



INTERIOR BOARD OF INDIAN APPEALS

Colorado River Indian Tribes v. Phoenix Area Director, Bureau of Indian Affairs

26 IBIA 39 (06/08/1994)



# United States Department of the Interior

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

COLORADO RIVER INDIAN TRIBES

v.

PHOENIX AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 94-120-A

Decided June 8, 1994

Appeal from a determination that a proposal to contract under the Indian Self-Determination Act, P.L. 93-638, was not submitted by a tribal organization.

Docketed and dismissed.

1. Bureau of Indian Affairs: Administrative Appeals: Generally--  
Contracts: Indian Self-Determination and Education Assistance  
Act: Generally--Indians: Indian Self-Determination and Education  
Assistance Act: Generally

The Board of Indian Appeals has jurisdiction pursuant to 25 CFR Part 2 over certain threshold decisions rendered by Bureau of Indian Affairs officials in considering proposals to contract under the Indian Self-Determination Act, P.L. 93-638, despite the special appeal procedure in 25 CFR Part 271.

APPEARANCES: Peter Nimkoff, Esq., Attorney General, Parker, Arizona, for appellant.

## OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Colorado River Indian Tribes seeks review of a February 3, 1994, decision of the Phoenix Area Director, Bureau of Indian Affairs (Area Director; BIA), determining that a proposed contract under the Indian Self-Determination Act (P.L. 93-638) "[could] not be entered into because the joint venture arrangement between the Colorado River Indian Tribes and SKW Constructors, Inc., does not meet the definition of a tribal organization." <sup>1/</sup> For the reasons discussed below, the Board of Indian

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<sup>1/</sup> The Area Director's letter continued:

"However, [appellant] may resubmit its P.L. 93-638 contract application with the tribe as the prime and SKW as a subcontractor. If you require technical assistance to complete and resubmit your application, please contact the Colorado River Agency Superintendent or the Area Indian Self-Determination Specialist."

Appeals (Board) finds that this appeal must be dismissed as being untimely filed.

In support of his decision, the Area Director cited section 102 of P.L. 93-638 (25 U.S.C. § 450f (1988) 2/) and 25 CFR 271.11. Section 450f authorizes the Secretary to enter into contracts "with a tribal organization." 25 CFR 271.11 provides that "[a]ny tribal organization is eligible to apply for a contract or contracts with the Bureau." "Tribal organization" is defined in 25 U.S.C. § 450b(1) to mean

the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities.

See also 25 CFR 271.2(r).

Apparently after informal discussions, in March 1994 3/ the Area Director provided appellant with appeal information. The March letter states:

The \* \* \* decision of February 3, 1994, may be appealed to the Interior Board of Indian Appeals, 4015 Wilson Boulevard, Arlington, Virginia 22203, in accordance with the regulations in 41 [sic, should be 43] CFR 4.310-4.340. Your notice of appeal to the Board must be signed by you or your attorney and must be mailed within 30 days of the date you receive this decision. \* \* \* You must send copies of your notice of appeal to: (1) the Assistant Secretary - Indian Affairs \* \* \*; (2) each interested party known to you; and (3) this office. Your notice of appeal sent to the Board of Indian Appeals must certify that you have sent copies to these parties. \* \* \* If you file a notice of appeal, the Board of Indian Appeals will notify you of further appeal procedures.

If no appeal is timely filed, this decision will become final for the Department of the Interior at the expiration of the appeal period. No extension of time may be granted for filing a notice of appeal. [Emphasis in original.]

The Area Director's March letter further stated that the 30-day appeal period would begin to run upon appellant's receipt of that letter. 4/

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2/ All further citations to the United States Code are to the 1988 edition.

3/ The date on the copy of the letter received by the Board is not legible. A date-stamp on the copy shows that it was received by appellant on Mar. 7, 1994.

4/ 25 CFR 2.7(b) provides that "[f]ailure to give \* \* \* notice [of the appeal procedures] shall not affect the validity of the decision or action

The Board first became aware that appellant had attempted to file an appeal when it received a telephone call from BIA concerning the case. Subsequently, the Acting Chief, Division of Contracting and Grants Administration, BIA, transferred the original notice of appeal to the Board. The Board received the notice of appeal on May 31, 1994. The notice was addressed to the Assistant Secretary - Indian Affairs (Assistant Secretary), and showed that copies had been sent to the Area Director; the Superintendent, Colorado River Agency, BIA; and two persons associated with SKW Constructors, Inc. Nothing in the notice shows the Board's address, or otherwise indicates that a copy of the notice was sent to the Board. There is a reference to the Board on page 2 of the notice: "Appellants request oral audience before the Board of Indian Appeals, or such other Hearing Authority as shall grant full and speedy relief."

If the Area Director gave appellant the correct appeal information, this notice of appeal is untimely. 43 CFR 4.332(a) states that a notice of appeal from a decision of a BIA Area Director must be filed with the Board, and that an untimely notice of appeal must be dismissed. Although the Area Director's March letter incorrectly referenced 41 CFR rather than 43 CFR, the letter itself properly informed appellant that its notice of appeal was to be filed with the Board, and provided appellant with the Board's correct mailing address.

The Board has consistently held that a notice of appeal is not timely when the appellant has been given the correct appeal information but files a notice of appeal with an official other than the Board, resulting in receipt of the notice of appeal by the Board outside the time period specified in the regulations. *See, e.g., Reeves v. Anadarko Area Director*, 25 IBIA 40 (1993), and cases cited therein. Appellant received the Area Director's March letter on March 7, 1994. Therefore, its notice of appeal needed to be filed with the Board on or before April 6, 1994. As noted above, because appellant chose to file its notice of appeal with the Assistant Secretary, the Board did not receive the notice until May 31, 1994. If appellant was properly informed that its appeal was to the Board, the appeal is untimely.

As the Board stated in *Kaw Nation v. Anadarko Area Director*, 24 IBIA 21, 25 (1993), "until new P.L. 93-638 regulations are promulgated, questions will continue to arise concerning the proper appeal route to be followed for various issues related to P.L. 93-638 contracts." <sup>5/</sup> Here the question is whether this appeal is governed by 25 CFR 271.81-.82, or by 25 CFR Part 2 and 43 CFR Part 4, Subpart D.

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fn. 4 (continued)

but the time to file a notice of appeal regarding such a decision shall not begin to run until notice has been given in accordance with paragraph (c) of this section."

<sup>5/</sup> Draft regulations were published in the *Federal Register* on Jan. 20, 1994. 59 FR 3166.

In Tohatchi Special Education & Training Center, Inc. v. Navajo Area Director, 25 IBIA 259 (1994), the Board requested briefing from the Assistant Secretary on the application of 25 CFR 271.81-.82. As stated in that decision at page 261, the Assistant Secretary argued "that the appeal procedure in Part 271 was intended to apply only to contract declinations which are based upon the declination criteria in 25 U.S.C. 450f(a) (2) or upon funding issues."

25 U.S.C. § 450f(a) (2) provides:

If \* \* \* authorized by an Indian tribe \* \* \*, a tribal organization may submit a proposal for a self-determination contract to the Secretary for review. The Secretary shall, within ninety days after receipt of the proposal, approve the proposal unless, within sixty days of receipt of the proposal, a specific finding is made that--

(A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;

(B) adequate protection of trust resources is not assured; or

(C) the proposed program or function to be contracted for cannot be properly completed or maintained by the proposed contract.

The possibility that the appeal procedures in 25 CFR Part 271.81-.82 might apply in this case arises from the background information document provided to appellant with the Area Director's February decision. Paragraph 3 of that document states: "Pursuant to 20 BIAM, Supplement 1, Section H - Declination Procedures, under (2), a review of the contract proposal was completed and limited to the declination criteria provided in Section 2.1H of this supplement."  
"

Although this paragraph initially appears to suggest that appellant's proposal may have been declined under section 450f(a) (2), section 2.1E of 20 BIAM Supplement 1 requires "Bureau offices [to] immediately review the contract proposal against the declination criteria provided in Section 2.1H of this supplement." After a thorough reading of both the Supplement and the Area Director's decision and the background document, the Board concludes that the statement in paragraph 3 was intended to show compliance with the requirement established in section 2.1E of the Supplement. The Area Director's decision itself does not decline to enter into a contract for any of the reasons specified in section 450f(a) (2), but instead concludes that the entity submitting the proposal was not eligible to contract under P.L. 93-638.

[1] Based upon previous briefing from the Assistant Secretary on the application of 25 CFR 271.81-.82, and its own construction of these

regulations, the Board concludes that a decision that an organization is not eligible to contract under P.L. 93-638 is a threshold question not covered by those appeal procedures. Because no other administrative appeal procedure is provided by statute or regulation for these decisions, the Board further concludes that this appeal falls under BIA's usual appeal procedures in 25 CFR Part 2 and 43 CFR Part 4, Subpart D. Cf. Tohatchi, supra. Accordingly, appellant was given the correct appeal information.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal from the Phoenix Area Director's February 3, 1994, decision is docketed and dismissed as being untimely filed.

//original signed

Kathryn A. Lynn  
Chief Administrative Judge

I concur:

//original signed

Anita Vogt  
Administrative Judge