

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)
TUNICA-BILOXI TRIBE OF)
LOUISIANA, et al.,)
)
Plaintiffs,)
)
v.) **Civil Action No. 02-2413 (RBW)**
)
UNITED STATES OF AMERICA,)
)
Defendants.)
_____)

ORDER

_____ Consistent with the Court's rulings as expressed in the Memorandum Opinion that is being issued contemporaneously with the filing of this Order, it is hereby

ORDERED that Defendants' Unopposed Motion to Correct the Order issued December 9, 2003 [#37] is granted. An amended Order setting forth the Court's dismissal of plaintiff's claims for years prior to fiscal year 1995 and subsequent to fiscal year 2001 will be issued by the Court forthwith. It is further

ORDERED that Plaintiffs' Motion for Partial Reconsideration or Clarification of the Court's December 9, 2003, Memorandum Opinion and Order [#41] is denied.

SO ORDERED on this 22nd day of January, 2004.

REGGIE B. WALTON
United States District Judge

The plaintiffs' motion for partial reconsideration is not as easily resolved. In their motion, plaintiffs assert that the Court improperly dismissed their claims that the Secretary of Health and Human Services breached the implied covenant of good faith and fair dealing (contained in the First and Second Claims for Relief) and that the Secretary breached his duty of trust (contained in the Third Claim for Relief) by failing to request sufficient appropriations from Congress to fully fund indirect contract costs accrued pursuant to Indian Self-Determination and Education Assistance Act ("ISDA") contracts. Plaintiffs make several arguments regarding why these claims should not be dismissed, all of which must be rejected by the Court.

First, plaintiffs state that the Court's dismissal of these claims is "inconsistent with the Court's other holdings in the Memorandum Opinion." Pls.' Mot. at 1. Specifically, the plaintiffs point to the fact that the Court initially denied the defendants' request to dismiss these claims on the theory that plaintiffs had failed to exhaust their administrative remedies by failing to raise these claims before the contracting officers in their respective cases. However, the Court finds nothing inconsistent in its conclusion. On the one hand, the court concluded that the plaintiffs did not fail to exhaust their administrative remedies concerning the good faith and fair dealing claims² because these claims were not independent claims upon which the plaintiffs sought monetary recovery but were "alternative theor[ies] to obtain recovery of the amounts they sought from the contracting officers." *Tunica-Biloxi Tribe of Louisiana v. United States of America*, No. 02-2413, slip op. at 16 (D.D.C. Dec. 9, 2003). However, despite the

²The defendants directed their exhaustion argument only to the good faith and fair dealing claims.

Court's conclusion that the claims should not be dismissed on the basis of failure to exhaust administrative remedies, the Court concluded that these claims failed to state a claim upon which relief could be granted. The exhaustion and failure to state a claim arguments were separate grounds for dismissal.

Second, plaintiffs argue that because the Court concluded that there is a trust relationship between the plaintiffs and the United States, this necessarily implies that there must be a duty on the Secretary's behalf to request sufficient appropriations from Congress to fully reimburse plaintiffs for their indirect contract costs. However, although the Court recognized the existence of a trust relationship between the United States and Indian tribes, the Court expressly stated that

even if the Court were to conclude that a fiduciary relationship between the parties exists, and that a covenant of good faith and fair dealing can be implied, *these recognitions do not necessarily translate into a duty on the part of the Secretary to request additional appropriations from Congress. The text of the ISDA makes clear that Congress did not intend to obligate the Secretary to distribute funds that had not been allocated to him under the Act.*

Id. at 38 (emphasis added). The Court quoted at length from the Circuit Court's ruling in *Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338, 1346 (D.C. Cir. 1996), noting that this case supports the proposition that the Secretary does not have a duty to request additional appropriations. *Tunica-Biloxi Tribe*, slip op. at 39.

Third, plaintiffs heavily rely on two Court of Federal Claims decisions for the proposition that "the good faith, fair dealing, and trust clauses . . . vitiate [d]efendants' affirmative defense of unavailability of appropriations." Plaintiffs' Reply in Support of Their Motion for Reconsideration or Clarification ("Pls.' Reply") at 1. The first case, S.A.

Healy Co. v. United States, 576 F.2d 299 (Cl. Ct. 1978), involved a claim by a contractor for costs incurred as a result of a temporary shutdown of a project, which the plaintiff contractor argued had been caused by the defendant's failure to request funds in an amount from Congress sufficient to fund the construction contract entered into with the plaintiff. *Id.* at 300. The governmental defendant argued that there was language in the Reclamation Project Act of 1939, 43 U.S.C. § 388 (2000), the act applicable to the contract, which expressly limited its liability. That language provided, in part, that "the liability of the United States is contingent on the necessary appropriations being made therefor by the Congress and an appropriate reservation of funds thereunder." *Id.* (quoting 43 U.S.C. § 388). The defendant also pointed to language in the contract, which it argued supported its position that it had no duty to provide funds in the event Congress failed to provide adequate funding. *Id.* at 301. In ruling for the plaintiff, the court concluded that "[t]he contents of [the contract], as well as those of the Reclamation Act, are simply not designed unequivocally to put the contractor on notice that [it] bears all risk of loss ensuing from the unavailability of funds for earnings, no matter what the reason therefor." *Id.* at 304. Construing the ambiguity against the defendant, the court concluded that because the agency failed to request adequate funding from Congress, it could not shift the burden of loss to the contractor. *Id.* at 307. On this point, the court noted that "the agency knew that it had approved a higher schedule of earnings than would be appropriated should Congress pass the bill as sent to it by the President." *Id.* at 305. Despite this ruling, however, the *S.A. Healy* Court was careful to explain that it was not holding that the agency had a duty to

request additional appropriations; rather, the Court held that in light of the agency's inadequate funding request, the agency was not able to shift the burden of the loss to the contractor. *Id.* at 307. Specifically, the court stated

In short, then, we hold that the protective umbrella of the funds available clause, *as worded in this contract*, does not extend to an exhaustion of funds occasioned by the agency's decision to request funding grossly inadequate to support the level of earnings approved by the agency for the fiscal year. *In order not to be misunderstood, we add at this point we are not holding that under this contract the defendant's executive branch was contractually obligated to request from defendant's legislative branch appropriations adequate to fund continued performance. It may well have been free to decide it would request any level it pleased.* We hold only that (a) a contract will not be construed to throw all the cost and loss necessarily incident to such a decision on the contractor, and none of it on the party whose decision caused the loss, *unless clauses of the contract require that result without ambiguity*, and (b) that a governmental agency that claims a right to do this is under an implied obligation to assist its contractor, by timely and candid information to take the measures that the latter may deem best to diminish and mitigate its loss.

Id. (emphasis added).

The second case plaintiffs rely on, *San Carlos Irrigation & Drainage Dist. v. United States*, 23 Cl. Ct. 276 (1991), involved a case arising under the San Carlos Act, Pub. L. 108-105, 43 Stat. 475 (1924). The plaintiffs and the defendant had entered into a Repayment Contract that "impose[d] a continuing duty on the United States to operate and maintain" the plaintiffs' dam. *Id.* at 283. The plaintiffs argued that the defendant breached its obligation under the Act and the contract by failing to properly maintain the dam. *Id.* The defendant argued that the language of the contract, specifically "a funds available clause, preclude[d] liability for the failure to install replacement gates for which the [Bureau of Indian Affairs (BIA)] never received funding." *Id.* at 282. The language of the contract provided that the contract was

made contingent upon Congress making the necessary appropriations for expenditures hereunder In case such appropriation as may be necessary to carry out this contract is not made, the [plaintiff] hereby releases the United States from all liability due to the failure of Congress to make such appropriations.

Id. at 282-83. In holding that this language did not exempt the United States from its contractual obligation to repair the dam, the Court stated that the defendant could not "escape liability under the contract because the BIA did not attempt to obtain appropriations from Congress to repair the spillway gates." *Id.* at 283 (citing *S.A. Healy*, 576 F.2d at 307). The Court stated that the defendant's "operation and maintenance duty [was] not contingent upon Congressional appropriations." *Id.* Rather, "[b]oth the Repayment Contract and the San Carlos Act provide that operation and maintenance costs shall be paid for out of landowner assessments." *Id.*

Neither the *S.A. Healy* or the *San Carlos Irrigation & Drainage Dist.* convince the Court that it should alter its prior ruling. First, it is significant that neither decision involves contracts arising under the ISDA. Second, neither case directly supports the proposition put forth by the plaintiffs, namely, that the federal defendant had a *duty to request* sufficient appropriations from Congress. Rather, each held that the governmental defendants were not able to shift the risk of loss to the plaintiffs, despite insufficient funding having been provided by Congress. This point is explicitly made by the *S.A. Healy* court, where it stated: "[W]e are not holding that under this contract the defendant's executive branch was contractually obligated to request from defendant's legislative branch appropriations adequate to fund continued performance. It may well

have been free to decide it would request any level it pleased." 576 F.2d at 307.³ In any event, neither case is binding on this Court. See *District of Columbia v. America Excavation Co.*, 64 F. Supp. 19, 19-20 (D.C. Cir. 1946) (stating that legal authority from other circuit courts while "persuasive . . . nevertheless . . . [is] not binding or controlling on this court, in the absence of any ruling in this jurisdiction."). Finally, and perhaps most significantly, there is binding authority from the District of Columbia Circuit that supports the Court's ruling that the defendant did not have a duty to request appropriations from Congress regarding funding of indirect contract costs incurred in connection with the performance of ISDA contracts. See *Ramah Navajo Sch. Bd.*, 87 F.3d at 1346 ("Congress clearly included the proviso [of 25 U.S.C. § 450j-1(b) in the ISDA] not to excuse the Secretary's obligation to follow the mandates of the statute, but rather to make evident that the Secretary is not required to distribute money if Congress does not allocate that money to him under the Act." The Court further concluded that the "subject to availability" clause does not require the Secretary "to go . . . in search of" extra funding.).

In light of the above discussion, the Court concludes that it correctly dismissed plaintiff's claims that the defendants breached the implied covenant of good faith and fair dealing and the duty of trust. To the extent plaintiffs are arguing that the breach of the implied covenant of good faith and fair dealing is merely a response to the defense

³While the *San Carlos Irrigation & Drainage Dist.* Court rejected the defendant's reliance on this language to escape liability, the Court there concluded that "the Repayment Contract [did] not unambiguously 'throw all the cost and loss necessarily incident to' a decision not to seek funding on the contractor. Hence, *Healy* applies . . ." 23 Cl. Ct. at 283 n.8. Thus, looking at the specific contract at issue, the court reached a determination that the risk of loss had not been shifted solely to the contractor as a result of the specific terminology used in the contract. *Id.*

of unavailability of funds position that the government has asserted, the Court's ruling definitively explains why that position does not defeat the defense. To the extent plaintiffs contend that the trust claim is viable, the Court's reasoning similarly precludes that claim. Furthermore, pertaining to the trust claim, the Court also stated its concern that this claim, which was an independent claim for relief, was not redressable because even if the Court concluded that the Secretary had a duty to request additional appropriations, the mere act of compelling him to ask for additional funds does not mean that the funds would be appropriated.⁴ Therefore, in light of the reasoning set forth above and in accordance with the Court's analysis set forth in its December 9, 2003 Memorandum Opinion, the Court explicitly holds that the Secretary did not have any duty to request additional appropriations from Congress and therefore has not violated a duty of trust or the implied covenant of good faith and fair dealing. Accordingly, plaintiffs' motion for reconsideration is denied.

SO ORDERED on this 22nd day of January, 2004.

REGGIE B. WALTON
United States District Judge

⁴Plaintiffs seem to agree with this proposition, as they pose the question, "For who can say what Congress might have appropriated if given an adequate request?" Pls.' Mot. at 5.