



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: December 4, 2007

CBCA 692-ISDA

CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD NATION,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Brain Upton and Rhonda Swaney of the Confederated Salish and Kootenai Tribes of the Flathead Nation Legal Department, Pablo, MT, counsel for Appellant.

Colleen M. Dulin, Office of the Solicitor, Department of the Interior, Lakewood, CO, counsel for Respondent.

Before Board Judges **VERGILIO** and **WALTERS**.

VERGILIO, Board Judge.

On March 30, 2007, this Board received a notice of appeal from the Confederated Salish and Kootenai Tribes of the Flathead Nation (CSKT or contractor). CSKT had an annual funding agreement (AFA) with the United States Fish and Wildlife Service (FWS), an agency of the Department of the Interior (Government). During the period that the agreement was extended, while the parties were attempting to negotiate a successor agreement, the Government took over performing an activity (bison feeding) that the contractor was performing. The contractor here asserts that the Government breached the agreement by failing to provide the contractor with (1) written notice of allegedly inadequate

performance and (2) an opportunity to respond to the allegations before the Government reassumed the activity. This appeal is based upon a deemed denial of the claim. The contractor asks that the Board find that the Government materially breached the contract and violated regulations.

In resolving a Government motion, the Board determined that it has jurisdiction over this appeal pursuant to statutory provisions, 25 U.S.C. §§ 450m-1, 458cc, and the agreement, which make applicable the Contract Disputes Act, as amended, 41 U.S.C.A. §§ 601-613 (2006) (CDA). *Confederated Salish & Kootenay Tribes v. Department of the Interior*, CBCA 692-ISDA, 07-2 BCA ¶ 33,677. The Board determined that a contract existed, as the agreement had been extended while the parties pursued negotiations for a follow-on contract. The legal question here addressed, as posited in that opinion, is whether the Government was obligated to continue with the whole of the extended agreement, or, similar to an option under a contract, could opt to let the agreement expire in whole or in part. As noted therein, without a Government obligation, there might not be a material breach. 07-2 BCA at 166,745. Each party has submitted a brief and a reply addressing this issue. The contractor has elected the accelerated procedure. 41 U.S.C. § 607(f); Rule 53 (72 Fed. Reg. 36,794, 36,808 (July 5, 2007)). The Board is issuing this decision with due expedition, given the attempts by the parties to settle the dispute and the jurisdictional and additional submissions.

During the extension period, the contract remained viable while the parties were negotiating a successor agreement. The contract details the obligations of the parties; the terms and conditions of the contract are identical during the extension period to those existing just before the extension to the contract. The contract addresses its expiration when the parties are not negotiating a subsequent agreement covering an activity. Although the contractor factually and legally takes issue with the Government's contention that these specific circumstances permitted it to reassume the bison feeding activity on December 7, 2006, the Board need not resolve that dispute here. On December 11, 2006, the Government ceased negotiations for a subsequent agreement. That determination ended this contract. The contractor is neither seeking to recover for any damages that arose during the period between December 7 and 11, 2006, nor asserting that the Government's ending of the contract constituted a breach. Therefore, because the contract properly expired on December 11, the determination of December 7 did not constitute a material breach. The contractor is not entitled to the relief it seeks, and the Board need not determine if the Government could have ended the bison feeding activity on December 7 under the provisions of the contract dealing with emergency and unusual circumstances or because it was no longer negotiating to include that activity in a successor agreement.

Findings of Fact

The Agreement/Contract

1. The FWS and CSKT entered into a contract, the AFA. Exhibit 1 (all exhibits are in the appeal file). The contract specifies the statutes and regulations under which it is authorized; it contains direction regarding interpretation and contractor compliance. Exhibit 1 at 2 (§§ 3.A, B).

2. The contract both specifies that it is effective through September 30, 2006, inclusive, and addresses an extension:

As provided by the Tribal Self-Governance Regulations at 25 C.F.R. § 1000.146, and subject to applicable laws and regulations, the FWS and the CSKT may agree in writing to extend to a date after September 30, 2005, [sic] the term for performing any Activity covered by this AFA. All of the terms and conditions of this AFA will apply during any extension of the term of this AFA. The FWS and the CSKT may modify the Activities covered by this AFA or the consideration paid by the FWS to the CSKT for performing an Activity only by amending the AFA as provided in section 20.A of this AFA.

Exhibit 1 at 29 (§ 23.C). The referenced section 20.A specifies that, with exceptions not here relevant, the parties “may modify this AFA only by amendment executed in the same manner as this AFA[.]” Exhibit 1 at 28. The contract was executed as a written, bilateral document with signatures from each party. Exhibit 1 at 30. The contract defines Activity: “when capitalized, means a program, service, function, or activity, or portion thereof, at the National Bison Range Complex (NBRC), which the FWS agrees to fund and the CSKT agrees to perform under this AFA.” Exhibit 1 at 3 (§ 4). Within the categories of Activities CSKT is to perform is the activity to husband “surplus bison in a humane manner, with appropriate feed and water, to maintain sound, healthy animals.” Exhibits 2 at 12 (§ 2.D.7.g), 18 at 64-65 (§ 2.D.7.g). The annual work plan for fiscal year 2006 specifies that anytime that bison are held in pens, feed and water should be provided “ad libitum” (interpreted by the FWS as requiring that hay be available at all times) and must be checked twice daily. The priority is stated as: “High priority to maintain healthy animals.” Exhibit 18 at 64 (§ 2.D.7.g).

3. The contract contains a section addressing emergencies and unusual events. As to notice, the section states, “Where practicable, after otherwise learning of an emergency or other unusual event in the physical area covered by this AFA and affecting an Activity, the Refuge Manager promptly and orally will notify the Coordinator or, where the Coordinator is not available, another available CSKT Employee of the emergency or other

unusual event, and of how the Activity is affected.” Exhibit 1 at 23 (§ 15.A). The section further dictates, in pertinent part:

B. *Temporary Operation and Control.* Where necessary to deal with an emergency within the physical area covered by this AFA, the FWS temporarily may assume operation and control of any Activity, including supervising any CSKT Employee engaged in the Activity. When the emergency ceases to exist, the FWS will return operation and control over the Activity to the CSKT.

C. *Emergency Procedures.* In an emergency, the FWS and the CSKT will use the following procedures:

1. *Determination by the Refuge Manager.* The Refuge Manager will determine when an emergency exists and when it has ceased to exist.

2. *Notice to CSKT Employees.* The Refuge Manager will notify the Coordinator or another available CSKT Employee that an emergency exists, as provided in subsection 15.A of this section of this AFA.

Exhibit 1 at 23.

4. The contract distinguishes the concepts of retrocession (withdrawal by the CSKT from the agreement with regard to, and its ceasing to perform, any or all Activities covered by the agreement), reassumption (the FWS reassuming performance of and ceasing to fund any or all of the Activities covered by the agreement), and expiration. Exhibit 1 at 6 (§ 4, Definitions), 24-27 (§ 16, Retrocession, Reassumption, and Expiration).

5. The contract contains provisions dealing with FWS reassumption:

1. *Tribal Self-Governance Regulations.* Except as otherwise provided in subsection 16.A and this subsection 16.C of this section of this AFA, the FWS may reassume any or all of the Activities covered by this AFA in accordance with the Tribal Self-Governance Regulations at 25 C.F.R. Part 1000, Subpart M.

2. *Criteria for Reassumption.* The FWS may reassume any or all of the Activities covered by this AFA if the Regional Director, on behalf of the Secretary, finds and notifies the CSKT in writing that the performance of the CSKT under this AFA is causing imminent jeopardy to natural resources or public health or safety, or that the CSKT is in material-breach of this AFA.

3. *CSKT Response to Reassumption.* Upon receiving from the FWS a notice as provided in the Tribal Self-Governance Regulations at 25 C.F.R. § 1000.313 concerning any Activity, the CSKT will [take various actions.]

Exhibit 1 at 25-26 (§ 16.C).

6. Regarding its expiration, the contract dictates:

In accordance with the Tribal Self-Governance Regulations at 25 C.F.R. § 1000.148, where the FWS and CSKT are negotiating a Subsequent AFA covering an Activity with the prior written approval of the FWS and subject to any terms the FWS and the CSKT previously agree to in writing, the CSKT may continue to perform the Activity pending negotiation of a Subsequent AFA. To the extent the CSKT and the FWS are *not* negotiating a Subsequent AFA covering an Activity:

1. *Transition.* In the last month of the term of this AFA, the CSKT will work with the FWS to ensure an orderly transition in returning to the FWS responsibility for performing the Activity; and

2. *Available Property.* On the last day of the term of this AFA, the CSKT will return to the FWS all Available Property provided by the FWS to the CSKT, and not needed by the CSKT to perform an Activity for which the FWS and the CSKT are negotiating or have executed a Subsequent AFA for the next fiscal year.

Exhibit 1 at 26-27 (§ 16.D).

7. By letter dated September 5, 2006, the FWS extended the contract, regarding all activities of the existing agreement, pending completion of negotiations. The letter extending the contract specified that, during this extension period, the current AFA will remain in effect. Exhibit 19.

8. Beginning in the extension period, the contractor cared for bison that were to be relocated to other national wildlife refuges. Exhibit 44 at 1. At least as of December 5, 2006, some individuals within the Government who were involved in overseeing the care of the bison were discussing the care as an emergency situation and as requiring a reassumption of the given activity. Exhibits 40, 41 at 2.

9. By letter dated December 7, 2006, the FWS informed the contractor:

The U.S. Fish and Wildlife Service (Service) entered into an Annual Funding Agreement (AFA) with the Confederated Salish and Kootenai Tribes (CSKT) to perform certain Activities at the National Bison Range (NBR). This AFA commenced on March 15, 2005, and expired on September 30, 2006. The Service authorized an extension of this agreement on September 5, 2006, for an undetermined length of time while negotiations for a subsequent AFA are in progress.

One of the Activities identified in Attachment A of the AFA is:

2.D.7.g. “Husband surplus bison in a humane manner, with appropriate feed and water, to maintain sound, healthy animals.”

Effective immediately, the Service is withdrawing authorization granted to CSKT to perform this Activity.

Exhibit 44. The letter contains a discussion of the reasons why the Government is withdrawing authorization to perform the activity, and notes that if an agreement for fiscal year 2007 is signed, the value of performing this activity will be deducted from the compensation due the contractor. Exhibit 44 at 2.

10. As stated in a letter dated December 11, 2006, to the contractor, as of that date, the FWS terminated negotiations concerning an AFA for fiscal year 2007 for activities at the NBRC, withdrew the contractor’s authority to extend performance under the thereby expired fiscal year 2006 AFA, and reassumed all responsibilities for performing all activities covered by that AFA. Exhibit 52.

11. In January 2007, the contractor submitted a written claim to an awarding official. As specified in the claim, the contractor disputes the factual assertions and decision made in and actions taken pursuant to the letter of December 7, 2006, Finding 9. The contractor maintains that the Government cannot take back any of the contracted activities except through the reassumption provisions of the agreement. Further, it contends that the Government factually misstates what occurred, and breached the agreement by taking back the bison feeding activity by utilizing improper procedures and failing to provide notice and an opportunity to respond. Exhibit 65.

12. The Regional Director did not respond to the letter. In a notice of appeal dated March 28, 2007, the contractor indicates that the appeal is being filed based upon the deemed

denial of the claim. The contractor alleges that the Government breached the agreement when it reassumed the bison feeding activity by failing to provide the contractor with (1) written notice of allegedly inadequate performance and (2) an opportunity to respond to the allegations before the Government.

Discussion

The legal issues addressed by the parties for resolution involve the Government's obligations during the extension period of the contract. Contrary to the views of the Government, a contract existed that dictates the obligations of the parties; this was not a unilateral contract coming into existence by the performance of the contractor. As decided in resolving the Government's earlier motion, the contract provided for such an extension that was effectuated with the written determination by the Government during the original contract period while the parties were negotiating a successor agreement, Finding 7. This conclusion disposes of many of the allegations by the Government, contending that no contract existed or that a unilateral contract existed.¹

The contractor maintains that the Government was obligated throughout the period of the AFA, as extended, to abide by the terms and conditions of the AFA. Most particularly, it contends that the Government could not reassume the bison feeding activity without following the AFA procedures for such an action. The contractor contends further that the Government could not simply conclude that the bison feeding activity would no longer be part of the negotiations for a successor AFA and thereby take back those functions from the contractor under this contract, as such would constitute an amendment requiring bilateral

¹ The record contains a bilateral amendment to the AFA, signed by the parties on November 17, 2006, with a stated effective date of October 1, 2006. The document states that the "amendment extends the period of performance through December 31, 2006 and provides additional funding for the period beginning October 1, 2006 through December 31, 2006." Exhibit 11. Neither party referenced the document as material to this dispute or addressed reliance upon that document until questioned by the Board. Although the contractor is pursuing relief elsewhere, alleging that the Government improperly ceased negotiations, it is not maintaining here that the extended contract would survive the termination of negotiations simply because of the amendment and its stated ending date of December 31, 2006. Contractor's Reply Brief (Nov. 16, 2007) at 7-8. The Board will not consider the document further, given that neither party is relying upon the amendment as extending the contract beyond December 11, 2006, when the Government expressly informed the contractor that the Government is ceasing negotiations for a successor AFA and is withdrawing authority to perform under the extended contract. Finding 10.

agreement, 25 CFR 100.148 (2006). It also maintains that the Government did not follow procedures of section 15, dealing with emergencies and unusual circumstances, such that it cannot now invoke that section as justification for its actions.

The Government contends, principally, that the contractor's alleged failings regarding the bison feeding created an emergency situation that permitted it to withdraw the authority for the contractor to continue with the feeding activity. It also maintains that it could exclude an activity from negotiations for the successor AFA, and thereby end the authority of the contractor to perform that activity during the extension period.² Further, it notes that as of December 11, 2006, it ended negotiations with the contractor for a successor AFA, such that it appropriately reassumed all activities under the then expired AFA.

During the extension period, the parties were bound by the terms and conditions of the contract. Findings 2, 6, 7. The contract continued under the provisions dealing with an extension while the parties were negotiating a subsequent agreement. The contractor has identified no provision that requires the contract to automatically continue after a party ceases negotiations for a subsequent agreement. As of Monday, December 11, 2006, the Government informed the contractor that the Government's attempts to negotiate a successor AFA were ended, and with that determination, the authority to perform under the AFA expired. Finding 10. The contractor does not here contend that that determination constituted a breach. The expiration of the contract ended the parties' obligations thereunder as here at issue. The contractor does not suggest that it is entitled to any relief for the period between and including December 7 and 11, 2006. Even if deemed to be a breach, the Government's taking over the bison activities on December 7 was not a material breach to the contract. With this conclusion, that the December 7 action was not a material breach, the other allegations of the parties are moot.

Decision

The Board **DENIES** this appeal.

JOSEPH A. VERGILIO
Board Judge

² The Government has not established the relevance of the priorities clause of the contract, Exhibit 1 at 9 (§ 7.C), that permits the Government Refuge Manager to establish priorities for the contractor to follow in performing activities.

I concur:

RICHARD C. WALTERS
Board Judge