UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: October 1, 2009

CBCA 282-ISDA

METLAKATLA INDIAN COMMUNITY,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Geoffrey D. Strommer of Hobbs, Straus, Dean & Walker, LLP, Portland, OR, counsel for Appellant.

Melissa Jamison, Office of General Counsel, Department of Health and Human Services, Rockville, MD, counsel for Respondent.

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

SOMERS, Board Judge.

The Metlakatla Indian Community (Metlakatla) provided health care services to its members under self-determination contracts with the Department of Health and Human Services (HHS), Indian Health Service (IHS). The contracts were entered into 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). In this appeal, Metlakatla seeks additional amounts of indirect contract support costs (CSC) funding from

IHS under an ISDA contract for fiscal year (FY) 1999.[1] IHS has moved for summary relief, asserting that Metlakatla has no statutory or contractual right to additional funding, because providing such funding would have caused IHS to exceed the Congressional cap on CSC for FY 1999. Metlakatla opposes and has cross-moved for summary relief. For the reasons set forth below, we grant the Government's motion for summary relief and deny Metlakatla's motion.

Background

In 1975, Congress enacted the ISDA to promote tribal autonomy by permitting Indian tribes to manage federally-funded services that were previously administered by the Federal Government. *See* 25 U.S.C. § 450a; *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 634 (2005). Transfers of federal programs to tribal control under the ISDA are accomplished through "self-determination contracts" under which a tribe agrees to take over administration of a federal program such as an IHS hospital or clinic. 25 U.S.C. § 450f(a). The Government is required to provide self-determination contractors with the same amount of funding that would have been appropriated for the tribal programs if IHS had continued to operate the programs directly. This amount is known as the "Secretarial amount" or "tribal share." 25 U.S.C. § 450j-1(a)(1).

Originally, the ISDA did not require the Government to pay the administrative costs that the tribes incurred to operate the programs. As a result, the tribes absorbed those costs, which reduced the funds available for the tribes to provide direct services to their members. *See Thompson v. Cherokee Nation of Oklahoma*, 334 F.3d 1075, 1080 (Fed. Cir. 2003).

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[1] Initially, Metlakatla filed appeals on claims for FYs 1995-1999 (CBCA 181-ISDA and 279-ISDA through 282-ISDA). By decision dated July 28, 2008, the Board dismissed the FY 1997 and FY 1998 claims (CBCA 280-ISDA and 281-ISDA) for lack of subject matter jurisdiction because Metlakatla failed to submit these claims to the awarding official within six years after they accrued, as required by the Contracts Disputes Act of 1978, 41 U.S.C. § 605(a). *Metlakatla Indian Community v. Department of Health and Human Services*, CBCA 280-ISDA, *et al.*, 09-2 BCA ¶34,239 (2008). The appellant appealed the Board's decision to the United States Court of Appeals for the Federal Circuit. The Federal Circuit consolidated that appeal with other cases and issued a decision affirming in part, reversing in part, and remanding the cases. *Arctic Slope Native Association, Ltd. v. Department of Health and Human Services*, Nos. 2008-1532, et al. (Fed. Cir. Sept. 29, 2009).

This decision resolves the claim for FY 1999 (CBCA 282-ISDA).

Congress amended the ISDA in 1988 to require the Federal Government to provide funds to pay the administrative expenses of covered programs. Those expenses included "contract support costs," defined in the statute as costs that a federal program would not have directly incurred, but that tribal organizations acting as contractors reasonably incur in managing the program. 25 U.S.C. § 450j-1(a)(2).

In addition, Congress amended the ISDA to authorize IHS to negotiate additional instruments, self-government "compacts," with a select number of tribes. Pub. L. No. 100-472, tit. II, § 201(a), (b)(1), 102 Stat. 2288, 2289 (1988); *see* 25 U.S.C. § 450f note, *repealed by* Pub. L. No. 106-260, § 10, 114 Stat. 711, 734 (2000). The selected tribes were given the option of entering into either contracts or compacts[2] with IHS to perform certain programs, functions, services, or activities (PFSAs) which IHS had operated for Indian tribes and their members. If a tribe and IHS entered into a contract or a compact, they also entered into annual funding agreements (AFAs) as to the years covered by the instrument.

The provision of funds for CSC is "subject to the availability of appropriations," notwithstanding any other provision in the ISDA, and IHS is not required to reduce funding for one tribe to make funds available to another tribe or tribal organization. 25 U.S.C. § 450j-1(b).

The provision of funds for CSC is "subject to the availability of appropriations," notwithstanding any other provision in the ISDA, and IHS is not required to reduce funding for one tribe to make funds available to another tribe or tribal organization. 25 U.S.C. § 450j-1(b).

In 1988, Metlakatla entered into a contract with IHS to provide "various Health and Related Services for Alaska Natives, Annette Island Reserve." Appeal File, Exhibit 2 at 3-1. For FY 1995, effective October 1, 1994, amendment no. 54 modified the original contract and extended the period of performance to cover the period from October 1, 1994, through September 30, 1995. *Id*. at 4-1.

On April 1, 1995, Metlakatla and IHS entered into a new contract, with yearly AFAs, in which Metlakatla would provide health services for part of FY 1995 and FY 1996. Appeal File, Exhibits 5, 6, 11. From FY 1997 through FY 1999, Metlakatla has operated the associated programs, functions, and services for Annette Island Reserve as a member of the "Alaska Tribal Health Compact between Certain Alaska Native Tribes and the United States

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[2] For the purposes of this decision, there are no significant differences between contracts and compacts.

of America" (ATHC), a compact which authorized thirteen Alaskan tribes to operate health care programs. *Id*., Exhibit 2 at 15-1.

With regard to funding, the contract, as amended and restated on October 1, 1998, stated:

> Subject only to the appropriation of funds by the Congress of the United States and to adjustments pursuant to § 106(b) of the Indian Self-Determination and Educational Assistance Act, as amended, the Secretary shall provide the total amounts specified in the Annual Funding Agreements.

Appeal File, Exhibit 17 at 16. For each fiscal year, the contract required that the Secretary shall, among other things:

> make available the funds specified for that fiscal year under the Annual Funding Agreements by paying the respective total amount as provided for in each Annual Funding Agreement in advance lump sum, as permitted by law, or such other payments as provided in the schedule set forth in each Annual Funding Agreement.

Id. at 17.[3] The contract acknowledges that the program funding may not meet all needs:

> The parties to the Compact understand that the Indian Health Service budget is inadequate to fully meet the special responsibilities and legal obligations of the United States to assure the highest possible health status for American Indians and Alaska Natives and that, accordingly, the funds provided to the Co-Signers are inadequate to permit the Co-Signers to achieve this goal. The Secretary commits to advocate for increases in the Health Service budget . . . .

Id. at 29.

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[3] The annual funding agreement stated that "one annual payment in lump sum [would] be made annually in advance by check or wire transfer." Appeal File, Exhibit 18 at 13.

The annual funding agreement for FY 1999 set forth the funding available for CSC. Pursuant to the agreement, IHS paid Metlakatla a total of $464,097 for CSC for that fiscal year. Respondent's Statement of Uncontested Facts ¶ 6; Appellant's Statement of Uncontested Facts ¶ 5.

Metlakatla submitted its claim for unpaid CSC on June 30, 2005. The amount claimed was either for $110,429, based upon a contract theory of recovery which assumes the appropriation for FY 1999 is capped, or $211,330, based upon a theory of recovery which challenges the applicability of the appropriations cap and which asks for the amount listed on a shortfall report. Appeal File, Exhibits 2 at 15, 20 at 2.

In our previous decision, we concluded, based upon the record, that Congress had restricted funds available for CSC for FY 1999. *Metlakatla Indian Community v. Department of Health and Human Services*, CBCA 280-ISDA, *et al.*, 09-2 BCA ¶ 34,239 (2008). The requirement to fund CSC is subject to the availability of appropriations, notwithstanding any other provisions in the ISDA. 25 U.S.C. § 450j-1(b). Congress restricted IHS's FY 1999 appropriation when it provided "not to exceed $203,781,000 . . . for payments to tribes and tribal organizations for contract or grant support costs . . . ." Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 328, 112 Stat. 2681, 2681-337 (1998). No separate amount had been designated for the Indian Self-Determination Fund for initial and expanded programs. *Id.*

However, because we could not determine, based upon the record, whether providing Metlakatla with additional funding for CSC would have caused IHS to expend more than $203,781,000 for CSC for FY 1999, we denied the IHS motion to dismiss the FY 1999 claim for failure to state a claim upon which relief can be granted. On this issue, we stated that if providing Metlakatla with additional funding for CSC would have caused IHS to expend more than the funds appropriated for CSC for the appropriate fiscal year, Metlakatla had no statutory or contractual right to such additional funding and its claim for additional funding would not be one upon which we could grant relief, citing *Greenlee County, Arizona v. United States*, 487 F.3d 871 (Fed. Cir. 2007); *Babbitt v. Oglala Sioux Tribal Public Safety Department*, 194 F.3d 1374 (Fed. Cir. 1999); and *Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996). If, however, IHS could have provided additional funding for CSC without expending more than $203,781,000 for CSC for FY 1999, we concluded that Metlakatla might be able to establish that it had a statutory or contractual right to such funding up to the amount of the unexpended funds, in which case its claim would be one upon which we could grant relief.

After the Board issued its decision, the parties agreed that IHS would supplement the appeal file with documentation addressing the issue of whether IHS could have provided

additional funding for CSC without expending more than the amount appropriated for the fiscal year. Accordingly, IHS supplemented the record with the declaration of Elizabeth Fowler, the Director of the Office of Finance and Accounting (OFA) at IHS.

In her declaration, the Director stated that one of her responsibilities includes monitoring the obligation and expenditure of funds that Congress appropriates for IHS. Declaration of Elizabeth Fowler (Oct. 28, 2008) at 1. The Director explained that, since FY 1998, Congress included a "cap" in the annual IHS appropriations for CSC. The funds appropriated by Congress for CSC are "one-year" funds, meaning that the funds must be obligated before the end of the fiscal year in which they were appropriated. The funds remain available for five years after the close of the fiscal year for liquidation of obligations incurred during that one fiscal year. After the expiration of that period, the funds are statutorily withdrawn. *Id*. at 2.

Each year, IHS allots its CSC funding among the twelve IHS area offices. Each area office obligates its CSC allotment to the tribes and tribal contractors in its area by incorporating the funding into annual funding agreements or modifications to self-governance contracts or compacts. IHS then records the obligations in its accounting system. At some point thereafter, the Department of the Treasury disburses the obligated funds. Fowler Declaration at 2.

Since 1998, IHS has obligated almost all of the funds appropriated by Congress for CSC. These funds have never been sufficient to satisfy all of the requests for CSC made by IHS's tribal contractors. Therefore, pursuant to published policies, IHS has divided the funding among the various contractors. Fowler Declaration at 3.

In FY 1999, there were apportioned to IHS, in a one-year account, $203,781,000 for CSC for ongoing self-determination contracts and compacts. OFA records show that $203,567,506 was obligated by the close of the fiscal year, leaving what appeared to be an unobligated balance of $213,494. However, the records contained a pen-and-ink change in the amount of $213,494 for a CSC award that was not posted to the accounting system due to an omission. Thus, the actual unobligated balance at the end of the fiscal year was $0. Fowler Declaration at 3, Attachments A-F.

The balance in the account fluctuated over the next five years due to administrative recording errors, de-obligations, and refunds. The funds were statutorily withdrawn in September 2004. OFA records show that as of September 30, 2004, when the funds were statutorily withdrawn, the unobligated balance in the account was $179,539. The unobligated balance included $37,750 in the Phoenix area, $5609 in the Oklahoma area, and $136,178

at IHS headquarters. The balance of undelivered requests on September 30, 2004, was $4251.93. Fowler Declaration at 3, Attachments G-H.

Generally, unobligated funds at the end of the fiscal year occur for three reasons: (1) a de-obligation, in which IHS determines that the amount of an obligation not yet disbursed is in excess of the amount that actually should have been obligated; (2) a refund, in which IHS determines that the amount of an obligation that was disbursed was in excess of the amount that actually should have been obligated and disbursed, and IHS has thus recovered the funds; and (3) IHS never obligated the funds. Fowler Declaration at 5.

During this time period, an additional reason caused the amount of unobligated funds to fluctuate. As the result of a pending lawsuit, a United States district court ordered IHS to make payments into the court registry from various CSC accounts, including $136,178 for FY 1999, to secure funding in the event that IHS did not prevail in its appeal. However, IHS ultimately prevailed in the litigation, and on October 15, 2002, the court returned a total of $1,025,185.78 to IHS, representing payments to the registry and interest. As a result, the original obligation of $136,178 for FY 1999 was de-obligated and the original disbursement of this amount was credited. Fowler Declaration at 6.

Discussion

The Government has asked the Board to resolve this appeal by granting its motion to dismiss for failure to state a claim upon which relief can be granted. The appellant has countered by filing its opposition to the motion and a motion for summary relief. We address the Government's motion first.

Resolving a dispute on a motion to dismiss for failure to state a claim upon which relief can be granted is appropriate when the facts asserted by the claimant do not entitle it to a legal remedy. *Boyle v. United States*, 200 F.3d 1369 (Fed. Cir. 2000). When considering a motion for failure to state a claim, we must assume all well-pled factual allegations are true and indulge in all reasonable inferences in favor of the nonmovant. *Anaheim Gardens v. United States*, 444 F.3d 1309, 1314-15 (Fed. Cir. 2006) (citing *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). Dismissal for failure to state a claim should not be granted unless it appears beyond doubt that the appellant cannot prove any set of facts in support of its claim that would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

In general, a case can only be dismissed for failure to state a claim for which relief may be granted when that conclusion can be reached by looking solely to the pleadings. In this case, the parties have submitted materials outside the pleadings, so we consider this

motion as a motion for summary relief. *Walker Equipment v. International Boundary and Water Commission*, GSBCA 11527-IBWC, 93-3 BCA ¶ 25,954, at 129,074 (citing *Carter v. Stanton*, 405 U.S. 669 (1972)). In resolving the motion, we consider the facts alleged in the light most favorable to the appellant, the non-moving party. *Id*. (citing *Armco, Inc. v. Cyclops Corp.*, 791 F.2d 147, 149 (Fed. Cir. 1986); *Johns-Manville Corp. v. United States*, 12 Cl. Ct. 1, 14-15 (1987)).

Metlakatla argues that it is entitled to receive, at a minimum, all "unexpended funds" remaining in the appropriation. It contends, however, that the Government is liable in damages for all unpaid CSC, a total of no less than $211,330 in FY 1999. Appellant's Response to Respondent's Amended Motion for Summary Relief on FY 1999 Appeal (CBCA 282-ISDA) at 5.

"'Unexpended funds' are the portion of the appropriation that the agency did not spend during the fiscal year, including both obligated amounts that the agency had not yet disbursed, and unobligated amounts." Government Accountability Office, *Principles of Federal Appropriations Law* (the "*GAO Redbook*"), vol. I at 5-67 to -68; *see also* 31 U.S.C. § 1551(a). As is evident from the record, however, no unexpended funds remained in the fiscal year account with which we are concerned. Thus, in FY 1999, IHS obligated the entire $203,781,000 that Congress appropriated for CSC, leaving nothing for additional obligations or expenditures. Once IHS fully obligated the amount appropriated by Congress for CSC, any additional obligation or expenditure would have caused IHS to exceed the Congressional cap, in violation of 31 U.S.C. § 1341(a)(1)(A). That statute prohibits an agency from making a disbursement or obligation that exceeds the amount appropriated by Congress.

However, even assuming that unexpended funds remained to pay Metlakatla's additional CSC, Metlakatla submitted its claim for these additional costs after the funds had been returned to the Treasury. Pursuant to 31 U.S.C. § 1552(a), "[o]n September 30 of the 5th fiscal year after the period of availability for obligation of a fixed appropriation account ends, the account shall be closed and any remaining balance (whether obligated or unobligated) in the account shall be canceled and thereafter shall not be available for obligation or expenditure for any purpose." *See also City of Houston, Texas v. Department of Housing and Urban Development*, 24 F.3d 1421, 1426 (D.C. Cir. 1994) ("[I]t is an elementary principle of the budget process that, in general, a federal agency's budgetary authority lapses on the last day of the period for which the funds were obligated. At that point, the unobligated funds revert back into the general Treasury." (citing *West Virginia Association of Community Health Centers v. Heckler*, 734 F.2d 1570, 1576 (D.C. Cir. 1984)); *National Association of Regional Councils v. Costle*, 564 F.2d 583, 587 (D.C. Cir. 1977); *Principles of Federal Appropriations Law*, vol. II, at 5-73 to -75.

Metlakatla did not file its claim for additional contract support funds for FY 1999 until June 30, 2005, months after the appropriated funds had lapsed. Once the budget authority had lapsed, the agency properly returned the funds to the Treasury in compliance with statutory requirements.

Metlakatla does not dispute that any unexpended funds eventually lapsed at the end of the account period for the fiscal year, but instead reiterates its position that the pre-existing contract obligated IHS to pay full CSC from the available and unexpended funds. Metlakatla asserts that, under *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631 (2005), its contract and indirect cost agreement constitute a binding contractual obligation on the part of IHS to pay 100% of CSC, if funds were available. The remedy available to Metlakatla, however, is constrained by the mandate that the appellant is entitled to be paid its full CSC requirement only as long as appropriations are legally available to do so. As explained above, Metlakatla did not submit its claim for additional CSC until after the appropriations had lapsed. Once the appropriations lapsed, the funds were no longer available with which to pay any claims. Accordingly, for the same reasons that we grant the Government's motion for summary relief, we must deny Metlakatla's motion for summary relief, which seeks an award of additional CSC for FY 1999.

Decision

For the foregoing reasons, respondent's motion for summary relief is granted, and appellant's motion for summary relief is denied. The appeal is **DENIED**.

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JERI KAYLENE SOMERS
Board Judge

We concur:

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CATHERINE B. HYATT
Board Judge

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CANDIDA S. STEEL
Board Judge