UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR RECONSIDERATION DENIED: December 18, 2008

CBCA 279-ISDA-R

METLAKATLA INDIAN COMMUNITY,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent,

Geoffrey D. Strommer of Hobbs, Straus, Dean & Walker, LLP, Portland, OR, counsel for Appellant.

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

Before Board Judges **HYATT** and **STEEL**.[1]

STEEL, Board Judge.

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[1] The Board's decision in CBCA 279-ISDA, for which reconsideration is sought, was issued by a panel which included Judge Martha H. DeGraff, as well as Judges Hyatt and Steel. Since the issuance of that decision, Judge DeGraff has retired. Under applicable precedent, a board of contract appeals may not change the panel that decides a motion for reconsideration. *Petersen Equipment Fire & Emergency Services v. Department of the Interior*, CBCA 185-R, 08-2 BCA ¶ 33,939 (citing *Universal Restoration, Inc. v. United States*, 798 F.2d 1400, 1406 n.9 (Fed. Cir. 1986) and *Stan Dieker v. General Services Administration*, GSBCA 16050-R, 03-2 BCA ¶ 32,375). Accordingly, the motion for reconsideration docketed as CBCA 279-ISDA-R is being decided solely by Judges Hyatt and Steel, the remaining members of the original panel.

On July 28, 2008, the Board denied the motion of respondent, the Department of Health and Human Services (HHS), to dismiss for lack of subject matter jurisdiction the Metlakatla Indian Community's (Metlakatla) appeal seeking additional Indian Self-Determination and Educational Assistance Act (ISDA) moneys. The Board held that the six-year claim-filing time limit of the Contract Disputes Act (CDA), 41 U.S.C. § 605(a), does not apply to the fiscal year (FY) 1996 portion of the ISDA contract at issue.[2] By regulation, the time limit only affects claims arising from contracts awarded after October 1, 1995. 48 CFR 33.206 (1996). The Government has moved the Board to reconsider that decision.

In 1996, section 605(a) of the Contract Disputes Act was amended to impose a six-year time limit for the filing of claims. The regulation implementing 41 U.S.C. § 605(a) provided that those contracts "awarded" before October 1, 1995, were not subject to the six-year claim-filing limitation. 48 CFR 33.206 (1996). The statute's application was thus not retroactive.

HHS argued in support of its motion to dismiss that for purposes of 41 U.S.C. § 605(a), the award date of the contract should be considered the effective date of the applicable annual funding agreement (AFA), or October 1, 1995. By contrast, Metlakatla argued that the contract was awarded for purposes of the new CDA six-year claim-filing limitation on the date of execution of the contract (the date the parties signed the underlying agreement), or in the alternative, the signature/execution date of the AFA, i.e., September 28, 1995, or before.

In determining the timeliness of the FY 1996 claim, the Board looked to the date on which the underlying contract had been awarded, since the critical issue for application of § 605(a) is what constitutes award. The Board held that the contract was either awarded on April 4, 1995, the date on which the parties both signed the agreement, or at the latest, when the related AFA for FY 1996 was signed by both parties, on September 28, 1995. Since the six-year time limit did not apply to bar the Metlakatla 1996 claim, the Board declined to dismiss the FY 1996 appeal.

Citing Board Rules 26(a) and 27(a)(2), HHS argues that this decision has the unintended effect of creating a legally binding obligation prior to the date that was intended by the parties, the effective date (October 1, 1995), thus violating the prohibition of the Antideficiency Act, 31 U.S.C. § 1341, against an agency obligating the Government in advance of an appropriation. This ruling, the Government also submits, was therefore a

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[2] Familiarity with the July 28, 2008, decision is presumed.

"justifiable or excusable" mistake under our rules, and is a mistake which must be corrected. The consequence of that correction, of course, would be the dismissal of the appeal for FY 1996.

Arguments already made and reinterpretations of old evidence are not sufficient grounds for granting reconsideration or for altering a decision. Rule 26(a). Where a party makes arguments which it raised or could have raised during briefing of the underlying motion, even if the reasoning is more sophisticated, the Board need not reconsider its decision. *Mitchell Enterprises, Ltd. v. General Services Administration*, CBCA 402-R, 07-2 BCA ¶ 33,644, *aff'd sub nom*, *Mitchell Enterprises, Ltd. v Bibb*, 283 F. App'x 788 (Fed.Cir. 2008). The Board has evaluated the Government's arguments for reconsideration and determines that they were or could have been made at the time the Government briefed its motion to dismiss. The Board need not reconsider the ruling on that basis.

The Government also argues in its motion to reconsider that the Board has discretion to grant reconsideration when a party demonstrates a mistake of either fact or law under Board Rule 27(a)(2). *Flathead Contractors, LLC v. Department of Agriculture*, CBCA 118-R, 07-2 BCA ¶ 33,688, *aff'd sub nom*, *Flathead Contractors, LLC v. Schafer* (Fed.Cir. Nov. 10, 2008). Citing *Flathead*, the Government suggests that the balance between justice and finality weighs in favor of reconsideration where the tribunal is convinced that correcting the originial decision may be necessary to avoid a manifest injustice. Manifest injustice can be shown through decisions or data that the tribunal overlooked – "matters, in other words, that might reasonably be expected to alter the conclusions" reached by the tribunal. *Tidewater Contractors, Inc. v. Department of Transportation*, CBCA 50-R, 07-2 BCA ¶ 33,618, at 166,502. The Government argues that it was a critical mistake to hold that for purposes of 41 U.S.C. §605(a) the award date of the contract or AFA was the execution date of those agreements; that instead the award date must be the effective date of the contract, because to hold otherwise would not take into account the ramifications of the Anti-deficiency Act.[3]

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[3] This contract/AFA took into account and satisfied the Antideficiency Act by including prescribed language which made clear that funding was not available until appropriated, and would not take effect until October 1, 1995. Thus, there are no Anti-deficiency Act implications to the Board's decision. *See* 1 General Accounting Office, Principles of Federal Appropriations Law 5-9 (3d ed. 2006) (GAO Redbook). The Federal Circuit recognizes the GAO Redbook as providing expert opinions. *Thompson v. Cherokee Nation of Oklahoma*, 334 F.3d 1075, 1084 (Fed. Cir. 2003); *see also Integral Systems, Inc. v. Department of Commerce,* GSBCA 16321-COM, 05-1 BCA ¶ 32,946, at 163,229.

It is the Government, not the Board, which is mistaken. The ISDA does not make the effective date of the contract the "award date." The effective date "means nothing"; a contract is binding once signed by both parties. *American Photographic Industries, Inc.*, ASBCA 29272, et al., 29832, 90-1 BCA ¶ 22,491, at 112,893. The appropriate date for consideration under 41 U.S.C. § 605(a) is the date the contract is awarded because the regulation does not apply to contracts awarded before the regulation went into effect. *Motorola, Inc. v. West*, 125 F.3d 1470, 1474 (Fed. Cir. 1997). The ISDA itself states when an award must take place for the purpose of its contracts and compacts. Unless the relevant Secretary declines to enter into agreement, an ISDA contract must be approved and awarded within ninety days of receipt of the tribal proposal for a contract, 41 U.S.C. § 450f(a)(2). Thus, award is tied to the formation of the contract, not the implementation of the contract.

The date upon which the contract between these parties was formed was the execution date, when an agreement was evidenced by the signatures of the parties. As the Board noted, this occurred on April 4, 1995, or at the latest on September 28, 1995, and predated application of the six-year claim-filing deadline of 41 U.S.C. § 605(a).

Decision

Accordingly, the motion to reconsider is **DENIED**.

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CANDIDA S. STEEL
Board Judge

I concur:

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CATHERINE B. HYATT
Board Judge