UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR RECONSIDERATION DENIED: February 24, 2010

CBCA 237-ISDA-R

CONFEDERATED TRIBES OF COOS,
LOWER UMPQUA, AND SIUSLAW INDIANS,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Geoffrey D. Strommer, Marsha K. Schmidt, and Stephen D. Osborne of Hobbs, Straus, Dean & Walker, LLP, Portland, OR, counsel for Appellant.

Jay L. Furtick, Office of the General Counsel, Department of Health and Human Services, Seattle, WA, counsel for Respondent.

Before Board Judges **SOMERS**, **HYATT**, and **STEEL**.

SOMERS, Board Judge.

Appellant seeks reconsideration of the Board's October 1, 2009, decision in *Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians v. Department of Health and Human Services*, CBCA 237-ISDA, 09-2 BCA ¶ 34,278. Although familiarity with that decision is presumed, this opinion contains additional facts to clarify statements made in the original decision. We correct those clerical errors identified in appellant's motion for reconsideration. Otherwise, we deny appellant's motion because it has not presented sufficient grounds to warrant further reconsideration under the Board's Rules.

Background

The Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians (collectively, the "Confederated Tribes" or appellant) provided health care services to its members under self-determination contracts or compacts with the Department of Health and Human Services (HHS), Indian Health Service (IHS), pursuant to the Indian Self-Determination and Education Assistance Act (ISDA or Act), Pub. L. No. 93-638, codified as amended at 25 U.S.C. §§ 450, *et seq*. (2006). The appeal focused upon the Confederated Tribes' claim for additional amounts of indirect contract support costs (CSC) funding from IHS under ISDA contracts for fiscal year (FY) 1998.

After the initial pleadings had been filed in this appeal with a predecessor board, the Department of the Interior Board of Contract Appeals, the parties filed motions for summary relief. The Confederated Tribes contended that (1) they should have received CSC for new and expanded contracts covered by a separate, uncapped appropriation; (2) they should receive CSC from FY 1998 funds that had been deobligated and left unexpended for five years after FY 1998; and (3) under a theory identified as the "recurring funds contract theory," a portion of the Confederated Tribes' CSC would have been recurring to the contract as an existing obligation and should have been paid from the capped appropriations when it was initially distributed.

The IHS responded, arguing that appellant has no statutory or contractual right to additional funding under any theory because providing such funding would have caused IHS to exceed the $168,702,000 capped CSC appropriation for FY 1998.[1] The IHS supplemented

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[1] In FY 1998, Congress imposed an overall cap of $168,702,000 on the total amount of CSC for both new and ongoing programs. *Department of the Interior & Related Agencies Appropriations Act*, Pub. L. No. 105-83, 111 Stat. 1543, 1582-833 (1997). Congress also specifically earmarked $7.5 million of those funds to the ISDA fund for new and expanded programs. *Id*. The Board's October 1, 2009, decision contained a clerical error on this point when it referenced an element of the FY 1999 appropriation. The Board cites the correct amount elsewhere in that decision. *See Confederated Tribes*, 09-2 BCA at 169,336. Likewise, the Board cited the correct amount in a previous decision. *Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians v. Department of Health and Human Services*, CBCA 171-ISDA, et al., 08-2 BCA ¶ 33,922, at 167,867-68, *reversed in part on other grounds*, *sub nom*. *Arctic Slope Native Association, Ltd. v. Sebelius*, 583 F.3d 785 (Fed. Cir. 2009), *petition for rehearing and rehearing en banc filed* (Fed. Cir. Dec. 4, 2009). While the holding in the October 2009 decision is not affected by the clerical errors, this opinion amends any erroneous references to the FY 1999 appropriations.

the original administrative record, providing evidence that by the close of FY 1998, IHS had obligated the entire capped CSC appropriation for ongoing programs. When the one-year appropriation expired on September 30, 1998, IHS had fully obligated the FY 1998 CSC for Portland area tribes, which included the Confederated Tribes. Of the amount allocated in ongoing CSC for the Portland area for obligation and disbursement, specifically $14,082,781, IHS paid appellant its share of the CSC amount, which was $434,355. The remaining CSC amount was obligated and disbursed to other tribes in the Portland area. As of September 30, 1998, the Portland area did not have any unobligated CSC funds. In addition, IHS had obligated $7,491,424 of the FY 1998 CSC that Congress earmarked for new and expanded programs.[2]

In its October 2009 opinion, the Board expressly found that no unexpended funds remained in the FY 1998 fiscal year account. The Board held that the FY 1998 CSC appropriation was capped at $168,702,000 and concluded that providing additional CSC to appellant in FY 1998 would have caused IHS to exceed the cap. *Confederated Tribes*, 09-2 BCA at 169,336, 169,339. Secondly, the Board determined that even assuming that unexpended funds had remained to pay the Confederated Tribes' additional CSC, appellant had submitted its claim after the funds had been returned to the Treasury. *Id*. at 169,339-40.

Appellant has filed a motion for reconsideration, advancing the following arguments: (1) as to the CSC for new and expanded programs, the Board committed an error of fact by misquoting the FY 1998 amount appropriated in the FY 1998 law; (2) CSC for FY 1998 should have been paid from funds that were available because the funds had not been expended or had been de-obligated; (3) appellant had no duty to submit a claim for the funds during the five-year window; and (4) the IHS should have distributed the capped appropriation funds in a different way, using a base amount set by the recurring funds from the prior years (the "recurring funds contract theory"). The IHS objects, stating that appellant is attempting to raise old arguments yet again. We agree with the IHS.

Discussion

Under Board Rules 26 and 27, reconsideration is granted in very limited circumstances, such as in the case of fraud, misrepresentation, or other misconduct of an adverse party; justifiable or excusable mistake, inadvertence, surprise, or neglect; and/or

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[2] As to the remaining $8576 of the funds from the new and expanded program appropriation, the IHS presented uncontroverted evidence suggesting that these funds were obligated in FY 1999. *See* Respondent's Amended Motion for Summary Relief for FY 1998 at 8.

newly discovered evidence that could not have been discovered previously through due diligence. Rule 27(a) (48 CFR 6101.27(a) (2009)). "Arguments already made and reinterpretations of old evidence are not sufficient grounds for granting reconsideration." Rule 26(a); *see also Tidewater Contractors, Inc. v. Department of Transportation*, CBCA 50-R, 07-2 BCA ¶ 33,618. Reconsideration may not be used to retry a case or introduce arguments that could have been made previously. *Beyley Construction Group Corp. v. Department of Veterans Affairs*, CBCA 5-R, et al., 08-1 BCA ¶ 33,784.

In this case, appellant is simply seeking to relitigate legal issues previously considered by this Board. As a result of the Board's decision in *Confederated Tribes*, 08-2 BCA ¶ 33,922, the parties agreed to supplement the record to address the only issue to be resolved: whether providing appellant with additional funding would have caused IHS to expend more than the money appropriated for CSC for FY 1998. The Board expressly rejected the Confederated Tribes' position when we determined that funds for FY 1998 could not be obligated outside of that fiscal year and that such funds had expired prior to appellant's submission of its claim.

The remaining arguments presented by appellant do not fall within the limited circumstances identified as grounds for reconsideration. As to the Confederated Tribes' assertion that the Board did not address their "recurring contract fund" theory, we did not need to resolve the issue of whether appellant would be entitled to additional monies under that theory based upon our finding that appellant would not be entitled to any additional CSC funding because all appropriations had been obligated for FY 1998.

Decision

In conclusion, the Confederated Tribes' motion does not meet the standards required for reconsideration. Accordingly, appellant's **MOTION FOR RECONSIDERATION** is **DENIED**.

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JERI KAYLENE SOMERS
Board Judge

We concur:

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CATHERINE B. HYATT
Board Judge

CANDIDA S. STEEL
Board Judge