



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS GRANTED IN PART: October 26, 2026

CBCA 8722

AMERICAN INDIAN HEALTH SERVICE OF CHICAGO,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Caleb J. Norris and Elliott A. Milhollin, Hobbs Straus Dean & Walker, Washington, DC, appearing for Appellant.

Eno-Obong J. Essien and Megan R. Nathan, Office of the General Counsel, Department of Health and Human Services, Baltimore, MD, counsel for Respondent.

Before Board Judges **BEARDSLEY**, **KULLBERG**, and **NEWSOM**.

BEARDSLEY, Board Judge.

Appellant, American Indian Health Service of Chicago (AIHSC), seeks relief from the Department of Health and Human Services (HHS) Indian Health Service's (IHS) demand for the repayment of \$204,690.41 in advanced payments made to AIHSC. AIHSC claims that it is not required to repay \$100,231.67 in unallowable payments because it was the victim of fraud. AIHSC claims further that it does not owe IHS \$104,458.74 because those payments were allowable. We grant HHS's motion to dismiss for failure to state a claim with regard to the \$100,231.61 in unallowable payments. We deny HHS's motion to dismiss with regard to the \$104,458.74 because AIHSC's allegations that those payments were allowable states a claim to relief that is plausible on its face.

Background

AIHSC is a nonprofit organization that provides medical services to the underprivileged Native American community in the Chicago area. Notice of Appeal at 3, 5-6.¹ IHS awarded three contracts (75H70521C00003, 75H70522C00004, 75H70523C00002) to AIHSC, all with the same contract provisions relevant to this appeal. *Id.* at 6. AIHSC received advance payments under the contracts in accordance with a schedule approved by the contracting officer and pursuant to Federal Acquisition Regulation (FAR) 52.232-12, Advance Payments (MAY 2001), Alternate II (MAY 2001), Alternate IV (APR 1984) (48 CFR 52.223-12 (2023)) as incorporated into the contracts by full text. Appeal File, Exhibits 1 at 52-60, 2 at 127-35, 3 at 239-47 (collectively, hereinafter, Contracts § I.3.3).² In 2023, IHS received information that the executive director of AIHSC made unauthorized payments to herself and to her husband, also a AIHSC employee, in violation of AIHSC's policies and "without the knowledge or approval of AIHSC's [b]oard." *Id.* at 4, 10. "[T]he Executive Director [also] accessed AIHSC's pay roll [sic] system without the knowledge of the [AIHSC] [b]oard to manipulate her bi-weekly pay rate to give herself retroactive pay raises and to avoid tax deductions." *Id.* AIHSC represented to IHS that it "believe[d] that there is a plausible case of fraud committed by" the executive director and that she "misused Federal grants funds to benefit herself and her husband." *Id.* at 5, 11, 21. AIHSC subsequently terminated both the executive director and her husband. *Id.* at 4, 10, 19.

AIHSC admits that \$100,231.67 of the payments made by AIHSC's executive director to herself (for health fringe benefits) and to her husband (for overtime pay, retroactive pay, health fringe benefits, and a bonus) were unallowable.³ Notice of Appeal at 4, 10-11. AIHSC, however, asserts that \$104,458.74 of the payments made to AIHSC's executive director and her husband (for premium pay) and payments made to the executive director (for hazard pay and retroactive pay) were allowable because the AIHSC board approved the payments. *Id.* at 4-5, 11, 20-21. AIHSC further asserts that the premium pay and hazard pay payments were made to all its employees "due to the extra ordinary [sic] circumstances

¹ For the Notice of Appeal, citations are to .pdf page numbers, including appellant's cover letter.

² All exhibits are found in the appeal file. Page references are to the Bates numbers added by the parties.

³ This unallowable amount includes an entertainment cost of \$1500 for a Thanksgiving dinner for AIHSC's staff in 2022. Notice of Appeal at 28.

during COVID-19 in order to retain employees” and that these payments did not violate IHS’s or AIHSC’s policies. *Id.* at 4.

In September 2025, IHS issued a contracting officer’s final decision and demand for payment in the amount of \$204,690.41 for unallowable and improper payments made to the executive director and her husband. Notice of Appeal at 6-18. The contracting officer noted that AIHSC and IHS agreed that \$100,231.67 of the payments made were unallowable. *Id.* at 10-11. For the payments totaling \$104,458.74, she found that the payments were unallowable because AIHSC had not obtained prior written contracting officer approval for the hazard pay, premium pay, or retroactive pay, as required by FAR Part 31 and Office of Management and Budget (OMB) Uniform Guidance. *Id.* at 12-14. She further found that the payments were made without the AIHSC board’s knowledge or approval and in violation of AIHSC’s policies. *Id.*

HHS moved to dismiss AIHSC’s appeal for failure to state a claim on the grounds that AIHSC has not alleged and cannot prove any set of facts for relief from its repayment obligation of the unallowable costs. Respondent’s Motion to Dismiss at 6. In addition, HHS claimed that AIHSC is seeking non-monetary injunctive relief beyond CBCA’s authority by requesting specific performance for IHS to pursue recovery of the amount owed from AIHSC’s former executive director. *Id.* at 11-12.

AIHSC opposed HHS’s motion to dismiss, asserting that it has alleged facts sufficient to state a claim upon which relief can be granted. Appellant’s Opposition to Motion to Dismiss at 1-2. AIHSC claims that it “does not believe that it can or should” be required to repay the \$100,231.67 of unallowable costs because (1) AIHSC was a victim of fraud; (2) it no longer has the funds; and (3) it cannot use grant funds to cover the costs. *Id.* AIHSC further claims that the remaining \$104,458.74 of payments are allowable because “the [b]oard had already approved the Executive Director to make those payments as well as others by granting the Executive Director the general authority to make such payments in her discretion.” *Id.* at 5. These payments involved “COVID-related premium payments and hazard pay” that were also made “across the board” to other employees. *Id.* at 2. AIHSC asserts that the executive director’s salary increase was “part of an entire package of salary increases approved by the AIHSC [b]oard” and “entirely reasonable” based on market salaries for similar positions. *Id.*

Discussion

Standard of Review

To survive a motion to dismiss for failure to state a claim upon which relief may be granted under Board Rule 8(e) (48 CFR 6101.8(e) (2023)), [AIHSC] “must point to factual allegations that, if true, would state a claim to relief that is plausible on its face, when the Board draws all reasonable inferences in favor of the contractor.” *UnitedHealthcare Insurance Co. v. Office of Personnel Management*, CBCA 7357, 23-1 BCA ¶ 38,375, at 186,419 (quoting *B.L. Harbert International, LLC v. General Services Administration*, CBCA 6300, et al., 19-1 BCA ¶ 37,335, at 181,569). [AIHSC’s] factual allegations need only be sufficient “to raise a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Parsons Government Services, Inc. v. Department of Energy, CBCA 7822, 24-1 BCA ¶ 38,576, at 187,495.

To determine if AIHSC has asserted factual allegations that state a claim for relief that is plausible on its face, we look to AIHSC’s notice of appeal, which AIHSC designated as its complaint. We also consider “materials attached to or incorporated by reference in the complaint,” *Comp Environmental, Inc. v. Department of the Interior*, CBCA 7771, et al., 25-1 BCA ¶ 38,823, at 188,875 (citing *Pennington Seed, Inc. v. Produce Exchange No. 299*, 457 F.3d 1334, 1342 n.4 (Fed Cir. 2006)), and the terms of the contracts. *John Douglas Burke v. Department of Health & Human Services*, CBCA 7492, 23-1 BCA ¶ 38,304, at 185,971 (The contract is “integral to a claim arising under it” and can be considered in a motion to dismiss. (citing *Systems Management & Research Technologies Corp.*, CBCA 4068, 15-1 BCA ¶ 35,976, at 175,789)), *aff’d*, No. 2024-1019, 2024 WL 4579346 (Fed. Cir. Oct. 25, 2024). The documents attached to AIHSC’s complaint include (1) IHS’s September 16, 2024, notice of intent to issue a demand letter; (2) AIHSC’s October 28, 2024, response to the notice of intent to issue a demand letter; (3) AIHSC’s January 8, 2025, response to the notice of intent to issue a demand letter; and (4) IHS’s September 15, 2025, demand letter and contracting officer’s final decision.

\$100,231.67 in Claimed Costs

There is no dispute that the payments made by AIHSC to the executive director and her husband (plus the entertainment cost), totaling \$100,231.67, were unallowable costs. Since AIHSC was permitted to withdraw advanced funds “only to pay for allowable costs as prescribed by the **52.232.12 Payment** clause of this contract,” Contracts § I.3.3(C), these payments were erroneously paid to AIHSC and must be repaid to IHS. “[W]hen a payment

is erroneously or illegally made it is in direct violation of article IV, section 3, clause 2, of the Constitution,” *Fansteel Metallurgical Corp. v. United States*, 172 F. Supp. 268, 270 (Ct. Cl. 1959) (citing *Royal Indemnity Co. v. United States*, 313 U.S. 289 (1941)), and it is “the duty of the Government to sue” for “recovery of money erroneously paid.” *Id.* (citing *United States v. Wurts*, 303 U.S. 414, 415 (1938)). “It is a well-settled principle that the Government has inherent authority to recover sums illegally or erroneously paid.” *Aetna Casualty & Surety Co. v. United States*, 526 F.2d 1127, 1130 (Ct. Cl. 1975) (citing *Wurts*, 303 U.S. at 415, and additional cases).

AIHSC contends that it should not have to repay these unallowable costs due to the fraudulent acts of its executive director. IHS’s demand for payment, however, is not premised on fraud but is premised correctly on the “established doctrine that the government is required to recover amounts paid to a contractor that the contractor was not entitled to receive.” *Eyak Services, LLC*, ASBCA 58556, et al., 14-1 BCA ¶ 35,570, at 174,327 (citing FAR 32.601-605; *Acme Process Equipment Co. v. United States*, 347 F.2d 538, 551 (Ct. Cl. 1965) (acknowledging that the Government can recover “funds which its agents have wrongfully, erroneously, or illegally paid”); *Fansteel*, 172 F. Supp. at 270). IHS’s claim for repayment of unallowable costs “implicate[s] the parties’ contract rights” and “not whether [AIHSC’s employees] committed fraud. *Id.* “[W]hether fraud or other illicit acts were committed in the course of the events underlying the Government’s claims are separate matters,” and “[t]he Board is not deciding whether fraud . . . occurred.” *Id.* (quoting *Medica, S.A.*, ENGBCA PCC-142, 00-2 BCA ¶ 30,966, at 152,812). The issue of the executive director committing fraud, therefore, has no bearing on whether AIHSC must repay the unallowable costs.

Even if AIHSC has no reserve funds to repay IHS, IHS cannot make an exception to or waive the requirement for AIHSC to repay the unallowable costs, absent clear statutory authority to do so. *Royal Indemnity Co.*, 313 U.S. at 295; see *Fansteel*, 172 F. Supp. at 270 (“[N]o officer or agent of the Government is clothed with authority to disburse money belonging in the public treasury without authority so to do.”) (citing *Heidt v. United States*, 56 F.2d 559, 560 (5th Cir. 1932)); *Mr. William R. Barton*, B-276550, 97-2 CPD ¶ 174 (Dec. 15, 1997) (citing *The Honorable Dale L. Bumpers and Lowell Weicker, Jr.*, 67 Comp. Gen. 271, 273 (1988)). Neither HHS or AIHSC has identified any such authority. As such, HHS cannot act beyond the limits of its authority. *Fansteel*, 172 F. Supp. at 270 (citing *Wisconsin Central Railroad Co. v. United States*, 164 U.S. 190 (1896)). The fact that AIHSC no longer has the funds to repay the unallowable costs does not expand IHS’s authority to allow it to forgive AIHSC’s debt. “When the Government mistakenly overpays a contractor, there is not only a duty to refund the overpayments, but the Government must, by force of law, seek recovery.” *Government of the Virgin Islands of the United States*, ASBCA 30648, 88-1 BCA ¶ 20,265, at 102,572 (1987) (citing *DiSilvestro v. United States*, 405 F.2d 150 (2d Cir. 1968); *Aetna Casualty*, 526 F.2d 1127).

To the extent that AIHSC is requesting that the Board direct IHS to pursue recovery of the unallowable costs directly from AIHSC's former employees, the Board has no authority to grant such non-monetary, injunctive relief. *See Texas Industrial Security, Inc. v. General Services Administration*, CBCA 8467, 26-1 BCA ¶ 38,946, at 189,572 (2025) (citing *Western Aviation Maintenance, Inc. v. General Services Administration*, GSBCA 14165, 98-2 BCA ¶ 29,816, at 147,642).

We cannot grant relief to AIHSC, even if AIHSC was the victim of fraud, no longer has the funds as a result, or relies on grants to fund its mission. Thus, we grant the motion to dismiss AIHSC's claim for unallowable costs in the amount \$100,231.67.

\$104,458.74 in Claimed Costs

AIHSC has alleged sufficient facts to plausibly find that \$104,458.74 of its costs for premium pay, hazard pay, and retroactive pay were allowable. AIHSC could withdraw funds to pay for allowable costs or to pay expenses that were "approved in writing by the administering office."⁴ Contracts § I.3.3(C). Accepting as true AIHSC's assertions that the AIHSC board approved these payments, that AIHSC paid all of its employees hazard and premium pay, and that these payments did not violate IHS's or AIHSC's policies, such payments could be determined to be allowable in accordance with the contracts.⁵ Such a determination, however, requires further development of the facts that led to the distribution of these payments. Accordingly, AIHSC's complaint states a claim for relief that is plausible on its face. We, therefore, deny HHS's motion to dismiss AIHSC's claim for \$104,458.74 in potentially allowable costs.

⁴ The Bemidji Area office is the administering office and is the office location of the contracting officer. Contracts, Exhibits 1 at 40, 2 at 114, 3 at 226.

⁵ HHS relies on the provisions of FAR Part 31 and OMB Uniform Guidance within 2 CFR pt. 200, subpt. E and app. IV, to determine that these costs were unallowable. However, since the contracts did not incorporate FAR Part 31 or OMB Uniform Guidance, *see* Contracts § I.3.3, these regulations and guidance do not govern whether a cost is allowable under these contracts.

Decision

HHS's motion to dismiss is **GRANTED IN PART**.

Erica S. Beardsley

ERICA S. BEARDSLEY

Board Judge

We concur:

H. Chuck Kullberg

H. CHUCK KULLBERG

Board Judge

Elizabeth W. Newsom

ELIZABETH W. NEWSOM

Board Judge