

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FILED
UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO

JUN 24 2005

PUEBLO OF ZUNI, on behalf of itself)
and all others similarly situated,)
)
Plaintiff,)

v.)

UNITED STATES OF AMERICA;)
MICHAEL O. LEAVITT, Secretary of the)
United States Department of Health and)
Human Services; and)
CHARLES W. GRIM, Director of the)
Indian Health Service, United States)
Department of Health and Human Services,)
)
Defendants.)

MATTHEW J. DYKMAN
CLERK

BB/WPL

Case No. CIV 01-1046 ~~LH/EPG~~

INITIAL PRETRIAL REPORT

Counsel have conferred and submit herewith the parties' consolidated Initial Pretrial Report.

APPEARANCES

Counsel are:

Lloyd B. Miller, David Mielke, and Melanie Osborne for the plaintiff

Rachel J. Hines for the defendants

NATURE OF THE CASE

This is a putative class action brought by the Pueblo of Zuni to recover damages for the defendants' alleged failure to pay Plaintiff and other Tribal contractors the full amount of contract support costs under the Indian Self-Determination and Education Assistance Act, as amended, 25

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U.S.C. § 450 *et seq.* ("ISDA"), and under contractual agreements with the Federal Government authorized by that Act.

AMENDMENTS TO PLEADINGS

Plaintiff does not presently contemplate filing an amendment to the First Amended Complaint ("Complaint").

Defendants have not yet filed an Answer.

STIPULATIONS

The parties hereto stipulate and agree that venue of Plaintiff's individual action is properly laid in this District. Plaintiff believes that venue of the putative class action is properly laid in this District. Defendants, however, are not certain whether venue is proper for the class, as presently defined, or any other individual IHS contractor, in this District.

The parties hereto stipulate and agree that the United States District Court for the District of New Mexico has jurisdiction over the parties. Plaintiff believes that the United States District Court for the District of New Mexico has jurisdiction of the subject matter. Defendants have not yet determined whether or to what extent the Court has jurisdiction over the subject matter of this action, as explained more fully in their Motion to Stay Briefing on Class Certification and to Stay Merits Discovery, filed March 25, 2005.

The parties further stipulate to the following facts:

1. Plaintiff Pueblo of Zuni is a federally-recognized Indian Tribe with Tribal headquarters in Zuni, New Mexico.
2. Defendant Michael O. Leavitt is the Secretary of the U.S. Department of Health and Human Services ("Department").

3. Defendant Charles W. Grim is the Director of the Indian Health Service ("IHS"), an agency within the Department.

4. Defendants are officers or employees of the United States, sued in their official capacities.

The parties further stipulate and agree that the law governing this case includes:

The ISDA, as amended, 25 U.S.C. § 450 *et seq.*; the Contract Disputes Act, 41 U.S.C. § 601 *et seq.*; OMB A-87, 60 Fed. Reg. 26,484, 26,490 (1995), and the Department of Interior and Related Agencies annual appropriations acts.

PLAINTIFF'S CONTENTIONS

During the period covered by this First Amended Complaint (federal fiscal years 1993 through the present) the ISDA required the defendants to enter into contracts with the Plaintiff and other Tribal contractors represented by the class, and further required that the contract price include "contract support costs." The defendants (1) failed to properly calculate the Tribal contractors' "contract support cost" requirements, (2) failed to pay the properly calculated amounts required to be paid, and (3) also failed to fully pay the contractors' undercalculated "contract support cost" requirements. The Plaintiff and other Tribal contractors suffered damages as a result of this violation of the ISDA and breach of the Plaintiff's and the class's contracts.

DEFENDANTS' CONTENTIONS

Plaintiff, who is a party to ISDA self-determination contracts with the Secretary of the U.S. Department of Health and Human Services ("HHS"), challenges the amount of indirect contract support costs ("CSC") that it received under the Contract Disputes Act ("CDA") dating back to fiscal year 1993. Indirect CSC are administrative costs that benefit more than one program or service

under contract. Defendants have not yet filed an answer and are in the process of completing their investigation of the allegations in the First Amended Complaint. Defendants have, however, identified some possible jurisdictional defects.

The CDA requires, inter alia, that before any CDA claim may be brought in federal court, the claim must be presented to a contracting officer. This requirement is mandatory; the failure to present a claim bars a reviewing court from asserting jurisdiction over that claim. Similarly, the CDA has very explicit time requirements, the violation of which also renders a reviewing court without subject matter jurisdiction. Thus, Defendants must review Plaintiff's claims to ensure that the timeliness and presentment requirements of the CDA have been satisfied such that this Court has subject matter jurisdiction over Plaintiff's claims for each of the years that are the subject of the Complaint.

Second, Defendants must investigate whether Plaintiff has been seeking indirect CSC from the IHS on the basis of an out-of-date indirect cost rate. Under the applicable regulations, ISDA contractors must secure new indirect cost rates each year. Any failure to obtain new rates may render Zuni's claims unripe or not yet final. In addition, if Plaintiff has have been seeking and obtaining funding for indirect CSC based on rates that actually overcompensate it, Plaintiff may not be able to allege any Article III injury-in-fact.

Moreover, for fiscal year 1998, Plaintiff's claim that it was entitled to indirect CSC regardless of the congressional appropriation fails because the ISDA and the individual contracts explicitly make the annual funding for indirect CSC subject to the available annual congressional appropriation, and the fiscal year 1998 appropriation expressly limited the amount of CSC made available to an amount that was less than all of the tribal contractors' needs. Finally, Plaintiff's

challenge to the indirect cost formula also fails. The Indian Health Service ("IHS") is allowed to pay CSC only for costs that are directly attributable to IHS programs, as originally set forth in OMB regulations and, more recently, as set forth in the ISDA.

Defendants reserve all other defenses and arguments related to the First Amended Complaint.

DISCOVERY

Plaintiff intends to obtain the following discovery:

1. Requests for production of class members' contracts, compacts, AFAs, and indirect cost agreements, during the period covered by the Complaint.

2. Requests for production of documents, requests for admission, interrogatories and / or depositions regarding:

a. the defendants' practice and policies regarding the payment of contract support costs;

b. the defendants' damage calculations for their historical underpayment of contract support costs; and

c. the Department's Division of Cost Allocation's practice and policies with regard to calculation of indirect contract support cost requirements.

Defendants intend to obtain the following discovery:

As set forth in Defendants' Motion to Stay, Defendants propose that merits discovery be stayed pending Defendants' opportunity to answer or otherwise respond to the First Amended Complaint. If class certification briefing and merits discovery is ultimately required, Defendants intend to obtain the following discovery:

1. Class certification discovery (written discovery and/or depositions), including discovery of Plaintiff related to the typicality of their claims and their adequacy as class representative, as well as discovery of their proposed expert.

2. Merits discovery (written discovery and/or depositions) to determine the basis for each of the allegations in the First Amended Complaint.

3. Merits discovery (written discovery and/or depositions) into the composition of Plaintiff's direct cost base for each relevant year and the share of CSC or other indirect costs paid by federal agencies other than IHS, including:

a. All documents submitted by Plaintiff to the U.S. Department of the Interior's National Business Center (and its predecessor, the Office of the Inspector General) in order to obtain an indirect cost rate for all years relevant to the allegations in the Complaint, including all indirect cost proposals.

b. Plaintiff's Single Audit and annual financial statements for all years relevant to the allegations in the Complaint.

c. Documentation related to all of the other grants and contracts awarded to Zuni.

4. If the Court were to certify a class, Defendants expect that they would seek discovery on all of the above matters as they relate to each class member.

~~In accordance with the Civil Justice Expense and Delay Reduction Plan adopted in compliance with the Civil Justice Reform Act, and pursuant to Title 28 U.S.C. § 473(a)(1), this case is assigned to a " _____ " track classification. Accordingly, the termination date for discovery is _____, and discovery shall not be reopened, except by an order of the Court upon a showing of good cause. This deadline shall be construed to require that~~

discovery be completed on or before the above date. Service of interrogatories or requests for production shall be considered timely only if the responses are due prior to the deadline. A notice to take deposition shall be considered timely only if the deposition takes place prior to the deadline. The pendency of dispositive motions shall not stay discovery.

Motions relating to discovery (including, but not limited to, motions to compel and motions for protective order) shall be filed with the Court and served on opposing parties by _____. See D.N.M.LR-Civ. 7 for motion practice requirements and timing of responses and replies. This deadline shall not be construed to extend the twenty-day time limit in D.N.M.LR-Civ. 26.6.

Plaintiff shall identify to all parties in writing any expert witness to be used by Plaintiff at trial and to provide expert reports pursuant to FED. R. CIV. P. 26(a)(2)(B) no later than _____. All other parties shall identify in writing any expert witness to be used by such parties at trial and to provide expert reports pursuant to FED. R. CIV. P. 26(a)(2)(B) no later than _____.

List all witnesses who, at this time, you think will either testify or be deposed, giving their name, title, address and a brief summary of their testimony.

By Plaintiff:

1. *Bryceson Pinto, Acting Tribal Administrator*
Pueblo of Zuni
Office of Finance / Accounting
P.O. Box 339
1203-B State Highway 53
Zuni, New Mexico 87327-0339

Information regarding the Plaintiff's contract support cost shortfalls, self-determination contracts with the federal government, and Contract Disputes Act claims.

2. *Margaret Garcia, Division Director*

Pueblo of Zuni
Community Health Services
P.O. Box 339

Zuni, New Mexico 87327-0339

Information regarding of the Plaintiff's operation of various IHS programs operated under the Plaintiff's self-determination contracts with the federal government.

3. *Dr. Charles Grim, IHS Director*

Indian Health Service
440 Reyes Building
801 Thompson Avenue
Rockville, Maryland 20852

Information regarding the Administration's position regarding the payment of contract support costs awarded to tribal contractors during years relevant to this case, including the Indian Health Service's and the Administration's budget requests.

4. *Dr. Michael H. Trujillo, Past IHS Director*

Last known address and position:
Former Assistant Surgeon General
Office of the Surgeon General
5600 Fishers Lane
Room 18-66
Rockville, MD 20857

Information regarding the Administration's position regarding the payment of contract support costs awarded to tribal contractors during years relevant to this case, including the Indian Health Service's and the Administration's budget requests.

5. *Dan Madrano and Elizabeth Fowler, Current Acting co-Directors of the Division of Financial Management for IHS*

140 Reyes Building
801 Thompson Avenue
Rockville, Maryland 20852

Information regarding financial policy and budget execution at IHS, contract support cost allocations, the operation of the IHS financial system (budget, accounting, planning, etc.), and reserves and past year appropriations accounts during years relevant to this case.

6. *Lovell Hopper and Carl L. Fitzpatrick, Past Directors of the Division of Financial Management for IHS*

Last known address and position:
Indian Health Service
Parklawn Building
5600 Fishers Lane

Room 5A-54

Rockville, Maryland 20857

Information regarding financial policy and budget execution at IHS, contract support cost allocations, the operation of the IHS financial system (budget, accounting, planning, etc.), and reserves and past year appropriations accounts during years relevant to this case.

7. *Daniel J. Cesari, Deputy Director, Division of Financial Management for IHS*

Last known address and position:

Indian Health Service

Parklawn Building

5600 Fishers Lane

Rockville, Maryland 20857

Information regarding financial policy and budget execution at IHS, and the operation of the IHS financial system (budget, accounting, planning, etc.).

8. *Douglas Black, Director*

Office of Tribal Activities

Indian Health Service

220 Reyes Building

801 Thompson Avenue

Rockville, MD 20852

Information regarding IHS's contract support cost allocations and policies.

9. *Ron Demaray, Director, Division of Self-Determination Services*

Office of Tribal Activities

Indian Health Service

220 Reyes Building

801 Thompson Avenue

Rockville, Maryland 20852

Information regarding IHS's contract support cost allocations and policies.

By Defendants:

1. Elizabeth Fowler
Acting Director, Office of Finance and Accounting (as of April 15, 2005)
Indian Health Service
140 Reyes Building
801 Thompson Avenue
Rockville, Maryland 20852
(301) 443-1270

Ms. Fowler may have discoverable information regarding congressional appropriations made available to the Indian Health Service in each relevant year.

2. Ronald B. Demaray
Director of Self-Determination Services, Office of Tribal Programs
220 Reyes Building
801 Thompson Avenue
Rockville, Maryland 20852
(301) 443-1104

Mr. Demaray may have discoverable information about the negotiation of ISDA agreements, contract support cost distribution and shortfalls, and the negotiation of indirect cost rates, as well as IHS policies and procedures with respect to ISDA agreements and agreement funding.

3. Diego Lujan
Senior Contracting Officer
Albuquerque Area Indian Health Service
5300 Homestead Road NE
Albuquerque, New Mexico 87110
(505) 248-4565

Mr. Lujan may have discoverable information about Plaintiff's contracts, payments made to Plaintiff thereunder, and Plaintiff's claims for additional contract support costs.

As Defendants have not yet filed an answer, Defendants will supplement their Initial Disclosures as appropriate pursuant to Federal Rule of Civil Procedure 26(e).

List all documents which you believe, at this time, will be exhibits at the trial.
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By Plaintiff:

1. Contracts, annual funding agreements, and indirect cost agreements between the plaintiffs and the defendants
2. IHS Circulars and policies regarding contract support costs
3. Annual "Justification of Estimates" for the Indian Health Service
4. Indian Health Service "ISD Queue lists" and "shortfall" reports
5. IHS's comprehensive fiscal year 1999 final determination regarding the contract support cost needs of all Tribes then remaining on the Queue from prior years

By Defendants:

1. Contracts, contract modifications, and annual funding agreements entered into between Plaintiff and IHS for all years relevant to the allegations in the Complaint.
2. Plaintiff's indirect cost rate agreements for all years relevant to the allegations in the Complaint.
3. Claims and supporting documents presented by Plaintiff to IHS pursuant to the Contract Disputes Act for all years relevant to the allegations in the Complaint.
4. Documents demonstrating payments made to Plaintiff by IHS for all years relevant to the allegations in the Complaint.
5. Documents demonstrating the allocation, obligation, and distribution of contract support costs for fiscal year 1998.

As Defendants have not yet filed an answer, Defendants will supplement their Initial

Disclosures as appropriate pursuant to Federal Rule of Civil Procedure 26(e).

List all experts who you believe, at this time, will testify at the trial, giving their name, address, area of expertise, and a brief summary of the anticipated testimony.

By Plaintiff:

1. *Dr. David Trigg Mather, Consultant*
1569 Northfield Rd.
Fairbanks, Alaska 99709

Dr. Mather is a healthcare consultant, primarily working with Tribal contractors operating federal facilities and programs under ISDA contracts and compacts. Anticipated testimony involves his knowledge regarding Tribal contractors' contract support cost budgets, calculations, proposals; IHS's contract support cost allocations, and the Plaintiff's and other Tribal contractors contract support cost shortfalls.

By Defendants:

Defendants have not yet filed an answer and are not certain at this time whether and/or who they may call as an expert witness.

OTHER PRETRIAL MOTIONS

Plaintiff intends to file:

1. Motion for Summary Judgment on Liability.
2. Motion for Class Certification (already filed at Dkt. 26)

Defendants intend to file:

1. Motion to Dismiss some or all claims (possible)
2. Motion for Summary Judgment

Pretrial motions, other than discovery motions, shall be filed with the Court and served on opposing party by _____. See D.N.M.LR-Civ. 7 for motion practice requirements and timing of responses and replies. Any pretrial motions, other than discovery motions, filed after the above dates shall be considered untimely in the discretion of the Court.

PRETRIAL ORDER

The parties agree that liability issues in this case should be resolved on cross-motions for summary judgment, but that should Plaintiff prevail, damages issues may require a trial (absent an intervening damages stipulation).

Counsel are directed to file a consolidated final Pretrial Order as follows: Plaintiff to Defendant on or before _____; Defendant to Court on or before _____.

In jury cases, proposed jury instructions shall be filed no later than _____.

In non-jury actions, requested findings of fact and conclusions of law shall be filed no later than _____.

Refer to "Other Matters."

PRETRIAL CONFERENCE AND TRIAL SETTING

This matter is set for a PRETRIAL CONFERENCE on _____ at _____, _____.m.

This matter is set for a NON-JURY TRIAL on a trailing calendar beginning on _____, at _____.m.

This matter is set for a JURY TRIAL on a trailing calendar beginning on _____, at _____.m.

ESTIMATED TRIAL TIME

The parties estimate trial will require _____ days/weeks.

This is a non-jury case.

This is a jury case.

SETTLEMENT

The possibility of settlement in this case cannot be considered until after the defendants filed an answer. The plaintiff has requested the appointment of a settlement judge.

OTHER MATTERS

Counsel are directed that the Pretrial Order will provide that no witnesses except rebuttal witnesses whose testimony cannot be anticipated, will be permitted to testify unless the name of the witness is furnished to the Court and opposing counsel no later than thirty (30) days prior to the time set for trial. Any exceptions thereto must be upon order of the Court for good cause shown.

If documents are attached as exhibits to motions, affidavits or briefs, those parts of the exhibits that counsel want to bring to the attention of the Court must be highlighted in accordance with D.N.M.LR-Civ. 10.6.

The Defendants have brought to the Court's attention that Michael Gross, Esq., counsel for Tunica-Biloxi et al. v. United States et al., No. 02-2413 (D.D.C.) (a putative class action lawsuit filed in the District of Columbia challenging the alleged underpayment of indirect CSC to Tunica-Biloxi Tribe and Ramah Navajo School Board by IHS), has filed a motion to transfer Tunica to this district for pretrial proceedings under 28 U.S.C. § 1407 (the multi-district litigation ("MDL") statute), and to consolidate or jointly manage Tunica with this case and another case in this district. Defendants plan to oppose the motion, but may seek, in the alternative, that the MDL panel consolidate the cases in the District of Columbia. The defendants thus take that position that further proceedings may occur regarding the forum in which this matter will be litigated for pre-trial purposes.

EXCEPTIONS

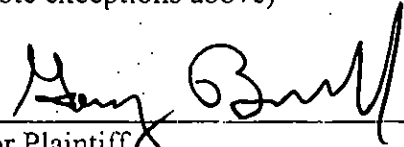
The parties disagree about the timing of merits discovery, as set forth in the parties' briefing of Defendants' Motion to Stay.

Plaintiff has filed a motion for certification of a class (docket no. 26) and believes that class discovery should commence at once and continue for a period of 45 days, to be followed by the opening of merits discovery.

Defendants believe that class certification and merits discovery should be stayed pending an opportunity for Defendants to answer or otherwise respond to the First Amended Complaint with a Rule 12(b)(1) motion to dismiss. Defendants request that briefing on class certification be stayed until Defendants either file an answer or the Court rules on any then-filed jurisdictional motion. Defendants also request sixty (60) days after the filing of an answer or the resolution of a Rule 12(b)(1) motion to dismiss, whichever is earlier, to conduct class certification discovery, and then twenty (20) days thereafter to file a response to Plaintiff's Motion for Class Certification.

Defendants request that merits discovery commence after the resolution of Plaintiff's Class Certification Motion.

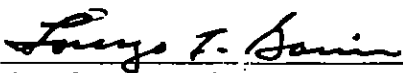
APPROVED WITH EXCEPTIONS
(note exceptions above)



For Plaintiff

Telephonically approved by
For Defendants Rachel Hites

APPROVED:



United States Magistrate Judge

APPROVED AND ADOPTED AS
THE ORDER OF THE COURT:



United States District Judge