



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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DISMISSED IN PART FOR LACK OF JURISDICTION: November 26, 2013

CBCA 311-ISDA, 312-ISDA, 313-ISDA, 314-ISDA, 315-ISDA,  
316-ISDA, 317-ISDA, 318-ISDA, 319-ISDA, 320-ISDA

CHICKASAW NATION,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Lloyd B. Miller of Sonosky, Chambers, Sachse, Miller & Munson, LLP, Anchorage, AK, counsel for Appellant.

Shara Michalka and Jennifer Mendola, Office of the General Counsel, Department of Health and Human Services, Dallas, TX, appearing for Respondent.

Before Board Judges **VERGILIO**, **DRUMMOND**, and **SHERIDAN** (presiding).

**VERGILIO**, Board Judge.

The Chickasaw Nation (tribe) submitted certified claims to recover contract support costs for fiscal years 1996 through 2005 under its annual contracts with the Department of Health and Human Services (agency), Indian Health Services (IHS). The claims alleged that the agency “failed to pay the full amount of the [tribe’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 [tribe].” The claims also alleged that the agency utilized an illegal calculation when it “failed to include in the calculation of the [tribe’s] contract support cost requirement the full indirect contract support costs associated with the [tribe’s] contract.” The contracting officer denied those claims. The tribe filed these appeals at the Board. As identified in a schedule of costs and a consolidated complaint, the tribe now seeks to recover for those same fiscal years not only contract support costs, but also what it

describes as associated lost third-party revenue, that is, what it considers to be damages flowing from the contract support costs it did not receive for the fiscal years in dispute. The lost revenues are expectancy damages or impact costs said to arise when the tribe did not receive contract support costs and diverted funds away from services that would have generated additional revenue. Before the tribe brought these appeals to the Board, the tribe did not submit a separate claim to the contracting officer seeking the lost revenue. The actually presented claims for contract support costs did not include any dollar figure for, or mention of, lost revenues. The agency here moves to dismiss for lack of jurisdiction the lost revenue assertions raised by the tribe in the consolidated complaint. The tribe opposes the motion.

The tribe's assertion in the certified claims, presented for contract support costs, that it seeks "without limitation, all damages arising out of the [agency's] failure to pay full contract support costs as required" does not by itself encompass a claim to recover lost revenue. The claims, particularly with certifications addressing specific dollar amounts and supporting documentation without identifying lost revenues, do not put the agency on notice that any such costs are sought.

This Board has issued a decision addressing this very issue of lost revenue and a claim for contract support costs, *Ketchikan Indian Community v. Department of Health and Human Services*, CBCA 1053-ISDA, et al. (Sept. 4, 2013). The Board held that lacking a proper claim to the contracting officer seeking lost revenue, the Board is without jurisdiction to resolve the issue of lost revenue arising from unpaid contract support costs, when the underlying claim was for contract support costs. The Board looked to the operational facts of the two issues, as it concluded that in order to recover lost revenue there are a myriad of facts to be proven beyond those needed to support the underlying claim for contract support costs. That additional proof included information regarding revenue from various insurance programs and private insurers, and information tying such information to contract support costs. The Board noted that the lost revenue assertion was not based upon facts or information that arose only after the initial claims were filed. Given the differences in operational facts, the Board held that the tribe could not modify its complaint without an underlying claim seeking lost revenue. The holding in *Ketchikan* is consistent with court precedent that recognizes as distinct claims matters arising from the same transactional facts. *Bowers Investment Co. v. United States*, 695 F.3d 1380 (Fed. Cir. 2012) (claim for alleged non-payment of rent for September 2006 was distinct from later claims for rent underpayments or non-payments of different months); *Phillips/May Corp. v. United States*, 524 F.3d 1264 (Fed. Cir. 2008). Here, the claims presented to the contracting officer to recover contract support costs did not encompass a claim for the recovery of lost revenue.

The schedule of costs and the consolidated complaint inappropriately attempt to expand the relief at issue beyond that sought in the certified claims here before the Board. Because of different operational facts, the claims do not create a basis for Board jurisdiction to resolve a purported dispute over lost revenue. Based upon *Ketchikan*, given that there was no claim for lost revenue, the complaint may not be amended to seek lost revenues. (However, for fiscal year 2005, a subsequent claim raises the issue of lost revenue, and is before the Board under a separate docket number.)

The special relationship between Indian tribes and the Government does not alter the resolution of this matter. The tribe had not presented a claim (in theory or dollar amount) to the contracting officer for lost revenue, although the tribe had presented certified claims for contract support costs. The relationship does not here impact the interpretation of statutory requirements under the Contract Disputes Act, 41 U.S.C. §§ 7101-7109 (Supp. IV 2011), or the determination of what is included in a certified claim.

The attempts to recover lost revenue, raised without an underlying claim to the contracting officer, are not properly before the Board. In accordance with *Ketchikan*, the Board grants the agency's motion and **DISMISSES FOR LACK OF JURISDICTION** those aspects of the consolidated complaint seeking lost revenue.

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JOSEPH A. VERGILIO  
Board Judge

We concur:

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JEROME M. DRUMMOND  
Board Judge

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PATRICIA J. SHERIDAN  
Board Judge