

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

On October 6, 2008, plaintiffs moved the Court for leave to file a second supplemental complaint pursuant to F.R.Cv.P. Rule 15(d). Doc. No. 163. This complaint alleges 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.

The Court has noted the value of consolidating all carry-forward claims in this forum and this proceeding.

[T]he Court hesitates to address one asserted accounting irregularity in the DOI's fixed-with-carry-forward methodology when so many other asserted problems in that methodology remain outside the Court's purview. These issues were dismissed for technical reasons . . . and may yet be considered if the plaintiffs (1) present these claims (for years beyond 2003) to the IHS and (2) successfully amend their complaint to include these claims. At a minimum, the plaintiffs should be afforded the opportunity to attempt to consolidate any other claims they desire to pursue in one forum and in one proceeding, lest the dispute between the parties sprawl into yet another lawsuit.

Memorandum Opinion (Doc. No. 160) ("*Opinion*"), at 68-69.

Directly counter to the Court's desire to avoid "sprawl," defendants reject the Court's suggestion, arguing that plaintiffs instead should file a new lawsuit to address the carry-forward claims raised by the second supplemental complaint. *Opposition to Plaintiffs' Motion for Leave to File Second Supplemental Complaint* (Doc. No. 166) ("Opp."), at 2.

The claims for damages in the second supplemental complaint have been previously addressed within this case by both parties. *See, e.g., Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment, etc.*,¹ at 22-25; *Defendants' Memorandum in Opposition to Motion for Partial Summary Judgment, etc.*,² at 22-26. They are not before the Court because of its ruling that the Contract Disputes Act requires that each claim be presented separately to the contracting officer. *Opinion* 39-41. The Court has not yet addressed plaintiffs' claims for injunctive relief, but the second supplemental complaint supplies additional context for addressing those claims. (Jurisdiction over injunctive relief is not dependent on the Contract Disputes Act and its presentment requirement. 25 U.S.C. § 450m-1(a); *Ramah Navajo School Board v. Babbitt*, 87 F. 3d 1338, 1344 (DC Cir. 1996).)

Rule 15(d) of the Federal Rules of Civil Procedure, provides that

"[u]pon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading

¹ *Plaintiffs' Renewed Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Partial Summary Judgment and Renewed Opposition to Defendants' Motion to Dismiss or for Summary Judgment* (Doc. No. 147-4).

² *Defendants' Combined Opposition to Plaintiffs' Motion for Partial Summary Judgment and Reply in Support of Motion to Dismiss and for Summary Judgment* (Doc. No. 148).

setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.”

The U.S. Court of Appeals for the Federal Circuit has held that:

Rule 15(d) unequivocally allows supplementing a complaint with a count based on later events. Where the supplemental pleading with respect to such later events relates to the same cause of action originally pleaded, the Supreme Court held . . . that it would be an abuse of discretion to deny the amendment. There the Court specifically stated that [Rule 15(d)] ‘plainly permits supplemental amendments to cover events happening after suit.’

Intrepid v. Pollock, 907 F.2d 1125, 1129 (Fed. Cir. 1990) (quoting *Griffin v. School Board*, 377 U.S. 218, 227 (1964), in which the supplemental complaint was permitted 10 years after the suit was originally filed).

Rule 15(d) of the Federal Rules of Civil Procedure provides for . . . supplemental pleading. It is a useful device, enabling a court to award complete relief, or more nearly complete relief, in one action, and to avoid the cost, delay and waste of separate actions which must be separately tried and prosecuted. So useful they are and of such service in the efficient administration of justice that they ought to be allowed as of course, unless some particular reason for disallowing them appears, though the court has the unquestioned right to impose terms upon their allowance when fairness appears to require them.

New Amsterdam Casualty Co. v. Waller, 323 F.2d 20, 28-29 (4th Cir.1963), *cert. denied*, 376 U.S. 963, 84 S.Ct. 1124 (1964), as quoted with approval in *Keith v. Volpe*, 858 F.2d 467, 473 (9th Cir. 1988).

The burden is generally on defendants to show why leave to file a supplemental complaint should be denied. *Nurridin v. Goldin*, 382 F. Supp. 2d 79, 88 (D.D.C. 2005); *Dove v. Washington Metro. Area Transit Auth.*, 221 F.R.D. 246, 247 (D.D.C. 2004).

I. ADDRESSING SOME CARRY-FORWARD CLAIMS IN THIS LITIGATION AND OTHER RELATED CLAIMS IN NEW LITIGATION DOES NOT PROMOTE JUDICIAL ECONOMY

Plaintiffs have consistently maintained that the shortfall-column claim and the double dipping claim are closely interrelated. NBC’s templates shunt most contractor

under-recoveries of indirect costs into the shortfall column, thereby ignoring them for purposes of the carry-forward calculations, so that only over-recoveries are carried forward for the most part. *See, e.g.*, 6th Kerkmans Declaration (Doc. No. 147, exh. 33), ¶ 53. NBC then aggravates this one-sided treatment by the “double-dipping” manipulation, doubling the over-recoveries, with the resulting inevitable reduction of the indirect cost rate. *Id.* Because the other manipulations set out in the second supplemental complaint also increase over-recoveries (or decrease under-recoveries), they are similarly compounded by the double-dipping manipulation.

Because of these interrelationships, the Court should address all manipulations in this action. The Court stated that it cannot now do so because of its ruling that damage claims based on double-dipping and the other manipulations were not properly presented pursuant to the Contract Disputes Act, even if plaintiffs only learned during discovery of the double-dipping manipulation and its relation to the other manipulations, including the shortfall-column manipulation already in the case. The proposed supplemental complaint shows that all manipulations and their interrelationship have been properly presented. Granting plaintiffs’ motion will allow the Court to address the problems holistically.

This Court has gained a working knowledge of the extremely complex rate-making system, plaintiffs’ claims, and the defenses asserted. If a new action were filed in lieu of a supplemental complaint, the new court would have to acquire this knowledge anew. It would not be able to move nearly as expeditiously toward resolution of these issues. Piecemeal litigation is hardly a way to achieve judicial economy.

Adjudication of all rate-making claims and issues for Indian Self-Determination Act contracts in this action is desirable, cost effective, and ultimately timesaving.

II. THIS COURT MAY EXERCISE JURISDICTION OVER THE CLAIMS OF THE SECOND SUPPLEMENTAL COMPLAINT; THE CLAIMS SATISFY THE REQUIREMENTS OF THE CONTRACT DISPUTES ACT.

Each carry-forward manipulation has now been presented to a contracting officer pursuant to the Contract Disputes Act. Relief has either been denied, in the case of *Tunica*, or has become deemed denied by the passage of time, in the case of RNSB, 41 U.S.C. § 605(c)(3) and (5),³ so that each claim is now appropriate for resolution by this Court in this action.⁴

Each plaintiff has submitted in writing to the contracting officer a clear and unequivocal statement of its claims. Each claim was properly certified. Each presentment noted that the adverse adjustments complained of were reciprocally reinforcing and cumulative, compounding from year to year through the carry-forward process. *Tunica*'s presentment set forth estimates of the annual cumulative amount of these damages. The contracting officer did not ask for further specifics. RNSB attached spreadsheets showing its calculation of the damages from the manipulations. Detailed

³ If the Court believes, despite the rote nature of the contracting officers' decisions already in the record, that it would benefit from a contracting officer's decision on RNSB's claims, it may "stay the proceedings to obtain a decision on the claim by the contracting officer." 41 U.S.C. § 605(c)(5).

⁴ In their proffered second supplemental complaint, plaintiffs identify *Tunica*'s September 14, 2007, submission to the contracting officer as Exhibit B to that complaint and RNSB's June 22, 2007, submission as Exhibit A. The contracting officer's March 26, 2008, denial of *Tunica*'s claim and counterclaim was identified as Exhibit C. In fact, these exhibits were not filed with the proposed complaint attached to this motion, but will be attached to the complaint when filed pursuant to the ECF procedure if this motion is granted.

These documents were previously in the record as Doc. No. 147, Exhs. 33 (exh. 3), 48, and 73. In addition, defendants have attached them as exhibits A, B, and C to their opposition to the instant motion (although in different order).

mathematical calculations are not required for presentation. *Opinion*, at 42, citing *Metric Constr. Co. v. United States*, 1 Ct. Cl. 383, 391 (Cl. Ct. 1983).

III. DEFENDANTS WILL NOT BE PREJUDICED.

While defendants foresee great practical problems arising from allowance of the supplemental pleading, plaintiffs see none.

Defendants contend that the new claims impose new burdens on defendants. That is not true: While the new complaint adds new years, it does not add new parties or change the essentials and legalities of the miscalculations already alleged.

The damage estimates from the new claims are already before the Court. Doc. No. 147, Exhs. 33 (exh. 3), 48, and 73. Those estimates were not challenged by defendants, except in the broad sense of disagreeing with the entire notion that plaintiffs have valid claims. The supplemental complaint is offered to meet the presentment requirements of the Contract Disputes Act with respect to the rate-making deficiencies that the Court found had not previously been properly presented. It necessarily addresses years not previously in the case, but it is not a harbinger of additional supplemental complaints to bring in claims for subsequent years. The only new legal issues for the new claim years go to damages, and then only if plaintiffs succeed in convincing the Court that claims for damages are viable in years in which appropriations for contract support are capped, an issue that cuts across all years after 1997.

Further discovery is not required. Each of the carry-forward manipulations in the second supplemental complaint was described in detail in Plaintiffs' Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Partial Summary Judgment, at 17-24 (Doc. No. 110), and the exhibits accompanying that motion. Defendants asked for and received permission to conduct discovery specifically directed at those carry-forward

manipulations. *Transcript of Proceedings, Jan. 12, 2007*, at 4, 8. *See also Order, Jan. 12, 2007* (Doc. No. 115). Defendants subsequently engaged in extensive discovery thereon, and relied on it in their filings. *See, e.g., Defendants' Combined Opposition*, note 2, above, at 13, 22, and accompanying statement of facts ¶¶ 12, 24, 20, 31, 33, 44, 45, 54.

The contract documents including annual funding agreements were prepared and are maintained by defendants, as were all indirect cost agreements. Defendants receive all of plaintiffs' single-agency audits and indirect cost rate proposals in the normal course of business. The amounts defendants actually paid in each year, and the amounts appropriated by Congress are likewise within defendants' ken. In short, defendants have all the facts necessary to prepare their defenses.

Defendants' allegations of further delay are unfounded. First, the case thus far has progressed slowly for various reasons—among them, the stay to await the Supreme Court's ruling in *Cherokee Nation v. Leavitt*, 543 U.S. 631, 125 S. Ct. 1172 (2005), delay in reopening the case after the Supreme Court's decision, discovery before the cross-motions were filed, and the need for re-briefing. None of these factors should affect the new complaint. Moreover, defendants will likely offer the same broad panoply of defenses already made to the new claims, defenses that they do not need to re-brief. *See Opinion*, at 69 n. 22.⁵

Prejudice to the non-moving party from delay “must in fact be undue, which means a denial of the opportunity to present facts or evidence which would have been offered had the amendment been timely.” *Dove*, 221 F.R.D. at 248 (internal edits and

⁵ Indeed, defendants promote these same defenses, not yet ruled upon by the Court, in arguing that the supplemental complaint would be futile. *Opp.* at 9.

citations omitted). Defendants have made no showing that the second supplemental complaint will somehow deny them opportunity to present facts or evidence they could have otherwise provided.

Trial of this case on damage issues, if required, will be arduous, but that would be true whether or not this motion is granted. Combining all rate-making claims in a single case could also encourage the parties to settle; settlement is unlikely if major elements of rate-making are left for another proceeding and another forum.

In short, the second supplemental complaint presents no new substantive controversy. It is clearly related to the issues already in the case. *See Health Ins. Ass'n v. Goddard Claussen Porter Novelli*, 213 F.R.D. 63, 66 (D.D.C. 2003) (“the court should freely grant a party’s request to file a supplemental pleading when the supplemental facts connect it to the original pleading”) (internal edits and citations omitted); *Aftergood v. CIA*, 225 F. Supp. 2d 27, 30 (D.D.C. 2002) (“leave to file a supplemental pleading should be freely permitted when the supplemental facts connect it to the original pleading”, citing *Quarantino v. Tiffany & Co.*, 71 F.3d 58, 66 (2d Cir. 1995)).

It is difficult to understand why defendants believe they would be less prejudiced in defending an entirely new law suit than by having all claims resolved in this court and proceeding.

CONCLUSION

Granting plaintiffs’ motion for leave to file a second supplemental complaint will promote judicial economy and will not prejudice the Government. Accordingly, Plaintiffs request that their motion be granted, and that the second supplemental complaint be considered filed on the granting of the motion.

Respectfully submitted,

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