

**INTERIOR BOARD OF CONTRACT APPEALS**

ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION	)	
	)	
	)	
Appellants,	)	IBCA Nos. 4809-2006, and 4821-
	)	2006 through 4826-2006
v.	)	
	)	ISDA Contract Nos. 244-94-0018, 244-
MICHAEL O. LEAVITT, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; CHARLES GRIM, DIRECTOR, INDIAN HEALTH SERVICE; UNITED STATES OF AMERICA	)	0019, 244-94-0020, 244-94-0021, 244-
	)	94-0022, 244-94-0023, and 244-94-0024
	)	(effective October 1, 1993 through
	)	September 30, 1995); and
	)	
Appellees.	)	ISDA Contract Nos. 244-96-0001 and
	)	244-96-0004 (effective October 1, 1995
	)	Through September 30, 1999)

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**GOVERNMENT MOTION TO DISMISS**

**APPEAL NUMBERS IBCA 4821-2006, IBCA 4822-2006,  
IBCA 4823-2006, IBCA 4824-2006, IBCA 4825-2006, and IBCA 4826-2006.**

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Pursuant to 43 C.F.R. § 4.105, the Government moves to dismiss appeal nos. IBCA 4821-2006, 4823-2006, 4824-2006, 4825-2006, and 4826-2006 on the grounds that these appeals were not filed with ninety days of appellant's receipt of the corresponding contracting officer's final decisions as required by section 7 of the Contract Disputes Act, 41 U.S.C. § 606. Additionally, the Government moves to dismiss Appeal no. IBCA 4822-2006 on the grounds that it is a duplicate of a previously docketed appeal—specifically, IBCA appeal no. 4809-2006, docketed on September 5, 2006.

## FACTUAL BACKGROUND

This case was initiated by the filing of a Protective Notice of Appeal dated August 30, 2006. (Attachment No. 1). The Notice appealed a single contracting officer final decision. A copy of that decision was attached to the notice of appeal. That decision, dated May 31, 2006, denied the contractor's claim for additional payment in the amount of \$20,110.00 under contract number 244-94-0018 in effect from October 1, 1994 through September 30, 1995 (i.e., fiscal year 1995). (Attachment No. 1). By docketing notice dated September 5, 2006, the appeal was docketed as appeal number IBCA 4809-2006. (Attachment No. 2). Appellant subsequently filed an Amended Protective Notice of Appeal dated September 15, 2006. (Attachment No. 3). While styled as an Amended Notice of Appeal, this submission, in fact, seeks to add entirely new separate and distinct appeals—appeals that were not included in the initial notice of appeal. These new appeals include appeals associated with contracts that are separate and distinct from the contract at issue in the initial notice of appeal and include claims for entirely separate and distinct contract periods (i.e., fiscal years). (Attachment No. 3). By docketing notice dated September 19, 2006, these multiple new appeals were docketed as IBCA Appeal Nos. 4821-2006 and 4823-2006 through 4826-2006. (Attachment No. 4).

A footnote on page two of the Amended Notice of Appeal indicates that a copy of a contracting officer's final decision is attached to the Amended Notice. The attached decision is the same decision that was appealed in the initial Notice of Appeal dated August 30, 2006. The footnote then remarks that, “[t]o the extent these damage claims were not the subject of the denial letter provided here, the Tribe appeals from the Contracting Officer's inactions, deemed by operation of law to be denials.” (Citation omitted). This statement mistakenly suggests that

the contracting officer's final decision denying the contractor's claim for \$20,110.00 under contract No. 244-94-0018 for fiscal year 1995 was the only contracting officer decision issued and that contracting officer final decisions were not issued regarding the additional claims submitted by the contractor pertaining to the other contracts and fiscal years as set forth in the Amended Notice of Appeal. This is incorrect. In fact, the contracting officer issued separate final decisions for each fiscal year of each individual contract. Altogether, a total of twenty-two decisions were issued. (Attachment No. 5). All twenty-two decisions were issued on May 31, 2006. The decisions were divided into three sets for mailing and all three sets were sent to the contractor on May 31, 2006 via certified mail. (Attachments Nos. 6 and 7). Each of the three mailed sets had its own certified mail return receipt. (Attachments Nos. 6 and 7). As evidenced by the certified mail return receipts, all three sets of the contracting officer final decisions were received by the contractor on June 1, 2006. (Attachment No. 7).

### ANALYSIS

By statute, a contractor has ninety days from the date that it receives a contracting officer's final decision to appeal that decision to a board of contract appeals. Specifically, Section 7 of the Contract Disputes Act of 1978, Pub. L. No. 95-673, as codified at 41 U.S.C. § 606, provides, in relevant part, that, "[w]ithin ninety days from the date of receipt of a contracting officer's decision under section 605 of this title, the contractor may appeal such decision to an agency board of contract appeals . . ." Similarly, the Rules of Practice Before this Board, as set forth in Federal regulation at 43 C.F.R. §4.102(a), provide, in pertinent part, that, "[t]he notice of appeal must be mailed or otherwise filed within 90 days from the date of receipt of the contracting officer's decision." In this case, the contractor received all twenty-two of the

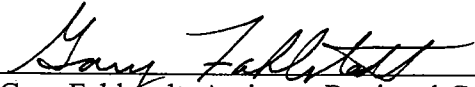
contracting officer's decisions on June 1, 2006. The contractor then had ninety days from that date, i.e., until August 30, 2006, to appeal any of those decisions to the Board. The contractor's initial notice of appeal is dated August 30, 2006, exactly ninety days from its receipt of the contracting officer's decisions. Thus, assuming the initial notice of appeal was placed in the mail on that date, the single appeal set forth in that initial notice of appeal would be timely.<sup>1</sup> The amended notice of appeal, of course, was prepared later. It is dated September 15, 2006. This is one hundred and five days from the date the contractor received the contracting officer's decisions—more than two weeks beyond the time period mandated by statute and Board rule. Consequently, all of the additional appeals contained in the amended notice of appeal are untimely. Because the ninety-day timely filing requirement is statutory and is based on a statute that waives the Government's sovereign immunity, it is jurisdictional. See Cosmic Construction Co. v. United States, 697 F.2d 1389, 1391 (Fed. Cir. 1982) (noting board of contract appeals lacks jurisdiction to waive the statutory ninety-day filing period and, therefore, upholding a board of contract appeals dismissal with prejudice of an appeal not filed within the prescribed ninety-day period). See also Olsberg Excavating Co. v. United States, 3 Cl.Ct. 249, 252 (1983) (compliance with the timely filing requirement of section 7 of the CDA is a prerequisite to the jurisdiction of a board of contract appeals and failure to comply with the timely filing requirement operates as a bar to any administrative consideration of the merits of the contracting officer's decision). Consequently, the board lacks jurisdiction to consider any of the additional

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<sup>1</sup> The Government has no way of knowing whether the notice of appeal was placed in the mail on the same date that it was signed and dated. If placed in the mail the following day, or at any subsequent time, it would be untimely. The Board may wish to verify the actual mailing date as reflected in the express mail record of the pickup and delivery dates.

appeals set forth in the amended notice of appeal and those appeals must be dismissed as untimely.

Respectfully Submitted this 2<sup>nd</sup> day of October, 2006.

  
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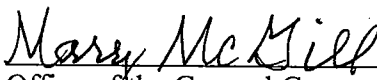
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **Government's Motion to Dismiss**, was mailed postage pre-paid to the following individual on this 2<sup>nd</sup> day of October, 2006:

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