



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR RECONSIDERATION DENIED: February 18, 2010

CBCA 282-ISDA-R

METLAKATLA INDIAN COMMUNITY,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Geoffrey D. Strommer, Marsha Schmidt, and Stephen D. Osborn, 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.

Appellant seeks reconsideration of the Board's decision in *Metlakatla Indian Community v. Department of Health and Human Services*, CBCA 282-ISDA, 09-2 BCA ¶ 34,279. Familiarity with that decision is presumed. We deny appellant's request for reconsideration because appellant has not presented sufficient grounds to warrant reconsideration under the Board's Rules.

Background

The Metlakatla Indian Community (Metlakatla) 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 Metlakatla's claim for additional amounts of indirect contract support costs (CSC) funding from IHS under ISDA contracts for fiscal year (FY) 1999.

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 numerous motions for summary relief. Of relevance here are the arguments presented by Metlakatla that it was entitled to additional funding for CSC, including the sum derived from multiplying an indirect cost rate by the direct cost rate. According to Metlakatla, a portion of the CSC should have been included in the initial distribution of the appropriations under a "recurring funds contract theory". Under this theory, had the IHS fully funded the contract in previous years, specifically FYs 1995 through 1997, the CSC amounts would have been recurring to the contract as an existing obligation and should have been paid from the capped appropriated funds when they were initially distributed.

The IHS responded, arguing that Metlakatla has no statutory or contractual right to additional funding under any theory because providing such funding would have caused IHS to exceed the statutory cap on CSC for FY 1999.

In its opinion, the Board expressly found that no unexpended funds remained in the FY 1999 fiscal year account. In FY 1999, the IHS obligated the entire \$203,781,000 that the Congress had appropriated for CSC, leaving nothing for additional obligations or expenditures. *Metlakatla*, 09-2 BCA at 169,344. Secondly, the Board determined that even assuming, for the sake of argument, that unexpended funds had remained to pay Metlakatla's additional CSC, Metlakatla would still not prevail because it submitted its claim after the funds would have been returned to the Treasury. *Id.*

Appellant has filed a motion for reconsideration which makes the following arguments: (1) CSC for FY 1999 should have been paid from funds that were available because the funds had not been expended or had been de-obligated; (2) Metlakatla had no duty to submit a claim for the funds during the five-year window; and (3) 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 Metlakatla 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 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. Nor is reconsideration to be used for retrying a case or introducing 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, Metlakatla is simply seeking to relitigate legal issues previously considered by this Board. As a result of the Board’s decision in *Metlakatla Indian Community v. Department of Health and Human Services*, CBCA 181-ISDA, *et al.*, 09-2 BCA ¶ 34,239 (2008), *reversed in part on other grounds, sub nom. Arctic Slope Native Association v. Sebelius*, 583 F.3d 785 (Fed. Cir. 2009), *petition for rehearing and rehearing en banc filed* (Fed. Cir. Dec. 4, 2009), the parties agreed to supplement the record to address the only issue to be resolved: whether providing Metlakatla with additional funding would have caused IHS to expend more than the money appropriated for CSC for FY 1999. The Board expressly rejected Metlakatla’s position when we determined that FY 1999 funds could not be obligated outside of that fiscal year and that such funds had expired prior to Metlakatla’s submission of its claim. The remaining arguments presented by Metlakatla do not fall within the limited circumstances identified as grounds for reconsideration. As to Metlakatla’s assertion that the Board did not address its “recurring contract fund” theory, we did not need to resolve the issue of whether Metlakatla would be entitled to additional monies under that theory based upon our finding that Metlakatla would not be entitled to any additional CSC funding because all appropriations had been obligated for FY 1999.

Decision

In conclusion, Metlakatla’s motion does not meet the standards required for reconsideration. Accordingly, Metlakatla’s **MOTION FOR RECONSIDERATION IS DENIED.**

JERI KAYLENE SOMERS
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

CANDIDA S. STEEL
Board Judge