



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED IN PART FOR LACK OF JURISDICTION: September 4, 2013

CBCA 1053-ISDA, 1054-ISDA, 1055-ISDA

KETCHIKAN INDIAN COMMUNITY,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Respondent.

Stephen V. Quesenberry of Hobbs, Straus, Dean & Walker, LLP, Berkeley, CA, counsel for Appellant.

Paula R. Lee, Office of the General Counsel, Department of Health and Human Services, San Francisco, CA, counsel for Respondent.

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

SHERIDAN, Board Judge.

In January 2008, Ketchikan Indian Community (KIC) appealed the Department of Health and Human Services (HHS), Indian Health Service (IHS) contracting officer's final decisions on its claims seeking additional contract support costs (CSCs) for fiscal years 1998 through 2000. KIC claimed it was entitled to \$851,490 in additional CSCs for fiscal year 1998, \$698,614 in additional CSCs for fiscal year 1999, and \$248,907 in additional CSCs for fiscal year 2000. The cases were placed in suspense for several years pending the resolution of several cases under appeal that were pertinent to the resolution of these cases. After the suspension was lifted, the cases were consolidated, and KIC filed a consolidated complaint. In addition to seeking additional CSCs, KIC identified in its complaint "lost third-party revenue expectancy damages." Respondent, HHS, moves the Board to dismiss KIC's expectancy damages claims, arguing that the Board lacks jurisdiction over these elements

because the underlying claims were never submitted to the IHS contracting officer for a decision. Respondent argues that the Contract Disputes Act (CDA), 41 U.S.C. § 7103(a) (Supp. IV 2011), requires that in order for the Board to have subject matter jurisdiction, claims must first be administratively exhausted at the agency level.¹ Based on the facts and law discussed below, the Board grants respondent’s motion to dismiss for lack of jurisdiction the portions of CBCA 1053-ISDA, 1054-ISDA, and 1055-ISDA related to lost third-party revenue expectancy damages.

Background

The Indian Self-Determination and Education Assistance Act (ISDEAA) directs the Secretary of HHS (and the Secretary of the Interior), upon the request of an Indian tribe, to turn over to that tribe the direct operation of certain programs which had been run by the agency for the benefit of the tribe. 25 U.S.C. § 450f(a)(1) (2006). Once a tribe requests control of its programs, the Secretary and the tribe enter into a self-determination “contract,” or in the case of self-governance tribes such as the Chickasaw, a self-governance “compact.” *Id.* §§ 450(a), (c), 458aaa-3(a). These contracts or compacts often have multi-year terms, while related funding agreements are negotiated annually (for self-determination contracts) or every few years (for self-determination compacts). *Id.* §§ 450j(c), 458aa-7(b).

The ISDEAA authorizes two categories of funding. First, the ISDEAA requires the Secretary to provide tribes with an amount of funding “not less than” the amount the Federal Government would have spent to operate the programs if they had not been turned over to the tribe. 25 U.S.C. § 450j-1(a)(1) (typically called the Secretarial amount). In addition, the ISDEAA requires the Secretary to pay a reasonable amount for contract support costs (CSC), which are reasonable costs incurred for activities that the tribe must carry on in connection with the operation of the contracted programs but that the Secretary did not incur or fund through resources other than those awarded under the contract or compact. *Id.* § 450j-1(a)(2).² The ISDEAA requires that funds distributed to a tribe as part of the Secretarial

¹ In 2011 the CDA 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. In this opinion, we cite to the current version of the Act.

² As originally enacted, the ISDEAA did not require the Government to pay CSCs. Pub. L. No. 93-638, 88 Stat. 2203 (1975). This changed in 1988, when Congress amended the ISDEAA to require the Government to provide funds to pay the reasonable CSCs of covered programs. ISDEAA Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285. Several tribes asserted that the Government had failed to fully fund their CSCs,

amount shall not be duplicated in CSC funding. *Id.* § 450j-1(a)(3)(A). Both the Secretarial amount and all CSC funding are distributed to tribes pursuant to annual funding agreements that are incorporated by reference into a compact. *Id.* § 458aaa-4.

In the cases at hand, the Secretary of HHS and KIC entered into a series of self-determination agreements for fiscal years 1998 through 2000, which were composed of compacts, funding agreements, and amendments for KIC's operation of its health clinic in Ketchikan, Alaska. Appeal File, Exhibits 11-16.

On September 30, 2005, KIC presented three written claims to the IHS Director covering fiscal years 1998, 1999, and 2000 and alleging that KIC was entitled to additional CSC funds under the ISDEAA agreements in effect for the respective years. Appeal File, Exhibits 1-3. KIC's three certified claims, totaling \$1,639,499, sought \$851,490 for fiscal year 1998, \$698,614 for fiscal year 1999, and \$248,907 for fiscal year 2000. *Id.* The claim letters were identical, with the exception of the amount that was sought for each year.

Each claim stated, "This claim is submitted pursuant to the provisions of the Contract Disputes Act (CDA), [now codified at 41 U.S.C. §§ 7101-7109], and § 110(a) and (d) of the [ISDEAA], for all damages arising out of the failure of the [IHS] to pay full contract support costs (including indirect costs and direct contract support costs)." Each letter then went on to allege that the IHS failed to meet its contractual and statutory obligations in two ways:

First, the IHS failed to pay the full amount of the Ketchikan Indian Community's contract support cost requirement calculated pursuant to IHS's policies, by applying an unlawful policy limiting the total amount that would be paid to the Ketchikan Indian Community.

Second, by the application of IHS's policies, IHS failed to include in the calculation of the Ketchikan Indian Community's contract support cost requirement the full indirect contract support costs associated with the Ketchikan Indian Community's contracts. IHS did so by employing the same illegal calculation of the Ketchikan Indian Community's indirect cost requirements associated with this contract that was struck down by the Tenth

resulting in numerous cases that led to two Supreme Court decisions holding that the Government must pay ISDEAA tribes (which had exhausted their administrative claims) the full amount of their incurred CSCs. *Ramah Navajo Chapter*, 132 S. Ct. 2181, 2188 (2012); *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 635-36 (2005).

Circuit in *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997). Specifically, IHS failed to adjust the indirect cost amount calculated by applying the Ketchikan Indian Community's indirect cost rate to account for the dilution in IHS's responsibility to pay indirect contract support costs caused by the erroneous assumption (reflected in applicable OMB Circulars concerning indirect cost rates) that all agencies funding the Ketchikan Indian Community contribute to the Ketchikan Indian Community's indirect cost pool at the full rate. By failing to make a further adjustment, IHS violated its contractual and statutory obligations to the Ketchikan Indian Community.

Appeal File, Exhibits 1-3.³ Each claim letter stated: “[T]his claim seeks, without limitation, all damages arising out of IHS's failure to pay full contract support costs as required by the ISDA and Ketchikan Indian Community's contracts.” *Id.* The required CDA certification for claims over \$100,000⁴ was included at the end of each letter.

The IHS Acting Director responded to each of the claims by fiscal year, issuing three final decisions each dated October 26, 2007. KIC was advised that the claims were denied

³ In various other appeals and decisions, these two types of claims have been referred to by several different names, presumably for ease of reference and clarity. The first allegation, that IHS failed to pay the full amount of Chickasaw's contract support costs when it limited the total amount that would be paid, is alternatively referred to as the “CSC underpayment claim,” “CSC shortfall claim,” and “CSC claim.” The second allegation, that IHS failed to properly adjust the indirect cost rate when it used erroneous assumptions struck down by *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997), is alternately referred to as the “rate-miscalculation claim,” “miscalculation claim,” and “rate dilution claim.” Various tribes have also raised additional theories of how the additional CSCs should be calculated. In addition to the damages relating to rate dilution, some tribes have included in their claims allegations associated with IHS' carry forward of adjustments made to indirect cost rates from prior years (referred to as “wrongful carry forward adjustment claims”) and IHS' failure to properly adjust the indirect cost carry forward computations so that shortfalls in indirect cost payment (caused by insufficient appropriations) were not carried forward to future rate computations (referred to as “restore shortfall in carry forward claims”). It does not appear that the appeals in issue here involve these claim elements. However, the appeals in issue do involve “lost third-party revenue expectancy damage” elements, which are the subject of the motion before us and are discussed more fully *infra*. This type of claim is referenced by a variety of shortened forms, e.g., “expectancy claim” and “third-party revenue claim.”

⁴ 41 U.S.C. § 7103(b).

because they were filed more than six years after the date they accrued and, therefore, failed to meet the six-year limitation period set forth in the CDA.⁵ Additionally, IHS denied all the claims because the claims “are subject to Congress’ express limitation on the amount of the IHS appropriation that could be used for CSCs.” Respondent’s Appeal File, Exhibits 8-10. KIC appealed the IHS final decisions to the CBCA, where they were docketed as CBCA 1053-ISDA, 1054-ISDA, and 1055-ISDA, and placed in suspense pending decisions on several pertinent cases under appeal at higher courts.

Following the issuance of various decisions, the suspensions in CBCA 1053-ISDA, 1054-ISDA, and 1055-ISDA were subsequently lifted, the appeals were consolidated for more efficient processing, and appellant filed its consolidated complaint. Paragraph two of the complaint, which was submitted approximately seven and a half years after the original claim, provided that:

The multiple claims covered by this appeal and this complaint encompass:

- (a) the claim that IHS, during each of [fiscal years] 1998 through 2000, unlawfully failed to pay in full the CSCs which the Secretary acknowledged were due and owing to KIC;
- (b) the claim that IHS, during each of [fiscal years] 1998 through 2000, unlawfully failed to calculate correctly, and thus underpaid, the indirect administrative CSCs the Secretary was required to pay under the ISDA, as construed by *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997); and
- (c) the claim that the IHS, by failing to pay the KIC its full CSCs during each of the [fiscal years] 1998 through 2000, caused the KIC to divert program funds to reimburse its fixed administrative expenses, which adversely affected KIC’s ability to provide more direct services to the beneficiaries of its programs, and those services would, in turn, have generated additional revenue from Medicare, Medicaid, and private insurers.**

Complaint ¶ 2 (emphasis added). While the allegations found in paragraphs 2 (a) and (b) had been set forth in appellant’s original claim letters, the allegations contained in paragraph 2 (c) were raised for the first time in the complaint. Also, the amounts sought in the complaint

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41 U.S.C. § 7103(a)(4).

had increased drastically from the sums sought in the 2005 claim letters. As it appeared that KIC had added additional elements and damages in its complaint, the Board ordered appellant to provide clarification of the bases and amounts of the claims giving rise to CBCA 1053-ISDA through 1055-ISDA. Appellant responded:

In CBCA 1053-ISDA, regarding fiscal year 1998, appellant seeks total damages of \$1,428,652, including \$1,044,235 for the CSC underpayment portion of the appeal, \$30,304 for the rate-miscalculation portion of the claim, and \$354,113 for the lost third-party revenue expectancy damages portion of the claim. In CBCA 1054-ISDA, regarding fiscal year 1999, appellant seeks total damages of \$1,031,046, including \$645,419 for the CSC underpayment, \$63,262 for rate-miscalculation claim, and \$322,365 in lost third-party revenue expectancy damages. In CBCA 1055-ISDA, regarding fiscal year 2000, appellant seeks total damages of \$371,097, including \$194,107 for the CSC underpayment, \$84,704 for rate-miscalculations, and \$92,286 in lost third-party revenue expectancy damages.

HHS submitted a motion to dismiss for lack of jurisdiction the elements of the appeals relating to KIC's alleged lost third-party revenue expectancy damages.

Discussion

HHS asserts that the lost third-party revenue expectancy damages claims for fiscal years 1998 through 2000, currently treated as elements of CBCA 1053-ISDA through CBCA 1055-ISDA, should be dismissed because these elements were never presented to the IHS contracting officer. HHS posits that KIC's expectancy damages claims are new claims, as opposed to being part of the original claims that had been presented to the contracting officer in September 2005, because the facts giving rise to the expectancy damages claims differ from the essential nature and basic operative facts of the original claims. HHS argues that the expectancy damages claims are fundamentally different from the original claims seeking direct and indirect CSCs. HHS also points out that the new expectancy damages claims contain new elements that significantly increase the damages KIC seeks, are based on different data, and seek a different type of relief from that sought in the CSC claims (additional CSCs versus damages for lost revenue).

KIC counters that the third-party expectancy claims are not new claims but instead augment the damages that are "legitimate because the essence of the claim remains the same: breach of contract for failure to pay full CSC, including all damages associated with those under payments." KIC maintains that the "basic operative facts are the breach by IHS of its contractual obligation to pay the full amount of the [CSCs], the resulting shortfall, and all

reasonably foreseeable elements of damages that flow directly from the breach and the shortfall in payment.” KIC explains that IHS’ underpayment resulted in damages “that amplify, but are directly dependent upon, the amount of the shortfall itself,” and “are an element of damages that will stand or fall based on the breach of contract and resulting [CSC] shortfall.”

KIC put the contracting office on notice of the basic shortfall claim and that it was seeking “all damages” resulting from this fundamental breach of the government’s contractual obligations. The contracting officer rejected the fundamental operative fact that was essential to the success of both the shortfall claim and the third-party expectancy damages—that is, the government had paid less than it was obligated to.

KIC asserts that IHS’ liability for payment of third-party expectancy damages is a direct and foreseeable consequence of the agency’s failure to pay the full CSCs.

Under the CDA, “[e]ach claim by a contractor against the Federal Government shall be submitted to the contracting officer for a decision.” 41 U.S.C. § 7103(a)(1). “Each claim by a contractor against the Federal Government relating to a contract shall be in writing.” *Id.* § 7103(a)(2). A claim is “a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising or relating to the contract.” 48 CFR 2.101 (2012); *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc); *Essex Electro Engineers, Inc. v. United States*, 960 F.2d 1576, 1581-82 (Fed. Cir. 1992). Claims over \$100,000 must contain a required certification.⁶ Thus, for the Board to have jurisdiction over a claim here, the tribe must first have submitted a written demand or written assertion to the contracting officer, seeking, as a matter of right, the payment of money in a sum certain, and where over \$100,000, the claim must be certified.⁷ The Federal Circuit in *Arctic Slope Native Ass’n, Ltd. v. Sebelius*, 583 F.3d 785, 793 (Fed Cir. 2009), held, “The presentation of claims to a contracting officer, as required by the CDA, is a prerequisite to review by a board of contract appeals.”

There is no requirement that a claim be presented in any particular form or use any particular wording, but the submission does need to provide the contracting officer with “a clear and unequivocal statement that gives the contracting officer adequate notice of the basis

⁶ 41 U.S.C. § 7103(b).

⁷ As noted earlier, appellant seeks lost third-party revenue expectancy damages in the amounts of \$354,113, \$322,365, and \$92,286 for fiscal years 1998 through 2000.

and amount of the claim.” *Kevin J. LeMay v. General Services Administration*, GSBCA 16093, 03-2 BCA ¶ 32,345, at 160,041 (quoting *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987)). The reason for this requirement is to allow the contracting officer to receive and pass judgment on the contractor’s entire claim. *Scott Timber Co. v. United States*, 333 F.3d 1358, 1366 (Fed. Cir. 2003).

As this Board explained in *New South Associates v. Department of Agriculture*, CBCA 848, 08-1 BCA ¶ 33,785, at 167,211:

The law is clear that in an appeal from a contracting officer’s decision, a contractor may increase the amount of its claim and present evidence in support of an increase, but may not raise any new claims which were not presented to the contracting officer. *Santa Fe Engineers, Inc. v. United States*, 818 F.2d 856, 858 (Fed. Cir. 1987). “A new claim is one that does not arise from the same set of operative facts as the claim submitted to the contracting officer.” *Hawkins & Powers Aviation, Inc. v. United States*, 46 Fed. Cl. 238, 243 (2000). “[S]o long as the essential nature and operative facts of the claim remain unchanged, the Board has jurisdiction to consider . . . increased/modified amounts of damages first raised in pleadings” *Whiting-Turner/A.L. Johnson Joint Venture v. General Services Administration*, GSBCA 15401, 02-1 BCA ¶ 31,708, at 156,622-23 (quoting *American Consulting Services, Inc.*, ASBCA 52923, 00-2 BCA ¶ 31,084, at 153,485). Updates to a claim which do not change the nature of the claim, its basic underlying facts, or the theory of recovery are allowed. *McDonnell Douglas Services, Inc.*, ASBCA 45556, 94-3 BCA ¶ 27,234, at 135,706-07.

In evaluating respondent’s contention that we lack jurisdiction to consider the portions of appellant’s claims relating to third-party expectancy damages, we must decide whether the claims originally presented to the contracting officer can reasonably be viewed as encompassing the matters raised in appellant’s complaint. An action brought under the CDA must be “based on the same claim previously presented to and denied by the contracting officer.” *Scott Timber Co.*, 333 F.3d at 1365 (quoting *Cerberonics, Inc. v. United States*, 13 C1. Ct. 415, 417 (1987)). The Federal Circuit pointed out that this standard does not require rigid adherence to the exact language or structure of the original administrative claim. Rather, when a new claim is asserted that was not directly addressed in the appellant’s original claim submission, the tribunal must examine whether the newly posed claim derives from the same operative facts, seeks essentially the same relief, and, in essence, merely asserts a new legal theory for the recovery originally sought. *Id.*; see also *Thomas D. McCloskey v. General Services Administration*, GSBCA 15901, 02-2 BCA ¶ 32,006; *Contel Advanced Systems, Inc.*, ASBCA 49073, 02-1 BCA ¶ 31,809; *J.S. Alberici Construction Co.*,

ENG BCA 6178, 98-2 BCA ¶ 29,875. “[T]o determine whether two or more separate claims . . . exist[], the court must assess whether . . . the claims are based on a common or related set of operative facts. If the court will have to review the same or related evidence to make its decision, then only one claim exists.” *Placeway Construction Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990).

A new claim arises when the significant facts on which the new claim is based differ from the factual basis of the earlier claim. In *Foley Co. v. United States*, 26 Cl. Ct. 936, 940 (1992), the Court of Federal Claims found that where the Government asserted an altered method of performance on one claim and an unforeseeable quality variation on another, these claims involved “entirely different facts” that constituted a new claim. In *AAB Joint Venture v. United States*, 75 Fed. Cl. 414, 422-23 (2007), the court found a new claim where the claim differed “in both the factual basis and the proof required” from the original claim. In *North Wind, Inc. v. Department of Agriculture*, CBCA 1779, 11-1 BCA ¶ 34,642, this Board found a new claim arose from differing operative facts where “the contracting officer would have to review assertions as to a change in the project design, rather than assertions as to the project as designed.” See also *Serco, Inc. v. Pension Benefit Guaranty Corp.*, CBCA 1695, et al., 11-1 BCA ¶ 34,707 (finding a new claim had arisen since the claims differed in, *inter alia*, number of employees, employee identities, dates, and invoice analysis). In *Wheeler Logging, Inc. v. Department of Agriculture*, CBCA 97, 08-2 BCA ¶ 33,984, where the Board concluded that, among other factors, significant change to the claim elements, amounts, and supporting data mandated a conclusion that the new elements of the claim were required to be certified and presented to the contracting officer in order for the Board to have jurisdiction.

The fact that a contractor may include language in its original claim to the effect that it seeks “any and all damages” relating to a breach does not, in and of itself, absolve the contractor of the requirement to specify the operative facts on which the claim is based. A claim cannot be broadly stated; it should reflect a “careful and reasonably precise” submission to the contracting officer. *Tecom, Inc. v. United States*, 732 F.2d 935, 937 (Fed. Cir. 1984); see also *Building Systems Contractors, Inc.*, VABC 2749, et al., 89-2 BCA ¶ 21,678 (noting contractor’s lack of “care or reasonable precision” in its submission to contracting officer justified denying/dismissing the claim). Once the role of the contracting officer has been circumvented by predicated a claim on a new factual theory, the party has submitted a claim differing from the basic operative facts of the original claim. See *Cerberonics*, 13 Cl. Ct. at 417-18.

In these appeals, KIC’s original claims seeking additional CSCs asserted that KIC had not been fully paid all the direct and indirect CSCs to which it was entitled for fiscal years 1998 through 2000. The CSCs are the direct and indirect costs the tribe incurred in

administering its health clinic. The facts that appear to be significant to the CSC claims go to establishing that KIC is entitled to additional CSCs and include, but are not limited to, establishing that a particular cost is a CSC, how that cost was derived and calculated, and that KIC incurred CSCs that were not funded.

The significant facts pertaining to KIC's lost third-party expectancy damages claims are fundamentally different from the facts needed to prove a right to additional CSCs. The essence of the lost third-party claims is that for each fiscal year that IHS failed to pay KIC its full CSCs, KIC diverted program funds to cover its fixed administrative expenses, thereby providing fewer direct services to the beneficiaries of its programs. Because KIC is entitled to bill third-party providers (e.g., Medicare, Medicaid, and private insurers) for the direct services it provides to eligible beneficiaries, fewer direct services provided resulted in reduced revenue recovery from the third-party providers.

The operative facts and quantification that pertain to the lost third-party expectancy damages portion of this case are completely distinct from the facts giving rise to entitlement to additional CSCs. Paragraph 2 (c) of KIC's complaint asserts that its entitlement to lost third-party revenue damages is premised on the tribe's diversion of program funds to reimburse fixed administrative expenses, which in turn adversely affected its ability to provide additional services to the beneficiaries of its programs and impacted its recovery of third-party revenue. None of the underlying or operative facts inherent in establishing entitlement to such damages is subsumed within the claims seeking full reimbursement of CSCs. The fact that a tribe may obtain revenue from providing direct services to beneficiaries is not apparent from the operative facts giving rise to the original claims.

It is not sufficient, in CDA cases, where there is the requirement that a written claim be first presented to the contracting officer, to merely add new claims, categories, or elements to an appeal. New claims, categories, or elements must go to the contracting officer for final decision unless they arise out of the same operative facts as the original claim. Modified amounts of damages that do not rely on changes to the essential nature of the original claim or its basic underlying facts are not required to be submitted again to the contracting officer. In considering whether KIC is entitled to lost third-party revenues a contracting officer would have to consider a significantly different set of operative facts from the set of facts the contracting officer had to consider in deciding whether KIC is entitled to additional CSCs. The allegations of lost third-party revenue set forth in KIC's complaint raised new claims that had not yet been submitted to the contracting officer. The Board lacks the jurisdiction to decide the merits of these claims until after they are submitted to the contracting officer for final decision and the appropriate administrative procedures have been followed.

Decision

For the reasons set forth above, HHS' motion is granted and the portions of CBCA 1053-ISDA, 1054-ISDA, and 1055-ISDA related to lost third-party revenue damages are dismissed for lack of jurisdiction.

PATRICIA J. SHERIDAN
Board Judge

We concur:

JERI K. SOMERS
Board Judge

CATHERINE B. HYATT
Board Judge