



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Office of the General Counsel
Public Health Division
Rockville, MD 20857

November 3, 2006

Andrea Lewis, Recorder
Interior Board of Contract Appeals
801 North Quincy St., Suite 300
Arlington, VA 22203

Re: Appeal of the Arctic Slope Native Association, Ltd.; IBCA Nos. 4794-4803/06

Dear Ms. Lewis:

Enclosed please find a copy of the Indian Health Service's Motion to Dismiss Arctic Slope Native Association, Ltd.'s August 21, 2006 Appeal and Complaint. Also enclosed is an extra copy of the Motion, attachments, and a diskette containing an electronic version of the Motion.

Please contact the undersigned counsel at 301.443.0405 if you have any questions or perceive any problem.

Sincerely,

A handwritten signature in black ink, appearing to read "Sean Dooley", written over a horizontal line.

Sean Dooley
Senior Attorney, Public Health Division
Office of the General Counsel

c.c. Lloyd Benton Miller, Esq.
Melanie Baca Osborne, Esq. ✓

THE DEPARTMENT OF THE INTERIOR
BOARD OF CONTRACT APPEALS

ARCTIC SLOPE NATIVE ASSOCIATION, LTD.)	
)	
Appellant,)	
)	
)	IBCA Nos. 4794-4803/06
)	
MICHAEL O. LEAVITT, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; CHARLES GRIM, DIRECTOR, INDIAN HEALTH SERVICE; UNITED STATES OF AMERICA)	ISDA Contract No. 243-96-6025
)	
Appellees.)	ISDA Compact No. 58G980054
)	

APPELLEE MOTION TO DISMISS

INTRODUCTION

Pursuant to 43 C.F.R. § 4.105, Appellee Indian Health Service (IHS) moves to dismiss IBCA Nos. 4794-4803/06, filed by Arctic Slope Native Association, Ltd. (ASNA or Appellant) for lack of jurisdiction. First, Appellant's claims for fiscal years (FY) 1996, 1997, and 1998 are barred by the Contract Disputes Act's statute of limitation, 41 U.S.C. § 605(a). Second, the Congressionally-imposed cap placed on contract support costs beginning in FY 1998 bars recovery for Appellant's claims for FY 1998, FY 1999, and FY 2000.

STATUTORY BACKGROUND

IHS has as its principal mission the provision of health care to American Indians and Alaska Natives throughout the United States. See Lincoln v. Vigil, 508 U.S. 182, 185 (1993). IHS operates under the authority of the Snyder Act, which authorizes it to "expend such moneys as Congress may from time to time appropriate" for the conservation of the health of Indians. See 25 U.S.C. § 13 (providing that the Bureau of Indian Affairs (BIA) will expend funds as appropriated for, inter alia, the "conservation of health" of Indians); 42 U.S.C. § 2001(a) (transferring to IHS BIA's responsibility for Indian health care).

The Indian Self-Determination and Education Assistance Act. In 1975, Congress enacted the ISDA, which was designed to encourage Indian self-government by permitting the transfer of certain federal programs, including health care programs, to tribal governments and other tribal organizations. See 25 U.S.C. §§ 450, 450a. The ISDA directs the Secretary of HHS, upon the request of an Indian tribe, to enter into "self-determination contract[s]." See id. § 450f(a)(1); id. § 450b(i) (defining "Secretary"). A self-determination contract is a contract for "the planning, conduct and administration of programs or services which are otherwise provided [by IHS] to Indian tribes and their members pursuant to Federal law." Id. § 450b(j).

Also relevant to this Appeal, the ISDA provided for the Secretary of HHS to conduct a research and demonstration project know as the Tribal Self-Governance Project formerly reprinted at 25 U.S.C. § 450f note (1999) (repealed by Pub. L. No. 106-260 § 10, 711 Stat. 734 (2000)). Under the Tribal Self-Governance Project, selected tribes entered into Compacts of Self-Governance rather than contracts. For the purposes of this motion, any differences between contracts and compacts are irrelevant.

Funds provided to tribes under ISDA include two components--the "Secretarial amount" and contract support costs ("CSC"). The Secretarial amount includes expenses for a broad array of functions and activities that support the delivery of, in the case of IHS, health care services. See id. § 450j-1(a)(1) (the "amount of funds . . . shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs"). Contract support costs can be broken down into three categories. See id. § 450j-1(a)(3)(A). First, direct CSC consists of administrative costs of the contracted-for program, such as unemployment taxes or workers' compensation insurance. See id. § 450j-1(a)(3)(A)(i); id. § 450b(c). Second, in the initial year of a contract, CSC includes "startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis." Id. § 450j-1(a)(5). Finally, and most relevant here, indirect CSC consists of administrative costs that are shared by several different programs or services. See id. § 450j-1(a)(3)(A)(ii); id. § 450b(f). The ISDA defines indirect CSC as "costs incurred for a common or joint purpose benefiting more than one contract objective, or which are not readily assignable to the contract objectives specifically benefited without effort disproportionate to the results achieved." Id.

The ISDA permits payment of only those CSC that are reasonable in light of the activities to be conducted. See 25 U.S.C. § 450j-1(a)(2). Congress also provided that "[n]otwithstanding any other provision in [the ISDA], the provision of funds under [the ISDA] is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization" Id. § 450j-1(b); see also id. § 450j(c) ("The amounts of such [self-determination] contracts shall be subject to the availability of appropriations.").

IHS's funding of indirect CSC under individual contracts and compacts, which is at issue in this Appeal, is based on a variety of factors, including: the provisions of the ISDA; the specific terms of each negotiated ISDA contract or compact; Appellant annual indirect cost rate, in the years that it had one; the amount of funding made available by Congress in the annual IHS appropriation; and IHS policies and procedures for the calculation and distribution of indirect CSC.

Appropriations Acts. Congress appropriates funds for IHS health care programs through an annual lump-sum appropriation for "Indian Health Services." See, e.g., Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, Tit. II, 110 Stat. 3009-212, 3009-215. IHS allocated its CSC funds in those years in accordance with guidelines established in consultation with Tribes, in anticipation of funding shortfalls for CSCs under those appropriations.

Starting in FY 1998, Congress explicitly limited the amount that IHS could expend on CSC by imposing a "cap" directly in the appropriations act. For example, in FY 1998, Congress appropriated \$1,841,074,000, together with various collections, to IHS to carry out its mandate under certain health care statutes, but provided that "not to exceed \$168,702,000 shall be for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts or grants or compacts" Dep't of the Interior & Related Agencies Appropriations Act, Pub. L. No. 105-83, 111 Stat. 1543, 1582-834 (1997). The phrase "not to exceed" is a standard phrase Congress uses to place a limit on the amount of funds an agency may spend on a particular program. See Principles of Federal Appropriations Law (GAO Redbook), Volume II, Chapter 6-8 (2nd ed. 1992) ("[t]he most effective way to establish a maximum (but not minimum) earmark is by the words 'not to exceed' or 'not more than' ... These are all phrases with

well-settled plain meanings."); see also Thomson v. Cherokee, 334 F.3d 1075, 1084-85 (Fed. Cir. 2003) ("Congress generally uses standard phrases to impose a statutory cap.").

The Contract Disputes Act. Relevant to this Motion, the ISDA also provides that the CDA "shall apply to self-determination contracts." 25 U.S.C. § 450m-1(d). The CDA itself is found at 41 U.S.C. §§ 601 et seq. and provides a mandatory administrative exhaustion scheme applicable to contract disputes between government contractors and the United States. The first step in the CDA process is that "[a]ll claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for decision." 41 U.S.C. § 605(a); see also 25 C.F.R. §§ 900.215-900.230 (explaining the exhaustion requirement for contract dispute claims brought under the ISDA). The CDA requires that each claim by a contractor against the government relating to a contract shall be submitted within six years after the accrual of the claim. 41 U.S.C. § 605(a). For claims under \$100,000, the contracting officer shall issue a decision within 60 days if the contractor requests that a decision be rendered within that period, and for claims over \$100,000, the contracting officer shall issue a decision within 60 days or notify the contractor when a decision will be issued (and it must be within a reasonable time, given the nature of the claim). See 41 U.S.C. § 605(c). The CDA explains further that "[a]ny failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim" Id. § 605(c)(5).

The ISDA contractor thereafter has the option of appealing a contracting officer's decision to: (1) the Interior Board of Contract Appeals (within 90 days of the decision), see id. § 606; 25 U.S.C. § 450m-1(d), (2) the United States Court of Federal Claims (within 12 months of a decision), see 41 U.S.C. § 609, or (3) a federal district court (within 12 months of a decision),

see id. § 609; 25 U.S.C. § 450m-1(a). Finally, the CDA provides that “contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, Board or Government agency, unless an appeal or suit is timely commenced as authorized by this chapter.” 41 U.S.C. § 605(b).

STATEMENT OF FACTS

The Arctic Slope Native Association, Ltd. (Appellant) is a tribal organization organized and authorized by several federally-recognized tribes in Alaska. In January 1995, Appellant submitted a proposal to the Indian Health Service (IHS) Alaska Area Office to assume operation of the Barrow Public Health Service Hospital. Appeal File 3:49. The Proposal, revised several times, provided for a four phased transition beginning January 18, 1996, under which Appellant would gradually assume responsibility for programs under the Contract, throughout FY 1996 and FY 1997. See Appeal File 3:69. Appellant continues to operate public health facilities and provides public health services to IHS beneficiaries pursuant to agreements entered into with the Secretary of HHS under the ISDA. (Compl. ¶ 6.).

At all relevant times during the years at issue in this Appeal, Appellant was either a party to a self-determination contract under Title I of the ISDA, or was a party to a self-governance compact under Title III of the ISDA. These ISDA agreements provide that Appellant will deliver health care services to Alaska Natives that would otherwise be provided to such individuals by the Indian Health Service. All of Appellant's AFAs are based on the Government's fiscal year.

Relevant to this Appeal, Appellant has already submitted claims under the CDA with respect to the AFAs at issue in this Appeal. We believe it is important that the Board know that

Appellant has also already agreed to a final accounting and settled all payments due under those AFAs. On September 14, 2000, Appellant requested a contracting officer's decision for unpaid amounts due under its AFAs in FY 1996, FY 1997, FY 1998, and FY 1999. In a letter dated September 28, 2000, Appellant rescinded its claims for FY 1998 and 1999, feeling that those two years could be settled without inclusion in the claim, but continued to pursue claims for FY 1996 and FY 1997. Appeal File 25:23. Subsequent discussions between the parties also resolved the FY 1996 and FY 1997 claims without the need for litigation. On January 23, 2001, Eben Hopson Jr, on behalf of Appellant, signed settlements concurring on final amounts due under AFAs for FY 1996, FY 1997, FY 1998, FY 1999, and FY 2000. Appeal File 25:14,15.¹

In a letter dated January 29, 2001, Appellant rescinded all claims for payment under its letter dated September 28, 2000. Appeal File 25:24. Appellant stated in this letter that it was "satisfied that the settlement offered by the Alaska Area Office to close this claim fairly represents amounts owed to ASNA, Ltd." Id. Appellant appears to have taken no further action with respect to these AFAs between January 2001, when it concurred that no additional payment was due under the AFAs, and September 30, 2005, when it filed claims for additional funding under those very same AFAs.

In a letter dated September 30, 2005, Appellant requested a contracting officer's decision for unpaid CSC due in FY 1996. Appeal File 1:1.

In another letter dated September 30, 2005, Appellant requested a contracting officer's decision for unpaid CSC due in FY 1997. Appeal File 1:6.

In another letter dated September 30, 2005, Appellant requested a contracting officer's decision for unpaid CSC due in FY 1998. Appeal File 1:11.

¹ The settlements included all funds under the AFAs except disputed FY 1998 Medicare/Medicaid funding.

In another letter dated September 30, 2005, Appellant requested a contracting officer's decision for unpaid CSC due in FY 1999. Appeal File 1:16.

In another letter dated September 30, 2005, Appellant requested a contracting officer's decision for unpaid CSC due in FY 2000. Appeal File 1:21.

In a letter dated November 23, 2005, Appellee requested that Appellant provide it with explanation for the amounts claimed, including documentation to support such claims.

In a letter dated January 27, 2006, Appellant's response to the November 23 request was that it "estimated" amounts due based on its legal theories. Appeal File 11:5. Appellant again failed to provide any supporting documentation to substantiate its claims and did not cite to any contract provision which would obligate the Government to award additional funding.

This current case was initiated by the filing of an Appeal and Complaint dated August 21, 2006. Despite failing to provide information requested by the contracting officer to render decisions on each claim, Appellant styled its Appeal as contract claims stemming from ten deemed denials by the contracting under the CDA. In its Complaint, Appellant challenges the amount of contract support cost funding it received from IHS under its ISDA contracts in fiscal years dating back to 1996. (Compl. ¶ 1).

ARGUMENT

I. THE BOARD LACKS SUBJECT MATTER JURISDICTION OVER APPELLANT'S FY 1996, FY 1997, AND FY 1998 CLAIMS.

Appellant's failure to meet the statutory deadlines for filing a claim under the CDA with respect to its FY 1996, FY 1997, and FY 1998 AFAs requires dismissal of those claims for lack of subject matter jurisdiction. The Supreme Court has unequivocally stated that a court's jurisdiction is a threshold inquiry that should be resolved before proceeding to the merits of an

action. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998) ("The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception.") (citations and internal quotation marks omitted). "Without jurisdiction the court cannot proceed at all in any cause." Id. at 94; see also United States ex rel. Grynberg v. Praxair, Inc., 389 F.3d 1038, 1048 (10th Cir. 2004) ("Questions of jurisdiction, of course, should be given priority--since if there is no jurisdiction there is no authority to sit in judgment of anything else.") (quoting Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 778 (2000)); Payton v. USDA, 337 F.3d 1163, 1167 (10th Cir. 2003) ("The jurisdictional issue must be resolved first.").

A. The Board Lacks Jurisdiction Over Claims Not Timely Filed Under the CDA.

A party seeking to sue the United States bears the burden of demonstrating that a specific statutory provision waives the government's sovereign immunity from suit. See Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994); United States v. Sherwood, 312 U.S. 584, 586-87 (1941); see also Weaver v. United States, 98 F.3d 518, 520-521 (10th Cir. 1996). The United States, as a sovereign, is immune from suit unless it consents to be sued. See United States v. Mitchell, 445 U.S. 535, 538 (1980) ("[T]he terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit...[a] waiver of sovereign immunity cannot be implied but must be unequivocally expressed.") (internal citations and quotations omitted).

The ISDA directs that, for all claims by contractors against the government for monetary relief, the CDA applies. See 25 U.S.C. §§ 450m-1(a), (d). Thus, the ISDA conditions its waiver of sovereign immunity for monetary claims against the government on the application of the CDA. See id.; see also Demontiney v. United States, 255 F.3d 801, 806 (9th Cir. 2001) (explaining limited waiver of sovereign immunity found in the ISDA); Tunica-Biloxi Tribe v.

United States, No. 02-2413, slip op. at 8-11 (D.D.C. December 9, 2003) (explaining jurisdictional prerequisite to litigate breach of an ISDA contract) (Attached as Exhibit A).

The CDA itself operates as a limited waiver of sovereign immunity for claims arising under contracts with the United States. See 25 U.S.C. §§ 450m-1(a), (d). In waiving sovereign immunity under the CDA, however, Congress put specific conditions on that waiver. First of all, "[a]ll 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." 41 U.S.C. § 605(a). Most relevant here, the CDA also requires that each claim by a contractor against the government relating to a contract shall be submitted within six years after the accrual of the claim. Id. "A contracting officer's decision... shall be final and conclusive and not subject to review by any forum, Board, or Government agency, unless an appeal or suit is timely commenced as authorized." 41 U.S.C. § 605(b). The CDA has very explicit timeliness requirements, see 41 U.S.C. §§ 605, 606, 607, 608, 609, a failure to follow of which renders a reviewing court without subject matter jurisdiction. Because Congress has limited the Court's jurisdiction over CDA claims by such conditions, these conditions cannot be waived or excused. See, e.g., Borough of Alpine v. United States, 923 F.2d 170, 172 (Fed. Cir. 1991) (refusing to read exceptions or tolling provisions into the CDA that Congress did not authorize); McNeil v. United States, 508 U.S. 106, 111 (1993) (declining to excuse a violation of the specific statutory administrative exhaustion process by stating, inter alia, "[w]e are not free to rewrite the statutory text."); McCarthy v. Madigan, 503 U.S. 140, 144 (1992) ("Where Congress specifically mandates, exhaustion is required.").

- B. Appellant's FY 1996, FY 1997, and FY 1998 Claims Were Not Filed Within the Six-Year Period Mandated by the Contract Disputes Act.

Any claim for breach of an ISDA contract awarded on or after October 1, 1995, is subject to the administrative statute of limitations provided in 41 U.S.C. § 605(a), which states: "[e]ach claim by a contractor against the government relating to a contract...shall be submitted within six years after accrual of the claim." 41 U.S.C. § 605(a). A tribal contractor's claim for breach of contract related to an ISDA contract or compact entered into on or after October 1, 1995, accrues on the last day of the applicable fiscal year, and would be barred as untimely six years later. See 31 U.S.C. § 1102; Alder Terrace, Inc. v. United States, 161 F.3d 1372, 1377 (Fed. Cir. 1998) ("A claim first accrues . . . 'when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action.'") (citation omitted); Oceanic Steamship Co. v. United States, 165 Ct. Cl. 217, 225 (Ct. Cl. 1964) ("Where a claim is based upon a contractual obligation of the Government to pay money, the claim first accrues on the date when the payment becomes due and is wrongfully withheld in breach of the contract"). ISDA funding is distributed throughout the fiscal year under annual funding agreements and may be distributed up until the last day of the fiscal year.

Regarding Appellant's FY 1996, FY 1997 and FY 1998 contracts, the table below shows when Appellant would have had to file its claims:

Contract Year	Last Day of Contract	Claim Filing Deadline	Actual Filing Date
	Effective Period		
FY 1996	September 30, 1996	September 30, 2002	September 30, 2005
FY 1997	September 30, 1997	September 30, 2003	September 30, 2005
FY 1998	September 30, 1998	September 30, 2004	September 30, 2005

It was not until well after the six-year limitations period lapsed that Appellant filed the claims for FY 1996, FY 1997, and FY 1998 which are now the basis of this Appeal. Accordingly,

