



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: October 1, 2009

CBCA 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 General Counsel, Department of Health and Human Services, Rockville, MD, counsel for Respondent.

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

SOMERS, Board Judge.

The Arctic Slope Native Association, Ltd. (ASNA) provided health care services to its members under self-determination contracts with the Department of Health and Human Services (HHS), Indian Health Service (IHS). The contracts were entered into 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.* (2006). In the appeals currently pending before the Board, ASNA seeks additional amounts of indirect contract support costs (CSC) funding from IHS under ISDA contracts for fiscal years (FYs) 1999 and

2000.¹ IHS has moved to dismiss ASNA's FY 1999 and FY 2000 claims, contending that the appellant has failed to state a claim upon which relief can be granted. Alternatively, IHS moves for summary relief as to these appeals. ASNA opposes and has cross-moved for summary relief. For the reasons set forth below, we grant the Government's motion for summary relief and deny ASNA's motion.

Background

In 1975, Congress enacted the ISDA to promote tribal autonomy by permitting Indian tribes to manage federally-funded services that were previously administered by the Federal Government. *See* 25 U.S.C. § 450a; *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 634 (2005). Transfers of federal programs to tribal control under the ISDA are accomplished through "self-determination contracts" under which a tribe agrees to take over administration of a federal program such as an IHS hospital or clinic. 25 U.S.C. § 450f(a). The Government is required to provide self-determination contractors with the same amount of funding that would have been appropriated for the tribal programs if IHS had continued to operate the programs directly. This amount is known as the "Secretarial amount" or "tribal share." 25 U.S.C. § 450j-1(a)(1).

Originally, the ISDA did not require the Government to pay the administrative costs that the tribes incurred to operate the programs. As a result, the tribes absorbed those costs, which reduced the funds available for the tribes to provide direct services to their members. *See Thompson v. Cherokee Nation of Oklahoma*, 334 F.3d 1075, 1080 (Fed. Cir. 2003). Congress amended the ISDA in 1988 to require the Federal Government to provide funds to pay the administrative expenses of covered programs. Those expenses included "contract support costs," defined in the statute as costs that a federal program would not have directly

¹ Initially, ASNA filed appeals on claims for FYs 1996-2000 (CBCA 190-ISDA and 289-ISDA through 297-ISDA). By decision dated July 28, 2008, the Board dismissed the FY 1996 through FY 1998 claims (CBCA 190-ISDA, 289-ISDA, 290-ISDA, 291-ISDA, 292-ISDA, and 293-ISDA) 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 the Contracts Disputes Act of 1978, 41 U.S.C. § 605(a). The appellant appealed the Board's decision to the United States Court of Appeals for the Federal Circuit. The Federal Circuit consolidated that appeal with other cases and issued a decision affirming in part, reversing in part, and remanding the cases. *Arctic Slope Native Association, Ltd. v. Department of Health and Human Services*, Nos. 2008-1532, et al. (Fed. Cir. Sept. 29, 2009).

incurred, but that tribal organizations acting as contractors reasonably incur in managing the program. 25 U.S.C. § 450j-1(a)(2).

In addition, Congress amended the ISDA to authorize IHS to negotiate additional instruments, self-government “compacts,” with a select 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). The selected tribes were given the option of entering into either contracts or compacts² 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 contract or a compact, they also entered into annual funding agreements (AFAs) as to the years covered by the instrument.

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).

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

With regard to funding, the contract stated:

Subject only to the appropriation of funds by the Congress of the United States and to adjustments pursuant to § 106(b) of the Indian Self-Determination and Educational Assistance Act, as amended, the Secretary shall provide the total amounts specified in the Annual Funding Agreements.

Appeal File, Exhibit 7 at 16. For each fiscal year, the contract required that the Secretary shall, among other things:

² For the purposes of this decision, there are no significant differences between contracts and compacts.

make available the funds specified for that fiscal year under the Annual Funding Agreements by paying the respective total amount as provided for in each Annual Funding Agreement in advance lump sum, as permitted by law, or such other payments as provided in the schedule set forth in each Annual Funding Agreement.

Id. at 17.³ The contract acknowledges that the program funding may not meet all needs; as summarized in section 17:

The parties to the Compact understand that the Indian Health Service budget is inadequate to fully meet the special responsibilities and legal obligations of the United States to assure the highest possible health status for American Indians and Alaska Natives and that, accordingly, the funds provided to the Co-Signers are inadequate to permit the Co-Signers to achieve this goal. The Secretary commits to advocate for increases in the Health Service budget

Id. at 34.

The annual funding agreements for FY 1999 and FY 2000 set forth the funding available for CSC. For FY 1999, although the agreement identified zero funding for CSC, the agreement confirmed in a footnote that ASNA would be paid no less than \$500,000 for CSC for that fiscal year. Appeal File, Exhibit 8 at 7. The parties later amended the annual funding agreement to add \$297,059 in direct and \$902,263 in indirect, non-recurring CSC. *Id.*, Exhibit 24 at 53. The parties amended the AFA again to add \$72,662 in direct and \$21,697 in indirect, non-recurring CSC. *Id.* at 64.

For FY 2000, the AFA lists \$5,254,412 in recurring base funds (including recurring CSC) and \$902,263 in non-recurring CSC. Appeal File, Exhibit 10 at 6. The FY 2000 AFA was amended several times to add additional CSC. *Id.*, Exhibit 24 at 68-106. In total, for

³ The annual funding agreement stated that “one annual payment in lump sum [would] be made annually in advance by check or wire transfer.” Appeal File, Exhibit 8 at 10.

FY 2000, IHS promised to pay ASNA \$896,483 (direct CSC) and \$2,162,108 (indirect CSC), totaling \$3,058,591.⁴ *Id.* at 103.

On September 30, 2005, ASNA submitted and the awarding official received claims for additional direct and indirect administrative CSC. Complaint ¶ 15.⁵ The amounts claimed for the two fiscal years at issue here are \$2,028,723 for FY 1999 and \$621,530 for FY 2000. As to these fiscal years, IHS argued that ASNA failed to state a claim upon which relief can be granted because in FY 1999 and FY 2000, Congress limited the funds available for CSC.

In our previous decision, we concluded, based upon the record, that Congress had restricted funds available for CSC for FY 1999 and FY 2000. *Arctic Slope Native Association, Ltd. v. Department of Health and Human Services*, CBCA 190-ISDA, *et al.*, 08-2 BCA ¶ 33,923, at 167,873. The requirement to fund CSC is subject to the availability of appropriations, notwithstanding any other provisions in 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 . . . 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 had been designated for the Indian Self-Determination Fund for initial and expanded programs. *Id.* Likewise, Congress restricted IHS's FY 2000 appropriation when it provided "not to exceed \$228,781,000 . . . 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).

However, because we could not determine, based upon the record, whether providing ASNA with additional funding for CSC would have caused IHS to expend more than \$203,781,000 for CSC for FY 1999, or \$228,781,000 for CSC for FY 2000, we denied the IHS motion to dismiss the FY 1999 and FY 2000 claims for failure to state a claim upon which relief can be granted. On this issue, we stated that if providing ASNA with additional

⁴ During FY 1999, IHS transferred to tribal management all non-residual PFSAs of the Area Office and the Alaska Native Medical Hospital not under contract or other funding agreements as of October 1997. By FY 2000, the transition plan was fully implemented, resulting in a significant increase in the funding amount provided for CSC to ASNA for its additional PFSAs. Appeal File, Exhibit 8 at 1-9.

⁵ Each fiscal year had two claims, one for the alleged failure to pay additional direct and indirect administrative CSC, and the second for the alleged failure to properly calculate the administrative CSC. Each claim has been docketed separately.

funding for CSC would have caused IHS to expend more than the funds appropriated for CSC for the appropriate fiscal year, 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, citing *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); and *Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996). If, however, IHS could have provided additional funding for CSC without expending more than \$203,781,000 for CSC for FY 1999, or more than \$228,781,000 for CSC for FY 2000, we concluded that ASNA might be able to establish that 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.

After the Board issued its decision, the parties agreed that IHS would supplement the appeal file with documentation addressing the issue of whether IHS could have provided additional funding for CSC without expending more than the amount appropriated for the fiscal year. Accordingly, IHS supplemented the record with the declaration of Elizabeth Fowler, the Director of the Office of Finance and Accounting (OFA) at IHS.

In her declaration, the Director stated that one of her responsibilities includes monitoring the obligation and expenditure of funds that Congress appropriates for IHS. Declaration of Elizabeth Fowler (Oct. 29, 2008) at 1. The Director explained that, since FY 1998, Congress included a “cap” in the annual IHS appropriations for CSC. The funds appropriated by Congress for CSC are “one-year” funds, meaning that the funds must be obligated before the end of the fiscal year in which they were appropriated. The funds remain available for five years after the close of the fiscal year for liquidation of obligations incurred during that one fiscal year. After the expiration of that period, the funds are statutorily withdrawn. *Id.* at 2.

Each year, IHS allots its CSC funding among the twelve IHS area offices. Each area office obligates its CSC allotment to the tribes and tribal contractors in its area by incorporating the funding into annual funding agreements or modifications to self-governance contracts or compacts. IHS then records the obligations in its accounting system. At some point thereafter, the Department of the Treasury disburses the obligated funds. Fowler Declaration at 2.

Since 1998, IHS has obligated almost all of the funds appropriated by Congress for CSC. These funds have never been sufficient to satisfy all of the requests for CSC made by IHS’s tribal contractors. Therefore, pursuant to published policies, IHS has divided the funding among the various contractors. Fowler Declaration at 3.

In FY 1999, there were apportioned to IHS, in a one-year account, \$203,781,000 for CSC for ongoing self-determination contracts and compacts. OFA records show that \$203,567,506 was obligated by the close of the fiscal year, leaving what appeared to be an unobligated balance of \$213,494. However, the records contained a pen-and-ink change in the amount of \$213,494 for a CSC award that was not posted to the accounting system due to an omission. Thus, the actual unobligated balance at the end of the fiscal year was \$0. Fowler Declaration at 3, Attachments A-F.

The balance in the account fluctuated over the next five years due to administrative recording errors, de-obligations, and refunds. The funds were statutorily withdrawn in September 2004. OFA records show that as of September 30, 2004, when the funds were statutorily withdrawn, the unobligated balance in the account was \$179,539. The unobligated balance included \$37,750 in the Phoenix area, \$5609 in the Oklahoma area, and \$136,178 at IHS headquarters. The balance of undelivered orders on September 30, 2004, was \$4251.93. Fowler Declaration at 3, Attachments G-H.

In FY 2000, there were apportioned \$228,781,000 for CSC in a one-year account. Fowler Declaration at 3, Attachments I-K. OFA records show that of this amount, \$228,700,203 was obligated by the close of FY 2000, leaving an unobligated balance of \$80,797. *Id.* at 4, Attachments L-N. OFA records show that as of September 30, 2005, when the funds were statutorily withdrawn, the unobligated balance in the account was \$137,013.51. The unobligated balance included \$835.51 in the Oklahoma area and \$136,178 at IHS headquarters. The balance of the undelivered orders on September 30, 2005, was \$10,140. *Id.* at 4, Attachments O-P.

Generally, unobligated funds at the end of the fiscal year occur for three reasons: (1) a de-obligation, in which IHS determines that the amount of an obligation not yet disbursed is in excess of the amount that actually should have been obligated; (2) a refund, in which IHS determines that the amount of an obligation that was disbursed was in excess of the amount that actually should have been obligated and disbursed, and IHS has thus recovered the funds; and (3) IHS never obligated the funds. Fowler Declaration at 5.

During this time period, an additional reason caused the amount of unobligated funds to fluctuate. As the result of a pending lawsuit, a United States district court ordered IHS to make payments into the court registry from various CSC accounts, including \$136,178 for FY 1999 and \$136,178 for FY 2000, to secure funding in the event that IHS did not prevail in its appeal. However, IHS ultimately prevailed in the litigation, and on October 15, 2002, the court returned a total of \$1,025,185.78 to IHS, representing payments to the registry and interest. As a result, the original obligations of \$136,178 for FY 1999 and \$136,178 for FY 2000 were de-obligated and the original disbursement of these amounts was credited.

Thus, these amounts were reflected in the fiscal year unobligated balances of September 30, 2004 and 2005, when the funds were statutorily withdrawn. Fowler Declaration at 7-8.

Discussion

The Government has asked the Board to resolve this appeal by granting its motion to dismiss for failure to state a claim upon which relief can be granted. The appellant has countered by filing its opposition to the motion and a motion for summary relief. We address the Government's motion first.

Resolving a dispute on a motion to dismiss for failure to state a claim upon which relief can be granted is appropriate when the facts asserted by the claimant do not entitle it to a legal remedy. *Boyle v. United States*, 200 F.3d 1369 (Fed. Cir. 2000). When considering a motion for failure to state a claim, we must assume all well-pled factual allegations are true and indulge in all reasonable inferences in favor of the nonmovant. *Anaheim Gardens v. United States*, 444 F.3d 1309, 1314-15 (Fed. Cir. 2006) (citing *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). Dismissal for failure to state a claim should not be granted unless it appears beyond doubt that the appellant cannot prove any set of facts in support of its claim that would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

In general, a case can only be dismissed for failure to state a claim for which relief may be granted when that conclusion can be reached by looking solely to the pleadings. In this case, the parties have submitted materials outside the pleadings, so we consider this motion as a motion for summary relief. *Walker Equipment v. International Boundary and Water Commission*, GSBCA 11527-IBWC, 93-3 BCA ¶ 25,954, at 129,074 (citing *Carter v. Stanton*, 405 U.S. 669 (1972)). In resolving the motion, we consider the facts alleged in the light most favorable to the appellant, the non-moving party. *Id.* (citing *Armco, Inc. v. Cyclops Corp.*, 791 F.2d 147, 149 (Fed. Cir. 1986); *Johns-Manville Corp. v. United States*, 12 Cl. Ct. 1, 14-15 (1987)).

ASNA argues that it is entitled to receive, at a minimum, all "unexpended funds" remaining in each appropriation. It contends, however, that the Government is liable in damages for all of the unpaid CSC for each year, a total of no less than \$2,146,762 in FY 1999 and no less than \$525,526 in FY 2000.

"Unexpended funds' are the portion of the appropriation that the agency did not spend during the fiscal year, including both obligated amounts that the agency had not yet disbursed, and unobligated amounts." Government Accountability Office, *Principles of Federal Appropriations Law* (the "GAO Redbook"), vol. I at 5-67 to -68; see also 31 U.S.C.

§ 1551(a). As is evident from the record, however, no unexpended funds remained in the fiscal year accounts with which we are concerned. Thus, in FY 1999, IHS obligated the entire \$203,781,000 that Congress appropriated for CSC, leaving nothing for additional obligations or expenditures. Once IHS fully obligated the amount appropriated by Congress for CSC, any additional obligation or expenditure would have caused IHS to exceed the Congressional cap, in violation of 31 U.S.C. § 1341(a)(1)(A). That statute prohibits an agency from making a disbursement or obligation that exceeds the amount appropriated by Congress.

For FY 2000, Congress appropriated \$228,781,000 to IHS for payment of CSC. According to IHS records, IHS obligated all but \$80,797 of the \$228,781,000 by the close of the fiscal year. The unobligated balance was allotted to the Albuquerque and Oklahoma Area offices. No other unobligated funds remained to pay ASNA's CSC.

However, even assuming that unexpended funds remained to pay ASNA's additional CSC, ASNA submitted its claim for these additional costs after the funds had been returned to the Treasury. Pursuant to 31 U.S.C. § 1552(a), "[o]n September 30 of the 5th fiscal year after the period of availability for obligation of a fixed appropriation account ends, the account shall be closed and any remaining balance (whether obligated or unobligated) in the account shall be canceled and thereafter shall not be available for obligation or expenditure for any purpose." *See also City of Houston, Texas v. Department of Housing and Urban Development*, 24 F.3d 1421, 1426 (D.C. Cir. 1994) ("[I]t is an elementary principle of the budget process that, in general, a federal agency's budgetary authority lapses on the last day of the period for which the funds were obligated. At that point, the unobligated funds revert back into the general Treasury." (citing *West Virginia Association of Community Health Centers v. Heckler*, 734 F.2d 1570, 1576 (D.C. Cir. 1984)); *National Association of Regional Councils v. Costle*, 564 F.2d 583, 587 (D.C. Cir. 1977); *Principles of Federal Appropriations Law*, vol. II, at 5-73 to -75.

ASNA did not file its claim for additional contract support funds for FY 1999 until after the appropriated funds had lapsed. In addition, although it filed its claim for FY 2000 funds on the date that the appropriation finally lapsed, in order to reach that appropriation, ASNA would have had to take immediate action on that same date to preserve the status quo, which may have preserved the funds, by seeking injunctive relief through the appropriate forum. *West Virginia Association*, 734 F.2d at 1576-77 ("Notwithstanding these basic principles of federal budgetary law, an equitable doctrine has been fashioned by the federal courts in recent years to permit funds to be awarded to a deserving plaintiff even after the statutory lapse date, *as long as the lawsuit was instituted on or before that date.*" (emphasis added)); *City of Houston, Texas*, 24 F.3d at 1426; *National Association*, 564 F.2d at 587-88 ("If, however, budget authority has lapsed before suit is brought, there is no underlying

congressional authority for the court to preserve. It has vanished, and any order of the court to obligate public money conflicts with the constitutional provision vesting sole power to make such authorization in the Congress.”). ASNA did not take action to preserve the status quo; thus, the budget authority lapsed without action. Once the budget authority had lapsed, the agency properly returned the funds to the Treasury in compliance with statutory requirements.

ASNA does not dispute that any unexpended funds eventually lapsed at the end of the account period for each fiscal year, but instead reiterates its position that the pre-existing contract obligated IHS to pay full CSC from the available and unexpended funds. ASNA asserts that, under *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631 (2005), as a government contractor, it is entitled to the full panoply of damage remedies afforded by the Contract Disputes Act, 41 U.S.C. §§ 601-613. The remedy available to ASNA, however, is constrained by the mandate that the appellant is entitled to be paid its full CSC requirement only as long as appropriations are legally available to do so. As explained above, ASNA did not submit its claim for additional CSC until after the appropriations had lapsed. Once the appropriations lapsed, the funds were no longer available with which to pay any claims. Accordingly, for the same reasons that we grant the Government’s motion for summary relief, we must deny ASNA’s motion for summary relief, which seeks an award of additional CSC for FYs 1999 and 2000.

Decision

For the foregoing reasons, respondent’s motion for summary relief is granted, and appellant’s motion for summary relief is denied. The appeals are **DENIED**.

JERI KAYLENE SOMERS
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

CANDIDA S. STEEL
Board Judge