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UNITED STATES CIVILIAN BOARD OF CONTRACT APPEALS ²⁰⁰⁸ FEB 24 A. 11: 45

ARCTIC SLOPE NATIVE
ASSOCIATION, LTD.,

Appellant,

v.

DEPARTMENT OF HEALTH AND
HUMAN SERVICES,

Respondent.

CIVILIAN BOARD OF
CONTRACT APPEALS

CBCA No. 294-ISDA through 297-ISDA

**ARCTIC SLOPE NATIVE ASSOCIATION'S (ASNA) MEMORANDUM
IN RESPONSE TO IHS'S MOTION TO DISMISS
AND
IN SUPPORT OF ASNA'S CROSS-MOTION FOR SUMMARY JUDGMENT
AWARDING \$183,790.93 IN CBCA NOS. 294-ISDA THROUGH 295-ISDA,
AND \$147,153.51 IN CBCA NOS. 296-ISDA THROUGH 297-ISDA**

INTRODUCTION

By Order entered July 28, 2008, this Board held that the government may be liable to Appellant Arctic Slope Native Association (ASNA) under ASNA's fiscal year 1999 contract "if . . . IHS could have provided ASNA with additional funding for [contract support costs] without expending more than \$203,781,000 for CSC in FY 1999 . . . up to the amount of the unexpended funds." Similarly, the Board also held that the government may be liable under ASNA's fiscal year 2000 contract to the extent IHS had "unexpended funds" from that year's CSC appropriation of \$228,781,000.¹

¹ See CBCA Order on Mot. to Dismiss at 8 (July 28, 2008) ("Order") ("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

In a new affidavit, the Director of IHS's Office of Finance and Accounting now concedes that IHS had "unexpended funds" in each of these two years. IHS concedes that these unexpended funds totaled \$183,790.93 in FY1999 and \$147,153.51 in FY2000. *Infra* at 4-5. Accordingly, under the law of this case, and because ASNA's contract underpayments far exceeded these limited sums, ASNA now moves for entry of a final judgment awarding damages in the amounts of these "unexpended funds" for 1999 and 2000. For this same reason, ASNA opposes IHS's motion to dismiss these portions of ASNA's claims.

In this Memorandum ASNA responds to IHS's Motion to Dismiss by addressing the presence at all relevant times (and thus the legal availability at those times) of certain unexpended funds in the FY1999 and FY2000 CSC appropriations. Also, in this Memorandum ASNA addresses its new Cross-Motion for Summary Judgment—prepared in light of the Board's July 28, 2008 Order—seeking an award of damages covering that portion of ASNA's claims that arose from IHS's failure to pay ASNA those "unexpended funds." In support of that cross-motion, ASNA incorporates all materials submitted in support of its original summary judgment motion, plus the Supplemental Statement of Undisputed Facts that accompanies this Memorandum.² ASNA's

one upon which we could grant relief.") and 9 ("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.")

² See [ASNA's] Memorandum in Opposition to Appellees' Motion to Dismiss and in Support of Appellant's Motion for Partial Summary Judgment at 12-13, 35-52 (filed Nov. 20, 2006); [ASNA's] Reply Memorandum in Support of Appellant's Motion for Partial Summary Judgment at 6-12 (filed Feb. 9, 2007); [ASNA's] Notice of Additional Authority (filed June 19, 2007); Appellant Arctic Slope Native Association's Response to Appellees' Notice of Additional Authority (filed June 28, 2007); [ASNA's] Notice of Filing Statement of Uncontested Facts in Support of Appellant's Motion for Partial Summary Judgment Addressing the Government's Liability Under the Complaint's First Cause of Action (filed Sept. 27, 2007); and Appellant's [ASNA's] Reply to Notice of Supplemental Authority (filed Nov. 13, 2007).

objective is to now bring this protracted proceeding to a conclusion so that both parties can proceed with their inevitable appeals—IHS challenging the Board's conclusion that it bears some liability in FY1999 and FY2000, and ASNA challenging the Board's conclusion that such liability is limited to "unexpended funds" from the relevant appropriations.

As for ASNA's additional contract underpayments, the record reflects (and Dr. David Mather's affidavit accompanying this Memorandum now attests) that ASNA suffered considerably larger underpayments in its contract support cost requirements than \$183,790.93 in FY1999 and \$147,153.51 in FY2000. But the Board's July 28, 2008 Order forecloses any additional claims beyond the limited "unexpended funds" that were left over from each appropriation.

With respect to ASNA's claims for damages resulting from underpayments in excess of the amount of "unexpended funds," ASNA respectfully disagrees with the Board's conclusion that the government's liability is limited to the "unexpended funds" remaining in each appropriation. Rather, ASNA contends that the government is liable in damages for all of the unpaid CSCs each year—a total of no less than \$2,146,762 in 1999 and no less than \$525,526 in 2000. The full payment of these CSC amounts each year was a contractual obligation under both the Indian Self-Determination Act and the terms of ASNA's contracts. *See, e.g.*, 25 U.S.C. § 450j-1(g). ASNA submits that under settled appropriations law over \$200 million in unrestricted lump-sum CSC appropriations were legally available each year to pay ASNA's contract support costs in full, and that, accordingly, ASNA's contract rights could not be reduced merely because each appropriation turned out to be "insufficient" to pay "all" the contracts the agency had awarded. *See Cherokee Nation v. Leavitt*, 543 U.S. 631, 637-638, 640 (2005) (emphasis in original).³ Nonetheless, under

³ *See also* Appellant's [ASNA's] Supplemental Mem. in Resp. to the Board's Order of January 11, 2008 at 8-19 and earlier briefs cited *id.* at 8 n.10 (filed Feb. 13, 2008).

the law of this case established in the Board's July 28, 2008 Order, ASNA recognizes that its claims arising out of additional CSC underpayments in excess of each appropriation's "unexpended funds" are now subject to dismissal pursuant to IHS's Motion. Thus, ASNA respectfully reserves its right to appeal the Board's Order and the Board's anticipated dismissal of these additional damage claims.

ARGUMENT

I. IHS HAD UNEXPENDED FUNDS FROM ITS CSC APPROPRIATIONS TOTALING \$183,790.93 IN FY1999 AND \$147,153.51 IN FY2000.

IHS's motion asserts that "IHS obligated the entire \$203,781,000 that Congress appropriated for CSC in FY 1999, leaving \$0 available for additional obligations or expenditures."⁴ At one moment in time this may have been technically correct. But it is not the full story, and thus is not fully true.

As IHS's own affiant, OFA Director Elizabeth Fowler, admits—but IHS's Motion never discloses—the full story is that for five years IHS carried on its books the unexpended sum of \$183,790.93 from its FY1999 CSC appropriation, and that these unexpended funds eventually lapsed back to the Treasury unspent.⁵ Although IHS's Motion recites that these funds were initially

⁴ Respondent Agency's Leave for Mot. to Dismiss and Mot. to Dismiss at 5 ("IHS Mot. to Dismiss").

⁵ Fowler Decl. ¶ 10 ("The balance in this account fluctuated over the next five years due to administrative and recording errors, deobligations, and refunds, and 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 balance of undelivered orders on September 30, 2004, was \$4,251.93."). Thus, the FY1999 unexpended funds in the amount of \$183,790.93 are comprised of: (1) the \$179,539.00 shown as an "Unobligated Balance" as of September 30, 2004; and (2) the \$4,251.93 shown as "Undelivered Orders" as of September 30, 2004. *See id.* and Attachment G, AR 46 at 31. The Fowler Declaration explains that "Undelivered Orders" which existed at the close of the account likely occurred because "staff at the IHS Area Office may have simply neglected to deobligate funds" (an action which would have reclassified such funds as "unobligated"). Fowler Decl. at ¶ 14.

“obligated” and thus were initially slated to be spent, IHS’s Motion never discloses that shortly afterward these same funds were “deobligated” and thereafter never paid to anyone. *Compare, e.g.,* IHS Mot. to Dismiss at 5-6 with Fowler Declaration ¶ 19a. Based upon the Fowler Declaration submitted by IHS, ASNA hereby stipulates that IHS had \$183,790.93 in “unexpended funds” from its FY1999 CSC appropriation.

Based upon the same agency declaration, ASNA also stipulates that IHS had \$147,153.51 in “unexpended funds” from its FY2000 CSC appropriation, the sum that Ms. Fowler states lapsed to the Treasury from that appropriation.⁶

II. IHS COULD HAVE USED ITS UNEXPENDED FUNDS TO PAY ASNA.

IHS notes that the FY1999 and FY2000 CSC appropriations were one-year funds that could only be spent to satisfy contract obligations incurred for each fiscal year and before each fiscal year expired. IHS Mot. to Dismiss at 4 (in part, quoting 31 U.S.C. § 1553(a)) and 8. IHS also notes that “unexpended CSC funds . . . remain available for five years [after the close of the fiscal year] for liquidation of obligations incurred during the fiscal year of the appropriation” *Id.* at 5 (citing § 1553(a)). On these basic points the parties agree.

But IHS errs in applying these settled principles to the facts presented here.

⁶ Fowler Decl. ¶ 13 (“The balance in this account fluctuated over the next five years due to administrative and recording errors, deobligations, and refunds, and the funds were statutorily withdrawn in September 2005. 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 balance of undelivered orders on September 30, 2005, was \$10,140.”) *See also id.* at Attachment O, AR 46 at 91. These two sums total \$147,153.51. The fact that \$80,797 of the unobligated balance was identified as of September 30, 2000, with the remaining funds identified later (Fowler Decl. at ¶ 12), is of no moment. Either way, these were unexpended funds that IHS could lawfully have paid ASNA prior to the funds lapsing to the Treasury on September 30, 2005.

Curiously, with regard to FY1999 IHS writes as if the entire appropriation had actually been expended, so that nothing at all was left, asserting that “any additional obligation or expenditure would have caused IHS to exceed the Congressional cap and violate Federal law.” IHS Mot. to Dismiss at 6 (emphasis added). But as the Fowler Declaration makes plain, that is demonstrably wrong: IHS had \$183,790.93 remaining on hand in unexpended funds. *Supra* at 4-5. It follows that the “expenditure” of these funds to pay ASNA would not have “caused IHS to exceed the Congressional cap and violate Federal law.” IHS offers no reason for avoiding its duty to pay these funds to ASNA in satisfaction of ASNA’s FY1999 contract obligation.

As for FY2000, IHS changes course, acknowledging that at least some unexpended funds did remain that year. IHS Mot. to Dismiss at 7 (noting “it appears that IHS did not obligate the full amount of the FY 2000 CSC appropriation . . .”). But here, IHS then relies on a faulty premise to contest its liability: it asserts that it could not pay ASNA these unexpended funds either, because it could not undertake a new obligation “after the close of FY 2000.” *Id.* at 8. The problem with this premise is that IHS would not have been undertaking a “new” obligation had it paid ASNA, for there was an existing contractual obligation in FY2000 to pay ASNA its full CSC requirement, under a contract document that was executed by the parties in September 1999, over one year before the FY2000 appropriation lapsed on September 30, 2000.⁷ The duty to pay—the contract obligation—was a direct product of this existing contract and of a statute incorporated into the contract that imposed upon IHS a legal duty to “add to the contract the full amount” of contract support costs required by 25 U.S.C. § 450j-1(a)(2), subject only to the availability of appropriations

⁷ FY2000 Annual Funding Agreement, Sept. 30, 1999 (AR 10).

to do so. 25 U.S.C. §§ 450j-1(b) (availability clause) and (g). Indeed, the FY2000 Appropriations Act (like the FY1999 Act) expressly provided that:

funds made available to tribes and tribal organizations through contracts, grant agreements, or any other agreements or compacts authorized by the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450), shall be deemed to be obligated at the time of the grant or contract award⁸

There was thus no need for a new contract obligation. Indeed, were it otherwise this Board would not have ruled in its July 28, 2008 Order that IHS could be liable to ASNA if IHS had “unexpended funds;” instead, the Board would have ruled that no liability exists regardless of the presence of unexpended funds. So the Board has already rejected the very argument that IHS now advances anew.

Another appellant, the Metlakatla Indian Community, in parallel litigation before the Board involving the identical issue, has addressed in detail just how misguided IHS’s contrary argument is, an analysis we incorporate by reference in the interest of brevity.⁹ A recent district court opinion perhaps said it best in rejecting the precise same argument:

In his brief, the Secretary asserts that “ISDA does not mandate the payment of a specific amount of indirect CSC,” Def.’s Mem. at 16, and “[i]t is the contracts themselves that create an entitlement to CSC.” *Id.* at 17. These statements represent a very troubling misapprehension of the statute. ISDA mandates the payment of *full* indirect CSC and ISDA itself establishes that entitlement. . . . The Secretary is not free to negotiate hard and require the Tribe to accept less than full funding if, as seems likely, the Secretary has more money available. See Def.’s Mem. at 18 n.6

⁸ Fowler Decl. Attachment I, AR 46 at 60-61 (reproducing excerpt of public law) (emphasis added); see also Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681-278 (1998); Consolidated Appropriations Act, 2000 Pub. L. No. 106-113, 113 Stat. 1501A-181 - 1501A-182 (1999).

⁹ See Metlakatla Indian Community’s Response to IHS Amended Motion for Summary Relief on FY1999 Appeal, at 8-12 (filed Jan. 30, 2009 in *Metlakatla Indian Cmty. v. Indian Health Serv.*, CBCA Nos. 181-ISDA, 279-ISDA through 282-ISDA).

“because IHS has already obligated all but minor amounts of the capped funds” for the years between 1998 and 2004, “no additional CSC funding can be awarded to Plaintiff for those years”). Although the Secretary cannot disburse funds he does not have or amounts in excess of limitations set by Congress, he still has the obligation to fund indirect CSC to the greatest extent possible inasmuch as the statutory promise is full funding.

Menominee Indian Tribe of Wis. v. United States, 539 F. Supp. 2d 152, 155 (D.D.C. 2008)

(additional citations omitted) (second emphasis added).¹⁰

In short, the notion that IHS could not pay these unexpended funds to ASNA because doing so was not in service of an existing contract obligation is a red herring. In this contract setting, *City of Houston v. Dep’t of Housing & Urban Dev.*, 24 F.3d 1421 (D.C. Cir. 1994) (cited in IHS Mot. to Dismiss at 8) is of no help to IHS. *Houston* involved a municipal grant recipient that did not have an existing contract obligation to be paid. Understandably in that situation, the lapse of the fiscal year would indeed place the appropriation beyond reach. For the same reason—the City of Houston being a disappointed grantee rather than a contractor—the City had no remedy at law once the fiscal year ended. In contrast, a government contractor who goes unpaid has the full panoply of damage remedies afforded by the Contract Disputes Act, 41 U.S.C. §§ 601-613, a fact one would have thought the Supreme Court put to rest in this very context in *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005).¹¹

¹⁰ *Cherokee Nation* is instructive. There, the Supreme Court reversed the Tenth Circuit’s ruling in favor of IHS and held the government liable for underpaying an FY1997 contract, even though IHS had more than fully paid the bare face amount of the CSCs mentioned in the contract. That is because, without regard to this lesser amount, the Cherokee Nation was entitled to be paid its full CSC requirement so long as appropriations were legally available to do so. See Appellant’s [ASNA’s] Reply to Respondents’ Statement of Genuine Issues at 4-5 (filed Nov. 13, 2007) (explaining the record in *Cherokee Nation*).

¹¹ See also *Star-Glo Associates, LP v. United States*, 414 F.3d 1349, 1355 (Fed. Cir. 2005) (noting greater latitude for the government when, unlike *Cherokee Nation*, “the government is not

Thus in FY2000, just as was the case in FY1999, a pre-existing contract was in place that required IHS to pay full contract support costs out of the agency's appropriation, subject only to the availability of appropriations to do so. And under the law of this case the existence of that contractual obligation each year was sufficient to impose a requirement upon IHS to pay ASNA from these available and unexpended funds.

III. ASNA IS ENTITLED TO A DAMAGES AWARD OF \$183,790.93 IN FY1999 AND \$147,153.51 IN FY2000, DUE TO IHS'S FAILURE TO PAY ASNA THESE ADDITIONAL CONTRACT SUPPORT COSTS FROM IHS'S AVAILABLE BUT UNEXPENDED APPROPRIATIONS.

Attached to this Memorandum is an affidavit of David Mather, PhD., who served as an expert in the *Cherokee* litigation, and who has previously submitted an affidavit in this case. Dr. Mather's Affidavit explains that in FY1999 ASNA suffered contract support cost shortfalls under its contract that far exceeded the \$183,790.93 that was legally available in FY1999 to pay ASNA from IHS's unexpended funds. Mather Affid. at ¶¶11 and 17. Similarly, Dr. Mather's Affidavit explains that in FY2000 ASNA again suffered CSC shortfalls under its contract that far exceeded the \$147,153.51 that was legally available that year to pay ASNA from IHS's unexpended funds. Mather Affid. at ¶¶21 and 27. (Putting aside additional damage claims, Dr. Mather calculates the total CSC underpayments ASNA suffered in those two years as no less than \$2,146,762 and \$525,526, respectively. Mather Affid. at ¶¶17 (FY1999) and 27 (FY2000).) Accordingly, under the law of the case established in this Board's July 28, 2008 Order, ASNA is entitled to a damages

seeking to limit contractual liability, but to limit benefit payments"); *Greenlee County, AZ v. United States*, 487 F.3d 871, 879 (Fed. Cir. 2007) ("PILT [the Payment in Lieu of Taxes Act], like the statute in *Star-Glo*, involves a benefits program not a contract, and 'there is greater room' in benefits programs to find the government's liability limited to the amount appropriated") (quoting *Star-Glo* and distinguishing contracts at issue in *Cherokee Nation*).

award in the amounts of \$183,790.93 (FY1999) and \$147,153.51 (FY2000), plus interest under 41 U.S.C. § 611 of the Contract Disputes Act from September 30, 2005 (the date of ASNA's claim) to the date of payment.

Respectfully submitted this 24th day of February 2009.

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