



DEPARTMENT OF HEALTH AND HUMAN RESOURCES APPEALS BOARD

Ninilchik Traditional Council

Docket No. A-2000-17; Decision No. 1711 (IBIA Docket No. 99-72-A)
(12/07/1999)

Related Indian Self-Determination Act cases:

Administrative Law Judge decision, 10/14/1999

Administrative Law Judge decision, 08/02/2000



Departmental Appeals Board
Appellate Division
Room 637-D, HHH Building
200 Independence Avenue, SW
Washington, D.C. 20201

SUBJECT: Ninilchik Traditional
Council
Docket No. A-2000-17
(IBIA Docket No. 99-72-A)
Decision No. 1711

DATE: December 7, 1999

FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE ORDER

The Indian Health Service (IHS) appealed the October 14, 1999 Amended Recommended Order of Administrative Law Judge (ALJ) Harvey C. Sweitzer regarding IHS's partial declination of a proposal by Ninilchik Traditional Council (NTC) for indirect type contract support costs (CSC) under an existing Indian Self-Determination Act (ISDA) contract for operation of an IHS health care program. IHS partially declined the proposal on the ground that the amount of funds proposed exceeded the applicable funding level for the contract, as determined under section 106(a) of the ISDA. In particular, IHS determined that, of the indirect type CSC proposed by NTC, \$96,453 proposed for administrative personnel duplicated direct program funding. IHS also found that the total amount proposed for administrative personnel, to the extent it included the \$96,453, was unreasonable. The ALJ granted summary judgment in favor of NTC and directed that the full amount of funds proposed be added to NTC's ISDA contract. The ALJ found specifically that, under the applicable regulations, NTC's proposal was not subject to the declination criteria because the proposal was "substantially the same" as NTC's prior year funding agreement. The ALJ further found that NTC's proposed funding agreement must be fully funded because none of the exceptions to the ISDA's prohibition on a reduction of funding in subsequent years were applicable. The ALJ also denied IHS's request for an interlocutory appeal of his prior ruling denying IHS's motion to transfer the case to the Interior Board of Contract Appeals (IBCA) on jurisdictional grounds.

As discussed below, I conclude as a preliminary matter that the ALJ did not err in ruling that this case was properly heard by him pursuant to 25 C.F.R. Part 900, Subpart L, and was not subject to the jurisdiction of the IBCA pursuant to 25 C.F.R. Part 900, Subpart N. However, I conclude that the ALJ did err in finding that NTC's proposed funding agreement was not subject to the declination criteria because it was "substantially the same" as NTC's prior year funding agreement within the meaning of the applicable regulations. The two funding agreements were not "substantially the same" since the means and circumstances for determining indirect CSC differed substantially between the agreements, and indeed, the prior year funding agreement in contrast to the proposal at issue was not based on a final negotiated rate or methodology that had been reviewed or approved by any component of HHS. Moreover, a construction of the regulations as permitting application of the declination criteria to NTC's proposed funding agreement avoids a situation where IHS would be required to award funding indefinitely for costs that are unallowable under the ISDA. I further conclude that the ALJ erred in finding that NTC's proposed funding agreement must be fully funded because none of the exceptions to the ISDA's prohibition on a reduction of funding in subsequent years were applicable. That section prohibits only reductions in the amount of funds required by the ISDA and would not bar IHS's partial declination of duplicative and/or unreasonable costs.

I therefore remand the case to the ALJ to determine whether NTC's proposal in fact included amounts that were duplicative and/or unreasonable and IHS thus properly partially declined the proposal as in excess of the funding level for the contract under the ISDA.

This decision is based on the record before the ALJ, IHS's objections to the ALJ's recommended order, the parties' submissions in response to my written questions, and an informal telephone conference held with the parties.

Statutory Background

The ISDA, Public Law No. 93-638 as amended, 25 U.S.C. § 450f et seq., directs IHS to award "self-determination" contracts to tribal organizations to provide programs, functions, services, and activities (PFSAs) for the

benefit of Indians that had previously been provided by IHS. Section 102 of the ISDA. Section 102(a)(2) provides that the Secretary of the Department of Health and Human Services (HHS) must approve a tribal organization's proposal for a self-determination contract unless the Secretary makes one of five specific findings. See also 25 C.F.R. § 900.22. The finding that was the basis for the partial declination appealed here is that the amount of funds requested exceeds the applicable funding level for the contract, as determined under section 106(a). ISDA, section 102(a)(2)(D); 25 C.F.R. § 900.22(d). In such cases, the Secretary is still required to "approve a level of funding authorized under section 106(a)." ISDA, section 102(a)(4); 25 C.F.R. § 900.26.

Section 106(a)(1) of the ISDA provides that the amount of funds awarded under a self-determination contract—

shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, without regard to any organizational level within the Department of the Interior or the Department of Health and Human Services, as appropriate, at which the program, function, service, or activity or portion thereof, including supportive administrative functions that are otherwise contractible, is operated.

Section 106(a)(2) of the ISDA provides that, in addition to the amount specified in section 106(a)(1), contract costs shall include "contract support costs" (CSC) for the "reasonable costs for activities" which must be carried out by the contractor but are not normally carried on by the Secretary in the direct operation of the program. Section 106(a)(3)(A) provides that CSC

shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of

(i) direct program expenses for the operation of the Federal program that is the subject of the contract, and

(ii) any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the

operation of the Federal program, function, service, or activity pursuant to the contract,

except that such funding shall not duplicate any funding provided under section 106(a)(1).

Section 106(a)(3)(B) of the ISDA provides that, during the period that a tribe operates PFSAs pursuant to a self-determination contract, the tribe shall have the option to negotiate with the Secretary, on an annual basis, "the amount of funds that the tribe . . . is entitled to receive under such contract" Section 106(b)(2) states that the amount of funds "required by subsection (a)" "shall not be reduced by the Secretary in subsequent years" except in certain specified circumstances (such as reduction in federal appropriations for the contracted activity or completion of the activity).

The implementing regulations provide in pertinent part that if a tribe's proposed successor annual funding agreement--

is substantially the same as the prior annual funding agreement . . . , the Secretary shall approve and add to the contract the full amount of funds to which the contractor is entitled, and may not decline, any portion of a successor annual funding agreement. Any portion of an annual funding agreement which is not substantially the same as that which was funded previously (e.g., a redesign proposal; waiver proposal; different proposed funding amount; or different program, service, function, or activity) . . . is subject to the declination criteria and procedures

25 C.F.R. § 900.32.

A tribal organization whose contract proposal has been declined is entitled to a hearing on the record, with the right to engage in full discovery relevant to any issue raised. ISDA, section 102(b)(3). Section 900.163 of 25 C.F.R. provides for an opportunity for a hearing by an ALJ. At the hearing, the Secretary has the burden of proof to clearly demonstrate the validity of the grounds for declining the contract proposal. ISDA, section 102(e)(1) ; 25 C. F. R. § 900.163.

Any party may appeal the ALJ's recommended decision with respect to a declination by IHS to the Secretary of HHS by filing written objections to the ALJ's recommended decision within 30 days after receiving it. 25 C.F.R. § 900.166. The Secretary has 20 days from the date she receives any timely objections to modify, adopt, or reverse the recommended decision. 25 C.F.R. § 900.167. On August 16, 1996, the Secretary delegated her authority to hear such appeals to the Appellate Division of the Departmental Appeals Board. I have been appointed by the Board Chair as the deciding official in this case. I must uphold the ALJ's decision unless I determine that it was based on an error of fact or law.

Factual Background

This appeal involves IHS's partial declination of a proposal submitted by NTC (received by IHS on September 25, 1998) for indirect type CSC as part of its fiscal year 1999 annual successor funding agreement under an existing ISDA contract. That contract provided in pertinent part:

Subject to available appropriations, there shall be added to this Contract, the full amount of funds to which the Contractor is entitled under sections 106(a) and (g) of the [ISDA]. The allowable indirect costs shall be obtained by applying negotiated indirect cost rates to direct cost bases agreed upon by the parties.

Objections of Indian Health Service to Recommended Decision of the Administrative Law Judge (IHS Objections), Ex. A (Contract Number 243-96-6013), section E(5). Pursuant to this provision, indirect CSC were initially paid by IHS based on an indirect cost rate negotiated by NTC and the HHS Division of Cost Allocation (DCA). NTC's fiscal year 1998 funding agreement included \$234,704 in indirect type CSC based on the most recent negotiated indirect cost rate of which IHS was aware, an 80% provisional rate effective through fiscal year 1997. ¹

¹ A provisional rate is a temporary indirect cost rate applicable to a specified period which is used pending the establishment of a final rate for that period. Office of Management and Budget (OMB) Circular.

IHS Response to Questions, dated 11/24/99, at 3. In fact, on August 3, 1998, DCA imposed a unilateral indirect cost rate of 47.5% for fiscal year 1996, and instructed operating agencies not to provide indirect costs to NTC for fiscal year 1997 and subsequent periods since NTC had not submitted an indirect cost proposal for fiscal year 1997. IHS Objections, Ex. E. A stipulated settlement of NTC's appeal of the 47.5% rate indicated that the parties disputed whether NTC had submitted additional information which DCA said was essential to establish a final rate for fiscal year 1996, but that DCA had concluded in any event that certain indirect type costs had to be disallowed and accordingly established the 47.5% rate. NTC Response to Questions, dated 11/23/99, Ex. B. By letter dated May 5, 1998, IHS advised NTC that "there is a potential problem with the future award of funding for indirect costs without the underlying indirect rate agreement." IHS Objections, Ex. C. IHS stated that NTC could retain indirect CSC funding in fiscal year 1999 either by negotiating a new indirect cost rate with the cognizant agency or by negotiating "indirect-like costs" with the Alaska Area Native Health Service, part of IHS. Id.

NTC chose to negotiate with the Alaska Area Native Health Service and submitted a proposal for indirect type CSC of 82.17%, or \$235,006, for fiscal year 1999. IHS Objections, Ex. D. IHS determined that the proposed costs met the applicable requirements² with the exception of the amount proposed for personnel costs. According to IHS, \$96,453 of the \$133,115 proposed for administrative personnel duplicated direct program funding provided under section 106(a)(1) of the ISDA for health administration personnel, in violation of section 106(a)(3)(A) of the ISDA. IHS further stated that administrative personnel costs of \$229,568 (\$96,453 plus \$133,115) would be unreasonable in view of the fact that direct program funding was only \$212,666. IHS advised NTC that it declined to provide \$96,453 of the requested indirect type funding for personnel costs "[a]s a result

¹ (... continued)

A-87, Attachment E, Para. B.7.

² IHS identified those requirements as section 106(a) of the ISDA, section A2(c) of Indian Health Service Circular #96-04, and OMB Circular A-87.

of the duplicative funding prohibition and/or the unreasonableness of the claimed costs for personnel to administer the contract." Id.

Pursuant to the notice of appeal rights in IHS's declination letter, NTC appealed IHS's partial declination to the Interior Board of Indian Appeals (IBIA), which referred the appeal to the Office of Hearings and Appeals for assignment to an ALJ. IHS subsequently moved to transfer the case to the IBCA on jurisdictional grounds. According to IHS, it had incorrectly treated the matter as a pre-award decision, which required application of the declination criteria in section 102 of the ISDA and was subject to the jurisdiction of the IBIA. IHS stated that the matter was in fact a post-award dispute concerning the amount of CSC to be paid to NTC under an existing contract, and was instead subject to the jurisdiction of the IBCA. On September 14, 1999, the ALJ denied IHS's motion to transfer, finding that "[t]he appealed decision pertains to an annual funding agreement proposal under an existing contract with an indefinite term." The ALJ further found that 25 C.F.R. § 900.32 authorizes the Secretary (whose authority was delegated to IHS) under certain conditions to decline a proposed successor annual funding agreement under the declination procedure in 25 C.F.R. Part 900, Subpart E, and that section 900.31 of Subpart E makes applicable the procedures in Subpart L, which provide for an appeal to the IBIA. The ALJ concluded that he had jurisdiction to hear the appeal and set the matter for hearing (although, as indicated below, he later determined that a hearing was unnecessary). IHS requested an interlocutory appeal of this ruling; however, as indicated below, the ALJ later denied this request.

NTC then moved for summary judgment on the ground that there were no material facts in dispute and that it was entitled to prevail as a matter of law. NTC argued that 25 C.F.R. § 900.32 was dispositive of the case since, according to NTC, its proposed fiscal year 1999 funding agreement was "substantially the same" as its prior year funding agreement. Section 900.32 provides that the Secretary may not decline any portion of a proposed successor annual funding agreement if it is "substantially the same" as the prior agreement.

The ALJ granted NTC's motion for summary judgment in an October 14, 1999 recommended order. The ALJ found that IHS was precluded from declining NTC's proposed fiscal year 1999 funding agreement since it was "substantially the same" as the prior funding agreement. The ALJ stated in pertinent part:

Appellee's argument that the FY 1999 proposal was not "substantially the same" as its prior annual funding agreement cannot be sustained. It argues that it was not substantially the same because Appellant's DCA-negotiated, indirect cost rate lapsed and Appellee then made its own independent determination that the amount proposed was illegal. Its argument does not show that the proposal differed from the previous annual funding agreement but, rather, that the decisionmaker and resulting conclusions differed.

ALJ's recommended order at 3. The ALJ also observed that "[w]hether the decisionmaker was actually different is open to argument. Both DCA and Appellee are delegates of the same official: the Secretary of the Department of Health and Human Services." *Id.*, n.1. The ALJ further found that IHS's \$96,453 reduction of the amount proposed by NTC was not authorized by section 106(b)(2) of the ISDA since this reduction was not based on any of the reasons for a reduction listed in that section. The ALJ therefore concluded that the full amount of funds proposed by NTC should be added to its ISDA contract. The ALJ also denied IHS's request for an interlocutory appeal on the jurisdictional issue in view of his order granting summary judgment on the merits, stating that IHS could raise any jurisdictional issues during the course of any appeal of his order.

Analysis

IHS filed timely objections to the ALJ's recommended order. IHS argued as a threshold matter that the ALJ erred in ruling that this case involved a pre-award dispute that was properly heard by him under 25 C.F.R. Part 900, Subpart L. Since I find persuasive the rationale stated in the ALJ's September 14, 1998 ruling and since IHS merely maintained that this case involved a post-award dispute without addressing the analysis in the ALJ's ruling, I adopt that analysis without further discussion.

On the merits, IHS argued that the ALJ erred in concluding that NTC's proposed successor annual funding agreement was "substantially the same" as its prior year funding agreement merely because the level of funding was the same. According to IHS, the loss of NTC's indirect cost rate was a substantial change "which gave the IHS the opportunity and the responsibility to examine the types of indirect-like costs [NTC] was claiming" IHS Objections at 15. In IHS's view, the ALJ's "flawed reasoning . . . would permit a tribe to avoid adverse findings on the legality of funding they receive from the IHS by requesting the same level of funding from one year to the next." *Id.* at 10. IHS took the position that the ALJ should have permitted it "to prove its case that NTC is requesting to be funded for contract support costs at a level that is not permitted by the statute." *Id.* at 15. These arguments are discussed below.

1. NTC's proposed fiscal year 1999 funding agreement was not "substantially the same" as its prior year funding agreement within the meaning of 25 C.F.R. § 900.32 and was thus subject to the declination criteria.

As noted above, section 900.32 of 25 C.F.R. provides that, in general, if a tribe's proposed successor annual funding agreement is "substantially the same" as the prior annual funding agreement, the Secretary may not decline any portion of the successor funding agreement.³ It further provides that "[a]ny portion of an annual funding agreement proposal which is not substantially the same as that which was funded previously (e.g., a redesign proposal; waiver proposal; different proposed funding amount; or different program, service, function, or activity) . . . , is subject to the declination criteria . . ." The ALJ found that NTC's fiscal year 1999 proposed funding agreement was "substantially the same" as the prior year funding agreement, differing only

³ The regulation also indicates a proposed successor annual funding agreement may be considered "substantially the same" as the prior year funding agreement notwithstanding "funding increases included in appropriations acts or funding reductions as provided in section 106(b) of the Act." Since the amount of NTC's proposed fiscal year 1999 funding agreement was approximately the same as the amount of the prior year funding agreement, this is not an issue here.

with respect to "the decisionmaker and the resulting conclusions" ALJ's recommended order at 3. I conclude that the ALJ erred in making this finding for the following reasons.

First of all, NTC's proposed fiscal year 1999 funding agreement differs from its prior year funding agreement in that its prior year funding agreement was not based on a final negotiated rate or methodology that had been reviewed or approved by any component of HHS. Although the prior year funding agreement purported to be based on an indirect cost rate of 80%, NTC had an 80% provisional indirect cost rate for fiscal years 1996 and 1997 only. DCA unilaterally reduced NTC's 80% provisional rate to a final rate of 47.5% for fiscal year 1996 and NTC failed to submit a proposal for a final indirect cost rate for fiscal year 1997. Thus, although NTC's self-determination contract requires a "negotiated" indirect cost rate, the prior year funding agreement was not based on any current negotiated or approved rate or methodology. In contrast, NTC's proposed fiscal year 1999 funding agreement is based on an indirect type cost methodology that is subject to negotiation with IHS. I agree with IHS that NTC's decision to submit a proposed fiscal year 1999 funding agreement with an indirect type methodology directly to IHS after having a prior year funding agreement that was not based on a negotiated or final rate resulted in a proposal that was not "substantially the same" as the prior year funding agreement, thus giving IHS both the opportunity and the responsibility to examine the types of indirect CSC NTC was claiming. Such scrutiny is particularly appropriate since DCA had the authority to lower NTC's indirect cost rate if DCA had identified duplicative and/or unreasonable costs in a proposal for an indirect cost rate in fiscal year 1999. Cf. OMB Circular A-67, Attachment E, Para. C.2.a.; Vanderbilt University, DAB No. 903 (1987).

Moreover, the difference between the two funding agreements is more than simply a matter of there being a different decisionmaker. The means and circumstances

⁴ As noted earlier, the ALJ also suggested that the "decisionmaker" with respect to the two funding agreements in question may not have been different since

for determining indirect CSC can differ substantially between an indirect type cost methodology approved by IHS and an indirect cost rate approved by DCA. An indirect cost rate is the ratio (expressed as a percentage) of the indirect costs to a direct cost base, used for determining the proportion of indirect costs to be borne by more than one program administered by a tribe (or other governmental entity). OMB Circular A-87, Attachment E, Para. B.2. The rates negotiated with the cognizant federal agency (usually the agency providing the largest amount of federal funds) are made available to all federal agencies for their use. *Id.*, Para. D.1.b. and E.1. and 3. Certain types of indirect cost rates may be adjusted after the rate year after actual costs are established. *Id.*, Para. B.5.-8. In addition, an indirect cost rate agreement is subject to re-opening if it is subsequently found to violate a statute or the information upon which the rate was negotiated is later found to be materially incomplete or inaccurate. *Id.*, Para. E.3. If a dispute arises in a negotiation of a rate, the dispute is to be resolved in accordance with the appeals procedures of the cognizant agency. *Id.*, Para. F.4. In contrast, where the amount of indirect type CSC is negotiated directly with an IHS area office, the negotiated amount pertains only to the tribe's self-determination contract and has no effect on the amount to which the tribe is entitled under other federal contracts or grants. There is no specific authority for adjusting or re-opening the negotiated amount. In the event of a dispute in the negotiations (such as the dispute here), the appeals procedures would be those in 25 C.F.R. Part 900, Subpart L.

NTC's self-determination contract with IHS required that the annual funding agreement identify the funds to be provided, which would include indirect CSC. IHS Objections, Ex. A (Contract Number 243-96-6013), Para.

⁴ (... continued)

DCA and IHS were both part of HHS. However, since these two components of HHS have different missions and operate independently of each other, as recognized in HHS regulations and policies, they cannot reasonably be considered one and the same. Moreover, although the prior year funding agreement purports to be based on an indirect cost rate approved by DCA, no provisional or final rate was ever approved by DCA for fiscal year 1998.

F.(2). The contract also had a separate provision which specifically stated how indirect CSC were to be determined (i.e., based on a negotiated indirect cost rate, meaning that this provision was abrogated both by the fiscal year 1999 proposed funding agreement, with its indirect type cost methodology, and by the fiscal year 1998 funding agreement, which lacked a final rate approved by DCA).⁵ In view of the importance of indirect CSC, a proposed funding agreement and a prior year funding agreement which provide for the different means of determining indirect CSC discussed above cannot reasonably be viewed as "substantially the same," notwithstanding the fact that the amount of indirect CSC under the two funding agreements happens to be approximately the same.⁶

⁵ NTC took the position that this contract provision could also be interpreted to refer to an agreement as to the amount of indirect type CSC negotiated with IHS pursuant to section 106(a)(3)(B) of the ISDA. That section provides that "[o]n an annual basis . . . , the tribe or tribal organization shall have the option to negotiate with the Secretary the amount of funds the tribe or tribal organization is entitled to receive under such contract pursuant to this paragraph." Even if this provision authorizes the determination of indirect CSC on a basis other than a negotiated indirect cost rate, however, it does not change the fact that NTC's self-determination contract with IHS provided for the determination of indirect CSC using only a negotiated indirect cost rate.

⁶ My conclusion is based on the fact that the processes for determining indirect CSC differed between the proposed funding agreement and the prior year funding agreement with the attendant possibility that the methodologies used and the costs recognized could also differ. The record before me does not enable me to establish how different in fact were the two methodologies or the nature or amount of the subcategories of costs recognized by the methodologies. Simply because the indirect CSC claimed under the proposed funding agreement remained approximately the same does not necessarily mean that the methodologies or the subcategories of costs recognized by the methodologies remained the same. Of course, if the

(continued...)

NTC argued, however, that the plain language of section 900.32 precludes application of the declination criteria if the amount of the proposed successor annual funding agreement is the same as the amount of the prior year funding agreement. NTC Response to Questions, dated 11/23/99, at 11-12. There is nothing in the regulations which plainly says that, however. Moreover, the regulation gives as examples of situations where a proposed funding agreement is not "substantially the same" as the prior year funding agreement "a redesign proposal; waiver proposal; different proposed funding amount; or different program, service, function, or activity." These examples suggest that a proposed funding agreement could be not "substantially the same" as the prior year funding agreement even if the amounts are the same, e.g., a proposal for a different PFSA could still be for the same amount as the prior year funding agreement.

My conclusion that NTC's proposed fiscal year 1999 funding agreement was not "substantially the same" as the prior year funding agreement within the meaning of section 900.32 is also consistent with the requirements of section 106(a)(3)(A) of the ISDA. As noted above, that section provides that CSC shall be "for reasonable and allowable costs" of operating the PFSAs pursuant to the contract, and "shall not duplicate" the direct program funding provided under section 106(a)(1). Assuming that IHS correctly determined that NTC's fiscal year 1999 proposed funding agreement included indirect type CSC which were duplicative and/or unreasonable, those costs would be unallowable under section 106(a)(3)(A). Thus, unless NTC's proposed fiscal year 1999 funding agreement is subject to the declination criteria pursuant to section 900.32, IHS would be required to award funding for costs that are clearly unallowable under the statute.

My finding that NTC's proposed fiscal year 1999 funding agreement is subject to the declination criteria is also consistent with the purpose of the ISDA to assure "maximum Indian participation" in the provision of

⁶ (... continued)

methodologies or subcategories of costs recognized did in fact differ substantially, that would be an additional factor in support of my conclusion herein.

federal services to Indian communities. Indian Self-Determination and Education Assistance Act, section 3(a) (25 U.S.C. § 450a). It is generally recognized that there is limited IHS funding for self-determination contracts for the provision of health care services. See Pascua Yaqui Tribe of Arizona, DAB No. 1692, at 6 (1999) ("Both parties agree, and the ALJ found, that congressional appropriations to IHS are limited and have historically been insufficient to fully meet the needs of Indian tribes nationwide for health care services"); S. REP. NO. 274, 100th Cong. , 1st Sess. 7-8 (1987). Thus, the purpose of the ISDA would not be served if IHS were required to continue to award limited CSC for duplicative and/or unreasonable costs identified by IHS in a review of a proposed successor annual funding agreement.

2. IHS's partial declination of NTC's proposed fiscal year 1999 funding agreement did not constitute a reduction of funding within the meaning of the prohibition on reductions in subsequent years in section 106(b)(2) of the ISDA.

NTC nevertheless argued that, regardless of what the regulation provides, the ALJ was correct in concluding that NTC was entitled to the full amount of funding in its proposed fiscal year 1999 funding agreement pursuant to section 106(b)(2) of the ISDA. That section prohibits the Secretary from reducing funding for self-determination contracts in subsequent years with certain exceptions which the ALJ found did not apply here. IHS did not dispute the ALJ's finding that none of the exceptions applied; however, IHS contended that section 106(b)(2) did not preclude IHS's partial declination here because there was no reduction within the meaning of that section in the first instance. IHS's position is fully supported by the plain language of section 106(b)(2). That section refers to a reduction of the "amount of funds required by subsection (a)." Section 106(a)(3)(A) in turn limits CSC to "reasonable and allowable costs" which do "not duplicate" any direct program funding. Thus, assuming that IHS correctly determined that the amounts it declined were duplicative and/or unreasonable, these amounts were not "required by subsection (a)," and accordingly there was no reduction within the meaning of section 106(b)(2).⁷

⁷ Similarly, the particular declination criterion

NTC further argued that "any ambiguity" in the ISDA "is to be construed in favor of the Indians without regard to the deference normally accorded agency interpretation." NTC Response to Questions, dated 11/23/99, at 7 [citation omitted]. Although this principle is not in dispute, it is of no avail to NTC. As discussed above, based on the unambiguous language of section 106(b)(2), it is clear that IHS's partial declination of NTC's proposed fiscal year 1999 funding agreement is not a reduction within the meaning of that section since IHS did not reduce the amount of funds "required by subsection (a)." ⁸

NTC also noted that the legislative history of section 106(b)(2) of the ISDA states that this provision was intended to provide "year-to-year stability" for such contracts and "contribute to better Tribal planning, management, and service delivery." NTC Response to Questions, dated 11/23/99, at 5-6, citing S. REP. NO. 274, 100th Cong., 1st Sess. 30 (1987). NTC argued that this legislative intent would be defeated if its fiscal year 1999 indirect type CSC were reduced below the prior year funding level based on a finding that some of the costs were duplicative and/or unreasonable. As just discussed, however, a partial declination of NTC's proposed funding agreement on the ground that it included such costs does not constitute a reduction of funding under section 106(b)(2). Thus, congressional intent in enacting this section is irrelevant here. ⁹

⁷ (... continued)

used by IHS, that "the amount of funds proposed for the contract is in excess of the applicable funding level for the contract, as determined under section 106(a)," would clearly apply if IHS established that NTC's proposed fiscal year 1999 funding agreement included duplicative and/or unreasonable costs since NTC is not entitled to such costs "in accordance with section 106(a)."

⁸ In any event, my construction of the regulations and the statute does favor tribes and tribal organizations since, as indicated above, it is in their interest that the limited funds available be used for allowable costs.

⁹ The passage in the legislative history cited by NTC also indicates that section 106 was intended to prevent "the diversion of Tribal contract funds to pay

(continued ...)

Finally, NTC argued that the requirement in section 106(a)(3)(A) that costs be reasonable and allowable but not duplicative could be enforced through the process of auditing contract expenditures and disallowing any expenditures found not to meet this requirement.¹⁰ This argument has no merit. It is true that section 106(f) of the ISDA specifically recognizes that contract costs may be disallowed based on an audit report. However, there is nothing in the ISDA which suggests that IHS may not decline to provide funding for unallowable costs in the first instance simply because it has the authority to disallow unallowable costs which are identified after funding has been provided. Indeed, section 106(a) requires a determination of the appropriate funding amount.

Conclusion

Based on the foregoing, I conclude that (1) NTC's proposed fiscal year 1999 funding agreement is not "substantially the same" as the prior year funding agreement and that, pursuant to 25 C.F.R. § 900.32, the proposed funding agreement was therefore subject to the declination criteria in section 102(a)(2) of the ISDA; and (2) IHS's partial declination of NTC's proposed fiscal year 1999 funding agreement was not a reduction of funding within the meaning of the prohibition on funding in subsequent years in section 106(b)(2) of the ISDA. Accordingly, the ALJ's findings to the contrary are in error.

I therefore remand the case to the ALJ to hold a hearing on the issue of whether NTC's proposed fiscal year 1999

⁹ (... continued)

for cost incurred by the Federal government." This appears to relate to section 106(b)(3) rather than 106(b)(2). In any event, there is nothing in the record for this case to suggest that IHS was attempting to divert funding in the manner suggested by the legislative history.

¹⁰ Since NTC conceded that it potentially would have to repay any duplicative and/or unreasonable costs, this undermines NTC's argument that fully funding its proposed fiscal year 1999 funding agreement would guarantee stable funding, consistent with the congressional intent underlying section 106(b)(2).

funding agreement included indirect type CSC that were duplicative and/or unreasonable and IHS thus acted properly in partially declining the proposal under section 102(a)(2)(D) of the ISDA. The ALJ may take any further action not inconsistent with this decision.

//original signed

Donald F. Garrett
Deciding Official