In the United States Court of Federal Claims

No. 04-694 C
Filed June 30, 2005

HDM CORP.,	)
Plaintiff,	)
v.	)
THE UNITED STATES,	)
Defendant,	)
and	)
GROUP HEALTH INCORPORATED,	)
Defendant-Intervenor.	)

OPINION AND ORDER

GEORGE W. MILLER, Judge.

This matter is before the Court on defendant's motion to dismiss plaintiff's taking claim, filed on November 18, 2004. Plaintiff filed an opposition brief on January 18, 2005. Defendant filed a reply brief on February 2, 2005. Oral argument was deemed unnecessary. For the reasons set forth below, defendant's motion to dismiss is DENIED.

BACKGROUND[1]

Plaintiff HDM Corp. ("HDM"), is a company that handles over 30 million Medicare crossover claims[2] annually. Am. Compl. ¶ 5. Since it began its Medicare crossover business in

[1] The recitation of facts in this section does not constitute findings by the Court. All of the stated facts are either undisputed or alleged and assumed to be true for the purposes of the pending motion.

[2] Medicare Crossover involves electronic coordination of healthcare benefit claims and concerns people eligible for both Medicare and Medicaid. These claims are processed through

1998, HDM has "invested in certain proprietary technology, computer software and computer hardware." Am. Compl. ¶ 7. On February 1, 1999, the U.S. Department of Health and Human Services, acting through the Centers for Medicare and Medicaid Services ("CMS")[3] invited companies to submit proposals for a "Coordination of Benefits" ("COB") contract.[4] *Id.* ¶ 24. Attached to and made part of the Request for Proposal cover sheet were representations that the successful bidder of the COB contract would not be responsible for the creation of crossover claims files. *Id*. ¶¶ 25-27. Because the RFP did not inform potential bidders that crossover claims would be a part of the contract awarded to the successful bidder, HDM did not submit a bid. *See id*. ¶ 29.

The COB contract was awarded in November, 1999. *Id*. ¶ 30. On August 15, 2003 and February 6, 2004, CMS announced the implementation of a new regulatory regime consolidating Medicare crossover claims. Am. Compl. ¶ 32. The effect of the new regulatory regime, according to plaintiff, was to grant a monopoly to the COB contractor over all Medicare crossover claims. *Id*. Implementation of the new regulatory regime included a modification to the COB contract that was executed without competitive bidding. *Id.* ¶ 33. HDM, facing the elimination of a major segment of its business, filed suit in this Court on April 20, 2004. In its original complaint, HDM alleged that CMS's actions constitute a taking of HDM's property without compensation in violation of the Fifth Amendment of the United States Constitution. HDM filed an Amended Complaint on February 8, 2005 in which it asserted two additional claims, neither of which are affected by the pending motion.

DISCUSSION

I. Jurisdiction Over Takings Claims

The court's subject matter jurisdiction, pursuant to the Tucker Act extends to "any claim against the United States founded . . . upon the Constitution . . . ." 28 U.S.C. § 1491(a)(1) (2000). To sustain jurisdiction under the Tucker Act, plaintiff's claim must also be based upon a money-mandating provision. *Joshua v. United States*, 17 F.3d 378, 379 (Fed. Cir. 1994). The Fifth Amendment provides, in relevant part, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V cl. 4. The Takings Clause is such a money-mandating provision. *Hansen v. United States*, 65 Fed. Cl. 76, 94 n.28 (2005).

Medicare and then "cross over" to supplemental insurers and Medicaid for further coverage, usually for Medicare co-payments and deductibles. Am. Compl. ¶ 6.

[3]CMS was previously known as the Health Care Financing Administration.

[4]Request for Proposal No. 99-0004/DSS. Am. Compl. ¶ 24.

II. Standard of Review for Motion to Dismiss

Dismissal under RCFC 12(b)(6) for failure to state a claim upon which relief can be granted is appropriate when the facts as alleged in the complaint do not entitle the plaintiff to a legal remedy. *New York Life Ins. Co. v. United States*, 190 F.3d 1372, 1377 (Fed. Cir. 1999). In reviewing a motion to dismiss, the court accepts all well-pleaded factual allegations as true, and draws all reasonable inferences in favor of the plaintiff. *Perez v. United States*, 156 F.3d 1366, 1370 (Fed. Cir. 1998). The case may be properly dismissed, however, if the plaintiff "can prove no set of facts in support of his claim that would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Leider v. United States*, 301 F.3d 1290, 1295 (Fed. Cir. 2002) (quoting *Conely*, 355 U.S. at 45-46).

III. Plaintiff Has Alleged A Cognizable Property Interest

The Federal Circuit employs a two-part analysis in evaluating claims that governmental action constitutes a taking of private property without just compensation. *Maritrans Inc. v. United States*, 342 F.3d 1344, 1351 (Fed. Cir. 2003) (citing *M & J Coal Co. v. United States*, 47 F.3d 1148, 1153-54 (Fed. Cir. 1995)). "First, a court must evaluate whether the claimant has established a 'property interest' for purposes of the Fifth Amendment." *Id.* (citing *M & J Coal Co.*, 47 F.3d at 1154). "It is axiomatic that only persons with a valid property interest at the time of the taking are entitled to compensation." *Chancellor Manor v. United States*, 331 F.3d 891, 901 (Fed. Cir. 2003) (citing *Wyatt v. United States*, 271 F.3d 1090, 1096 (Fed. Cir. 2001)). Thus, "if a claimant fails to demonstrate that the interest allegedly taken constituted a property interest under the Fifth Amendment, a court need not even consider whether the government regulation was a taking . . . . " *M & J Coal Co. v. United States*, 47 F.3d at 1352. If the court determines that a property interest exists, it proceeds to the second part of the analysis, *i.e.*, determining whether a compensable taking of that interest occurred. *Id.* (citing *M & J Coal Co.*, 47 F.3d at 1153-54; *Fla. Rock Indus. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994)).

The Constitution does not create or define property interests for Fifth Amendment purposes. *Adams v. United States*, 391 F.3d 1212, 1218 (Fed. Cir. 2004) (citing *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)). Instead, state, federal, or common law define the scope of property rights. *Id.* (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992)). HDM argues that it "possesses a property interest in its proprietary technology, including its Qwik+Cross® software and computer hardware . . . ." Br. Opp. Def's Mot. Dismiss at 8. *See also* Am. Compl. ¶ 7 ("In the course of developing its Medicare Crossover business HDM has invested in certain proprietary technology, computer software and computer hardware (hereafter, 'Property').."). Property such as that described by plaintiff can be the subject of a taking claim. *See Andrus v. Allard*, 444 U.S. 51, 65 (1979); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

In its motion to dismiss plaintiff's taking claim, defendant contends that HDM does not possess a property interest that is compensable under the Fifth Amendment. First, defendant

argues that to the extent that "HDM is claiming that . . . it obtained a property right to be able to pursue [Medicare Crossover] activity, and collect its associated revenues," no such property interest exists. Def's Mot. Dismiss at 5. Next, defendant argues that HDM does not possess a property interest in any expectation that the Medicare Crossover regulatory regime would remain unchanged. *Id*. at 9-11. Finally, defendant argues that HDM does not possess a property interest in the lost value of the services it sells to insurance companies. *Id*. at 11-15.

In response to defendant's arguments, HDM contends that it is not claiming a taking of any of the property interests described by defendant. Pl's Br. Opp. Def's Mot. Dismiss at 8. Instead, HDM maintains that it is claiming that it possesses a property interest in its "proprietary technology, including its Qwik+Cross® software and computer hardware . . . ." *Id*. That is the property interest HDM claims the Government has taken. *Id.* at 9-11.

Defendant states that it "agrees with HDM's assertion . . . that HDM possesses a property interest in its proprietary technology." Def's Reply Br. at 1. Defendant then argues that HDM "cannot demonstrate that the Government has in any manner appropriated this technology" and that HDM "has not alleged that the Government has affected any of the legally recognized property rights associated with its proprietary technology." *Id*. at 3. However, whether the Government's conduct amounted to an appropriation, or otherwise affected any of HDM's legally recognized property rights, *i.e.,*whether there was a taking of HDM's property, and whether HDM has alleged a cognizable property interest are two separate questions. In its motion to dismiss, defendant argued only that plaintiff had not alleged a property interest cognizable under the Fifth Amendment. In its motion to dismiss (as opposed to its reply brief), defendant failed to make any argument that the Government's conduct, assuming HDM had alleged a cognizable property interest, did not take that property. The Court will not address an argument raised for the first time in defendant's reply brief. *See, e.g.*, *Arakaki v. United States*, 62 Fed. Cl. 244, 246 n.9 (2004) ("The court will not consider arguments that were presented for the first time in a reply brief or after briefing was complete.") (citing *Novosteel SA v. United States*, 284 F.3d 1261, 1274 (Fed. Cir. 2002)); *Sonnenfeld v. United States*, 62 Fed. Cl. 336, 339 (2004) ("Because this argument was raised in the Government's reply brief, it has not been fully and properly briefed. Accordingly, the Government's contention is not ripe for decision by the Court."). Because, as defendant concedes, HDM has alleged a compensable property interest, defendant's motion to dismiss is DENIED.

CONCLUSION

For the reasons set forth above, defendant's motion to dismiss plaintiff's taking claim, set forth in Count I of plaintiff's Amended Complaint (styled "HDM's First Claim for Relief"), is DENIED.

IT IS SO ORDERED.

_____
GEORGE W. MILLER
Judge