

IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL
CIRCUIT

ARCTIC SLOPE NATIVE ASSOCIATION, LTD., ^{FILED} U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

Appellant,

APR 01 2011

JAN HORBALY
CLERK

v.

Kathleen Sebelius, SECRETARY OF HEALTH AND HUMAN SERVICES,

Appellee.

Appeal from the Civilian Board of Contract Appeals in Case Nos. 294-ISA, 295-
ISDA, 296-ISDA, and 297-ISDA, Administrative Judges Candida S. Steel and Jeri
Kaylene Somers

Appellee's Opposition to Appellant's Combined Petition For Rehearing And
Rehearing *En Banc*

TONY WEST
Assistant Attorney General

OF COUNSEL:

JEANNE E. DAVIDSON
Director

SEAN DOOLEY
MELISSA JAMISON
Senior Attorneys
U.S. Department of Health
and Human Services
Office of the General Counsel
Public Health Division

DONALD E. KINNER
Assistant Director

JACOB A. SCHUNK
Trial Attorney
Commercial Litigation Branch
Civil Division
Department of Justice
Attn: Classification Unit
8th Floor
P.O. Box 480
Ben Franklin Station
Washington, D.C. 20044
Tele: (202) 616-0320
Fax: (202) 307-0972

April 1, 2011

Attorneys for Appellee

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Appellee, the Secretary of Health and Human Services, respectfully opposes the Combined Petition for Rehearing and Reharing *En Banc* filed by Appellant, Arctic Slope Native Association, LTD (“ASNA”). This Court should deny ASNA’s petition because, consistent with precedent from this Court and the Supreme Court, the panel correctly found that Congress limited the amount of funds available for contract support costs in 1999 and 2000.

STATEMENT

I. Statutory Background

Congress enacted the Indian Self Determination Education and Assistance Act (“ISDA”) to encourage Indian self-government by permitting tribes to assume operation of certain Federal programs, including health care programs, that the United States previously operated for the benefit of Indians. *See* 25 U.S.C. §§ 450, 450a. To transfer control of such programs, the ISDA directs the Secretary of Health and Human Services (“HHS”), upon the request of an Indian tribe, to enter into self determination contracts. 25 U.S.C. § 450f(a)(1).

The ISDA allows tribes and tribal organizations to receive two types of funding – the Secretarial amount and contract support costs. 25 U.S.C. § 450j-1(a). Upon calculation and negotiation of both types of funding, “the Secretary shall add to the contract the full amount of funds to which the contractor is

entitled.” 25 U.S.C. § 450j-1(g). The Secretarial amount is the amount the “Secretary would have otherwise provided for the operation of the programs.” 25 U.S.C. § 450j-1(a)(1). Contract support costs are defined as the “reasonable costs” for certain activities the tribal contractor must carry out in its operation of the programs but that the Government, when it was operating the programs, did not incur. *See* 25 U.S.C. § 450j-1(a)(2).

Congress also places two explicit limits upon the Government’s financial liability to tribal contractors. First, Congress provides that, “[n]otwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations[.]” 25 U.S.C. § 450j-1(b); *see also* 25 U.S.C. § 450j(c) (“The amounts of such [ISDA] contracts shall be subject to the availability of appropriations.”). In the event of a lack of funds, Congress also provides that the Secretary is not “required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter.” 25 U.S.C. § 450j-1(b).

II. Congress’s Appropriations

Prior to 1998, Congress did not cap the amount of funds available to pay tribal contractors’ contract support costs. Instead, Congress simply appropriated a lump sum for Indian Health Services (“IHS”), a component of HHS, to use “to

carry out” its authorities and obligations, including funding its ISDA contracts.

See Cherokee Nation of Oklahoma v. Leavitt, 543 U.S. 631, 637 (2005) (internal quotation omitted). The lump sum appropriations “contained no relevant statutory restriction.” *Id.*

In response to ongoing disputes over the payment of contract support costs, in 1998 Congress began imposing statutory caps upon how much IHS could spend upon contract support costs. Slip Op. 6. IHS’s FY 1999 appropriation, thus, provided that, within IHS’s lump sum appropriation, “notwithstanding any other provision of law, of the amounts provided herein, *not to exceed* \$203,781,000 shall be for payments to tribes and tribal organizations for contract or grant support costs[.]” Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-279 (1988) (emphasis added). Congress used the exact same “not to exceed” language to limit the amount of funds available for contract support costs in IHS’s FY 2000 appropriation. *See* Dep’t of the Interior and Related Agencies Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-182 (1999).

III. ASNA’s Contracts

ASNA is a tribal organization authorized and organized by severally federally recognized Indian tribes in Alaska. *See* JA 122-154. Pursuant to ISDA,

beginning in 1996, IHS entered into annual funding agreements (“AFAs”) with ASNA for ASNA’s operation of the Barrow Public Health Service Hospital. JA 1083. Each AFA specified amounts for direct costs to operate the hospital and for contract support costs.

Even before ASNA entered into its first AFA in 1996, IHS believed it lacked sufficient funds to pay for all tribal contractors’ contract support costs. To resolve each year’s shortfall, IHS had designed and adapted a queue system for distributing contract support costs funding to increase the equities in the distribution, knowing that some contractors were receiving full funding for all of their contract support costs while others were receiving either partial funding or no funding for contract support costs. *See* JA 261-69, 270-91. The years at issue in this case – FY 1999 and FY 2000 – were no different in this respect, and neither ASNA nor IHS knew prior to entering into ASNA’s AFAs how much would be available for ASNA’s contract support costs. JA 161, 199.

Because IHS did not know how much would be available for ASNA’s contract support costs, the AFAs for both 1999 and 2000 contemplated that IHS would be able to pay only a portion of ASNA’s requested contract support costs. The 1999 AFA specifically provided that “[t]he Secretary is unwilling to cite a sum certain [that will be available for contract support costs] at this time because

the exact sources of funds is unknown.” JA 161. Similarly, the 2000 AFA stated that, “[i]f Congress appropriates a greater amount for contract support costs for [2000], additional contract support costs funds will be provided.” JA 199. Both AFAs also recognized “that the total amount of the funding . . . is subject to the adjustment due to Congressional action in appropriations Acts.” JA 171 (1999), (201) (2000).

Although the parties modified each AFA and IHS provided ASNA more in contract support costs funding than contemplated in the original AFAs, ASNA had reported contract support costs shortfalls, which is the difference between the amount paid for contract support costs and ASNA’s reported contract support cost need, in both FY 1999 and FY 2000. JA 1033.

SUMMARY OF ARGUMENT

ASNA raises two broad categories of challenges to the panel’s decision. Both are without merit.

First, ASNA erroneously contends that the panel decision is legally flawed because it conflicts with or misconstrues precedent from both the Supreme Court and this Court. Pet. 6-12. The panel carefully considered the cases cited in ASNA’s petition, and the panel’s decision is consistent with prior decisions and the text of the governing provisions.

Second, ASNA incorrectly asserts that, as evidence of the decision's legal flaws, the panel decision ignores the ISDA's purpose and the negative effects the decision will have upon Government contracting. Pet. 12-14. ASNA is mistaken. The panel's decision reflects Congress's intent, and the decision does not pose an unwarranted risk to Government contractors.

Finally, in the last complete paragraph of its petition, ASNA erroneously asserts that the panel erred in concluding that ASNA had waived an argument for partial payment of its contract support costs. Pet. 14-15. The panel correctly held that ASNA failed to raise this argument.

ARGUMENT

I. The Panel Correctly Held That IHS's Compliance With Congress's Appropriations Did Not Breach ASNA's Contract And Did Not Depart From Precedent From Either This Court Or The Supreme Court

ASNA incorrectly asserts that the panel decision either conflicts with or misapplies precedent from this Court and the Supreme Court. *See* Pet. 6-12. Specifically, ASNA erroneously claims (1) that the panel decision conflicts with the Supreme Court's decision in *Cherokee v. Leavitt*, 543 U.S. 631 (2005), and this Court's decision in the same case, *Thompson v. Cherokee Nation of Oklahoma*, 334 F.3d 1075 (Fed. Cir. 2003); (2) that the decision misapplies this Court's predecessor's decision in *Ferris v. United States*, 27 Ct. Cl. 542 (1892);

and (3) that the decision mistakenly relies upon *C.H. Leavell & Co. v. United States*, 530 F.2d 878 (Ct. Cl. 1976), and *Winston Bros. Co. v. United States*, 130 F. Supp. 374 (Ct. Cl. 1955). All of ASNA's contentions lack merit.

In both this case, Slip Op. 14-15, and in *Babbitt v. Oglala Sioux Tribal Public Safety Department*, 194 F.3d 1374 (Fed. Cir. 1999), this Court held that, when Congress uses "not to exceed" language to place an aggregate cap upon funds available for contract support costs, a contractor cannot prevail upon a breach claim when the agency allocated all of the funds available for contract support costs. As the panel explained in this case, this result makes sense because the phrase "not to exceed" is the "standard phrase used to express Congress's intent to designate a given amount as the maximum available amount for a particular purpose." Slip Op. 9. The panel also recognized that a contrary ruling would lead to the illogical result that "each tribe could sue separately, and the aggregate recovery would exceed the statutory cap." Slip Op. 11; *see also* Slip Op. 13 ("Adopting ASNA's approach would effectively defeat the statutory cap because the Secretary would be obligated to pay a total amount of tribal obligations exceeding the cap.").

ASNA fails to show how the panel decision contradicts precedent. ASNA contends that "[t]his case cannot be distinguished" from the Supreme Court's

decision in *Cherokee*, 543 U.S. 549, or this Court's decision in the same case, *Cherokee*, 334 F.3d at 1078, but the lump sum appropriation in *Cherokee*, unlike in this case or in *Oglala Sioux*,¹ did not cap the amount available for contract support costs. *Cherokee*, 543 U.S. at 637. Thus, *Cherokee* is materially distinguishable from both this case and *Oglala Sioux*.

Moreover, both the Supreme Court and this Court in *Cherokee* indicated that, had the facts in *Cherokee* been similar to the facts in this case, the Government would not have been liable for breach in that case.

Both the Supreme Court and this Court found dispositive in *Cherokee* that the agency had "unrestricted funds . . . sufficient to pay the claims at issue," because there were unrestricted funds in the agency's budget that could have been allocated for contract support costs shortfalls. *Id.* at 641 (citing *Cherokee*, 334 F.3d at 1093-94). In this case, as in *Oglala Sioux*, because of the cap upon the amount IHS could allocate for contract support costs, there were no extra funds

¹ ASNA contends either that *Oglala Sioux* is no longer good law after the decisions in *Cherokee* or that, if it is controlling, the Court should grant *en banc* review and overturn *Oglala Sioux*. Pet. 5 n.4. There is nothing in either *Cherokee* decision that overturns *Oglala Sioux* or calls its validity into question. This is particularly true given that, in this Court's *Cherokee* decision, the Court cited *Oglala Sioux* for the proposition that, "if there is a statutory restriction on available appropriations . . . the agency is not free to increase funding for that program beyond that limit," *Cherokee*, 334 F.3d at 1084.

available with which IHS could have paid ASNA's contract support costs. *See* 25 U.S.C. § 450j-1(b). Upon this basis alone, the Court should reject ASNA's petition.

Moreover, both the Supreme Court in *Cherokee* and this Court found that committee reports directing how much the agency should allocate for contract support costs did not affect the Government's liability in that case because committee reports do not have the force of law. *Cherokee*, 542 U.S. at 646 (“[R]estrictive language contained in Committee Reports is not legally binding.”); *Cherokee*, 334 F.3d at 1087 (“[C]ommittee report language as such is not binding on the Secretary.”). The necessary implication is that, had Congress enacted the committee recommendations into law, similar to the statutory caps Congress enacted for FY 1999 and FY 2000, the report language would have barred the contractor's claim.

ASNA also contends that, even if the panel decision does not contradict *Cherokee*, the Court should grant rehearing because the decision either misconstrues or fails to apply the rule established by this Court's predecessor in *Ferris v. United States*, 27 Ct. Cl. 542 (1892). Again, ASNA is incorrect.

The *Ferris* court allowed a contractor to recover for breach even though the lump sum appropriation to pay the costs of a project were not sufficient to pay all

the contractors' costs because the contractor had no knowledge the appropriation would be insufficient. *Ferris*, 27 Ct. Cl. at 546. The Court held that a contractor "is not chargeable with knowledge" of a contract's administration and that a contractor's rights cannot be "impaired by [a contract's] maladministration or by its diversion, whether legal or illegal, to other objects." *Id.*

ASNA attempts to demonstrate that it is similarly situated to the contractor in *Ferris*, claiming that it "had no notice that it was going to be paid less than its full contract amount until after it fully performed each contract," Pet. Br. 4, and "no notice of the limited nature of the appropriation," Pet. 12. These claims are false. The panel correctly held that ASNA was on notice that it may not receive its shortfall funding because the AFAs included language to that effect, including availability of funds clauses, and, because unlike in *Cherokee*, Congress placed a statutory cap upon the amount the Secretary could allocate for contract support costs. Slip Op. 12-13.

Moreover, both of the documents relied upon by ASNA for showing it had no notice of a potential shortfall belie its contention. ASNA cites to footnote five of its 1999 AFA, *see* Pet. 4, but that footnote provides that "[t]he Secretary is unwilling to cite a sum certain at this time because the exact sources of funds is unknown." JA 161 n.5. ASNA also cites to the queue developed by IHS, through

consultation with tribes, to identify unfunded tribal requests for contract support costs and to establish an order in which those requests might be fulfilled if Congress increased appropriations for contract support costs funding. Pet. 4 (citing JA 740). The very nature of the queue was that there was no guarantee of funding for requests on the list. Indeed, IHS noted at the top of the queue that the queue was no guarantee of payment because “[p]lacement in Queue may be subject to change” and “[a]mounts are subject to change[.]” JA 740.

Finally, ASNA fails to demonstrate that the panel erred by relying upon the decisions in *C.H. Leavell & Co.*, 530 F.2d 878, and *Winston Brothers*, 130 F. Supp. 374. ASNA contends that the panel “centrally rel[ied]” upon *Leavell* for establishing that the presence of the availability of funds clause alone provides sufficient notice to a contractor to avoid breach damages, Pet. 9, but ASNA mischaracterizes the panel’s decision. The panel only cited *Leavell* for the proposition that agencies began including availability of funds clauses in contracts after the *Ferris* decision. Slip Op. 12. The panel then cited the Supreme Court’s decision in *Cherokee* for holding that an availability of funds clause alone was not a defense to a contractor’s breach claim. Slip Op. 13.

ASNA also takes issue with the panel’s citation to *Winston Brothers*, claiming that *Winston Brothers* is “not the case here.” Pet. 11 n.5. ASNA’s

argument is misplaced. In a footnote, the panel cites *Winston Brothers* for the proposition that the Secretary “may have a duty to allocate funds among the tribes in a rational, non-discriminatory way.” Slip Op. 15 n.8. Nothing about the proposition for which the panel cites the case is contested or even central to the panel’s decision.

II. The Panel Decision Gives Full Effect To The Legislative Scheme Of Both The ISDA And The Contract Disputes Act

ASNA also asserts that the panel’s decision is incorrect because the decision (1) fails to liberally construe ambiguous terms in the ISDA in favor of the contractor, Br. 13; (2) gives the Secretary potentially unreviewable discretion concerning certain funding decisions, Pet. 13-14; and (3) “creates unprecedented instability in government contract law,” Pet. 2. ASNA is again incorrect.

First, Congress limited IHS’s ability to fund all contractors’ contract support costs, and IHS did not construe any ambiguous term of the ISDA when it fulfilled Congress’s intent. There can be no real dispute that, by enacting a cap upon how much IHS could allocate for contract support costs, Congress specifically understood that some contractors would incur contract support costs shortfalls. As indicated by the committee report’s discussion of the cap for FY 2000, Congress explicitly understood that there would be a shortfall but no Government liability

because “[t]he [*Oglala*] decision clearly states that the law unequivocally makes contracts providing such costs subject to the availability of appropriations and that any agency can only spend as much money as has been appropriated for contract support costs.” H.R. Conf. Rep. No. 106-479, at 495 (1999).

Second, the panel decision does not give the Secretary unreviewable discretion. Nothing in the decision prohibits contractors from challenging the reasonableness of IHS’s scheme for allocating contract support costs amongst all tribal contractors, and contractors also retain the ability to bring pre-contract challenges challenging any aspect of a proposed AFA. *See* 25 U.S.C. § 450f(b).

Finally, especially given that this Court decided *Oglala Sioux* in 1999, ASNA’s contention that the decision created “instability” is without merit. *See* Pet. 6 (“It is difficult to overstate how destabilizing the Panel’s decision is for government contractors.”). The decision on its face only applies to contract support costs for ISDA contracts, and tribal contractors have the right to cease performance at anytime without recourse. 25 U.S.C. § 458aaa-7(k).² Also, tribal contractors, unlike procurement contractors, can challenge a contract’s terms prior to agreeing to them, *see* 25 U.S.C. § 450f(b).

² This provision was not in place at the time of ASNA’s AFAs for FY 1999 and FY 2000, but the compact between ASNA and the Government assured ASNA of similar rights. JA 141.

III. The Panel Correctly Held That ASNA Had Waived Any Argument That It Is Entitled To A Portion Of Its Contract Support Costs

ASNA also erroneously asserts that the panel failed to consider its “alternative claim that it should at least be awarded damages arising out of the agency’s failure to spend a small portion of the contract support appropriation on *any* contractor.” Pet. 14 (emphasis in original).

The Panel noted ASNA’s contention before the Civilian Board of Contract Appeals that some funds were available to pay its contract support costs for 1999 and 2000 because a portion of each year’s appropriation lapsed to the Treasury. Slip. Op. 17 n.11. The Panel did not consider the merits of ASNA’s argument, finding instead that “the availability of lapsed funds was not argued.” *Id.* ASNA claims that “the argument was in fact addressed at pages 26 and 35 of ASNA’s opening brief,” Pet. 15, but nowhere on those pages does ASNA even address its previous argument that it is entitled to the funds purportedly lapsed to the Treasury. Thus, there was no error in the Panel’s decision.

CONCLUSION

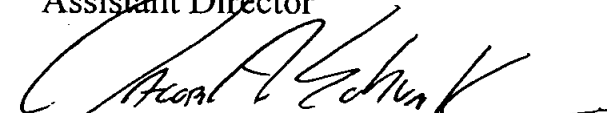
For the foregoing reasons, appellant’s petition for rehearing and rehearing *en banc* should be denied.

Respectfully submitted,

TONY WEST
Assistant Attorney General

JEANNE E. DAVIDSON
Director


DONALD E. KINNER
Assistant Director


JACOB A. SCHUNK
Trial Attorney

OF COUNSEL:

SEAN DOOLEY
MELISSA JAMISON
Senior Attorneys
U.S. Department of Health
and Human Services
Office of the General Counsel
Public Health Division

Commercial Litigation Branch
Civil Division
Department of Justice
Attn: Classification Unit, 8th Floor
1100 L Street, N.W.
Washington, D.C. 20530

Telephone: (202) 616-0320
Facsimile: (202) 307-0972

April 1, 2011

Attorneys for Appellee

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 1st day of April, 2011,
I caused to be sent, via Federal Express, two copies each of the foregoing
APPELLEE'S OPPOSITION TO APPELLANT'S COMBINED PETITION FOR
REHEARING AND REHEARING *EN BANC* addressed as follows:

Lloyd B. Miller
Sonosky, Chambers, Sachse, Endreson & Perry, LLP
1425 K Street, N.W., Suite 600
Washington, D.C. 20005

Lloyd B. Miller
Sonosky, Chambers, Sachse, Munson & Miller, LLP
900 West Fifth Avenue, Suite 700
Anchorage, AK 99501-2029

Carter G. Phillips
Sidley Austin, LLP
1501 K Street, N.W.
Washington, D.C. 20005

A handwritten signature in cursive script, appearing to read "Sue Smith", is written over a horizontal line.