

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TUNICA-BILOXI TRIBE OF LOUISIANA, et al.,)

PLAINTIFFS,)

vs.)

UNITED STATES OF AMERICA, et al.,)

DEFENDANTS.)

No. 1:02CV02413 (RBW)

**PLAINTIFFS' MOTION FOR PARTIAL
RECONSIDERATION OR CLARIFICATION
OF DECEMBER 9, 2003, MEMORANDUM OPINION AND ORDER**

Plaintiffs respectfully move this Court under Rule 60(b)(1) and (6), FR CivP, and paragraph 14 of the Court's General Order and Guidelines for Civil Cases, to reconsider or clarify its rulings on the good faith/fair dealing and trust claims. The Court's Order of December 9, 2003, dismisses the claim for breach of the covenant of good faith and fair dealing in the First and Second Claims for Relief as well as the Third Claim for Relief for breach of trust.

Plaintiffs suggest that these dismissals in the Order and the closing sentence in the Memorandum Opinion p. 40¹ are inconsistent with the Court's other holdings in the Memorandum Opinion. In its Memorandum Opinion, the Court states under exhaustion of

¹ "Plaintiffs' claim that the Secretary has breached the implied covenant of good faith and fair dealing and their third claim for relief based on the Secretary's alleged breach of trust must be dismissed."

remedies that “[the good faith/fair dealing] ‘claims’ will not be dismissed” and finds that there are trust duties attendant to Plaintiffs’ contracts. Opinion 16, 37-38.

The subsequent dismissals, Opinion 38-40, appear to be based on the Court’s assumption that only an order directing the Secretary to seek “additional appropriations” would satisfy the good faith and trust breaches, and the claims are therefore un-redressable because of futility. But Plaintiffs seek to use the good faith and trust claims in an entirely different way. It is the initial failure of the Secretary of HHS to request sufficient appropriations *in the first instance* that violated the good faith and trust clauses in the contract, not his refusal to seek supplemental appropriations.

Plaintiffs’ Opposition to Defendants’ Motion to Dismiss 1, 24-26, clarifies contentions relative to these two claims. Fairly read, the claims seek to assert a basis for a declaratory judgment that ordinary rules of government contract interpretation bar unavailability of appropriations *as a defense* where Defendants deliberately failed to request sufficient funds from Congress. It is this use of the failure-to-request allegations that Plaintiffs seek to preserve. If these good faith and trust allegations do not at a minimum give Plaintiffs an added basis for relying on *S.A. Healey Co. v. United States*, 576 F.2d 299 (1978) and *San Carlos Irrig. &*

Drainage Dist. v. U.S., 23 Cl. Ct. 276, 283 (1991), then the contract clauses² requiring good faith in the context of the trust relationship become virtually meaningless. The Order could be construed to bar Plaintiffs from proving the exact nature of the Secretary's trust responsibility or the good faith duty in the context of federal contract law and federal appropriations law, even if the proofs showed a deliberate failure to request insufficient appropriations, something that would be a flagrant breach of trust in a private setting. For who can say what Congress might have appropriated if given an adequate request?

Healey held that a much more restrictive exculpatory contract clause than the ones involved here could not be the basis for a government defense of unavailability of appropriations. The reason: the clause did not clearly shift to the contractor the burden of risk that the government would fail to ask Congress for enough appropriations to meet the contract obligations and under ordinary rules of contract construction, the resulting ambiguity must be resolved against the drafter, the United States:

In short, then, we hold that the protective umbrella of the funds available clause, as worded in this contract, does not extend to the 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,

²Tunica-Biloxi Contract January 1, 1996 at page 8 provides:

"1. TRUST RESPONSIBILITY

(A) IN GENERAL. The United States reaffirms the trust responsibility of the United States to the Tunica-Biloxi Tribe to protect and conserve the trust resources of the Tribe and the trust resources of individual Indians.

(B) CONSTRUCTION OF CONTRACT. Nothing in this Contract may be construed to terminate, waive, modify, or reduce the trust responsibility of the United States to the Tribe or individual Indians. The Secretary shall act in good faith in upholding such trust responsibility."

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.

576 F.2d, at 307.

Here, as in *Healey*, none of the clauses or provisions of the contracts or the statute cited by Defendants address the risk that the government would violate its trust responsibility and the covenant of good faith by purposely failing to ask the legislative branch for enough appropriations to pay the mandated contract price under 25 U.S.C. §450j-1(g). *S.A. Healey*, 576 F.2d, at 305; *see*, Model Agreement, 25 U.S.C. §450l(c) subpart (b)(4) and, e.g., Defendants' Exhibit J, pp. 6 and 7, containing the Model Agreement's rule of construction for ISDA contracts and availability clause.

The trust and good faith claims do not seek prospective relief. They are directed to past acts and omissions in the critical appropriations phase of the yearly funding cycle.

Pursuant to Local Rule 7.1(m), undersigned counsel has conferred with Rachel Hines, Esq., counsel for Defendants. Ms. Hines has indicated that Defendants will oppose this Motion.

Plaintiffs respectfully request this Court to rescind its dismissal of the good faith and trust claims and deny the Motion to Dismiss with regard to them, or in the alternative, to clarify that the allegations relating to the covenant of good faith and fair dealing and breach of trust are not dismissed insofar as they are used to respond to Defendants' affirmative defense of unavailability

of appropriations.

Respectfully Submitted:

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