UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: September 26, 2013

CBCA 195-ISDA, 306-ISDA, 307-ISDA, 308-ISDA, 309-ISDA, 310-ISDA

ASSINIBOINE AND SIOUX TRIBES OF FORT PECK RESERVATION,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Lloyd B. Miller and William F. Stephens of Sonosky, Chambers, Sachse, Endreson & Perry LLP, Washington, DC, counsel for Appellant.

Gary Fahlstedt and Althea S. Licht, Office of General Counsel, Department of Health and Human Services, Denver, CO, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **GOODMAN**, and **McCANN** (presiding).

PER CURIAM.

Respondent, the Department of Health and Human Services, has moved to dismiss the subject appeals for lack of jurisdiction because they were not filed within the ninety-day period set forth in the Contract Disputes Act, 41 U.S.C. § 7104(a) (Supp. IV 2011) (CDA). Appellant, the Assiniboine and Sioux Tribes of Fort Peck Reservation (Fort Peck Tribes), contends that the ninety-day time limit was tolled by the filing of a class action law suit seeking similar relief, and that the appeals were consequently filed in timely fashion, so the Board has jurisdiction over the cases.

Background

The Fort Peck Tribes entered into contracts with the Indian Health Service (IHS), an entity within the Department of Health and Human Services, under authority of the Indian Self-Determination and Educational Assistance Act, 25 U.S.C. §§ 450 et seq. (2006) (ISDA). Under these contracts, the Tribes were to administer for their members and other eligible individuals certain health care programs which otherwise would have been provided by the IHS. In return, the IHS was to pay the Tribes' costs of providing the services, including contract support costs (CSC).

On September 29, 2005, the Tribes filed claims with an IHS contracting officer pursuant to the ISDA, 25 U.S.C. § 450m-1(d), and the CDA, then 41 U.S.C. § 605(a),[1] for CSC relating to contracts covering fiscal years 1994 through 1999. The contracting officer denied the claims on May 31, 2006, and the Tribes received the decisions on June 1, 2006. The Tribes appealed the decisions to the Department of the Interior Board of Contract Appeals (IBCA). The decisions regarding the fiscal year 1995 contracts were appealed twice, once by filing dated August 30, 2006, and again by filing dated September 15, 2006. The decisions regarding the other fiscal years were appealed by filing dated September 15, 2006. The IBCA was consolidated into the Civilian Board of Contract Appeals (CBCA) in 2007, and the cases were transferred to this Board at that time. *See* Nat'l Def. Auth. Act For Fiscal Year 2006 § 847, 41 U.S.C. § 7105. They have been docketed by us as follows:

-- fiscal year 1994 contract claims, CBCA 195-ISDA

-- fiscal year 1995 contract claims, CBCA 192-ISDA (filing dated August 30, 2006) and 306-ISDA (filing dated September 15, 2006)

-- fiscal year 1996 contract claims, CBCA 307-ISDA

-- fiscal year 1997 contract claims, CBCA 308-ISDA

-- fiscal year 1998 contract claims, CBCA 309-ISDA

[1] The Contract Disputes Act was reorganized as part of the codification of title 41, United States Code, in 2011. Pub. L. No. 111-350, 124 Stat. 3677, 3816-26 (2011). The reorganization made no substantive change in the law. The provision to which we cite now appears in 41 U.S.C. § 7103(a) (Supp. IV 2011). Henceforth in this opinion, we cite to the current version of the Act.

-- fiscal year 1999 contract claims, CBCA 310-ISDA

In 2001, before these claims were filed, a class action suit was filed by the Pueblo of Zuni on behalf of a class of all ISDA tribal contractors, to recover alleged CSC under-payments from the IHS. *Pueblo of Zuni v. United States*, No. 01-1046 (D.N.M. Sept. 10, 2001) (*Zuni*). The Fort Peck Tribes assert that they were a putative member of the class. The *Zuni* class action remained pending until May 22, 2007, when the Federal District Court in New Mexico denied certification of the class. *Pueblo of Zuni v. United States*, 243 F.R.D. 436 (D.N.M. 2007).

Discussion

Respondent sees this case through the standard prism for CDA cases. The Act provides that "[a] contractor, within 90 days from the date of receipt of a contracting officer's decision . . . , may appeal the decision to an agency board [of contract appeals]." 41 U.S.C. § 7104(a). Further, "The contracting officer's decision on a claim is final and conclusive and is not subject to review by any forum, tribunal, or Federal Government agency, unless an appeal or action is timely commenced as authorized by this chapter." *Id.* § 7103(g). Other than CBCA 192-ISDA (which is not addressed in the motion), the Tribes did not appeal the contracting officer's decisions to an agency board of contract appeals within ninety days from the date of their receipt of the decisions. Therefore, respondent asserts, the decisions became final and conclusive and are not subject to review by the Board.

Respondent notes that the Court of Appeals for the Federal Circuit followed this line of reasoning in *Cosmic Construction Co. v. United States*, 697 F.2d 1389 (Fed. Cir. 1982). There, the Court held, "The ninety day deadline is thus part of a statute waiving sovereign immunity, which must be strictly construed . . . and which defines the jurisdiction of . . . the board." *Id.* at 1390 (citations omitted); *see also D.L. Braughler Co. v. West*, 127 F.3d 1476, 1480 (Fed. Cir. 1997); *Decker & Co. v. West*, 76 F.3d 1573, 1578 (Fed. Cir. 1996).

This Board has faithfully followed the court's command. *Tasunke Witco Owayawa (Crazy Horse School) v. Department of the Interior*, CBCA2381-ISDA, 11-2 BCA ¶ 34,810, at 171,310 ("the ninety-day requirement is statutory and cannot be waived by the Board"); *see also, Pixl Inc. v. Department of Agriculture*, CBCA 1203, 09-2 BCA ¶ 34,187; *Commodity Solutions, LLC v. Department of Agriculture*, CBCA 735, 07-2 BCA ¶ 33,689; *Charles T. Owen v. Agency for International Development*, CBCA 694, 07-2 BCA ¶ 33,638; *Robert T. Rafferty v. General Services Administration*, CBCA 617, 07-1 BCA ¶ 33,577 (dismissing for lack of jurisdiction an appeal filed twenty-three days late).

In 2008, the Supreme Court held that statutes of limitations come in two varieties:

> Most statutes of limitations seek primarily to protect defendants against stale or unduly delayed claims. . . . Such statutes . . . typically permit courts to toll the limitations period in light of special equitable considerations.
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> Some statutes of limitations, however, seek not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-related goal, such as facilitating the administration of claims, limiting the scope of a governmental waiver of sovereign immunity, or promoting judicial efficiency. The Court has often read the time limits of these statutes as more absolute, say as . . . forbidding a court to consider whether certain equitable considerations warrant extending a limitations period. As convenient shorthand, the Court has sometimes referred to the time limits in such statutes as "jurisdictional."

John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 133-34 (2008) (quotations and citations omitted).

Subsequent to receiving this explanation, in 2009, the Federal Circuit held that another time limitation of the CDA – for presenting claims to a contracting officer, 41 U.S.C. § 7103(a)(4)(A) – is subject to equitable tolling. *Arctic Slope Native Association, Ltd. v. Sebelius*, 583 F.3d 785, 798-99 (Fed. Cir. 2009). Thus, the presentment time limitation was effectively determined to be in the first category of limitations. However, the Federal Circuit has continued to consider the ninety-day limit for appealing contracting officer decisions to boards of contract appeals to be jurisdictional. *Systems Development Corp. v. McHugh*, 658 F.3d 1341, 1347 (Fed. Cir. 2011). Thus, if the CDA were the only law relevant to this motion, it would be clear that because appellant filed its appeals more than ninety days after receiving the decisions, we would have no jurisdiction to hear those cases.

Appellant maintains, however, that there is additional relevant law. At all times relevant to the filing of the claims, issuance of the contracting officer decisions, and filing of the appeals, there was pending a class action in which the Fort Peck Tribes were a putative member of the class. The Supreme Court has held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974); *see also Arctic Slope*, 583 F.3d at 791. "Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied." *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983); *see also Bright v. United States,* 603 F.3d 1273, 1278-79 (Fed. Cir.

2010); *Stone Container Corp. v. United States*, 229 F.3d 1345, 1354-55 (Fed. Cir. 2000). According to appellant, this tolling excuses the filings which would otherwise have been untimely.

CBCA 307-ISDA, 308-ISDA, and 309-ISDA

Respondent maintains that for three of the appeals, class action tolling cannot apply to the ninety-day period for filing appeals because the Fort Peck Tribes were not a member of the class whose certification was pending when the appeals were filed. As noted above, the CDA contains another time limitation requiring that "[e]ach claim by a contractor against the Federal Government relating to a contract . . . shall be submitted [to the contracting officer] within 6 years after the accrual of the claim" 41 U.S.C. § 7103(a)(4)(A). This provision was added to the CDA by the Federal Acquisition Streamlining Act of 1994 § 2351(a), 41 U.S.C. § 7103(a)(4), and applies to contracts awarded on and after October 1, 1995. 48 CFR 33.206. The Tribes' contracts for fiscal years 1996, 1997, and 1998 were awarded on or after October 1, 1995. These contracts ended -- and the claims consequently accrued -- on September 30 of 1996, 1997, and 1998, respectively. The claims under these contracts were all submitted to the contracting officer in September 2005, more than six years after the claims accrued.

The Federal Circuit has held that class action tolling as to the presentment requirement does not apply to parties who failed to make a timely presentment of their claims to a contracting officer because those parties were not members of the class. "[A] party that has not exhausted administrative remedies is not eligible to be a class member." *Arctic Slope*, 583 F.3d at 794.

> [A] party's failure to exhaust mandatory administrative remedies bars the court from treating that party as a class member. In that setting, class action tolling does not apply because the party that failed to comply with the statutory requirement to present its claims to a contracting officer would not have satisfied the requirement, set forth in *American Pipe*, making class action tolling available "to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 554.

Id. at 796.

The Board "has jurisdiction to decide any appeal from a decision of a contracting officer of an executive agency (other than [specified agencies, of which the IHS is not one]) relative to a contract made by that agency." 41 U.S.C. § 7105(e)(1)(B). Contracting officer

decisions are issued on claims. *Id.* § 7103. If a contractor's submission fails to meet the requirements specified by the CDA for claims, the contracting officer has no authority to issue a decision on the submission. *Braughler*, 127 F.3d at 1480-81. Any decision that may be issued has no legal significance. An appeal may not be taken from it. *Id.*; *Skelly & Loy v. United States*, 685 F.2d 414, 419 (Ct. Cl. 1982). These last statements by the Federal Circuit and its predecessor were made with regard to certification of claims. The Circuit has also stated, however, that "[t]he six-year presentment period is part of the requirement in [the CDA] that all claims by a contractor against the government be submitted to the contracting officer for a decision. . . . [T]he presentment of claims to a contracting officer . . . is a prerequisite to . . . review by a board of contract appeals." *Arctic Slope*, 583 F.3d at 793. Thus, we believe that the statements with regard to certification apply with equal force to the requirement for presentment of a claim within a specified period of time. Because the Tribes' claims involving fiscal year 1996, 1997, and 1998 contracts were untimely submitted to the contracting officer, the appeals of the contracting officer decisions on those claims, CBCA 307-ISDA, 308-ISDA, and 309-ISDA, cannot benefit from class action tolling as to the presentment requirement.

Appellant maintains, however, that as permitted in *Arctic Slope*, 583 F.3d at 798-99, the six-year limitation on presentment of claims to the contracting officer may be equitably tolled. Appellant further urges, based on an affidavit from its long-tenured tribal secretary, that its predicament precisely mirrors the situation of the Arctic Slope Native Association, Ltd., which the Federal Circuit held to merit equitable tolling of this time limit. *Arctic Slope Native Association, Ltd. v. Sebelius*, 699 F.3d 1289 (Fed. Cir. 2012). We need not decide whether the limitation on the presentment of the claims should be equitably tolled, because whatever our conclusion might be as to equitable tolling, that conclusion would not be dispositive of the issue presented in the motion to dismiss. As we discuss below, the fact that the appeals arising from these claims were filed after the CDA's ninety-day appeal period requires that we dismiss these appeals.

CBCA 192-ISDA, 195-ISDA, 306-ISDA, 310-ISDA

The claims involved in CBCA 195-ISDA (fiscal year 1994) and 192-ISDA and 306-ISDA (fiscal year 1995)[2] are not subject to the six-year presentment limitation. The

[2] We note that respondent has asserted, in an attachment to its motion, that CBCA 192-ISDA and CBCA 306-ISDA are duplicative of each other. The claims at issue in these cases are in the same amounts, and both of the cases involve contract support costs for fiscal year 1995. When the IBCA docketed the cases in 2006, it mistakenly gave this one (continued...)

claims involved in CBCA 310-ISDA (fiscal year 1999) are subject to the limitation, but they were submitted to the contracting officer within the specified time period. Does class action tolling apply to the ninety-day period for filing appeals in these cases?

The Supreme Court observed in *Crown, Cork & Seal* that "[a]t that point [that class certification is denied], class members may choose to file their own suits or to intervene as plaintiffs in the pending action." 462 U.S. at 354. But here, the Tribes did not wait for a determination as to class certification before they filed appeals of the contracting officer's denials of their claims. They filed their appeals after the ninety-day period for filing appeals specified in the CDA, but while the class action was still pending.

The issue to be resolved is whether such a limitations period is tolled while a class action is still pending. Five Courts of Appeal have considered this issue, and they have resolved it in two different ways.

The Second, Ninth, and Tenth Circuits have held that regardless of whether an individual suit is filed, the limitations period is tolled and a filing after the specified period for filing is considered timely. These courts reasoned that the filing of the class action covers the individual suits, making them all timely; that the filing of the class action puts the defendant on notice of the matters involved, so an individual suit does not constitute surprise; and that the *American Pipe* doctrine, which was created to protect class members from being forced to file cases individually, was not meant to induce those parties to forgo their right to sue separately. *State Farm Mutual Automobile Insurance Co. v. Boellstorff*, 540 F.3d 1223 (10th Cir. 2008);[3] *In re Hanford Nuclear Reservation Litigation*, 534 F.3d 986, 1008-09 (9th Cir. 2008); *In re WorldCom Securities Litigation*, 496 F.3d 245 (2d Cir. 2007).

The First and Sixth Circuits have held, to the contrary, that a class member who chooses to file an independent action without waiting for a determination on class certification may not rely on the tolling of a limitations period. These courts, relying on

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[2] (...continued)
matter two different numbers, and when the cases were transferred to the CBCA in 2007, the latter board simply gave a separate number to each case from the IBCA's docket.

[3] In this case, the pendency of a class action was found to toll the time for filing a suit even though (a) the class action was not filed until well after the individual plaintiff's claim accrued and (b) the putative class was later modified in a way that excluded the individual plaintiff from the class. The court found pivotal the fact that the individual plaintiff's action was not time-barred when the class action was filed and she was a putative member of the class when her individual suit was initiated.

decisions by trial courts,[4] reasoned that a principal purpose of *American Pipe*, keeping parties and courts from being burdened by multiple suits which may evaporate once a class has been certified, would not be furthered by allowing the filing of individual, time-barred cases while class certification is pending. *Wyser-Pratte Management Co. v. Telxon Corp.*, 413 F.3d 553, 568-69 (6th Cir. 2005); *Glater v. Eli Lilly & Co.*, 712 F.2d 735, 739 (1st Cir. 1983).

We believe that the second position is applicable to the appeals at issue, in light of the abundant case law holding the CDA's ninety-day appeal period to be jurisdictional and absolute. Appellant proceeded under the ISDA and the CDA by submitting claims to the contracting officer. Respondent's contracting officer issued final decisions which clearly stated the time period for appealing the decision. The CDA warns of specific consequences if an appeal is filed after that period has passed: "The contracting officer's decision [will be] final and conclusive and not . . . subject to review by any forum, tribunal, or Federal Government agency." Under this statute, once the claims process is initiated, both parties are bound to follow it to conclusion.

As discussed above, the Federal Circuit and the boards of contract appeals have held the period for appealing a contracting officer's final decision be a strict, jurisdictional period which cannot be waived. Accordingly, we dismiss CBCA 195-ISDA, 306-ISDA, 310-ISDA for lack of jurisdiction, as they were not timely filed at the Interior Board of Contract Appeals. The appeal docketed as CBCA 192-ISDA, which is not addressed in respondent's motion, was filed within ninety days of appellant's receipt of the contracting officer's decision, so it remains before us.

We recognize that the Federal Circuit has held that because of

> the special relationship between the government and Indian tribes, we must judge the government's conduct with the Indian tribes by the most exacting fiduciary standards. . . . This special relationship is especially crucial under the ISDA, which Congress passed to facilitate and promote economic growth and development amongst the Indian tribes.

Arctic Slope Native Association, Ltd. v. Sebelius, 699 F.3d at 1297-98 (quotations and citations omitted).

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[4] One of these decisions was reversed by the Second Circuit in *WorldCom*, *In re WorldCom, Inc. Securities Litigation*, 294 F.Supp.2d 431 (S.D.N.Y. 2003). Others are listed by the Tenth Circuit in *State Farm*, 540 F.3d at 1231 n.14.

The Federal Circuit did not find this special relationship dispositive in *Arctic Slope*, but only viewed it in the context of the issues raised in that case. In these appeals, the special relationship between the Government and the Indian tribes is promoted by applying a tried and fair method of resolving contract disputes, the CDA, to cases arising under the ISDA. We do not view this special relationship as allowing the Tribes to ignore or to be entitled to an extension of an appeal period that has been repeatedly held to be jurisdictional and absolute. The CDA, the government contracting officer's decision, and relevant case law clearly advise as to the consequences of an untimely appeal. A litigant's untimely filing of an appeal does not bring into question "the government's conduct with the Indian tribes," which is the focus of the special relationship. To hold the Indian tribes to the same standard as other litigants does not violate the special relationship.

The Tribes have not alleged that they considered the ninety-day appeal period tolled when they filed the appeals shortly after the expiration of the appeal period. They have not explained why the appeals were filed after the appeal period expired. The consequences are the same for the Tribes as for any other contractor who has filed an untimely appeal. The appeal period is jurisdictional, and the Board has no jurisdiction if an appeal is untimely filed.

Decision

The motion to dismiss CBCA 195-ISDA, 306-ISDA, 307-ISDA, 308-ISDA, 309-ISDA, and 310-ISDA for lack of jurisdiction is granted. These appeals are **DISMISSED FOR LACK OF JURISDICTION.**