United States Department of the Interior

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APPEALS OF MISSISSIPPI BAND OF CHOCTAW INDIANS

IBCA 4711 thru 4715 Decided: April 14, 2006

Bureau of Indian Affairs, Tribally Controlled School Act Contract No. GTS 78 T 98076, 79, & 80, FY's 2000-2002

Appellant's Motion for Summary Judgment Granted; Government Motion Denied

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OPINION BY ADMINISTRATIVE JUDGE PARRETTE.

Both the Government and the above-named Appellant separately have moved for summary judgment in connection with the Mississippi Band's (hereafter, "Tribe's") pending Appeal from a July 15, 2005, final decision of the Contracting Officer (CO) holding that although the Tribe was entitled to recover a total of $4,231,391 in Contract Support Costs (CSC) for Fiscal Years (FY's) 2000, 2001, and 2002, it could not legally recover these costs until new appropriations became available, because of explicit ceilings in the Department's applicable Appropriations Acts. Contract support costs generally are indirect costs calculated by applying an indirect cost rate to the amount of funds otherwise payable to the tribe. The Tribe seeks here to recover these overhead funds, plus interest.

EXHIBIT
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Because the Department's underpayment appears to be solely the result of a mistake or error in BIA's disbursement procedures, as discussed below, and because funds for these payments were available within appropriation limits at the time the disbursements of funds to the various Indian tribes took place, we conclude that the Tribe is entitled to prompt payment of the full amount for which the CO found it eligible, plus interest in accordance with the Prompt Payment Act, 31 U.S.C. §§ 3902 and 3907, and the Contract Disputes Act, 41 U.S.C. § 611.

Background

The facts of the case are undisputed. For each of Fiscal Years 2000, 2001, and 2002, the Bureau of Indian Affairs (BIA) inadvertently did not include in its calculation of Appellant's allowable CSC under 25 U.S.C. § 450j-1(a)(2) the amounts it was entitled to on the basis of its contemporaneous Indian school grants. After all of the Department's CSC funds for those years had been expended, the Tribe on September 8, 2003, filed a claim with BIA seeking a belated payment of the omitted funds. The Deciding Official (CO) found that the amounts that should have been paid to Appellant were, FY 2000, $686,357; FY 2001, $1,108,282; and FY 2002, $2,436,752; for a total of $4,231,391. But she concluded that the Tribe could lawfully be paid these amounts only when new BIA appropriations became available. The Tribe disagreed and appealed to the Board.

The CO based her decision on language in the Appropriation Acts for each of the three years that limited CSC expenditures to amounts "not to exceed" specific totals for each year. The Department did not receive any later supplemental appropriation to pay additional CSC for those years, and the Tribe has not yet received the omitted payments. It therefore seeks from the Judgment Fund, 31 U.S.C. § 1304, the total amount due.

Law (in part)

Paragraphs (1), (2), and (3) of 25 U.S.C. § 450j-1 are as follows:

(1) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this subchapter shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, without regard to any organizational level within the Department of the Interior or the Department of Health and Human Resources, as appropriate, at which the program, function, service, or activity or portion thereof, including supportive administrative functions that are otherwise contractable, is operated.

(2) There shall be added to the amount required by paragraph (1) contract support costs which shall consist of an amount for the reasonable costs of activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which–

(A) normally are not carried on by the respective Secretary in his direct operation of the program; or

(B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

(3)(A) The contract support costs that are eligible costs for the purpose of receiving funding under this subchapter shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of–

(i) direct program expenses for the operation of the Federal program that is the subject of the contract, and

(ii) any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract.

(B) On an annual basis, during such period as a tribe or tribal organization operates a Federal program, function, service, or activity pursuant to a contract entered into under this subchapter, the tribe or tribal organization shall have the option to negotiate with the Secretary the amount of funds that the tribe or tribal organization is entitled to receive under such contract pursuant to this paragraph.

Positions of the Parties

The Government argues that the CO was correct in concluding that a Deciding Official could only make a finding that the Tribe was entitled to the additional funds, but because of the Anti-Deficiency Act, 31 U.S.C. §§ 1341, 1350, she could not obligate the additional funds needed to pay the Tribe the amount owed. The Government further argues that because the Department cannot pay the funds, the Board cannot either, because the Board is only the "authorized representative" of the Secretary under 43 CFR 4.1, and it cannot do what the Secretary cannot do. It contends that the Cherokee case (Cherokee Nation v. Leavitt, 543 U.S. 631, 125 S. Ct. 1172 (2005)), does not apply because the funds involved in that case were unrestricted; whereas, here the funds are subject to a precise limitation or "cap," such as the one involved in Babbitt v. Oglala Sioux Tribal Public Safety Department, 194 F.3d 1374 (Fed. Cir. 1999), cert.denied, 530 U.S. 1203 (2000), in which the Court noted that "in the face of underfunding, an agency can only spend as much money as has been appropriated for a particular program" (194 F.3d at 1378).

But in its 41-page Opposition Memorandum, the Tribe disputes the Government's view of the law, discussing cogently and in great detail the various relevant cases and their holdings, essentially beginning with Ramah Navajo School Board v. Babbitt, 87 F.3d 1338 (D.C. Cir. 1996), and concluding with Thompson v. Cherokee Nation of Oklahoma, 334 F.3d 1075 (Fed. Cir. 2003), aff'd Cherokee Nation v. Leavitt, 543 U.S. 631 (2005). The thrust of these cases is simply that self-determining Indian tribes have an absolute contractual right to their proportional shares (which are normally stated in percentage terms) of capped or uncapped appropriations, whether or not the appropriation is sufficient to meet all of the tribes' needs. We need not decide that universal issue in this case.

Discussion

As the D.C. Circuit Court said in Ramah, supra (also quoted by the Board in a previous case):

> We do not think that there is any support in the text or history of the ISDA [Indian Self-determination Act], or in prior caselaw, for the district court's conclusion that the ISDA committed the allocation of insufficient CSF [contract support funds] to the Secretary's discretion. Congress has clearly expressed in the CDA both its intent to circumscribe as tightly as possible the discretion of the Secretary, see ISDA ¶ 450k(a) (prohibiting the Secretary from promulgating any regulation or imposing any nonregulatory requirement, except for regulations pertaining to sixteen carefully delineated topics not relevant here), and its intent to make available judicial review of all agency action, see id. 450m-1(a). The statute itself reveals that not only did Congress *not* intend to commit allocation decisions to agency discretion, it intended quite the opposite: Congress left the Secretary with as little discretion as feasible in the allocation of CSF. (87 F.3d at 1344, emphasis added.)

In our case, the Deciding Official, acting on behalf of the Secretary, admitted that the Tribe was in fact entitled to the CSC funds and acknowledged that it did not timely receive them simply because of a BIA error at the time the funds were being disbursed. However, there is no contention that the Tribe is not entitled to them; the present issue is rather how and when they will be paid. The Government asserts that they cannot be paid now because there is no available appropriation authorizing them, since the relevant cap on appropriations for that purpose has already been reached, and the Anti-Deficiency Act makes it a criminal offense to pay out Government funds under those circumstances.

The Government does not cite what appears to be the strongest case in support of its Motion, Shoshone-Bannock Tribes v. Dept. of Health and Human Services, 279 F.3d 660 (9th Cir. 2002), in which HHS then used a system of paying full CSC costs until its funds were exhausted and then told the remaining tribes to wait until the following year when they would rise to the top of the list of potential CSC recipients. But in the meantime the tribes got no funds. The Shoshones sued in district court for the current year's CSC's, and the district court granted them, but the 9th Circuit court overturned the district court's decision on the ground that all CSC funds had been expended and that the ceiling on the total CSC appropriation controlled. The court cited the Federal Circuit case of Babbitt v. Oglala Sioux Tribal Public Safety Department, supra, as the basis for its decision.

Appellant's reply, with which we agree, is that such circumstances are the very purpose of the Judgment Fund, established under 31 U.S.C. § 1304, which specifically provides for the payment of necessary amounts to pay final judgments, interest, and costs when the judgment is payable, such as under a decision of a board of contract appeals. 31 U.S.C. § 1304(a)(3). Thus, the sole issue in this Appeal whether Appellant is entitled to a favorable judgment from the Board as to immediate payment. We think that it is. CSC funds are not merely incidental, gratuitous, or surplus funds added to the amounts that BIA would normally expend for program operation. They are, rather, intended to cover the administrative and other expenses necessary for tribal operation of the various self-government programs. The tribes' right to them is clearly contractual as well as statutory.

The most recent major case involving contractual CSC funds, Cherokee Nation, supra, a Supreme Court case decided subsequent to Oglala Sioux, although not directly on point, is clearly relevant because the issue before the Court was whether the Government's promises under the ISDA are legally binding (543 U.S. 634). The Court pointed out that the Indian Self-Determination Act (ISDA) "uses 'contract' 426 times to describe the nature of the Government's obligation, and that 'contract' normally refers to 'a promise for the breach of which the law gives a remedy, or the performance of which the law...recognizes as a duty'." We think that Appellant here, like the appellant in Cherokee, has a contractual right to its CSC funds. In its discussion of unrestricted funding, the Court observes (543 U.S. 637) that:

> [T]he Government normally cannot back out of a promise to pay on grounds of "insufficient appropriations," even if the contract uses language such as "subject to the availability of appropriations," and even if an agency's total lump-sum appropriation is insufficient to pay *all* the contracts the agency has made. See *Ferris v. United States, 27 Ct. Cl. 542, 546 (1892)* ("A contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects."); see also *Blackhawk, supra, at 135, and n.9, 622 F. 2d at 552, and n. 9.*

543 U.S. 638.

In Cherokee, the Government also argued for a special interpretation of the ISDA's language amounting to an affirmative grant of authority to it to adjust funding levels "based on appropriations." The Court responded, at 543 U.S. 644, that:

> In our view, however, the Government must again shoulder the burden of explaining why, in the context of Government contracts, we should not give this kind of statutory language its ordinary contract-related interpretation, at least in the absence of a showing that Congress meant the contrary. We believe it important to provide a uniform interpretation of similar language used in comparable statutes, lest legal uncertainty undermine contractors' confidence that they will be paid..." citing United States v.Winstar Corp., 518 U.S. § 839, 884-885 (1996), inter alia.

Thus, pacta servanda sunt ("agreements must be honored"), which is the well-established foundation of international law, is equally important in domestic matters. Add to that the fact that Indian Tribes are domestic dependent nations with many of the attributes of national sovereignty, and that the program involved is a school program, and it is evident that the Government promises to them ought to be expeditiously carried out, particularly when there is clearly a valid and readily accessible legal means of doing so – here, the Judgment Fund. We express no opinion on how this matter would otherwise be decided, but we side with the Supreme Court that CSC agreements are valid and enforceable contracts.

We conclude that BIA's denial of immediate payment of CSC funds due under 25 U.S.C. § 450j-1(a)(2) but withheld by error is clearly a breach of contract that is redressable through the Contract Disputes Act and the Judgment Fund, 31 U.S.C. § 1304(a)(3), to the extent that other funds are unavailable. Cherokee Nation, supra; Winstar, supra.

Lest we open a Pandora's box of litigation, however, we must add the caution that our present holding is limited to the facts of this Appeal, where (a) neither party denies that the Tribe was entitled to the funds involved; (b) the funds involved were inadvertently omitted at the time they were disbursed to other tribes but (c) were within BIA's statutory appropriation ceiling at the time of general disbursement and (d) subsequent payment was

expressly determined by the Deciding Official to be proper. We express no opinion on the likely outcome of this Appeal if the facts had been different.

Decision

The Government's Motion for Summary Judgment is denied. Appellant's Motion for prompt payment is granted, together with interest as provided by the Prompt Payment Act and the Contract Disputes Act, calculated from the date the CSC payment would normally have been made. It is so ordered.

Bernard V. Parrette
Administrative Judge

I concur:

Candida S. Steel
Chief Administrative Judge