



DEPARTMENT OF THE INTERIOR HEARINGS DIVISION

Navajo Nation v. Albuquerque Area Contracting Officer, Bureau of Indian Affairs

Docket Nos. IBIA 97-172-A and IBIA 98-99-A (04/23/2003)

UNITED STATES DEPARTMENT OF THE INTERIOR
Hearings Division - Office of Hearings and Appeals
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NAVAJO NATION)	Docket Nos. IBIA 97-172-A
Appellant,)	and 98-99-A
)	Indian Self-Determination Act
v.)	25 U.S.C. §§ 450, et seq.
)	
ALBUQUERQUE AREA CONTRACTING)	ORDER RECOMMENDING
OFFICER, BUREAU OF INDIAN AFFAIRS)	APPROVAL OF
Appellee.)	<u>MOTION TO DISMISS</u>

APPEARANCES: Dori Richards, Office of Regional Solicitor, DOI, Albuquerque, NM
for the Bureau of Indian Affairs,

Thomas W. Christie, Britt E. Clapham and William Johnson,
Assistant Attorneys General, Window Rock, AZ
for the Navajo Nation

BEFORE: Administrative Law Judge Richard L. Reeh

BACKGROUND

On September 5, 1997, The Interior Board of Indian Appeals (IBIA) received a notice of appeal from Appellant, Navajo Nation (Tribe, Navajo Nation or Nation). The Nation requested a review of a decision issued on May 2, 1997 by the Albuquerque Area Office (AAO) Contracting Officer (CO), Bureau of Indian Affairs (BIA). The case was assigned case number 97-172-A by the IBIA and was referred to the Hearings Division of the Office of Hearings and Appeals (OHA) for hearing and a recommended decision. The Director of the Office of Hearings and Appeals (OHA) assigned this matter to the Albuquerque, NM OHA. It was later transferred to the undersigned.

The AAO Contracting Officer's decision partially declined a proposed Indian Self-Determination and Education Assistance Act (ISDEA) contract relating to the Navajo Nation Water Resource Management Planning and Pre-Development and Water Rights Litigation programs (WRMPPD). The Nation had submitted a proposal for renewal contract relating to water rights protection activity and litigation support. The AAO Contracting Officer made essentially the same decision regarding the Nation's follow-on contract proposal that was submitted the next year. The Tribe also appealed that decision. That case was assigned case number 98-99-A and was also referred to the Hearings Division. Since both cases related to the same WRMPPD contract, the same

facts and the same authorities, parties agreed that the matters should be joined.

During a December 15, 1997 pre-hearing conference, parties agreed that an evidentiary hearing was not yet necessary. Each desired an opportunity to confer with one another, to pursue settlement opportunities and to address legal issues. Parties thereafter agreed upon a scheduling order. On September 18, 1998, the government submitted a Motion to Dismiss for the Nation's failure to adhere to the scheduling order. The Motion was overruled, and a new scheduling order was agreed upon. The government later submitted a "Motion to Dismiss or for Summary Judgment." Both parties have addressed the issues raised. The motion should be resolved in the government's favor, as discussed below.

FACTUAL BACKGROUND

Although no hearing has been conducted in this case, pre-hearing submittals demonstrate agreement about the following facts. The United States has a trust responsibility to the Navajo Nation (and other tribes nation-wide) to engage in water rights protection activity, including litigation. Water rights litigation is the responsibility of the government. The government and Navajo Nation have historically had agreements relating to Navajo Water Rights Protection. The government and Nation entered into an ISDEA contract for specific Navajo WRMPPD projects beginning in 1991. Although the contract was scheduled to expire in 1996, it was extended to May, 1997. The Nation submitted requests to renew the contract for 1997 and 1998. The Albuquerque Area Office Contracting Officer timely issued declinations. The Nation timely appealed.

The parties do not agree about the scope of the WRMPPD contracts. The government asserts that the proposed 1997 and 1998 contracts were for "litigation support" only, were "discretionary" and then were only to be entered into either when, or to the extent that, appropriated monies were adequate to fund the support. The Tribe asserts that the proposed contracts were for a comprehensive water rights protection program that must be ongoing until water rights litigation is concluded. It says, "the mandatory component of the funding for this program ensures the ability of the Tribe to be able to work to protect its own interest ..."

The overall record shows that the 1991-1996 WRMPPD contract as well as the 1997 and 1998 contract proposals were small parts of a nation-wide water protection program administered by the Department. The BIA receives requests for funding WRMPP programs from many tribes, and the requests for funding "greatly exceed the available appropriations. In FY 1996 requests exceeded \$54 million for an available \$19.8 million" (Virden Declaration)

It appears that, while WRMPPD Statements of Work vary, there are some common provisions. In Squamish Indian Tribe v. Kevin Gover, C96-5468RJB (DC - Western District Washington) the court found that the Squamish program entailed measurement of stream flows and development of inter-agency agreements to manage water on the reservation. Tasks within the Squamish scope were similar to those contemplated in the Navajo Nation FY 1997 Scope of Work (Government's Surrender, App. C). The program in Squamish appeared to be more than an

agreement for litigation support. In that case the court found “. . . no support in the record that the Tribe’s water resources program was not a service within the meaning of 25 U.S.C. § 450f(a)(1).”

While the parties disagree about scope in the instant case, they do agree that the proposed contracts were subject to declination criteria.

DISCUSSION

Briefs or Memorandums of Authority and other submissions have been received from both sides. The Navajo Nation argues that its water resources program, like that of the Squamish Tribe, *supra*, is an ISDEA service requiring mandatory renewals and observance of specific declination procedures. The Tribe’s position, however, is weakened by contractual documents that demonstrate bi-lateral understanding that the government’s ability to contract for proposed services is limited by the availability of funds. (See Appendices to Government’s Surreponse.) Historical WRMPPD Statements of Work and attachments to SOWs in the instant record made it clear that the Navajo Nation was to perform work only to the extent that funds were available. This language supports the government’s position that these programs are discretionary in nature. The government’s position is that the proposals were properly considered and properly declined. It’s position is strengthened by the fact that (1) Congressional appropriations for WRMPPD work are made for the purpose of enabling the Department to administer a national water rights protection program; (2) the appropriations are made in limited lump sums that change annually; (3) the appropriations are not sufficient to fund every program; (4) funding requests from competing tribes usually far exceed the appropriations; and (5) there is no statutory methodology for properly allocating the moneys. The government also asserts that this appeal is moot.

Absence of Remedy

The government argued that the subject of this appeal has been rendered moot because no available appropriations remain for the years 1997 and 1998, and the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, (Omnibus Act) prohibits use of FY 1999 moneys to fund such contracts. Following the reasoning in Pascua Yaqui Tribe of Arizona v. Acting Director, Tucson Area Office, Indian Health Service, IBIA 98-61-A (1998), it said that, *even if the Tribe were successful in establishing that its proposal to contract for the services was improperly declined, the remedy of funding a contract for those services is not now available.*

Regarding the Omnibus Act, the government states that the Tribe’s underlying argument, that the definition of “new contract” is a contract for activities not previously covered by an ISDA contract between the contracting parties, is fallacious. The government goes on to argue that the term "new contract" may include activities previously covered because ISDA contracts are not effective in perpetuity but expire after a term of years. After expiration, the government says, a new contract must be executed for a tribe to continue to plan, conduct, and administer the programs that have been covered under the expired contract.

New Work. ISDA contracts do not appear to be very good vehicles for discretionary WRMPPD work. Except in specific circumstances recognized by both the Tribe and the government, *infra*, ISDA contracts for ongoing work are required to be renewed, and renewed at current or higher funding levels. Water rights protection, however, is a category of work that does not lend itself to recurrent funding measures. Congressional funding for Water Rights protection activity appears to be mercurial. Funding levels are expected to vary significantly from year to year, and the statutes provide no methodology for dealing with the ensuing problems. WRMPPD contractual documents appear to contain provisions that work around these problems. They provide, for example, that the Tribe is to perform work only to the extent that funds are available. In light of such provisions, the government's positions that (1) each contract stands on its own and, (2) when a WRMPPD contract expires, a proposed renewal is an application for a "new contract," are tenable.

The government declared that appropriated funds are not available to afford the Tribe a remedy. As this declaration was uncontested, it may be determined that all appropriations for 1997 and 1998 were fully expended, and no other monies are available for funding these proposals. That leads to a probable conclusion that no remedy remains, and the claim should be dismissed as moot. If there is an absence of available remedy, the Motion to Dismiss should be sustained.

Water Rights Contracting

The Navajo Nation's position is that the instant renewal proposals are subject to declination requirements and funding provisions included in the ISDEA. The Nation says, if the Secretary had wanted to make the Navajo WRMPPD contract a discretionary agreement, he or she should have done so by processing the contract as a Section 103 grant rather than a Section 102 contract. The Nation relies on Section 106(b) of the ISDEA, as it provides, broadly, that the contract amount shall not be reduced by the Secretary in subsequent years except pursuant to * * * (A) a reduction in appropriation from the previous fiscal year for the program or function to be contracted; (B) a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution; (C) a tribal authorization; (D) a change in the amount of pass-through funds needed under a contract; or (E) completion of a contracted project, activity or program. The Nation asserts, and it appears, that neither (C) nor (D) is applicable to the instant contract renewal. It also asserts that (E) is not applicable to these proceedings. Regarding (A) the Tribe argues there has been no showing that Congress reduced the level of appropriations from prior fiscal years. Regarding (B) the Tribe says there has been no showing that there was a directive in the Report accompanying any DOI appropriation that funding for this activity be reduced. Regarding (E), the Tribe says that the water resource program has not been completed. Rather, it is ongoing. The Nation submits that, without demonstrating applicability of one of these conditions, the BIA cannot unilaterally reduce funding levels through declinations, as it did in this case. The Tribe's basic premise is that it "was not applying to contract a new program, service, function or activity. Rather, it was merely renewing its previous contracts to continue performing the same activities. * * * and * * * the funding amount had been established under the provisions of Sections 102 and 106."

The government's position is that the renewal application was properly considered under

Section 102 of the ISDEA, and that the BIA fulfilled all procedural requirements for declination. The government says that the scopes of work for renewal of WRMPPD contracts vary from year to year, and that the Secretary must evaluate amounts, if any, to be awarded for proposed programs in light of written priority criteria and limited by the amount of funding provided by legislation.

While the parties agree that the government and Navajo Nation have historically had agreements relating to Navajo Water Rights Protection, the government says the WRMPPD contract stands on its own and is not a reflection of past agreements. It says, “WRMPPD funding is intended to specifically provide support for litigating water rights and, *if sufficient funds exist*, to facilitate tribal participation in water rights development or protection activities.”

The government showed that funding for programs such as the Navajo Nation water rights support program is provided to the BIA in lump sums that vary from year to year and, since statutes provide no methodology for doing so, that the Secretary must exercise discretion about how limited appropriated funds should be apportioned among many competing tribes. It showed that, in order to insure the discretion would not be exercised arbitrarily, a scoring or distribution system incorporating national program priorities was implemented. It also showed that all WRMPPD contract proposals are evaluated using specific ranking factors. In the face of limited funds available, the scoring system led to a partial declination for 1997 and a declination for 1998. These actions followed ranking factor analyses by the AAO Contracting Officer. They were based on the CO’s determinations that the amounts of funds required for the Tribe’s proposed contracts were in excess of the applicable funding levels available. His conclusion was that the amount of funds proposed under the contract was in excess of the applicable scored funding level, as determined under section 106(a) of the ISDEA.

The Navajo Nation has not disputed the fact that limited appropriations were available for 1997 and 1998. It has not disputed the fact that the Secretary had implemented a scoring system for allotting limited appropriations. While it did describe the BIA’s scoring system as an “unknown (and perhaps unknowable) prioritization system,” it did not allege that the scoring system was either flawed or improperly applied by the Contracting Officer. Rather, the Tribe’s position was that its Water Resources contract has existed since 1991, when a base of funding for the services was established. It also said the contract proposals were renewal proposals, and that the Department reduced funding for the proposed services in contravention of section 106(b) of the ISDEA, 25 U.S.C. § 450 j-1(b). (Section 450j-1(b) identifies circumstances in which the amount of funds provided under the terms of self-determination contracts shall not be reduced.)

The BIA is responsible for funding the WRMPPD nationwide. It has done so by developing a mechanism for equitable distribution of limited funds. The mechanism, through a prioritization method for allotting limited appropriations to various tribes, is designed to insure that all tribes are treated fairly. The Secretarial amount allocated to the Navajo Nation WRMPPD for 1997 was shown to have been based on the amounts of funds that the BIA allocated to Albuquerque Area Office for those years in light of scoring factor analysis made by the AAO Contracting Officer. That same analysis was followed for the Tribe’s 1998 proposal.

The government established the fact that WRMPPD funding is not recurring funding. This fact was not disputed by the Tribe. The government also showed that the BIA is required to exercise discretion in allotting limited WRMPPD appropriations, and that the Bureau avoids arbitrary exercises of that discretion by reliance on a scoring mechanism. That mechanism was shown to have been utilized in these cases, and the Bureau exercised its discretion by allotting all of its appropriated funds to administer national priorities. Allocation to one tribe of higher dollar amounts than those called for by the scoring mechanism would result in taking funds from the WRMPPD contract of another tribe, and the Bureau cannot be forced to do that. Funds adequate for funding the instant proposed contracts were shown to be available only in limited amounts for 1997, and not at all for 1998. In view of this circumstance, the discretionary determinations of the AAO Contracting Officer were not arbitrary, capricious or an abuse of discretion. They should not be disturbed.

After the AAO CO made the determinations described above, did the BIA fulfill procedural requirements for declinations? The Nation submits that, after the CO made a determination to fund the 1997 renewal contract in a lower amount, he did not comply with declination procedures required by the statutes and regulations. The government submits that all formalities associated with a partial declination for this renewal contract were observed. Records in the case file show that the CO utilized scoring criteria to determine allocation of WRMPPD funds within the Albuquerque Area, that results of the scoring system required he make declination decisions and that he timely gave notice of the declinations to the Tribe.

Ultimately, the WRMPPD program has been shown to be one in which tribes perform work for a nation-wide water rights protection program. Although ISDEA contracting has been used as a vehicle to implement national priorities, language in SOWs demonstrates that participating tribes understand and agree that the national program is limited by the considered judgment of Congress. Their program participation is limited by lump sums that are appropriated annually for this purpose. The amount of monies appropriated reflect Congressional determinations about what is suitable for this program nationally. The appropriations have never been adequate to fully fund every Tribe's contract proposal. In fact, the record shows that Congress typically funds less than one-third of proposed needs. Congress funds to only the national level it determines to be appropriate. The Department is then called on to properly distribute the lump sum appropriations received. To avoid being arbitrary or capricious, it does so using a ranking system. Agency action in administering such appropriations must be given a high level of deference. See Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 836 (1984), Ferry v. Udall, 336 F.2d 706 (9th Cir. 1964) Exhibits received show that tribes participating in the program understand and agree to work within this system. Fully funding one tribe's contract proposal when the scoring system does not call for such funding would, necessarily, skew the ranking system and unfairly take funds away from other tribes. Appendices to the government's Surreponse show that the Navajo Nation was well aware of this system during the course of its water rights protection activity as early as 1991. To fully fund its renewal application(s) for 1997 and 1998 would not be fair to other tribes, according to the scoring system, and the scoring system was not challenged during these proceedings.

MOTION TO DISMISS

If there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law, then summary judgment may be rendered. Fed. R. Civ. Proc. Rule 56(c). Is there such an issue? In this case, the government established that the funding was non-recurring and lump-sum in nature. It also established that the BIA implemented a uniform scoring system to insure proper allocation of limited appropriations. The Contracting Officer was shown to have used that system when making the instant WRMPPD decisions. The Contracting Officer's decisions were timely made. They were made in light of the 1997 and 1998 levels of funding allocated to the Albuquerque Area Office. Notices of the decisions were timely given to the Navajo Nation. These proofs were required for the government to meet its initial burden. They were not disputed. Nothing submitted by the Navajo Nation established the presence of a genuine issue about these material facts. Rather, the Tribe argued that no exception allows the government to either to decline or to partially decline the Tribe's WRMPPD proposals. In the overall WRMPPD contracting environment discussed above, however, the Tribe's argument is not persuasive. In this circumstance, granting Summary Judgment is appropriate. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986) and Tao v. Freeh, 27 F.3d 635, 638 (D.C. Cir. 1994).

CONCLUSION and RECOMMENDATION

Based upon the agreed facts and pre-hearing submittals, a decision in favor of the government is appropriate, as discussed above. The AAO Contracting Officer's declinations should be affirmed. I, therefore, recommend that the Albuquerque Area Office Contracting Officer's partial declination (1997) and his declination (1998) both be affirmed

NOTICE OF RIGHT TO OBJECT

Within 30 days of the receipt of this recommended decision, either party may file an objection to the recommended decision with the Interior Board of Indian Appeals (IBIA). See 25 C.F.R. § 900.165(b). An appeal to the IBIA shall be filed at the following address: Interior Board of Indian Appeals, 801 North Quincy Street, Arlington, VA 22203. A party who appeals must serve a copy of the Notice of Appeal on the official whose decision is being appealed. A party who appeals shall certify such service to the Board. If neither party files an objection to the recommended decision within 30 days, the recommended decision will become final.

Done at Oklahoma City, Oklahoma this April 23, 2003 .

// original signed

Richard L. Reeh
Administrative Law Judge