



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS FOR LACK
OF JURISDICTION DENIED: September 24, 2007

CBCA 692-ISDA

CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD NATION,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Brain Upton and Rhonda Swaney of the Confederated Salish and Kootenai Tribes of the Flathead Nation Legal Department, Pablo, MT, counsel for Appellant.

Colleen M. Dulin, Office of the Solicitor, Department of the Interior, Lakewood, CO, counsel for Respondent.

Before Board Judges **VERGILIO**, **STEEL**, and **WALTERS**.

VERGILIO, Board Judge.

On March 30, 2007, this Board received a notice of appeal from the Confederated Salish and Kootenai Tribes of the Flathead Nation (CSKT). CSKT maintains that its annual funding agreement (AFA) with the United States Fish and Wildlife Service (FWS), an agency of the Department of the Interior (Government), was extended pursuant to its terms for the period that the parties were attempting to negotiate a successor agreement. CSKT contends that when the Government took over performing an activity (bison feeding), the Government

breached the agreement by failing to provide CSKT with (1) written notice of allegedly inadequate performance and (2) an opportunity to respond to the allegations before the Government reassumed the activity. This appeal is based upon a deemed denial of the claim. CSKT brings this matter here pursuant to the terms of a statute, 25 U.S.C. §§ 450m-1, 458cc, and the agreement, which make applicable the Contract Disputes Act, as amended, 41 U.S.C.A. §§ 601-613 (2006) (CDA).¹

The Government filed a motion to dismiss for lack of jurisdiction, as well as a subsequent clarification. CSKT submitted a response in opposition to the motion. The Government premises the motion on its conclusion that there was no binding contract at the time of the performance in question. The Government also suggests that the matter may be dismissed because the contractor failed to submit a claim to the contracting officer.

The Board concludes that the agreement was a valid contract, extended for the period of performance covering the time of the alleged breach. The agreement expressly states that it may be extended for a period while the parties are attempting to negotiate an agreement for the subsequent fiscal year. The terms and conditions of the agreement expressly are made applicable during the extension period, including the period of the alleged breach by the Government.

CSKT's submission of a written claim to an awarding official complied with the requirements of the contract and applicable regulations. The regulations that make that determination final and conclusive, unless timely appealed, do not indicate that a claim must then be submitted to a contracting officer before an appeal is submitted to this Board. This action does not arise directly under the CDA. CSKT properly submitted a claim under the agreement to the awarding official. As permitted under the agreement, CSKT brought its dispute here based upon a deemed denial of the claim because the official did not issue a decision within sixty days of receipt of the claim. The Board concludes that it has jurisdiction over this dispute.

The Board denies the Government's motion to dismiss for lack of jurisdiction.

¹ As directed by statute, with the termination of the Department of the Interior Board of Contract Appeals (IBCA) and the creation of this Civilian Board of Contract Appeals (CBCA), references in statute and regulation to the IBCA are now to be treated as referring to the CBCA. National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 847(e), 119 Stat. 3394 (2006). As appropriate, this opinion substitutes the CBCA for the IBCA.

Findings of Fact

The Agreement/Contract

1. The FWS and CSKT entered into an agreement, the AFA. Exhibit 1 (all exhibits are in the appeal file). The agreement specifies the statutes and regulations under which it is authorized; it contains direction regarding interpretation and CSKT compliance. Exhibit 1 at 2 (§§ 3.A, B).

2. The Chairman of the CSKT Tribal Council signed the agreement on behalf of CSKT. Two individuals signed the agreement on behalf of the FWS, a Regional Director, Mountain and Prairie Region (defined as “Regional Director”), and a contracting officer, Mountain and Prairie Region. Exhibit 1 at 6, 30.

3. The agreement both specifies that it is effective through September 30, 2006, inclusive, and addresses an extension:

As provided by the Tribal Self-Governance Regulations at 25 C.F.R. § 1000.146, and subject to applicable laws and regulations, the FWS and the CSKT may agree in writing to extend to a date after September 30, 2005, [sic] the term for performing any Activity covered by this AFA. All of the terms and conditions of this AFA will apply during any extension of the term of this AFA. The FWS and the CSKT may modify the Activities covered by this AFA or the consideration paid by the FWS to the CSKT for performing an Activity only by amending the AFA as provided in section 20.A of this AFA.

Exhibit 1 at 29 (§ 23.C). The agreement defines Activity: “when capitalized, means a program, service, function, or activity, or portion thereof, at the National Bison Range Complex (NBRC), which the FWS agrees to fund and the CSKT agrees to perform under this AFA.” Exhibit 1 at 3 (§ 4). Within the categories of Activities CSKT is to perform is the activity to husband “surplus bison in a humane manner, with appropriate feed and water, to maintain sound, healthy animals.” Exhibit 2 at 12 (§ 2.D.7.g). The agreement specifies the consideration exchanged by the parties--in exchange for CSKT’s performance of activities, the FWS will provide consideration specified in the agreement. Exhibit 1 at 18 (§ 12, Consideration).

4. Regarding the expiration of the AFA, the agreement dictates:

In accordance with the Tribal Self-Governance Regulations at 25 C.F.R. § 1000.148, where the FWS and CSKT are negotiating a Subsequent AFA

covering an Activity with the prior written approval of the FWS and subject to any terms the FWS and the CSKT previously agree to in writing, the CSKT may continue to perform the Activity pending negotiation of a Subsequent AFA. To the extent the CSKT and the FWS are *not* negotiating a Subsequent AFA covering an Activity:

1. *Transition.* In the last month of the term of this AFA, the CSKT will work with the FWS to ensure an orderly transition in returning to the FWS responsibility for performing the Activity; and

2. *Available Property.* On the last day of the term of this AFA, the CSKT will return to the FWS all Available Property provided by the FWS to the CSKT, and not needed by the CSKT to perform an Activity for which the FWS and the CSKT are negotiating or have executed a Subsequent AFA for the next fiscal year.

Exhibit 1 at 26-27 (§ 16.D).

5. Over the signature of the Deputy Regional Director, the FWS provided CSKT a letter dated September 5, 2006:

As you are aware, the current negotiations between the Confederated Salish and Kootenai Tribes (CSKT) and the U.S. Fish and Wildlife Service (Service) for a Fiscal Year 2007 Annual Funding Agreement (AFA) at the National Bison Range will not be completed in time to execute the FY 2007 AFA at the start of the new fiscal year on October 1, 2006.

It is the Service's understanding that the CSKT are willing to continue performing the activities of the FY 2005-06 AFA in FY 2007, pending completion of the negotiations. As outlined in Section 16.D of the FY 2005-06 AFA (*Expiration*), the Service hereby authorizes CSKT to extend performance of the current AFA in FY 2007, beginning on October 1, 2006.

Pursuant to 25 C.F.R. § 1000.148, during this extension period, the current AFA will remain in effect, including coverage of the CSKT under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671-2680. The CSKT, under that regulation, may use any funds remaining from the FY 2005-06 AFA, savings from other programs, or Tribal funds for that purpose. No additional funds from the Service will be provided to the CSKT until a FY 2007 AFA is executed.

Exhibit 19.

6. A letter dated December 7, 2006, over the signature of the Deputy Regional Director, informed CSKT:

The U.S. Fish and Wildlife Service (Service) entered into an Annual Funding Agreement (AFA) with the Confederated Salish and Kootenai Tribes (CSKT) to perform certain Activities at the National Bison Range (NBR). This AFA commenced on March 15, 2005, and expired on September 30, 2006. The Service authorized an extension of this agreement on September 5, 2006, for an undetermined length of time while negotiations for a subsequent AFA are in progress.

One of the Activities identified in Attachment A of the AFA is:

2.D.7.g. “Husband surplus bison in a humane manner, with appropriate feed and water, to maintain sound, healthy animals.”

Effective immediately, the Service is withdrawing authorization granted to CSKT to perform this Activity.

Exhibit 44. The letter contains a discussion of the reasons why the Government is withdrawing authorization to perform the activity; at this stage in the proceedings, it is relevant that CSKT disagrees with some of the factual statements contained therein. Exhibit 53.

7. By letter dated December 11, 2006, the Regional Director notified CSKT that, as of that date, the FWS is terminating negotiations concerning an AFA for fiscal year 2007 for activities at the NBRC, is withdrawing CSKT’s authority to extend performance under the expired fiscal year 2006 AFA, and is reassuming all responsibilities for performing all activities covered by that AFA. Exhibit 62.

8. The agreement contains a section captioned “Appeals”: “The Tribal Self-Governance Regulations at 25 C.F.R Part 1000, Subpart R--Appeals, and section 450m-1 of the Act, Contract disputes and claims, 25 USC § 450m-1, govern the resolution of disputes arising under this AFA.” Exhibit 1 at 27 (§ 18).

9. In a letter dated January 10, 2006 [sic 2007], to the Regional Director, with a caption “Contract Dispute Claim,” CSKT specifies that the letter is filed pursuant to the dispute provisions: “As the awarding official, this is being filed with you per 25 C.F.R.

§ 900.219(a).” Exhibit 65 at 2. CSKT disputes the factual assertions and decision made in and actions taken pursuant to the letter of December 7, 2006, Finding 6. CSKT maintains that the Service cannot take back any of the contracted activities except through the reassumption provisions of the agreement. CSKT contends that the Government factually misstates what occurred, and contends that the Government utilized improper procedures and failed to provide notice and an opportunity to respond, thereby breaching the agreement by taking back the bison feeding activity. The letter concludes with the following pertinent sentences:

This claim involves less than \$100,000. In accordance with the provisions of 25 C.F.R. § 900.223(b), CSKT is requesting a decision in response to this claim within sixty days.

Please forward this to the relevant contracting official, if it is anyone other than yourself, for decision in accordance with 25 C.F.R. § 900.222.

10. The Regional Director did not respond to the letter. In a notice of appeal dated March 28, 2007, the contractor indicates that the appeal is being filed based upon the deemed denial. CSKT alleges that the Government breached the agreement by failing to provide the CSKT with (1) written notice of allegedly inadequate performance and (2) an opportunity to respond to the allegations before the Government reassumed the activity.

Discussion

In its motion to dismiss for lack of jurisdiction, the Government maintains that there was no contract for the extension period; that is, it states that the extension was not a contract because CSKT was not obligated to continue performance, and the Government could opt to not pay for work. Further, the Government asserts that there was no signed agreement for the extension period, such that there was no binding contract.² Although the Government does not contend that the Regional Director was other than an awarding official under the AFA, the Government maintains that the CSKT failed to submit its claim to the contracting officer, as required under the CDA as a prerequisite to Board jurisdiction.³

² It is difficult to reconcile the position of the Government asserted in the motion, that there was no binding contract between the parties at the time in question, with its position that CSKT was not performing adequately under the terms of the agreement.

³ CSKT pursues relief elsewhere regarding the Government’s failure to enter into an AFA with CSKT for fiscal year 2007. However, that action does not impact upon or diminish the claim of breach here raised by CSKT. The Board views the two disputes

CSKT opposes the motion. It maintains that the fiscal year agreement was extended by the parties and remained a binding contract. CSKT contends that it followed the terms of the agreement, statute, and regulation in pursuing this claim.

A binding contract

Although the agreement through fiscal year 2006 was not a procurement contract, 25 U.S.C. § 450b(j), the agreement was a contract, with each side providing consideration, Findings 1, 3. *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631 (2005). Before the contract expired, the parties were engaged in negotiating an agreement for fiscal year 2007. Pursuant to the terms of the contract, a Deputy Regional Director provided written notice that, given the on-going negotiations, and understanding that CSKT was willing to continue performance, the FWS authorized CSKT to extend performance under the current contract pending completion of the negotiations. Finding 5. The contract permitted such an extension, and explicitly stated, “All of the terms and conditions of this AFA will apply during any extension of the term of this AFA.” Findings 3, 4. (Pre-dispute correspondence from the FWS supports the notion of a binding extension. Finding 6.) The Board concludes that the written notification and performance by CSKT thereafter established a valid contract extension with the terms and conditions of the contract in effect during the extension period. With the extension, the contract did not expire as of October 1, 2006.

Claim

The Board’s jurisdiction and authority arise pursuant to the Indian Self-Determination and Education Assistance Act, as amended, 25 U.S.C. § 458cc(c), and regulations, 25 CFR pt. 1000 (2006), not directly under the CDA (a statute that does not define the term “claim”). 25 U.S.C. § 450m-1(d). The agreement, through regulations applicable thereunder, instructs CSKT to submit a claim as a written demand to the awarding official.⁴ 25 CFR 900.218,

(pursued in different forums) by CSKT to be discrete. Of relevance here, CSKT maintains that its AFA was extended and during the extension the Government breached the agreement.

⁴ Regulation, 25 CFR 900.6, defines the phrase “awarding official” to mean:

any person who by appointment or delegation in accordance with applicable regulations has the authority to enter into and administer contracts on behalf of the United States of America and make determinations and findings with respect thereto. Pursuant to the Act, this person can be any Federal official, including but not limited to, contracting officers.

.219, 1000.429. The awarding official is to issue a decision, in this instance, within sixty days of receipt of the claim. 25 CFR 900.223. The decision is to indicate that CSKT may take an appeal from the decision directly to the Board. 25 CFR 900.222. Absent an appeal or suit, the decision is final and conclusive. 25 CFR 900.227. CSKT may treat a failure to issue a decision within the sixty-day period as a denial of the claim. 25 CFR 900.224. Particularly given the regulation that specifies that a decision of the awarding official is to indicate that an appeal may be taken directly to the Board, without a requirement for a separate claim or decision to a contracting officer, the Board deems the requirement of the CDA to submit a claim to a contracting officer to be satisfied by a written claim submitted to an awarding official. The agreement treats the awarding official as the equivalent of a contracting officer for purposes of resolving a dispute under the agreement and the CDA.

The Government recognizes that two individuals signed the agreement on behalf of the FWS--a regional director and a contracting officer. The Government does not contend that the regional director lacked authority as an awarding official. In light of the signature, and the failure by the Government to suggest or substantiate an alternate position, the Board concludes that the regional director was an awarding official. CSKT submitted a claim to the appropriate official, in accordance with the terms and conditions of the agreement and the applicable regulations. Given the passage of time, CSKT timely filed an appeal with the Board based upon a deemed denial of its claim.

Conclusion

The Board has jurisdiction over this timely-filed dispute. In developing the record on the merits, the parties should focus upon regulations and the language of the contract that extends the contract while the parties negotiate an agreement for fiscal year 2007. The contract recognized that the parties may cease to negotiate an agreement for the following fiscal year. Finding 4. With the letter of December 7, 2006, it appears that the Government concluded that it would exclude the given activity of bison feeding from negotiations for an agreement for fiscal year 2007. Finding 6. (With the subsequent letter dated December 11, 2006, the Government ceased negotiations for a follow-on agreement. Finding 7.) CSKT bears the burden of proof in this dispute. It contends that, regarding the reassumption of the activity, the Government was required, but failed, to follow procedures of the agreement, Exhibit 1 at 14 (§§ 10.A.3, 16), and regulation, 25 CFR 1000, subpt. M. What has yet to be explored is whether the Government was obligated to continue with the whole of the extended agreement, or, similar to an option under a contract, could opt to let the agreement

expire in whole or in part. It may be that, without a Government obligation, there could not be a material breach.

Decision

The Board **DENIES** the Government's motion to dismiss for lack of jurisdiction.

JOSEPH A. VERGILIO
Board Judge

We concur:

CANDIDA S. STEEL
Board Judge

RICHARD C. WALTERS
Board Judge