



U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES

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October 13, 2006

Honorable Bernard V. Parrette, Judge
Interior Board of Contract Appeals
801 North Quincy Street, Suite 300
Arlington, VA 22203

RE: **St. Croix Chippewa Indians of Wisconsin v. Michael O. Leavitt, Secretary, Health and Human Services; Charles Grimm, Director, Indian Health Service; United States Of America**, Docket Nos. IBCA 4810-2006, IBCA 4811-2006, IBCA 4812-2006, IBCA 4813-2006, IBCA 4814-2006, IBCA 4815-2006, IBCA 4816-2006, IBCA 4817-2006, IBCA 4818-2006.

Dear Judge Parrette:

Enclosed for filing is the original and two copies, and a computer disc in WordPerfect, of Appellees' "Motion to Lift Stay and to Dismiss 'Protective Notice of Appeal.'"

Appellees respectfully request that the additional copy of the brief be date stamped by the Recorder and returned to Appellees' counsel in the self-addressed, postage-paid envelope provided.

The undersigned certifies that on October 13, 2006 he sent a copy of that motion and this letter to Appellant's counsel, at the address listed on the attached Certificate of Service.

Thank you for your attention to this matter.

Sincerely,

Donna Morros Weinstein
Chief Counsel, Region V

By

Fred R. Garzino
Assistant Regional Counsel
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Encl.

cc: as stated

States District Court or in the Court of Federal Claims, and so there would be no reason to stay proceedings in this, the only available forum.

Moreover, the Stay should be lifted because it is prejudicial to Appellees. Given the paucity of information in St. Croix's form claim letters,¹ Appellees have not been informed of the exact bases of St. Croix's claims. Thus, Appellees may not yet have had reason to look for and preserve what they later learn may be relevant evidence. Any further delay in the cases also prejudices Appellees in preparing their defenses because memories fade and persons with knowledge of the contracts in question may become unavailable. Additionally, in the event that they do not prevail in these appeals, Appellees are prejudiced by the Stay because, pursuant to 41 U.S.C. § 611, interest accrues on any amounts that might ultimately be found to be due to St. Croix. Finally, judicial economy favors the prompt resolution of dispositive motions Appellees intend to file once the stay is lifted regarding two appeals as to which St. Croix never filed administrative claims with the contracting officer (1998 and 2001), and four appeals as to which St. Croix signed contract releases (1996, 1997, 1999 and 2000).

FACTS

By letters dated September 29, 2005, St. Croix submitted claims for contract support costs for seven Contract Years: 1996, 1997, 1999, 2000, 2002, 2003 and 2004.² On May 31, 2006, Dennis S. Murphy, Senior Contracting Officer for the Bemidji Area Office of the Indian

¹Copies of St. Croix's form claim letters are attached hereto as Exhibit 1.

²Although St. Croix filed appeals relating to Contract Years 1998 and 2001, it did not submit claims or, accordingly, receive contracting officer's decisions for those Contract Years. The contractor's submission of a claim meeting the CDA's requirements is a jurisdictional requirement for this Board's consideration of a purported appeal from a contracting officer's final decision. H.L. Smith, Inc. v. Dalton, 49 F.3d 1563, 1564 (Fed Cir. 1993); In re Thomas Creek Lumber & Log Co., 2006 WL 1234605, IBCA No. 4020-1999 (2000).

Health Service (“IHS”), faxed to St. Croix final decision letters denying the claims and sent hard copies of those letters via certified mail, return receipt requested. IHS’s records confirm that each of the seven facsimiles was received by St. Croix on May 31, 2006. Attached as Exhibit 2 hereto are copies of the facsimile verification records that confirm that each of the seven facsimiles was received by St. Croix on that same day, May 31, 2006.³

On September 1, 2006, 93 days after it received the faxed decision letters, St. Croix filed a “Protective Notice of Appeal and Request for A Stay” with this Tribunal. St. Croix stated in its “Protective Notice of Appeal,”

The same issues involved in this appeal are pending before the United States District Court for the District of New Mexico in a putative class action [the Zuni case]. A Motion for Class Certification . . . is pending before the New Mexico District Court. The Tribe is a putative class member in the Zuni case. Thus, the disposition of the Motion for Class Certification affects whether the Tribe will proceed with this appeal. The Tribe files this Notice as a protective Notice of Appeal, preserving the right of the Tribe to proceed in this forum if a class action is not certified in Zuni.

Appellees received the “Protective Notice of Appeal and Request for A Stay” on September 5, 2006. That same day, this Tribunal issued a Docketing Notice stating that

³There is an error in the machine-generated dates on the facsimile verification forms. While the machine-generated date is May 28, 2006, the correct date of transmission is the hand-written date of May 31, 2006, that appears on the verification sheet for each of the seven denial letters.

The Indian Health Service office that sent the seven denial letters to St. Croix on May 31, 2006, learned on September 28, 2006, that its facsimile machine was not synchronized with the actual date. As demonstrated by the verification sheets in Exhibit 2, there was a difference of four days between the machine-generated date (May 28, 2006) and the actual date (May 31, 2006). This was verified when another facsimile was sent from the same machine to Appellees’ counsel on September 27, 2006. Exhibit 3 shows that the machine-generated date for this facsimile was September 24, 2006. The actual date of receipt was September 27, 2006, as indicated on page 1 and also by the date stamp used by Appellees’ counsel’s office on the back of the last page.

These attached faxed confirmation pages establish that the denial letters dated May 31, 2006, were in fact sent to and received by St. Croix via facsimile on May 31, 2006.

Appellant's request for a Stay had been granted.⁴ Appellees were not afforded an opportunity to respond to St. Croix's request for a stay of the proceedings before it was entered.

SUMMARY OF ARGUMENT

A. St. Croix did not timely file a valid appeal in this forum, which, therefore, lacks jurisdiction to hear the captioned cases. First, St. Croix's "Protective Notice of Appeal" was not sufficient to meet the requirements of an appeal under the CDA. Rather, it is an attempt by St. Croix unilaterally to establish its own rules of procedure outside of the CDA and extend indefinitely the statutory 90-day deadline for appealing to the IBCA. Furthermore, St. Croix failed to file its appeal within 90 days of its receipt of the contracting officer's decision letters, as mandated by the CDA.

B. In the alternative, if this Tribunal does not dismiss St. Croix's appeals on the foregoing grounds, the Stay should be lifted and the cases should proceed. Pursuant to the Election Doctrine, once a Tribal contractor timely appeals a contracting officer's final decision to the IBCA, the contractor has made a binding election to proceed before this Tribunal and may not later appeal the contracting officer's decision in any federal court. Since these appeals could not be adjudicated as a part of the Zuni litigation, there is no reason to stay proceedings in this forum.

C. Even if this Tribunal were to find that St. Croix may use its "Protective Notice of Appeal" as a placeholder, the Stay should be lifted because the claims stretch back a decade to 1996 and many of the claims are already stale. Unless the cases proceed expeditiously Appellees are likely to be prejudiced if individuals with knowledge of events are no longer available to

⁴The September 5, 2006 Docketing Notice also states, "Appellant's counsel filed its Complaint with the Notice of Appeal." However, Appellees have not received a complaint and, during a September 20 telephone conference, counsel for St. Croix confirmed that Appellant has not filed a complaint.

testify. Moreover, Appellees may be prejudiced financially by the Stay because, under the CDA, while the Stay is in effect interest continues to accrue on any amounts ultimately found to be due to St. Croix. The interests of justice are not served by staying these cases until St. Croix finally decides where it wants its appeal to be heard, and Appellees should be permitted to file their dispositive motions on the appeals of at least six of the Contract Years at issue.

D. In the event that St. Croix's claims are not dismissed and the Stay is lifted, Appellees request that this Tribunal require St. Croix to file Complaints in the captioned appeals within 30 days. In addition, Appellees request that a briefing schedule be set for Appellees to file dispositive motions regarding six of St. Croix's nine appeals, on the grounds that St. Croix never filed claims for Contract Years 1998 and 2001 and that St. Croix signed valid contract releases for Contract Years 1996, 1997, 1999 and 2000.

ARGUMENT

A. **Because St. Croix did not comply with the Contract Disputes Act's requirement that its appeal be filed within 90 days of receipt of the contracting officer's final decisions, St. Croix's appeals must be dismissed.**

1. **St. Croix's "Protective Notice of Appeal" is not effective as a binding selection of this forum within 90 days, as mandated by the CDA.**

The CDA is a statute by which Congress has waived sovereign immunity for certain types of contract disputes. Jo-Mar Corp. v. United States, 15 Cl.Ct. 602, 605 (1988). The CDA states, "Within 90 days from the date of receipt of a contracting officer's decision under section 605 . . . , the contractor may appeal such decision to an agency board of contract appeals . . . , " in this case the Interior Board of Contract Appeals ("IBCA"). 41 U.S.C. § 606. The United States Supreme Court "has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not implied." Soriano v. United States, 352 U.S. 270, 276, 77 S.Ct. 269, 273 (1957). "The [CDA's] ninety day deadline is thus

part of a statute waiving sovereign immunity, which must be strictly construed,” Cosmic Constr. Co. v. United States, 697 F.2d 1389, 1390 (Fed. Cir. 1982), and “[t]imely filing of an appeal is considered a condition to the government's waiver of immunity.” Jo-Mar, 15 Cl.Ct. at 605-06. Because it is jurisdictional, the 90 day time limit, unlike some of the IBCA’s rules, cannot be relaxed or modified in the interests of justice, or otherwise. J.C. Equipment Corp., IBCA 2885-89, 1991 WL 629480 (1991). Congress set the 90-day deadline and the Board should not read into 41 U.S.C. § 606 exceptions and tolling provisions that Congress did not contemplate or authorize. Borough of Alpine v. United States, 923 F.2d 170, 172 (Fed. Cir. 1991); Renda Marine v. United States, 71 Fed. Cl. 782, 789 (2006). The Appellant bears the burden of establishing jurisdiction before the IBCA. Ball, Ball & Brosammer, Inc., 1998 WL 119766, IBCA 3542-95 (1998).

A contracting officer’s decision is “final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by [the CDA].” 41 U.S.C. § 605(b). The CDA provides two alternative forums in which a contractor can appeal a contracting officer’s adverse final decision: the appropriate agency’s board of contract appeals; or the United States Court of Federal Claims. 41 U.S.C. §§ 606, 607, 609; Nat’l Neighbors, Inc. v. U.S., 839 F.2d 1539, 1541 (Fed. Cir. 1988). The Indian Self-Determination and Education Assistance Act (“ISDA”) provides that, in addition, the United States district courts have concurrent jurisdiction “with the United States Court of Claims, over any civil action against the Secretary for money damages arising out of contracts authorized under [the ISDA].” 25 U.S.C. § 450m-1. Thus, St. Croix was free to file its appeal in any of the following forums: (1) the IBCA (41 U.S.C. § 606); (2) the Court of Federal Claims (41 U.S.C. § 609(a)); or (3) an appropriate United States district court (25 U.S.C. § 450m-1).

Although St. Croix had only 90 days to appeal to this Board, it has a full year in which to file an appeal in an appropriate federal court. 41 U.S.C. §§ 606, 609.

The CDA provides that a contractor has only 90 days to appeal a contracting officer's decision if it wishes to proceed before an agency board, but a full year in which to file an appeal in an appropriate federal court. 41 U.S.C. §§ 606, 609. This waiver of sovereign immunity must be strictly construed and exceptions may not be implied. Jo-Mar, 15 Cl.Ct. at 605. St. Croix's "Protective Notice of Appeal" is insufficient to perfect an appeal before this Board because St. Croix does not unequivocally state its intent to proceed before this Board within the 90 days mandated by the CDA. St. Croix stated in its "Protective Notice of Appeal" that it is a member of a putative class in Zuni, pending in the U.S. District Court for the District of New Mexico, and that it was filing a protective appeal before the IBCA to preserve its "right to proceed in this forum if a class action is not certified in Zuni." As the Federal Circuit stated, "The statutory choice is to appeal the *decision of the contracting officer*, i.e. to *pursue* that claim in one forum in lieu of another. The mere filing of a document, which is not a 'proceeding' on the merits, is not a viable election pursuant to the statute." Nat'l Neighbors, 839 F.2d at 1543 (emphasis original).

St. Croix failed to make a viable election to proceed before the Board within 90 days of its receipt of the final contracting officer's decision as required by the CDA. At the time it filed its "Protective Notice of Appeal," St. Croix simultaneously sought to stay all proceedings before this Tribunal. It explained that it preferred to proceed in New Mexico District Court as a member of a putative class in Zuni. St. Croix does not intend for its "Protective Notice of Appeal" to be a proceeding on the merits before this Board, but rather wishes only to preserve the opportunity to proceed before this Board sometime in the future, in the event no class is certified

in Zuni. In filing its “Protective Notice of Appeal and Request for Stay” St. Croix is seeking to create a new rule allowing it to activate an appeal before the Board long after the 90-day period established by the CDA has expired. But, there is no provision in the CDA or case law supporting the use of an appeal to the IBCA as a mere “placeholder” while St. Croix awaits the outcome of the class certification motion in the Zuni litigation, thereby circumventing the CDA’s jurisdictional 90-day deadline.

St. Croix’s “Protective Notice of Appeal” is nothing but an attempt to forum shop by avoiding a statutorily mandated, jurisdictional deadline. Thus, because St. Croix’s “Protective Notice of Appeal” does not unequivocally state St. Croix’s intent to proceed in this forum, which St. Croix admits, the captioned cases must be dismissed.

2. St. Croix failed to file its “Protective Notice of Appeal” within 90 days of its receipt of the faxed copies and this Tribunal lacks jurisdiction to hear St. Croix’s appeal.

The CDA’s limitations period for appeal begins to run upon the contractor’s receipt of the decision. Borough of Alpine, 923 F.2d at 172. Even if a timely “Protective Notice of Appeal” without intent to proceed were sufficient to invoke the IBCA’s jurisdiction in this case, St. Croix failed to file its notice of appeal within 90 days of its receipt of the contracting officer’s decisions and thus this Tribunal does not have jurisdiction over these appeals. The CDA provides that a contracting officer “shall mail or otherwise furnish a copy of the decision to the contractor.” 41 U.S.C. § 605(a). On May 31, 2006, the contracting officer “otherwise furnished a copy” when he faxed the decision letters at issue to St. Croix.

The CDA requires contracting officers to “mail or otherwise furnish a copy of the decision to the contractor,” and faxes are an accepted means of furnishing copies. Moreover, IHS regularly relies on faxes in communicating with tribes, including St. Croix, and this manner

of furnishing copies is reliable. Appellees have detailed fax confirmation sheets showing successful transmission and have met the burden of showing that they provided a copy of the decision to St. Croix. The detailed fax transmission sheets show the telephone number to which the fax was sent, the date and time on which the faxes were sent, the number of pages faxed, and a portion of the fax cover sheet. This evidence should create a rebuttable presumption that St. Croix received the contracting officer's final decision letters by fax on May 31, 2006. Thus, if St. Croix wishes to dispute its receipt of the contracting officer's decisions by fax, it bears the burden of showing that it did not receive the faxes. Leixab, S.A., ASBCA 51581, 1998 WL 545347 (1998), citing Eastern Computers, Inc., ASBCA No. 49185, 96-2 BCA ¶28,343.

The faxed decisions St. Croix received on May 31, 2006, expressly informed St. Croix that they were the contracting officer's final decisions and that if St. Croix wished to appeal to the IBCA it must do so within 90 days. The 90-day period for appeal ended on August 29, 2006. St. Croix did not mail its appeal to the IBCA until September 1, 2006, three days after the statutory 90-day period to appeal had expired. Because St. Croix did not file its appeals with the IBCA within the 90-day period mandated by the CDA, this Tribunal lacks subject matter jurisdiction over those appeals and the appeals must be dismissed.⁵

⁵Since the dismissal of St. Croix's "Protective Notice of Appeal" would be for lack of jurisdiction, St. Croix would remain free to pursue its appeals in the federal courts if it complies with 41 U.S.C. § 609 regarding judicial review.

B. In the alternative, if St. Croix’s “Protective Notice of Appeal” was timely, and sufficient to constitute a binding election to proceed in this forum, the Stay should be lifted so the appeals can proceed.

1. If this Tribunal holds that St. Croix has timely filed valid appeals, under the Election Doctrine, there is no reason to stay the proceedings because St. Croix’s appeal must be heard by this Board and in no other forum.

If this Tribunal rejects the foregoing argument and determines that by filing its “Protective Notice of Appeal” St. Croix timely and validly selected this forum for its appeal, this Tribunal should find that St. Croix has made the binding election to proceed here and cannot pursue its appeals in federal court at a later date. In that case, these matters must remain before this Tribunal; the Stay serves no purpose because St. Croix does not have the option to proceed at a later date in the Zuni litigation.

Once the contractor has appealed to a forum that has jurisdiction, it cannot change its mind and take its case to another forum. The CDA provides that an appeal to federal court is “in lieu of appealing . . . to an agency board.” 41 U.S.C. § 609(a)(1). Thus, the CDA expressly requires a contractor to select either the agency board or, in lieu of that forum, an appropriate federal court. As the Federal Circuit has held,

once a contractor makes a binding election to appeal the [contracting officer’s] final decision to a board of contract appeals or to the Court of Federal Claims, the contractor can no longer pursue its claim in the other forum.

Bonneville Assocs. v. United States, 43 F.3d 649, 653 (Fed. Cir. 1994) (citing Nat’l Neighbors, 839 F.2d at 1542). This is known as the Election Doctrine. Nat’l Neighbors, 839 F.2d at 1541-42. “Under the Election Doctrine, the binding election of forums is an “either-or” alternative, and, as such, does not provide a contractor with dual avenues for contesting a contracting officer’s adverse decision.” Id. Thus, pursuant to the Election Doctrine, the contractor’s election of a forum pursuant the CDA is irrevocable. Mark Smith Construction Co. v. United States, 10

