



INTERIOR BOARD OF INDIAN APPEALS

Northwest Computer Supply v. Acting Deputy to the Assistant Secretary (Operations)

16 IBIA 125 (05/12/1988)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

NORTHWEST COMPUTER SUPPLY

v.

ACTING DEPUTY TO THE ASSISTANT SECRETARY--
INDIAN AFFAIRS (OPERATIONS)

IBIA 88-2-A

Decided May 12, 1988

Appeal from a decision of the Acting Deputy to the Assistant Secretary--Indian Affairs (Operations) cancelling the certification of Northwest Computer Supply as an eligible enterprise under the Buy Indian Act.

Affirmed.

1. Indians: Economic Enterprises: Buy Indian Act--Indians: Federal Recognition of Indian Tribes: Generally--Indians: Indian Preference: Buy Indian Act

For purposes of eligibility under the Buy Indian Act, 25 U.S.C. § 47 (1982), an "Indian" must be a member of a Federally recognized Indian tribe or otherwise considered to be an Indian by a Federally recognized Indian tribe with which affiliation is claimed.

APPEARANCES: Ethel L. Scheet, President, Northwest Computer Supply, for appellant; George T. Skibine, Esq., Office of the Solicitor, U.S. Department of the Interior, for appellee.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Northwest Computer Supply, through its owner and president, Ethel L. Scheet, seeks review of an August 10, 1987, decision of the Acting Deputy to the Assistant Secretary--Indian Affairs (Operations) (appellee) cancelling appellant's certification as an eligible enterprise under the Buy Indian Act, 25 U.S.C. § 47 (1982), ^{1/} on the grounds that Scheet had not shown she was a member of a Federally recognized Indian tribe. For the reasons discussed below, the Board affirms that decision.

^{1/} All further references to the United States Code are to the 1982 edition.

Background

The Buy Indian Act provides: "So far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior."

The Bureau of Indian Affairs (BIA) policy concerning procurement pursuant to the Buy Indian Act, in effect at the time of appellee's decision, is set out at 20 BIAM 2.1 (1979). In relevant part, it provides:

It is the Bureau's policy that all purchases or contracts be made or entered into with qualified Indian contractors to the maximum extent practicable and to contact non-Indian contractors only after it has been determined that there are no qualified Indian contractors within the normal competitive area that can fill and are interested in filling the procurement requirement.

Under this policy, the following words or phrases have the meaning shown.

A. Indian. Indian means a person who is a member of an Indian tribe or otherwise considered to be an Indian by the tribe with which affiliation is claimed.

B. Indian Contractor. Indian contractor is a legal entity which is 100% Indian owned and controlled. [2/]

On October 23, 1986, Scheet submitted to the Contracting Officer, Billings Area Office, BIA (Contracting Officer), an application for certification of appellant as an eligible enterprise under the Buy Indian Act. The application showed that Scheet was the sole owner of appellant and that she claimed tribal affiliation with the Little Shell Tribe of Chippewa Indians of Montana. 3/ As proof that she was Indian, Scheet submitted a certification from the Tribal Operations Officer, Turtle Mountain Agency, BIA, dated October 15, 1986, stating that she was affiliated with the "Landless Chippewa Indians of Montana" and the Turtle Mountain Band of Chippewa Indians, and that she possessed 9/32 degree of Indian blood of the two groups. On November 25, 1986, the Contracting Officer notified Scheet

2/ On Jan. 20, 1988, BIA published a notice of change in policy, revising the definition of "Indian contractor" to require only 51% Indian ownership. The notice reiterates the basic policy statement and the definition of "Indian" found in 20 BIAM 2.1. It further states:

"[T]he Bureau believes it is in the best interest of the public to have an opportunity to comment on and codify this policy in the Code of Federal Regulations. Accordingly, the public will have an opportunity to comment on proposed regulations for the Buy Indian Act program which are being prepared for publication." 53 FR 1522 (Jan. 20, 1988).

3/ The Little Shell Tribe of Chippewa Indians of Montana has submitted a petition for Federal acknowledgment pursuant to 25 CFR Part 83.

that appellant qualified as an Indian economic enterprise and was therefore eligible to contract under the Buy Indian Act.

Between February and May, 1987, Scheet unsuccessfully sought to be awarded contracts under the Buy Indian Act. On June 16, 1987, the Contracting Officer notified her that appellant's certification under the Buy Indian Act had been cancelled because Scheet had not provided documentation that she was an enrolled member of a Federally recognized Indian tribe.

By letter of July 10, 1987, appellant filed an appeal with the BIA Central Office in Washington. In a decision dated August 10, 1987, appellee affirmed the Contracting Officer's decision. Appellee stated:

25 U.S.C. § 13 (the Snyder Act, November 2, 1921) [4/] is the basic authority under which the Secretary of the Interior provides services to Federally recognized Indians and Indian entities. Although our policy on the Buy Indian Act does not specifically address Federally recognized tribes, we are bound by the Snyder Act in the method by which we obligate monies appropriated by Congress. Therefore, due to the fact that your Company is not owned by a member of a Federally recognized Indian tribe, we are unable to certify you as eligible to receive a contract awarded under the authority of the Buy Indian Act.

Appellant's notice of appeal to the Board was received by the Board on October 14, 1987. Only appellee filed a brief on appeal.

Contentions of the Parties

In its notice of appeal, appellant states that the only issue it is appealing to the Board is "whether the Bureau of Indian Affairs can cancel [appellant's] certification under the Buy Indian Act because [Scheet is] not a member of a federally recognized tribe, although [she is] over one-quarter Chippewa Indian and a member of a tribe [which] has petitioned for federal recognition." 5/ Appellant contends that neither the Snyder Act nor the

4/ The Snyder Act provides:

"The Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States * * *."

5/ Appellant notes the Little Shell Tribe and its members are recognized as beneficiaries under the Pembina Chippewa Judgment Fund Distribution Act of 1982, P.L. 97-403, 96 Stat. 2022. Section 6 of that act provides in part:

"[T]he Secretary shall act on the [Little Shell Tribe's] petition for Federal recognition prior to September 30, 1985. * * * [I]f the Secretary fails to act on the recognition petition by September 30, 1985, the Secretary shall make a report to Congress on that date outlining the reasons for his failure to act and shall make no per capita payments under this subsection until action on the petition is final."

The Board has been advised that the Little Shell Tribe's petition is still pending.

Buy Indian Act requires that Scheet be a member of a Federally recognized tribe in order for appellant to be certified under the Buy Indian Act.

In his response, appellee argues that, although the Buy Indian Act does not specifically require that an Indian be a member of a Federally recognized tribe in order to qualify under the act, the Secretary of the Interior has defined "Indian" for purposes of the Buy Indian Act to mean "a person who is a member of an Indian tribe or otherwise considered to be an Indian by the tribe with which affiliation is claimed." 20 BIAM 2.1A. Appellee argues that, for purposes of 20 BIAM 2.1A, "Indian tribe" means a tribe which is included in the list of Indian tribes recognized as eligible to receive services from BIA, published in the Federal Register pursuant to 25 CFR 83.6(b), 6/ and notes that the Little Shell Tribe of Chippewa Indians is not included in that list.

Discussion and Conclusions

[1] Appellant appears to be contending that BIA is without authority to define "Indian" for purposes of the Buy Indian Act because the statute itself does not define the term. It is apparent, however, that BIA would not be able to administer the statute without some means of identifying the individuals who come within its terms. Further, the statute itself vests the Secretary with discretion in the granting of contracts, indicating an intent to vest the Secretary with authority, inter alia, to determine which persons should be considered "Indians" eligible to be awarded contracts under the statute. In exercise of the discretion granted by the statute, BIA adopted the procurement policy set out in 20 BIAM 2.1, including the definition of "Indian" in 20 BIAM 2.1A. 7/

The Board finds that BIA had the authority to adopt a definition of "Indian" for purposes of awarding contracts under the act.

As interpreted by appellee, the definition of "Indian" in 20 BIAM 2.1A includes the implied requirement that the tribe with which an eligible Indian claims affiliation be a Federally recognized tribe. 8/ In support of this interpretation, appellee cites Solicitor's Opinion M-36934, 88 I.D. 338

6/ The most recent list is published at 51 FR 25115 (July 10, 1986).

7/ Cf. Andrus v. Glover Construction Co., 446 U.S. 608, 609 and n.3 (1980).

8/ Some recent statutes concerning Federal programs for Indians make this requirement explicit. For example, the Indian Financing Act of 1974 defines "Indian" as "any person who is a member of any Indian tribe, band, group, pueblo, or community which is recognized by the Federal Government as eligible for services from the Bureau of Indian Affairs * * *." 25 U.S.C. § 1452(b). The Indian Self-Determination and Education Assistance Act of 1975 defines "Indian" as "a person who is a member of an Indian tribe," 25 U.S.C. § 450b(a), and "Indian tribe" as "any Indian tribe, band, nation, or other organized group or community which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 450b(b).

(1981). That opinion addressed a situation in which an individual sought to obtain a permit to acquire eagle feathers under the Bald Eagle Protection Act, on the grounds that he was a member of the Piscataway Indian Tribe. ^{9/} Section 2 of the Bald Eagle Protection Act, 16 U.S.C. § 668a, authorizes, under certain conditions, the taking of eagles "for the religious purposes of Indian tribes" but does not define "Indian tribe." The regulations promulgated pursuant to the act require applicants for eagle feathers to identify the tribe with which they are associated and to secure a certification from BIA of their status as Indians. 50 CFR 22.22 (a) (3) and (5).

The Solicitor concluded that only those tribes included in the annual list of Indian tribes published in the Federal Register pursuant to 25 CFR 83.6(b), constitute Indian tribes for purposes of the act and that "BIA is in no position factually or legally to certify the Indian status of a member of a group with which the BIA does not deal as an Indian tribe." 88 I.D. at 340. He further stated:

By regulations set forth in 25 CFR Part 54 [now Part 83], this Department has established a procedure under which groups claiming to be Indian tribes can secure a determination of their tribal status. The Department promulgated these regulations so that the claims of the many groups seeking tribal status could be determined in an orderly and rational manner by a body with expertise in making such determinations. * * * A group is eligible for the benefits and services available to Indian tribes only after it has secured federal acknowledgment as an Indian tribe under 25 CFR Part [83]. These benefits and services include eligibility for eagle feather permits.

88 I.D. at 340.

25 CFR 83.2 provides, inter alia, that:

Acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits from the Federal Government available to Indian tribes. Such acknowledgment shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their status as Indian tribes as well as the responsibilities and obligations of such tribes.

25 CFR 83.6(b) requires the Secretary to publish annually in the Federal Register a list of "all Indian tribes which are recognized and receiving services from the Bureau of Indian Affairs."

These regulations make clear BIA's intent to provide services and benefits only to those tribes which appear on the Federal Register list or which successfully complete the acknowledgment process. Eligibility

^{9/} The Piscataway Indian Tribe is not a Federally recognized tribe.

