

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**TUNICA-BILOXI TRIBE OF LOUISIANA,  
and RAMAH NAVAJO SCHOOL BOARD,  
INC.,**

PLAINTIFFS,

vs.

**UNITED STATES OF AMERICA, *et al.***

DEFENDANTS.

**No. 1:02CV02413  
(RBW/DAR)**

**PLAINTIFFS' MOTION FOR LEAVE  
TO FILE SECOND SUPPLEMENTAL COMPLAINT**

Pursuant to Rule 15(d) of the Federal Rules of Civil Procedure, Plaintiffs move for leave to file a second supplemental complaint to allege facts arising after the February 19, 2003, second amended complaint (Doc. No. 11), and the July 5, 2006, supplemental complaint (Doc. No. 102).

The basis for the motion follows:

1. On September 14, 2007, Plaintiff Tunica-Biloxi Tribe of Louisiana ("Tunica") filed a contract dispute under the Contract Disputes Act claiming Defendant United States failed to pay contract support costs for 2001 through 2005 in the amounts required by Indian Self-Determination Act, Public Law 93-638, as amended, 25 U.S.C. §§ 450 *et seq.* ("ISDA").
2. On March 26, 2008, the contracting officer denied Tunica's claims for 2001 through 2005 and counterclaimed against Tunica.

3. On June 22, 2007, Plaintiff Ramah Navajo School Board, Inc. (“RNSB”) filed a contract dispute under the Contract Disputes Act claiming failure of Defendants to pay contract support costs for 2004 through 2006 in the amounts required by ISDA.

4. The contracting officer has not acted on RNSB’s June 22, 2007, contract dispute. Accordingly, under the terms of the Contract Disputes Act, the claims are deemed denied.

WHEREFORE, Plaintiffs pray for an order granting leave to file the second supplemental complaint, to be considered filed upon the granting of the motion; and directing Defendants to answer the second supplemental complaint on such date that the Court directs Defendants to answer the second amended complaint and supplemental complaint previously filed in this litigation, or as the Court shall otherwise direct..

Plaintiffs provided Defendants’ counsel with a copy of this filing on September 26, 2008. On October 6, 2008, Defendants’ counsel informed Plaintiffs’ counsel that Defendants have not yet been able to determine their position on this motion.

A proposed order granting this motion is filed herewith.

Respectfully submitted,

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**PLAINTIFFS' MEMORANDUM IN SUPPORT OF  
MOTION FOR LEAVE TO FILE SECOND SUPPLEMENTAL COMPLAINT**

Plaintiffs have moved for leave to file a second supplemental complaint to allege contract disputes for which Plaintiffs exhausted Contract Disputes Act administrative remedies after the previous supplemental complaint in this action (Doc. No. 102) was filed on July 6, 2006.

Under F.R.Cv.P. Rule 15(d) leave should be freely granted when there are supplemental facts and claims related to the subject matter of the complaint and there will be no undue prejudice to defendants. *Quarantino v. Tiffany & Co.*, 71 F.3d 58, 66 (2d Cir. 1995); *Gillihan v. Shillinger*, 872 F.2d 935, 941 (10th Cir. 1989).

In its September 22, 2008, Memorandum Opinion (Doc. No. 160), at 68-69, the Court suggested that it was reluctant to consider one asserted accounting irregularity in the Department of the Interior's fixed-with-carry-forward methodology while other asserted problems in that methodology remained outside the Court's purview. The Court noted that these issues could be considered if the Plaintiffs were able to amend their complaint to include these claims. The Court further observed the value of consolidating

all of the asserted problems with the carry-forward methodology into a single proceeding before a single forum.

The second supplemental complaint accomplishes that consolidation. Each of the problems with the fixed-with-carry-forward methodology has been presented to a contracting officer pursuant to the Contract Disputes Act. Relief has either been denied or has become deemed denied by the passage of time, so that each claim is now appropriate for resolution by this Court in this action.

Accordingly, Plaintiffs request that their motion for leave to file the second supplemental complaint be granted, and that the second supplemental complaint be considered filed on the granting of the motion.

Respectfully submitted,

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**ORDER**

Pursuant to Rule 15(d) of the Federal Rules of Civil Procedure, Plaintiffs have moved for leave to file a second supplemental complaint to encompass facts arising since their previous supplemental complaint was filed on July 5, 2006. The motion is unopposed by Defendants. The Court, being fully advised in the premises, finds that justice requires that the motion be granted and the second supplemental complaint allowed. Accordingly, it is NOW THEREFORE

ORDERED that

1. Leave is granted to Plaintiffs to file the second supplemental complaint attached to its Motion, and that second supplemental complaint is filed as of the date of this Order; and

2. Defendants shall answer the second supplemental complaint on the date that the Court directs Defendants to answer the second amended complaint and supplemental complaint previously filed in this litigation, or as the Court shall otherwise direct.

SO ORDERED this \_\_\_ day of \_\_\_\_\_, 2008.

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UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT  
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**SUPPLEMENTAL COMPLAINT**

1. Plaintiffs Tunica-Biloxi Tribe of Louisiana (“Tunica”) and Ramah Navajo School Board, Inc. (“RNSB”), hereby supplement their Second Amended Complaint filed February 19, 2003 (Doc. No. 11) and their Supplemental Complaint, filed July 5, 2006 (Doc. No. 102), to address new circumstances and subsequent actions by Defendants.

2. The allegations of the Second Amended Complaint, including the class action allegations of ¶¶ 26-33, and of the Supplemental Complaint are incorporated by reference.

3. Tunica provides health care services to Indians on the Tunica reservation in Louisiana pursuant to its mature contract with Defendant United States, entered into pursuant to Title I of Indian Self-Determination Act, Public Law 93-638, as amended, 25 U.S.C. §§ 450 *et seq.* (“ISDA”). RNSB provides health care services to Indians in the Ramah Navajo Community in New Mexico pursuant to its mature contract with Defendant United States, entered into pursuant to Title I of ISDA.

4. Defendant United States is required to include in Plaintiffs' contracts the reasonable and allowable administrative costs necessary to Plaintiffs' operation of the contracted ISDA programs. A substantial component of these administrative costs, called contract support costs, is indirect costs. ISDA requires that the indirect costs reasonably necessary to Plaintiffs' operation of the contracted ISDA program be included in the contract price.

5. To determine the indirect cost component to which Plaintiffs are entitled under ISDA, 25 U.S.C. § 450j-1(a)(2), (3), and (g), Defendant Secretary of Health & Human Services ("HHS") uses indirect cost rates determined by the National Business Center (NBC) in the U.S. Department of the Interior.

6. Plaintiffs negotiate indirect cost rates with NBC, but only according to strict guidelines imposed by NBC and the Office of Management and Budget (OMB). Defendant Secretary of HHS knows or should know of NBC's indirect cost rate methodology because of the duties imposed on him by ISDA.

7. Plaintiffs have no control over the methodology used to calculate indirect cost rates. The written policies of Defendant Secretary of HHS establish that he would use a similar methodology to calculate a lump sum to cover the indirect cost component of the contract required by ISDA if an ISDA contractor did not have an indirect cost rate. The policies of the Defendant Secretary of HHS further require that if an ISDA contractor has an indirect cost rate, that rate must be used to calculate the indirect costs to which the contractor is entitled under its contract.

8. As a practical necessity, Plaintiffs must obtain indirect cost rates because most of their non-ISDA federal programs will not allow a contractor to expend grant or contract funds for common costs unless the contractor has a rate.

9. Plaintiffs, like most ISDA contractors, use fixed-with-carry-forward rates because, though seriously flawed, they are the best option available. In theory, under- and over-recoveries under the fixed-with-carry-forward system are added or deducted in future rate calculations, avoiding cash repayments by either party and other risks possible under other options.

10. The methodology used to calculate Plaintiffs' indirect contract support costs does not comply with the requirements of ISDA in several ways, as described more specifically in the following paragraphs.

11. *Rate dilution.* NBC employs a rate methodology that artificially and illegally depresses Plaintiffs' indirect cost rates. This rate depression is caused by including in the denominator of the indirect cost calculation the programs of federal agencies that have restrictions or prohibitions on the use of their funds to pay indirect costs, a practice found to violate ISDA in *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997). Defendant Secretary of HHS applies that depressed rate to calculate Defendant United States' indirect contract support cost obligations in Plaintiffs' contracts. ISDA requires that Defendant United States include in each ISDA contract the indirect costs needed to run the contracted programs at the level of service and efficiency at which the Defendant Secretary of HHS would have run them. 25 U.S.C. 450j-1(a)(2), (3), and (g).

12. “*Shortfall column*” error. NBC categorizes most of Plaintiffs’ under-recoveries as “shortfalls” and excludes them from indirect cost rate calculations. “Shortfalls” are not carried forward. Because of this exclusion, when carry-forward adjustments are used in computing Plaintiffs’ new indirect cost rates in the second succeeding year, that new rate is artificially and illegally depressed, thereby reducing Defendant United States’ indirect contract support cost obligations to less than what is required by ISDA. The use of a “shortfall column” is exclusive to ISDA contractors and is not authorized by OMB Circular A-87, which established and guides the indirect cost rate system, or by ISDA.

13. *Double-dipping*. In calculating indirect cost rates, NBC double bills Plaintiffs for perceived over-recoveries of indirect costs, by

- a. reducing the rate (and therefore the indirect cost component of the contract price) in the next rate cycle (two years hence) sufficiently to fully offset the over-recovery and thus repay the Government, but then
- b. again subtracting the same amount in rate calculations in the next rate cycle (four years hence), repeating the repayment already made two years earlier.

14. Because the “Shortfall column” error excludes most under-recoveries from carry-forward calculations, double dipping does not affect the ISDA contractors and Defendant United States evenhandedly, but rather amplifies the harm to contractors caused by the “shortfall column”. The two mechanisms, separately and together, reduce

the contract price for indirect CSC below what is required under 25 U.S.C. § 450j-1(a)(2), (3), and (g)

15. *Treating indirect costs spent as upper limit to indirect cost need.* In calculating Plaintiffs' carry-forward adjustments, NBC treats indirect costs actually incurred by Plaintiffs as the upper limit of any under-recovery carry-forward. NBC incorrectly assumes that what Plaintiffs spent for indirect costs were the indirect costs needed to run the contracted programs at the level of service and efficiency at which the Defendant Secretary of HHS would have run them. Since Plaintiffs know that the Defendant United States, for the reasons set out in this lawsuit, does not provide the reasonable and allowable administrative costs necessary to the Plaintiffs' operation of the contracted programs, it would be reckless for Plaintiffs to spend that amount. Plaintiffs are accordingly penalized by the assumption that what it spent for indirect costs is the upper limit of what it needed for indirect costs, resulting in a reduced under-recovery carry-forward and a lower rate when indirect contract support costs are calculated in the next rate cycle.

16. *Treating program funds used for reimbursing indirect costs as collections of indirect CSC in carry-forward calculations.* Because of chronic shortfalls in recovery of indirect contract support costs, Plaintiff RNSB has been forced to pay those costs from program funds. NBC treats these diverted program funds as recoveries of indirect costs by RNSB, thereby overstating over-recoveries and understating under-recoveries in carry-forward calculations. The consequence is the reduction of the RNSB's indirect cost

rate and, thus, Defendant United States' contract support cost obligation in RNSB's contract, all in violation of ISDA.

17. *Treating Tribal funds used to pay indirect costs as collections of indirect CSC in carry-forward calculations.* Over the years Plaintiff Tunica has expanded its own programs by adding health and other governmental services in addition to those it contracts with Defendant United States to provide under its ISDA contract. These additional tribal programs were, under protest, added to the indirect cost base in Tunica's rate proposals under the carry-forward calculation template mandated by NBC. Increasing the tribal programs in the base, under NBC's procedures, causes the indirect cost rate to go down. This results in ever expanding subsidization of the cost of administering the federal programs including the contracted IHS program in violation of ISDA.

18. In addition, Plaintiff Tunica has made contributions to the indirect cost pool over and above the proportion of the direct cost base accounted for by tribal programs. Treating Tunica's payment of indirect costs over and above the proportionate share of Tunica's tribal programs in the direct cost base overstates Tunica's recovery of indirect costs, thus increasing over-recoveries and reducing under-recoveries. The consequence is the reduction of the Tunica's indirect cost rate and, thus, Defendant United States' contract support cost obligation in Tunica's contract, all in violation of ISDA.

### **EXHAUSTION OF REMEDIES**

19. On September 14, 2007, Tunica filed a contract dispute claiming failure to pay contract support costs for 2001 through 2005 as required by ISDA. That contract dispute (previously filed in this action as Doc. No. 147, Exh. 73) is attached as Exhibit B to this supplemental complaint, and is incorporated herein by this reference.

20. On March 26, 2008, the contracting officer denied Tunica's claims for 2001 through 2005. The contracting officer's denial (previously filed in this action as Doc. No. 147, Exh. 33, exh. 3) is attached as Exhibit C to this supplemental complaint, and is incorporated herein by this reference.

21. On June 22, 2007, RNSB filed a contract dispute under the Contract Disputes Act claiming failure of Defendants to pay contract support costs for 2004 through 2006 as required by ISDA. That contract dispute (previously filed in this action as Doc. No. 147, Exh. 48) is attached as Exhibit A to this supplemental complaint, and is incorporated herein by this reference.

22. The contracting officer has not acted on that contract dispute. It is accordingly deemed denied.

### **GOVERNMENT COUNTERCLAIM**

23. In his March 26, 2008, denial of Tunica's claims for 2001 through 2005 (Exhibit C), the contracting officer asserted a counterclaim against Tunica for \$487,436.86, alleging that Defendant United States had overpaid Tunica's indirect costs for 2001 through 2004.

24. In adjusting indirect cost rates in the carry-forward calculations, Defendants already recovered from Tunica all overpayment of indirect costs in prior years. As described in paragraph 13, above, prior to the Defendants' counterclaim, Defendants had already recovered all prior overpayments *twice* through the "double-dipping" procedure described as. Defendants now seek to recover these overpayments a third time, by retroactively adjusting the original contract price as well as the contract prices in two subsequent cycles

#### **FIRST CAUSE OF ACTION**

25. Plaintiffs incorporate by reference all preceding paragraphs.

26. Defendant United States has breached its contract with Plaintiff Tunica by denying Tunica the contract support costs it was have entitled to have included in its contract for 2001 through 2005 under the Indian Self-Determination Act, Public Law 93-638, as amended, 25 U.S.C. §§ 450 *et seq.*

#### **SECOND CAUSE OF ACTION**

27. Plaintiffs incorporate by reference all preceding paragraphs.

28. Defendant United States has breached its contract with Plaintiff RNSB by denying RNSB the contract support costs it was have entitled to have included in its contract for 2004 through 2006 under the Indian Self-Determination Act, Public Law 93-638, as amended, 25 U.S.C. §§ 450 *et seq.*

#### **THIRD CAUSE OF ACTION**

29. Plaintiffs incorporate by reference all preceding paragraphs.

30. Each of Defendants' practices described in this complaint is an "adverse adjustment" prohibited by section 106((d)(1) and (2) of ISDA, 25 U.S.C. § 450j-1(d)(1) and (2). These adverse adjustments reciprocally reinforce each other and are cumulative, compounding from year to year, thereby denying Plaintiffs the contract support costs necessary to operate the contracted program at the level at which the Defendant Secretary of HHS would have run it.

#### **FOURTH CAUSE OF ACTION**

31. Plaintiffs incorporate by reference all preceding paragraphs.

32. Each of Defendants' practices described in this complaint confiscate savings achieved by Plaintiffs through prudence and efficiency, in violation of 25 U.S.C. § 450j-1(a)(4) and section (b)(9)

#### **FIFTH CAUSE OF ACTION**

33. Plaintiffs incorporate by reference all preceding paragraphs.

34. Defendants' counterclaim against the Plaintiff Tunica violates the Indian Self-Determination Act, Public Law 93-638, as amended, 25 U.S.C. §§ 450 *et seq.*, by denying Plaintiff Tunica the contract support costs necessary to operate the contracted program at the level at which the Defendant Secretary of HHS would have run it.

#### **PRAYER**

WHEREFORE, Plaintiffs respectfully request that the Court:

- a. Award Plaintiff Tunica-Biloxi Tribe of Louisiana money damages from Defendant United States for underpayment of Indirect Contract Support Costs for 2001 through 2005 in such amounts as established by the evidence;
- b. Award Plaintiff Ramah Navajo School Board, Inc. money damages from Defendant United States for underpayment of Indirect Contract Support Costs for 2004 through 2006 in such amounts as established by the evidence;
- c. Adjudge that Defendants' counterclaim against Plaintiff Tunica-Biloxi Tribe of Louisiana is without merit and that Defendants take nothing thereby;
- d. Adjudge the methods employed by Defendants for computing Plaintiffs' entitlement to Indirect Contract Support Costs to be in violation of the governing statutes and in breach of contract and enjoin Defendants accordingly;
- e. Award pre- and post-judgment interest on the award and reasonable attorney fees and costs to the extent provided by law; and
- f. Award such further relief as the Court may deem proper.

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