

THE GENERAL SERVICES ADMINISTRATION
CIVILIAN BOARD OF CONTRACT APPEALS

ARCTIC SLOPE NATIVE ASSOCIATION,
LTD.

Appellant,

v.

INDIAN HEALTH SERVICE; UNITED
STATES DEPARTMENT OF HEALTH
AND HUMAN SERVICES

Respondents.

CBCA 294-ISDA through 297-ISDA

IHS' REPLY IN SUPPORT OF ITS MOTION TO DISMISS

Appellant, Arctic Slope Native Association ("ASNA") misconstrues key appropriations principles, the law and the facts to reach an erroneous conclusion that it is entitled to additional payments for Contract Support Costs ("CSC"). ASNA's arguments are without merit and therefore dismissal is an appropriate option.

Fundamental principles of appropriations law foreclose ASNA's claims for additional contract support cost ("CSC") funding in fiscal years ("FY") 1999 and 2000. First, the law prohibits an agency from exceeding the amount of a Congressional appropriation, forbidding the agency from making either an obligation or an expenditure that would cause the agency to exceed the appropriation. 31 U.S.C. § 1341(a)(1)(A). Second, the law prohibits an agency from entering into a new obligation after the period of the appropriation's availability, which is the end

of the FY for a one-year appropriation. 31 U.S.C. § 1553(a). Both of these fundamental limitations foreclose the possibility that the Indian Health Service (“IHS”) could have obligated additional CSC funding to ASNA.

Under the Civilian Board of Contract Appeal’s July 28, 2008 ruling (“Decision”), ASNA’s FY 1999 and FY 2000 “claim[s] for additional funding would not be [claims] upon which [the Board] could grant relief” if paying such funding would have caused IHS to exceed the applicable appropriations caps. Decision at 9. The Board also stated that if IHS could have provided additional CSC in FY1999 and FY2000 without exceeding the cap, then ASNA *“might be able to establish”* a right to additional CSC funding “up to the amount of the unexpended funds.” *Id.* (emphasis added). ASNA cannot establish that it has any right to additional CSC because paying additional CSC funding to ASNA for FY 1999 and FY 2000 would have caused IHS to exceed the Congressional limits on CSC funding. Therefore, dismissal is appropriate in this Appeal.

Moreover, ASNA gets the facts wrong in support of its 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 filed February 24, 2009 (“Memorandum” or “Cross-Motion”). ASNA has made significant errors with respect to the calculation of its CSC claims. Therefore, even if the Board concluded that additional CSC was available, ASNA has failed to establish that it may receive any additional funds. In response to ASNA’s Cross-Motion, IHS incorporates all materials in support of IHS’s response to ASNA’s original motion for summary

judgment that was filed on November 20, 2006.

ARGUMENT

IHS submitted documentation proving that when the FY 1999 and FY 2000 appropriations expired on September 30, 1999 and September 30, 2000, no additional funding was available to obligate and pay ASNA additional CSC under its contracts.¹ During the five years after the close of each fiscal year, some CSC funds were returned to IHS for various reasons, while other funds remained obligated but unexpended. *See* Declaration of Elizabeth Fowler (“Fowler Declaration”) at ¶ 10,13. Federal law permitted IHS to use those funds only for recording, adjusting and liquidating existing obligations. *See* 31 U.S.C. § 1553(a); *see also* 1 General Accounting Office, Principles of Federal Appropriations Law 2-15 (3d ed. 2004) (“1 GAO Redbook”). Accordingly, IHS could not have provided additional CSC funding to ASNA for FY 1999 and FY 2000 without violating the CSC caps because: 1) making a new obligation to ASNA for additional funding during the FY, would exceed the CSC cap and violate the Antideficiency Act, codified at 31 U.S.C. § 1341(a)(1)(A); and (2) payment of additional funding to ASNA after the close of the FY, would have constituted a new obligation and resulted in a violation of 31 U.S.C. § 1553(a).

ASNA argues that IHS had a pre-existing legal duty, amounting to an obligation, to pay

¹ In FY 2000, according to IHS records, IHS obligated all but \$80,797 of the \$228,781,000 by the close of the fiscal year. *See* Fowler Declaration ¶ 12; Appeal Tab 46, Attachments L, N. However, the status of the \$80,797 changed in subsequent records, ultimately meaning that the funds were unavailable to ASNA.

CSC subject “only to the availability of appropriations.” Cross-Motion at 6.² In fashioning this argument, ASNA constructs an unrealistic definition of “obligation” that overlooks an essential component of incurring an obligation — guaranteed payment. In the context of appropriations law, “obligation” is a term of art. Though no single definition applies, an agency obligates the Federal Government when it acts to create either a “definite commitment on the part of the government” or “a legal duty that could mature into a legal liability by virtue of an action that is beyond the control of the government.”³ II General Accounting Office, Principles of Federal Appropriations Law 7-3 to 7-4 (3d ed. 2006) (“II GAO Redbook”); *see also* OMB Circular A-11 § 20, at 20 (“Obligation means a legally binding agreement that *will* result in outlays” (emphasis added)). Indeed, ASNA’s characterization of an “obligation” is anything but definitive.

ASNA’s theory receives no support from language in the annual appropriations acts

² Contrary to ASNA’s view, the availability of appropriations is not the only limitation on the payment of CSC. The ISDEAA permits payment of only those CSC that are reasonable in light of the activities to be conducted. *See id.* § 450j-1(a)(2). The ISDEAA provides that funding for CSC “shall not duplicate any funding provided [in the Secretarial amount].” *Id.* § 450j-1(a)(3)(A). Moreover, nothing in the ISDEAA includes a specific amount or a specific formula for determining the necessary and appropriate funding levels for any particular contract. In funding an ISDEAA contract, “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).

³ Despite the Antideficiency Act’s prohibition against an agency *obligating* or expending more than the amount appropriated, 31 U.S.C. § 1341(a)(1)(A), ASNA’s Memorandum focuses on the amounts IHS “spent.” *See, e.g.*, ASNA’s Cross-Motion, at 1-2. That focus overlooks that “[i]t is a violation of the Antideficiency Act to incur an obligation in an amount greater than the amount available.” OMB Circular No. A-11 § 20, at 20 (2008). Furthermore, nothing in the law requires IHS to spend the entire CSC cap prior to the close of the FY. Rather, IHS may spend appropriated funds after the FY closes, so long as the expenditures are made to liquidate obligations properly made during the appropriation’s period of availability. 31 U.S.C. § 1553(a).

stating that "funds made available to tribes and tribal organizations through contracts... authorized by the [ISDA] shall be deemed to be obligated at the time of the grant or contract award and thereafter shall remain available to the tribe or tribal organization without fiscal year limitation." E.g., Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681-278 (1998). The apparent purpose of the "deemed to be obligated" language (which is not restricted to CSC) is to establish that the "funds made available to tribes"— whatever the amount— are obligated and "shall remain available" for that purpose. Thus, the funds would be immune from administrative deobligation and reprogramming to a different purpose. *See* II GAO Redbook 7-59 to 7-61 (discussing deobligation by agency). That the "funds made available" through self-determination contracts are "deemed to be obligated" sheds no light on the amount of funds so obligated for ASNA. There is no suggestion in the appropriations acts of an intention to require that any particular sums be obligated to self-determination contracts, or that such funds would remain available after the close of the FY. If Congress wanted the FY 1999 and FY 2000 CSC funding to remain available for new obligations after the FY ended, Congress could have easily made all CSC funds "available until expended."⁴ Congress did not do so.

A. ASNA's Contract Dids Not Create an Obligation Above the Amounts Specified in the Annual Funding Agreement.

Absent a proper amendment to add an amount above what was agreed to and specified in the contract, a tribunal "cannot infer an obligation of funds that conflicts with contract

⁴ In fact, in prior years Congress intentionally made portions of the CSC appropriations "available until expended." *See, e.g.,* Dep't of the Interior & Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, 111 Stat. 1543, 1582 (1997).

requirements.” *McDonnell Douglas Corp. v. United States*, 37 Fed. Cl. 295, 302 (1997); *see also McDonnell Douglas Corp. v. United States*, 39 Fed. Cl. 665, 665 (1997) (restating its earlier holding that, under the terms of the contract, “funds could not be obligated without a contract modification” to add such funding), *reversed in part on other grounds*, 182 F.3d 1319 (Fed. Cir. 1999). Under the contract at issue in *McDonnell Douglas Corp.*, “[f]unds could be obligated . . . only by formal contract modification.” 37 Fed. Cl. at 301.

Similarly, both ASNA’s Compact and the AFAs require that the contract must be amended in writing, even for an increase in funding. For example, ASNA’s FY 1999 Compact clearly provides that “the Secretary shall provide the total *amounts* specified in the Annual Funding Agreements.” Appeal File 7, at 16 (emphasis added). Section 13 of the FY 1999 AFA, entitled “Amendment or Modification of this Agreement,” specifically requires that:

(d) — Due to Availability of Additional Funding. Co-Signer shall be eligible for any increases in funding or funding for Medicaid, Medicare, maintenance and improvement, other reimbursements and new programs to which it would have been eligible had it been administering programs under a self-determination contract, rather than under the Alaska Tribal Health Compact and this Agreement, and for any other funds that are not restricted by appropriations language for which any Alaska Tribe or tribal organizations may be eligible, including any new funds appropriated for Indian Health Service Headquarters and funds passed to Alaska Area as recurring or nonrecurring funds, and this Agreement shall be amended to provide for timely payment of such new funds to Co-Signer, Such amendment shall be originated and prepared within 30 days by the Alaska Area Office and executed through the Area Office in consultation with ASNA

Appeal File 8, at 20. Section 13(a) dictates the form of any amendments, requiring that, “[e]xcept as otherwise provided by this Agreement, the Compact, or by law, any modifications of

this Agreement shall be in the form of a written amendment and shall require written consent of each of the signatory Tribes, acting directly or through ASNA as authorized by resolution, the Arctic Slope Native Association and the United States.” *Id.* at 19.⁵

Accordingly, IHS owes no contractual or stand-alone statutory obligation to ASNA for FY 1999 and FY 2000. ASNA’s FY 1999 and FY 2000 contracts created an obligation only for the sum certain agreed to and specified in ASNA’s Annual Funding Agreements (“AFA”) and any amendments executed thereto. For FY 1999, the amount initially listed in the AFA for non-recurring CSC was \$0 . The AFA stated, “The Secretary is unwilling to cite a sum certain because the exact sources of funds is unknown.” Appeal File 8, at 7. The parties later amended the AFA to add \$297,059 in direct and \$902,263 in indirect non-recurring CSC. Appeal File 24, at 53. The parties amended the AFA again to add \$72,662 in direct and \$21,697 in indirect non-recurring CSC. Appeal File 24, at 64.

For FY 2000, section 4 of the AFA lists \$5,254,412 in recurring base funds (including recurring CSC) and \$902,263 in nonrecurring CSC. Appeal File 10, at 6. The FY 2000 AFA was amended the several times to add additional CSC. Appeal File 24, at 68-106. In summary, for FY 2000, IHS promised to pay ASNA \$896,483 (direct CSC) and \$2,162,108 (indirect CSC) totaling \$3,058,591. Appeal File 24, at 103 (Amendment #11).

After the FY 1999 and FY 2000 appropriations expired, funds were deobligated and additional monies remained obligated but unexpended. As a result, funds were returned to the

⁵ ANSA’s FY 2000 AFA contains similar language. *See* Appeal File 10 at 12. In some circumstances, IHS is authorized by the AFA to amend the AFA to add funds without ASNA’s written consent. *Id.* at 13.

Department of the Treasury (“Treasury”) when the appropriations closed. Although ASNA would like to ignore its contracts and appropriations law to access this money, the fact remains that the contract created no obligation for IHS to pay ASNA additional money, and without such an obligation, the CSC caps and applicable law prohibit ASNA from receiving any additional CSC funding under its contracts in FY 1999 and FY 2000. If Congress had intended a different result, it could have easily required that result. It did not do so. Because providing ASNA with additional funding would have caused IHS to violate the Congressional cap on CSC funding, “ASNA had no statutory or contractual right to such additional funding” and the Board’s ruling in favor of IHS is necessary. *See* Decision at 8.

Nothing in the Indian Self-Determination and Education Assistance Act (“ISDEAA”), 25 U.S.C. §§ 450–458aaa-18, overrides these principles. To the contrary, the “language [of the ISDEAA] strongly suggests that Congress, *in respect to the binding nature of a promise*, meant to treat alike promises made under the Act and ordinary contractual promises.” *Cherokee Nation of Okla. v. United States*, 543 U.S. 631, 639 (2005); *see also Cherokee Nation of Okla. v. United States*, 199 F.R.D. 357, 359 (E.D. Okla. 2001) (“The Indian Self-Determination Act does not prescribe or specify any particular amount that may be considered ‘full’ funding of contract support costs or ‘full’ contract support costs needs for any particular tribe or tribal organization.”); *cf. Babbitt v. Oglala Sioux Tribal Public Safety Dept.*, 194 F.3d 1374, 1379 (Fed. Cir.1999) (holding that *Oglala* differs from “a situation in which the Government, as a contracting party, had simply failed to appropriate and pay its unqualified contractual obligation. *Oglala's* situation differs fundamentally in that the ability of [Department of the] Interior to bind

the Government contractually was expressly conditioned on the availability of appropriations.”).

B. Any Additional Payments to ASNA after the Close of FY Would Be a New Obligation Prohibited by 31 U.S.C. § 1553(a).

Unless an obligation was made properly during the period of availability of the FY appropriation, 31 U.S.C. § 1553(a) prohibits IHS from charging any further payments to the account after the close of the FY:

After the end of the period of availability for obligation of a fixed appropriation account and before the closing of that account under section 1552(a) of this title, the account shall retain its fiscal-year identity and remain available for recording, adjusting, and liquidating obligations properly chargeable to that account.

“[I]n order to justify charging an appropriation after its period of availability for obligating purposes has expired, it is requisite that some action creating a *definite* liability against the appropriation must have been taken while it was available for incurring of obligations.” B-136383, 37 Comp. Gen. 861, 863 (June 27, 1958) (emphasis added). In the matter addressed by the Comptroller General in the June 27, 1958 opinion, it was determined that the Department of Commerce could not amend an existing grant agreement without incurring a new obligation. *Id.* at 863.

A contract change that exceeds the original contract, “like any new obligation,” is not properly chargeable to an expired appropriation. B-245856.7, 71 Comp. Gen. 502, 1992 WL 202643, at 2 n.1 (Aug. 11, 1992). Only when the original contract makes the subsequent change “fixed and certain,” such as by providing that the price will automatically increase if and when specified conditions occur, does the original contract create liability that “is chargeable to the appropriation initially obligated by the contract.” *Id.*; see also *Bureau of Customs & Border*

Protection — Automated Commercial Env. Contract, B- 302358, 2004 WL 3024395, at *6 (December 27, 2004) (explaining that indefinite delivery, indefinite quantity contracts fix the government’s liability at the minimum amount for which the government commits itself, with “[f]urther obligations occur[ing] as task or delivery orders are placed” (emphasis added)).

The recording requirement and the justification behind that requirement help demonstrate when payment for an increase in costs under the contract constitutes a new obligation, as opposed to an adjustment of a prior obligation. For cost reimbursement contracts, agencies must set aside funds for the ceiling amount of a contract in order to ensure that the funds will be available to liquidate the obligation and to avoid violation of the Antideficiency Act. *Matter of:*

Environmental Protection Agency — Request for Clarification of B-195732, June 11, 1980, 59 Comp. Gen. 518, 61 Comp. Gen. 609, 610 (Sept. 23, 1982). As a result, when a contractor seeks payment for additional costs under the contract, those costs are chargeable to the original contract (and the appropriation available at the time the contract was entered), so long as the costs “do not exceed the contractually set ceiling.” *Id.* at 611. In contrast, cost increases that “exceed contractually stipulated ceilings” are not properly chargeable to the original contract or its expired appropriation. *See id.* at 612. At least in part, this is due to the fact that “it would not be reasonable to require that amounts for cost increases beyond the contract’s ceiling similarly be reserved. There is no way to estimate the anticipated amount of such increases.” *Id.*

As discussed above, IHS took no action to create a definite liability beyond the amount already paid to ASNA in FY 1999 and FY 2000. To the contrary, IHS originally promised to pay specific amounts in the AFAs and the subsequent amendments. IHS made no other definite

