



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTIONS FOR SUMMARY RELIEF DENIED: October 29, 2009

CBCA 181-ISDA, 279-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 the General Counsel, Department of Health and Human Services, Rockville, MD, counsel for Respondent.

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

STEEL, Board Judge.

During fiscal years (FYs) 1995 and 1996 the Metlakatla Indian Community (Community) provided its members with health care services under contracts entered into with the Department of Health and Human Services (HHS), Indian Health Service (IHS), pursuant to the Indian Self-Determination and Education Assistance Act (ISDA), Pub. L. No. 93-638, codified as amended at 25 U.S.C. §§ 450, *et seq.* (2006). In these appeals, the Community seeks additional amounts of contract support cost (CSC) funding from IHS for these contracts. IHS moved to dismiss the complaints on the grounds that the Community

has no statutory or contractual right to the additional funding.¹ The Community opposed that motion and filed a motion for summary relief. IHS opposed appellant's motion and cross-filed for summary relief.

Background

In 1975, Congress enacted the ISDA to allow the Federal Government to transfer responsibility for certain governmental programs, such as health care services, to tribal governments and other tribal organizations. Congress required that the tribes operating such contracts be provided a program amount or "Secretarial amount" or "tribal share," i.e., the same amount of direct funds as would be expended if the Government were still operating the programs. 25 U.S.C. § 450j-1(a)(1).

In 1988, section 106 of the ISDA was amended to state that in addition to the Secretarial amount, the tribes should be provided CSC funds (including start-up costs, direct costs, and indirect costs) to cover the reasonable expenditures for activities which must be carried on by a tribal organization. 25 U.S.C. § 450j-1(a)(2). CSC funds are intended to cover costs that the federal agency would not have directly incurred (such as worker's compensation insurance), but that tribal organizations acting as contractors reasonably incur in managing the programs. *Id.*

Funding for these various types of 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). According to 25 U.S.C. § 450j-1(b)(2), from one fiscal year to the next, IHS cannot reduce the Secretarial amount and the CSC it provides except pursuant to any of five enumerated situations, including tribal authorization.

The ISDA requires IHS to submit to Congress by May 15 of each year an annual report which includes an accounting of the total amounts of funds provided for each program, an accounting of any deficiency of funds needed to provide required contract support costs to all contractors for the fiscal year (known as a shortfall report), and each tribal

¹ In a previous decision the Board held these claims were not barred by laches and denied the motion to dismiss. *Metlakatla Indian Community v. Department of Health and Human Services*, CBCA 280-ISDA, et al., 09-2 BCA ¶ 34,239 (2008). Familiarity with that decision is presumed.

organization's indirect cost (IDC) rate that has been negotiated with the appropriate Secretary. 25 U.S.C. § 450j-1(c).

For FYs 1995 and 1996, two contracts and three annual funding agreements (AFAs) addressed the funding arrangements at issue here.. The initial contract, no. 243-88-0184, awarded to appellant effective July 1, 1988, stated that no indirect CSC would be paid under the contract. Exhibit 3 at 17². Page two of the contract notes that \$188,400 "is being obligated to the Contract to permit the payment of the Contractor's administrative costs for a period of twelve months in addition to the recurring base funds available to the Indian Health Services []." Amendments 54 and 55 to that contract, effective October 1, 1994 (the first day of FY 1995), proposed payment of "total CSC" in the amount of \$441,252, and indicated that that amount was available. Exhibit 4 at 2, 10, and 13.

In the middle of FY 1995, the Community and IHS entered into a new contract, no. 243-95-6001, Exhibit 5, which reflected the terms of the model agreement mandated by the Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413 (codified as amended at 25 U.S.C. § 450*l*). Complaint, preamble. The initial contract was modified by decreasing the proposed annual CSC funds by 50% and using the remaining 50% to fund the new contract. The effective date of the new contract was April 1, 1995, and the contract covered the second half of FY 1995 and all of FY 1996.

Article II, "Terms, Provisions and Conditions," of the modified contract states, *inter alia*, that subject to the availability of appropriations, the Secretary shall make available to the contractor the total amount specified in the AFA, which amount shall not be less than the applicable amount determined pursuant to section 106(a) of the ISDA, 25 U.S.C. § 450j-1. Exhibit 5 at 7.

Article V, section 5, "Administrative Provisions," provides that there shall be added to the contract the full amount of funds to which the contractor is entitled under sections 106(a) and 106(g) of the Act. Specifically, the allowable indirect costs, including CSC, shall be obtained by applying negotiated indirect cost rates to direct cost bases agreed upon by the parties. Exhibit 5 at 19. The Community had negotiated an indirect cost rate with the Department of the Interior, Office of Inspector General. For FY 1995, this indirect cost rate was 26.9%. The FY1996 rate was 30.5%. *See, e.g.*, Exhibit 27.

The contract incorporated a new AFA covering April 1 to September 30, 1995. Exhibit 6. The AFA contained the following language:

² All exhibits are found in the appeal file, unless otherwise noted.

(E) For the period April 1, 1995 to September 30, 1995, the Contractor shall be reimbursed for indirect costs using a rate of 26.9%. The indirect cost amount that the Indian Health Service shall pay the Metlakatla Indian Community shall be included in the amount identified in Section 2(A) of this Agreement [i.e., the lump sum payment covering the Secretarial amount and CSC to be paid for the contract period].

Id. The parties are in agreement that the Government paid Metlakatla at least \$442,193 for CSC, which included \$357,735 for indirect CSC and \$84,458 for direct CSC, in each of FYs 1995 and 1996. Complaint ¶¶ 25, 27; Answer ¶¶ 25, 27.

In FY 1995, according to the shortfall report submitted to Congress, the Community had a direct cost base of \$1,754,372 and an IDC rate of 26.9% for a total indirect cost funding requirement of \$471,926. The IDC funding “available” and paid, however, totaled only \$357,735, resulting in an IDC shortfall of \$114,191. Exhibit 26 at 1. In FY 1996, according to the shortfall report submitted to Congress, the Community’s total CSC requirement for FY 1996, based on its direct cost base of \$1,642,037 and an IDC rate of 30.5%, was \$513,367³, and the Community was paid \$357,735, for a difference of \$155,632.

Positions of the Parties

In support of its motion for summary relief, the Community argues that it is entitled to judgment under the United States Court of Appeals for the Federal Circuit’s holding in *Thompson v. Cherokee Nation of Oklahoma*, 334 F.3d 1075 (Fed. Cir. 2003) (*Cherokee I*), which was upheld by the Supreme Court in *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631 (2005) (*Cherokee II*), as no cap applied to the IHS appropriations for FYs 1995 and 1996, and IHS had sufficient lump-sum appropriations to pay the Community’s CSC. Here, as in the *Cherokee* cases, the Government refused to pay the entire amount of CSC agreed to despite lump-sum appropriations which would have covered the obligation. The Community seeks an award of its full CSC costs for FYs 1995 and 1996 as shown on the applicable shortfall reports. Appellant’s Motion for Summary Relief at 4.

IHS argues that it is entitled to summary relief because it paid the actual and specific amount of CSC listed in the AFAs and that nothing more is required. The Government states that this case differs from the *Cherokee* cases in that while the contract documents do contain language stating that the amount of CSC would be calculated by using the Community’s negotiated indirect cost rate, the AFAs provide for a lesser amount. IHS did pay the specific

³ This is the amount listed on the shortfall report. The Board notes that according to its calculations \$1,642,037 multiplied by 30.5% equals \$500,821.

amount listed in the AFA. IHS asserts that the specific amount listed in the AFAs governs over the general terms identified in the contract. and argues that this “agreed-upon amount” controls over general terms to the contrary. Respondent’s Opposition to Appellant’s Motion for Summary Judgment and Respondent’s Cross-Motion for Summary Judgment at 17.

Discussion

Each party has asked the Board to rule in its favor on its own motion for summary relief and to deny its opponent’s motion. It is appropriate to resolve a dispute on a motion for summary relief if the moving party is entitled to judgment as a matter of law, based on undisputed material facts. All justifiable inferences must be drawn in favor of the non-moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). However, any doubt on whether summary relief is appropriate is to be resolved against the moving party. *Celotex Corp.* 477 U.S. at 325. If the Board determines that a material fact is in dispute, summary relief must be denied.

Each party’s motion must be evaluated on its own merits and all reasonable inferences must be resolved against the party whose motion is under consideration. *First Commerce Corp. v. United States*, 335 F.3d 1373, 1379 (Fed. Cir. 2003); *DeMarini Sports, Inc. v. Worth, Inc.*, 239 F.3d 1314, 1322 (Fed. Cir. 2001). The fact that the parties have cross-moved for summary relief does not require a grant of one of the motions. Each motion must be independently assessed on its own merit. *California v. United States*, 271 F.3d 1377, 1380 (Fed. Cir. 2001).

The Board’s role in deciding a motion for summary relief is not to resolve factual questions, or to weigh the evidence and determine the truth of the matter. The interpretation of language, the conduct and the intent of the parties, i.e., what meaning should be given by the Board to the words of a contract, may involve questions of material fact and not just questions of pure law which may be resolved on summary relief. *Butte Timberlands, LLC v. Department of Agriculture*, CBCA 646, 08-1 BCA ¶ 33,730 (2007). A fact is considered to be material if it will affect the Board’s decision, and an issue is genuine if enough evidence exists such that the fact could reasonably be decided in favor of the nonmovant after a hearing. *Beta Systems, Inc. v. United States*, 838 F.2d 1179, 1183 (Fed. Cir. 1988); *George P. Gobble v. General Services Administration*, CBCA 528, 07-2 BCA ¶ 33,675. In the instant case, the Boar One example of such a genuine issue in dispute is that the Government asserts that the contract required it to pay only the specific amount numerically set out in the AFAs, yet contract and AFA provisions also provide for the payment of the full ISDA CSC amount. d finds there are genuine issues of material fact that would affect the outcome of the suit under the governing law. If there is a genuine dispute of material fact, summary relief is inappropriate.

While the parties are in agreement that the contracts and AFAs were entered into as they appear in the record, that record contains discrepancies which cannot be resolved without reconciling conflicting evidence. The parties appear to have agreed to two inconsistent arrangements. On one hand, it appears that the Government would pay to the Community its direct costs multiplied by its negotiated IDC rate. The Government did not fully make such payments. On the other hand, the Government would pay to the Community only the specific CSC amount enumerated in the AFAs. It is not clear from the record how the specific amount to be paid as itemized in the AFA was determined, and whether that number was in fact negotiated with appellant. Furthermore, the shortfall reports submitted to Congress suggest a different understanding between the parties as to what payment was due to the Community under the contract and/or the statute.

Decision

The cross-motions for summary relief are **DENIED**.

CANDIDA S. STEEL
Board Judge

We concur:

JERI K. SOMERS
Board Judge

CATHERINE B. HYATT
Board Judge.