



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED: November 6, 2012

CBCA 2543-ISDA

KAW NATION,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Lindsay R. Naas, Gilbert, AZ, counsel for Appellant.

Sabrina A. McCarthy, Office of the Solicitor, Department of the Interior, Washington, DC, counsel for Respondent.

Before Board Judges **STERN**, **HYATT**, and **KULLBERG**.

STERN, Board Judge.

This appeal was filed by Kaw Nation (Kaw) following the denial by the Department of the Interior (Interior) of Kaw's claim of \$250,000, plus interest, for amounts due Kaw under its agreements executed with Interior.

Background

The Kaw Nation is a federally recognized Indian tribe with its headquarters in Kaw City, Oklahoma. The agreements between Kaw and Interior were executed pursuant to the terms of the Indian Self Determination and Education Assistance Act (ISDEAA), 25 U.S.C. §§ 450 to 458aaa-18 (2006). The ISDEAA provides that Indian tribes may perform certain

services, including law enforcement, that were previously provided by the United States. The ISDEAA permits Interior to provide tribes with funds in an amount previously spent by the Government for similar services so they can accomplish the takeover of the services. To accomplish this purpose, the ISDEAA provides for contracts to be executed between Interior and the tribes. The statute sets forth various provisions that must be included in each such contract, including one stating that “each provision of this contract shall be liberally construed for the benefit of the contractor. . . .” 25 U.S.C. § 450*l*.

On September 16, 1996, pursuant to the ISDEAA, Kaw entered into a Compact of Self-Governance (the compact) with Interior. Appeal File, Exhibit 1. Pursuant to the compact, the parties agreed to construe the document liberally and to permit Kaw to self-govern with regard to various programs, services, and activities of Interior’s Bureau of Indian Affairs (BIA). The compact provides in article 4, section 4:

The Nation shall be eligible for new programs, activities, services and functions on the same basis as other tribes and the Secretary or an authorized representative shall advise the Nation of the funding available for such programs.

....

The United States shall provide:

....

(ii) information on new programs, appropriation levels of direct and flow-through programs, budget and program plan revisions, and other data that is relevant to tribal decisions making about its current and future Compact programs, and funding.

Appeal File, Exhibit 1. Interior specifically agreed in article 5, section 6, of the compact to “interpret federal laws and regulations in a manner that facilitates this Compact . . .” *Id.* Funding to run these programs was to be provided to Kaw in accordance with annual funding agreements.

Under the calendar year 2009 and 2010 funding agreements, Kaw assumed responsibility, *inter alia*, for its law enforcement program. Appeal File, Exhibits 2, 6. Pursuant to the funding agreements, Kaw maintained a base budget from amounts transferred by Interior. The funding agreements provided that the amounts set forth within the agreements may be adjusted, dependent on amounts appropriated by Congress:

Section 8 – Adjustment due to Congressional Actions. The parties recognize that the total amount of funding in this Agreement is subject to adjustment due to Congressional action in appropriations acts. Upon enactment of relevant Congressional appropriations acts, or other laws affecting availability of funds to the BIA, the funding amounts under this Funding Agreement shall be adjusted in direct proportion to the general increases or decreases in levels of funding in each of the BIA Budget Categories as directed by Congress.

Appeal File, Exhibits 3, 6.

The funding agreements also provided that Interior was to inform Kaw of new programs and funds:

Section 9 – Eligibility for new Programs, Functions, Services and Activities [PFSAs]. The Nation shall be eligible for new PFSAs on the same basis as other Tribes, and the Secretary or an authorized representative shall advise the Nation of the funding available for such programs in accordance with Article IV, Section 4 of the Compact and how to access or apply for such program funding in accordance with Article IV, Section 4 of the Compact.

Appeal File, Exhibits 3, 6. Both funding agreements contained the additional statement that “[a]ny eligible new Law Enforcement Program funding will be determined and added to the funding agreement based on a determination by” Interior. Appeal File, Exhibits 3, n.8, 6, n.7.

So that Interior could track Kaw’s performance, the funding agreements provided that Kaw would furnish certain statistical information on crimes to Interior. This information was needed to support Interior’s compliance with the Government Performance and Results Act (GPRA) of 1993, Pub. L. No. 103-62 (1993). Pursuant to the terms of this Act, Interior was required to publicly report the goals and performance results of its programs. Both funding agreements provided that Interior would inform Kaw in a timely manner of the data and information to be provided. “The BIA Regional Office GPRA Coordinator will inform the Nation in writing of the data and information to be provided by the Nation sufficiently in advance to allow the Nation to prepare such data and information when such data and information is not otherwise available to [Interior].” Appeal File, Exhibits 3, § 24; 6, § 23. Further, the Code of Federal Regulations provided that Interior would prescribe the types of data to be collected and the format to be used. 25 CFR 12.41 (2008). The agreements stated, however, “The Kaw Nation’s obligations under this section shall not be unduly

burdensome and shall not impose any financial hardship to the Kaw Nation or result in a decrease in program services.” Appeal File, Exhibits 3, § 24; 6, § 23.

On October 3, 2005, Interior sent a letter to Kaw reminding it to furnish its crime statistics for fiscal year 2005. Appeal File, Exhibit 2. Other than in May and July 2009, as set forth below, there is no indication in the record that subsequent to this correspondence, Interior again specifically requested the crime data.

For fiscal year 2008, Kaw submitted its crime statistics as follows: Kaw’s October 2007 report was submitted on November 7, 2007; its November and December 2007 reports on January 17, 2008; its January through March 2008 reports on April 9, 2008; its April through August 2008 reports on November 10, 2008; and its September 2008 report on January 7, 2009. Appeal File, Exhibit 15.

Fiscal year 2009 crime statistics were received from Kaw by Interior beginning January 7, 2009, with the October 2008 thru December 2008 reports. On April 7, 2009, Interior received Kaw’s crime reports for January through March 2009. Appeal File, Exhibit 15. On May 22, 2009, Interior notified Kaw of the need to submit monthly crime reports. Appeal File, Exhibit 9. On July 9, 2009, Interior notified Kaw that its April, May, and June 2009 reports were needed. *Id.* Kaw submitted these reports to Interior on this same date. Kaw’s reports for July through September 2009 were received in October 2009. Appeal File, Exhibit 15.

Congress did not pass an appropriations act governing Interior for fiscal year 2009 (which began on October 1, 2008) until early in calendar year 2009. The Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, 123 Stat. 524, 713, which was enacted on March 11, 2009, provided an increase of \$25 million for tribal law enforcement in Indian country. Interior approved the allocation of this added funding in July 2009. Appeal File, Exhibit 5. Interior allocated this funding on an equal (and recurring) basis to tribes in Kaw’s region, but not to Kaw. On October 30, 2009, Congress again appropriated this increased amount for fiscal year 2010. Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-88, 123 Stat. 2904, 2916. Again, Kaw received none of this funding increase. In February 2010, Kaw first learned that most self-governance tribes in its region had received increases in their law enforcement funding in 2009. This added funding was recurring so that it would be paid in future years. Affidavit of Terri Humble (May 30, 2012) ¶ 3. On July 16, 2010, the Chairman of Kaw sent a letter to Interior stating, “We understand that each tribe in the Oklahoma Area, except for the Kaw Nation, received new recurring Law Enforcement funding for fiscal year 2010 in the approximate amount of \$125,000.” Appeal File, Exhibit 8. Interior denied the recurring

funding to Kaw on the basis that it had fallen behind in providing law enforcement crime data reports. On August 27, 2010, Interior informed Kaw that its April 2009, May 2009, and June 2009 monthly crime reports were not received until July 9, 2009. Appeal File, Exhibit 9. Therefore, it was denied the additional \$125,000 for fiscal year 2010 funding. Interior offered Kaw a one-time, non-recurring payment of \$125,000 for fiscal year 2010. *Id.* The offer was rejected by Kaw because it was only offered for fiscal year 2010 on a non-recurring basis, and Kaw sought both the fiscal year 2009 and 2010 funds on a recurring funding basis. Humble Affidavit, ¶ 5.

Kaw filed a claim with Interior for recurring payments of \$125,000, plus interest, for each of calendar years 2009 and 2010. Interior denied the claim on the basis that Kaw failed to timely file crime statistics required by regulation, 25 CFR 12.41, and therefore was ineligible to be considered for additional base funding as requested.

Discussion

Each party has filed a motion for summary relief on the basis that there are no material facts in dispute and that each is entitled to a favorable ruling from the Board.

Appellant seeks \$250,000, plus interest, representing \$125,000 for each of 2009 and 2010. This amount represents Kaw's share of funds that were distributed to tribes in its region as a result of additional law enforcement funding provided by Congress. Interior submits that Kaw's failure to timely provide crime statistics to Interior justified its decision not to increase the law enforcement funding to Kaw. Interior does not dispute Kaw's contention that if it had been included in the distribution, it would have received \$125,000 in both 2009 and 2010. Kaw argues that Interior failed to notify Kaw of the availability of the additional funding; that, in any event, Interior was aware of Kaw's crime statistics prior to the appropriation of the funding; and that Kaw was entitled to receive a portion of the added appropriation.

We are guided by the well-established rules applicable to summary relief motions. Summary relief is only appropriate where there is no genuine issue as to any material fact (a fact that may affect the outcome of the litigation) and the moving party is entitled to relief as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Any doubt on whether summary relief is appropriate is to be resolved against the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The moving party shoulders the burden of proving that no question of material fact exists. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). In the matter before us, we find no disagreement between the parties on the material facts. The parties disagree on the application of the law and the interpretation and

legal significance of the events that have transpired. It is appropriate for us to decide the matter on these summary motions.

Kaw and Interior entered into a Compact of Self-Governance in 1996 under the ISDEAA. Under the compact, Kaw agreed to run its own law enforcement program. We must look to the ISDEAA, the compact, and the funding agreements to determine the rights and obligations of the parties.

The compact between the parties specially provided that Kaw would be eligible for new programs on the same basis as other tribes. Interior accepted an obligation to provide Kaw information on new programs, “budget and program plan revisions, and other data relevant to tribal decision-making about its current and future . . . funding.” The funding agreements between the parties further obligated Interior to make Kaw eligible for new “programs, functions, services, and activities” on the same basis as other tribes. Interior agreed to advise Kaw of the funding available for such programs. The parties further agreed that the amounts of funding would be adjusted in direct proportion to increases or decreases of funding by Congress. Lastly, Interior agreed to add money to the funding agreement based on any new law enforcement program funding.

Pursuant to the funding agreements, Kaw accepted an obligation to provide to Interior data on its program. In that regard, Kaw furnished monthly crime statistics to Interior. During the years in question, however, Kaw’s reports were sometimes not submitted by the end of each month.

In 2009 and 2010 Congress passed appropriation acts providing an additional \$25 million per year in funding for law enforcement in Indian country. Interior provided \$125,000 to most tribes in Kaw’s region, on a recurring basis, from this additional appropriation, based on the crime statistics submitted by October 2008. Kaw was not provided the funding because it had not submitted its crime statistics for fiscal year 2008 by October 10, 2008, the deadline that Interior internally established for funding distribution. Kaw’s crime reports for April through August 2008 were not submitted to Interior until November 10, 2008. Kaw’s September 2008 report was not forwarded to Interior until January 7, 2009. Kaw was found ineligible due to its failure to have all of its crime statistics submitted by October 10, 2008.

We read the statute, compact, and funding agreements together to determine the parties’ obligations and intent. It is apparent to us that the intent of the parties here is to fund Kaw’s law enforcement program to the extent moneys are provided by Congress for this purpose. The parties agreed to exchange information so that Kaw would be aware of

all funding availability and could participate with all tribes in any added funding that would become available. We find the language regarding funding for “new” programs to apply to the present situation, as the record does not reflect any other meaning for the term, but in any event, there is sufficient other language in the agreements that obligate Interior to advise Kaw of any added funding. The agreements recognize that the amount of funding is to be adjusted based on Congressional action and reflect an intent by the parties to make additional funding available to Kaw.

Interior failed to inform Kaw of the added funding. It then excluded Kaw from participating in the extra funding even though it possessed all of Kaw’s relevant crime statistics by the time of actual Congressional passage of the appropriations. The funding agreements require a liberal interpretation of the agreements to permit Kaw to run its programs. Congress provided added funding to enable the tribes to administer the law enforcement programs. Interior’s failure to notify Kaw and subsequent denial of the additional funding provided by Congress violated the specific provisions of the agreements it executed with Kaw. In addition, Interior’s action violated the intent of Congress in transferring law enforcement programs to Kaw. The statutory language indicates an intent by Congress for Interior to cooperate to the fullest extent in implementing the program.

Interior had an obligation to inform Kaw of the additional funding available and of any requirement that it was imposing for Kaw’s participation for receipt of the added funds. We find that Interior acted arbitrarily in denying the added funding to Kaw though it actually possessed Kaw’s complete crime statistics at the time of passage of the omnibus spending bill in 2009, and well before Interior made the actual distribution of funds. In addition, Interior possessed most of Kaw’s fiscal year 2008 reports even by its self-imposed October 2008 deadline. Kaw is entitled to its share of the added law enforcement funding set forth in the 2009 omnibus appropriations bill on the same basis as the other tribes that were allocated funding. Interior had in its possession Kaw’s fiscal year 2009 crimes statistics at the time of passage of the fiscal year 2010 appropriations act. Kaw is also entitled to its share of the additional funds appropriated by Congress for fiscal year 2010. Kaw is entitled to the appropriate amount of interest on this additional funding, as provided in the Contract Disputes Act, 41 U.S.C. § 7109 (Supp. 2011).

Finally, we reject Interior’s contention that it can no longer allocate the added funding to Kaw since the funds have already been distributed to the other tribes and it cannot at this time take the funds back from those tribes to pay Kaw. The Supreme Court has specifically held that the Government is responsible to a contractor for the full amount due under a contract, even if the agency has exhausted its appropriation, if the appropriation contained enough money to permit the Government to comply with the contract. *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2191 (2012).

Decision

Interior's motion for summary relief is denied. Kaw's motion for summary relief is granted and the appeal is, **GRANTED**, as set forth herein.

JAMES L. STERN
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

H. CHUCK KULLBERG
Board Judge