other provisions of the ISDA. 25 U.S.C. § 450j-1(b). Congress restricted IHS's FY 1999 appropriation when it provided "not to exceed $203,781,000 shall be for payments to tribes and tribal organizations for contract or grant support costs . . . ." Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 328, 112 Stat. 2681, 2681-337 (1998). No separate amount was designated for the Indian Self-Determination Fund for initial and expanded programs. *Id*.

The fact that funds for CSC were restricted in FY 1999 does not, however, mean that ASNA has failed to state a claim upon which relief can be granted. If providing ASNA with additional funding for CSC would have caused IHS to expend more than $203,781,000 for CSC in FY 1999, ASNA had no statutory or contractual right to such additional funding and its claim for additional funding would not be one upon which we could grant relief. *Greenlee County, Arizona v. United States*, 487 F.3d 871 (Fed. Cir. 2007); *Babbitt v. Oglala Sioux Tribal Public Safety Department*, 194 F.3d 1374 (Fed. Cir. 1999); *Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996). If, however, IHS could have provided ASNA with additional funding for CSC without expending more than $203,781,000 for CSC in FY 1999, ASNA might be able to establish it had a statutory or contractual right to such funding up to the amount of the unexpended funds, in which case its claim would be one upon which we could grant relief. We do not know how much of the $203,781,000 IHS expended during FY 1999.

Because we do not know whether providing ASNA with additional funding for CSC would have caused IHS to expend more than $203,781,000 for CSC for FY 1999, we deny the motion to dismiss the FY 1999 claim for failure to state a claim upon which relief can be granted.

FY 2000 (CBCA 296-ISDA and 297-ISDA)

The FY 2000 claims accrued on the last day of the fiscal year, which was September 30, 2000. ASNA submitted these claims to the awarding official on September 30, 2005. We have jurisdiction to consider these claims because ASNA submitted them to the awarding official within six years after they accrued, as required by section 605(a) of the CDA. IHS argues that ASNA fails to state a claim upon which relief can be granted because in FY 2000, Congress limited the amount of money which IHS had available to fund CSC. Respondent's Motion to Dismiss at 12-13.

We agree with IHS that Congress restricted the funds available for CSC in FY 2000, for the same reason we agree with IHS that Congress restricted the funds available for CSC in FY 1999. Congress restricted IHS's FY 2000 appropriation when it provided "not to exceed $228,781,000 shall be for payments to tribes and tribal organizations for contract or grant support costs . . . ." Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-182 (1999).

The fact that funds for CSC were restricted in FY 2000 does not, however, mean that ASNA has failed to state a claim upon which relief can be granted. If providing ASNA with additional funding for CSC would have caused IHS to expend more than $228,781,000 for CSC in FY 2000, ASNA had no statutory or contractual right to such additional funding and its claim for additional funding would not be one upon which we could grant relief. *Greenlee County, Arizona*; *Oglala Sioux Tribal Public Safety Department*; *Ramah Navajo School Board, Inc*. If, however, IHS could have provided ASNA with additional funding for CSC without expending more than $228,781,000 for CSC in FY 2000, ASNA might be able to establish it had a statutory or contractual right to such funding up to the amount of the unexpended funds, in which case its claim would be one upon which we could grant relief. We do not know how much of the $228,781,000 IHS expended during FY 2000.

Because we do not know whether providing ASNA with additional funding for CSC would have caused IHS to expend more than $228,781,000 for CSC for FY 2000, we deny the motion to dismiss the FY 2000 claim for failure to state a claim upon which relief can be granted.

Decision

The motion to dismiss is **GRANTED** as to CBCA 190-ISDA and 289-ISDA through 293-ISDA. The motion to dismiss is **DENIED** as to CBCA 294-ISDA through 297-ISDA.

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CANDIDA S. STEEL
Board Judge

We concur:

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CATHERINE B. HYATT
Board Judge

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MARTHA H. DeGRAFF
Board Judge