

FEB 29 2000

NOTE: Pursuant to Fed. Cir. R. 47.6, this order
is not citable as precedent. It is a public order.

TIME

United States Court of Appeals for the Federal Circuit

00-1056

Donna E. Shalala,
SECRETARY OF HEALTH AND HUMAN SERVICES,

Appellant,

v.

CHEROKEE NATION OF OKLAHOMA,

Appellee.

Before NEWMAN, LOURIE, and BRYSON, Circuit Judges.

LOURIE, Circuit Judge.

ORDER

Cherokee Nation moves to dismiss the Secretary of Health and Human Services' appeal for lack of jurisdiction. The Secretary opposes. Cherokee Nation replies.

This matter involves claims by Cherokee Nation for additional contract support costs from the Indian Health Services (IHS) of the Department of Health and Human Services for indirect costs relating to Cherokee Nation's health programs for fiscal years 1994-1996. Cherokee Nation has operated its health programs since 1994 pursuant to a compact with IHS under Title III of the Indian Self-Determination and Education Assistance Act (ISDA), and the compact is augmented by annual funding agreements.

On October 31, 1997, the contracting officer (CO) denied Cherokee Nation's claim. The CO specified in an attachment to her final decision that that the IHS

overpaid Cherokee Nation by \$143,319 in 1994, Cherokee Nation had a shortfall of indirect costs in 1995 of \$945,485, and the INS overpaid Cherokee Nation by \$6,230 in 1996. The CO denied the claims because (1) Congress had not provided the agency with sufficient funds to meet the total needs of tribes for indirect costs, (2) the compact stated that funding amounts were subject to appropriation, (3) language in the annual funding agreements anticipated further adjustments, and (4) the ISDA specified that the IHS was not required to meet a tribe's total indirect costs if such action would reduce the funds available to other tribes.

Cherokee Nation appealed to the Department of the Interior Board of Contract Appeals. In its complaint to the Board, Cherokee Nation alleged that it was owed \$2,068,202.52 for contract support costs for fiscal year 1994, \$3,232,445.14 for fiscal year 1995, and \$1,739,710.86 for fiscal year 1996. On June 30, 1999, the Board granted summary judgment to Cherokee Nation as to entitlement.² The Board remanded the appeals to the parties for a determination of quantum, stating that if "agreement cannot be reached by the parties within 60 days from receipt of the decision, they should apply to the Board for further action." The Secretary appealed. Pursuant to agreement between the parties, the Board, on August 18, 1999, stayed its remand order until this court rules on the merits of this appeal of the entitlement issue.

While noting differences between the two actions, the Board nevertheless relied on its earlier decision in Alamo Navajo Sch. Bd., Inc. & Miccosukee Corp., IBCA 3463-3466m 3560-3562, 1997 WL 759441 (Dec. 4, 1997) (Miccosukee), to support its entitlement decision. This court recently reversed Miccosukee as a companion case to Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't, 194 F.3d 1374 (Fed. Cir. 1999), where we held that the provision of funds for contract support costs under the ISDA is subject to the availability of appropriations, and the agency's authority to contractually bind the government is expressly conditioned on the availability of appropriations.

Cherokee Nation moves to dismiss for lack of jurisdiction. The jurisdictional issue revolves around the scope of the CO's decision. Cherokee Nation argues that the CO addressed the question of quantum even though she ultimately found no entitlement. Cherokee Nation contends that it appealed both the issues of entitlement and quantum to the Board, and that the Board understood that both issues were before it when it bifurcated the appeals and decided entitlement first. Because the Board remanded the appeals to the parties for a determination of quantum, and that issue remains pending, Cherokee Nation argues that this court does not have jurisdiction over this appeal.

The Secretary opposes dismissal, arguing that the Board's decision "had the effect of disposing of the case and ending the litigation on the merits." The Secretary argues that the CO's discussion of indirect costs owed during the years in question was merely background information to her ruling of no entitlement and that it did not constitute an assessment of "the quantum of damages." She asserts that the only issue before the Board was whether the IHS was liable to Cherokee Nation for additional contract support costs, and that the Board completely decided the case before it in the decision now on review.

The parties rely on different cases from this court to support their positions. Cherokee Nation cites to Teledyne Continental Motors v. United States, 906 F.2d 1579 (Fed. Cir. 1990) and Teller Envtl. Sys., Inc. v. United States, 802 F.2d 1385 (Fed. Cir. 1986), and the Secretary relies primarily on Dewey Electronics Corp. v. United States, 803 F.2d 650 (Fed. Cir. 1986), for support. None of the cases cited, however, involve the situation where a contracting officer denied entitlement but nevertheless discussed

quantum.

"[A]n important focal point in ascertaining the finality of a board's decision is the scope and extent of the contracting officer's decision." Teledyne, 906 F.2d at 1582, citing Teller, 802 F.2d at 1389. In Teller, the contracting officer's decision was adverse to the contractor on both entitlement and quantum. Because both issues were before the Board and the Board decided only entitlement, remanding the damages determination to the parties, we ruled that this court lacked jurisdiction over the appeal. In Dewey, which was decided on the same day as Teller, we determined that we had jurisdiction over that appeal, because the contracting officer's deemed denial of the contractor's claims involved only the issue of entitlement. We determined that final resolution of the contractor's entitlement on four claims should not await a determination of quantum on its other five claims because the Board "in disposing of all of the entitlement questions, fully addressed all of the decisions (constructively made) of the contracting officer then on appeal to the Board."

Jurisdiction was determined to be lacking in Teledyne. We stated in that case that the important distinction between Teledyne, on the one hand, and Dewey and United States v. Boeing Co., 802 F.2d 1390 (Fed. Cir. 1986), on the other, was that in Dewey and Boeing the contracting officer "denied the contractors' money claims and therefore made no determinations of amount," whereas "Teledyne's CAS noncompliance and the amount due the government were determined by the contracting officer, but not finally resolved by the board." See also AAA Engineering & Drafting, Inc. v. Widnall, 129 F.3d 602 (Fed. Cir. 1997) (no jurisdiction where CO decided both liability and quantum but Board ruled on entitlement only, remanding

quantum determination to the parties).

Resolution of this motion, therefore, must start with the contracting officer's decision. The contracting officer determined no entitlement and denied Cherokee Nation's claim. Nevertheless, the CO discussed the amount of indirect costs owed, noting that "the Nation had a shortfall in FY 1995 of \$985,485." While not clearly enunciated, the CO appears to have considered the issue of quantum, perhaps in the event that entitlement was ultimately found on appeal, such as it was in this case. Although a determination of no entitlement by a contracting officer would not require a consideration of quantum, the CO's discussion appears to be more than mere "background information," the position that the Secretary urges us to adopt. Thus, the CO's decision could be construed to be in the alternative, i.e., no entitlement, but if entitlement, then quantum in a certain amount.

It also appears from the Board's decision that the Board assumed jurisdiction over both entitlement and quantum. The Board noted that it was bifurcating the appeals and deciding entitlement only. It outlined in its decision the specific amounts that Cherokee Nation alleged it was owed for contract support costs in each of the years in question, amounts that exceeded the CO's discussion of "the balance over or under funded" by \$6 million. Thus, in disposing of the entitlement issue, the Board did not fully resolve all issues raised in the contracting officer's decision. Therefore, review by his court must await consideration by the Board of the issue of quantum.

Accordingly,

IT IS ORDERED THAT:

- (1) Cherokee Nation's motion to dismiss is granted.
- (2) Each party shall bear its own costs.

FOR THE COURT

FEB 25 2000

Date

cc: Jeffrica J. Lee, Esq.
Lloyd Benton Miller, Esq.

s14

Alan D. Lourie

Alan D. Lourie
Circuit Judge

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

FEB 25 2000

JAN HORBALY
CLERK

ISSUED AS A MANDATE: FEB 25 2000