



INTERIOR BOARD OF INDIAN APPEALS

Kaw Nation v. Anadarko Area Director, Bureau of Indian Affairs

24 IBIA 21 (05/26/1993)

Related Board cases:

22 IBIA 199

24 IBIA 284



United States Department of the Interior

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

KAW NATION

v.

ANADARKO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 93-44-A

Decided May 26, 1993

Appeal from a decision concerning the allocation of Pawnee Agency funds for purposes of contracting under the Indian Self-Determination Act.

Vacated and remanded.

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

Where an appeal procedure for certain decisions under the Indian Self-Determination Act appears only in the Bureau of Indian Affairs Manual, and is not required either by statute or regulation, an appellant may waive the procedure in the Manual and proceed under the Bureau's general appeal regulations in 25 CFR Part 2.

2. Contracts: Indian Self-Determination and Education Assistance Act: Generally--Indians: Indian Self-Determination and Education Assistance Act: Generally

Under 25 U.S.C. § 450j-1(b) (3) (1988), the Bureau of Indian Affairs is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under the Indian Self-Determination Act.

3. Administrative Procedure: Generally--Bureau of Indian Affairs: Administrative Appeals: Discretionary Decisions--Contracts: Indian Self-Determination and Education Assistance Act: Generally--Indians: Indian Self-Determination and Education Assistance Act: Generally

Even in the case of a decision based on the exercise of discretionary authority, the Bureau of Indian Affairs has a responsibility to explain the rationale and factual basis of the decision.

APPEARANCES: Wanda Stone, its Chairperson, for appellant; George T. Skibine, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., and Alan R. Woodcock, Esq., Office of the Field Solicitor, U. S. Department of the Interior, Tulsa, Oklahoma, for the Area Director.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Kaw Nation 1/ seeks review of a December 11, 1992, decision of the Anadarko Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning the funds allocated to appellant for purposes of contracting under the Indian Self-Determination Act (P.L. 93-638) 2/ during FY 1993. For the reasons discussed below, the Board vacates the Area Director's decision and remands this matter for issuance of a new decision.

Background

Appellant is one of five tribes served by the Pawnee Agency, BIA. 3/ In 1991, all five tribes decided to contract all or most of the Agency's functions under P.L. 93-638, beginning in FY 1993. The tribes were unable to agree among themselves upon a division of Agency funds and so requested the Area Director to divide the funds. The Area Director issued a decision on December 16, 1991, in which he announced a formula for the distribution of Agency funds among the five tribes. Attached to the decision was a chart showing the allocation of funds to the tribes under the formula, based upon the then-estimated Agency appropriations for FY 1993. The Ponca, Pawnee, and Otoe-Missouria Tribes appealed the Area Director's decision to the Board. On August 7, 1992, the Board affirmed the decision. Ponca Tribe of Oklahoma v. Acting Anadarko Area Director, 22 IBIA 199 (1992).

By the beginning of FY 1993, all the tribes except appellant had decided not to contract Agency functions for that fiscal year. Appellant pursued its contracting plans and, on September 11, 1992, submitted proposals to contract five Agency programs--social services, credit and financing, agriculture, real property management, and real estate appraisals--beginning January 1, 1993. Appellant states that the contract proposals were approved by BIA but does not indicate the date(s) of approval. 4/

1/ Appellant is also known as the Kaw Indian Tribe of Oklahoma and is so listed on BIA's published list of Federally recognized tribes. 53 FR 52829, 52830 (1988).

2/ 25 U.S.C. §§ 450-450n (1988 and Supps.). All further references to the United States Code are to the 1988 edition or supplements thereto.

3/ The others are the Pawnee Tribe, the Ponca Tribe, the Otoe-Missouria Tribe, and the Tonkawa Tribe.

4/ No information concerning the contract proposals is included in the record. It is therefore not clear why the funding issue in this appeal was not addressed in the context of review of the contract proposals.

Some references in the record indicate that appellant contracted only the five programs noted above, and other references indicate that appellant

In early October 1992, the Agency sent appellant a revised Agency budget for FY 1993. The new budget incorporated a \$180,700 increase in appropriations for the Agency. It also showed an "Agency residual" amount of \$300,023 for contractible programs, ^{5/} representing funds needed to cover BIA operation of programs for the non-contracting tribes. The revised budget showed that reductions for residual funding had been made in appellant's allocation, as well as those of the other tribes. ^{6/}

Appellant wrote to the Area Office on October 19, 1992, contending that the Agency had calculated appellant's funding incorrectly and in derogation of the Area Director's December 16, 1991, decision. Appellant objected in particular to the provisions for residual funding. On October 27, 1992, the Superintendent wrote to appellant to explain the calculation of appellant's allocation. The Superintendent's letter indicated that the calculations were based on the formula in the 1991 decision, but that a reduction for residual funding was made before the funds were divided among the tribes. Further, the Superintendent stated, additional reductions were made in appellant's allocations for the five programs it was to contract beginning January 1, 1993. These were "first-quarter" reductions, intended to take into account the fact that appellant would not operate the programs during the first quarter of the fiscal year. ^{7/}

fn. 4 (continued)

contracted all ten contractible programs. It is possible that appellant had contracted some or all of the other programs prior to FY 1993. These were: scholarships, adult education, tribal courts, aid to tribal government, and law enforcement.

^{5/} As shown in other documents in the record, the residual funding was allocated almost entirely to salaries of BIA program staff, with minimal amounts for administrative expenses.

The residual funding amount of \$300,023 was reduced to \$285,876 in a subsequent budget revision dated Oct. 26, 1992. The difference between these two figures--\$14,147--is the same amount as appellant's "first-quarter" reductions, as shown on the Oct. 26 revision. See note 7 and accompanying text.

^{6/} The revised budget showed overall decreases in all the tribes' allocations. However, because the balance between the appropriation increase and the residual funding reduction varied from program to program, some programs showed increases in funding. Appellant's allocation showed increases in four programs; i.e., scholarships, adult education, aid to tribal government, and law enforcement; and decreases in the remaining six programs. Appellant's total allocation under the revised budget was \$335,089, or \$18,743 less than its estimated allocation on the chart attached to the 1991 decision.

^{7/} The revised budget shows that \$14,147 of appellant's total reduction was attributable to the reduction for first-quarter costs. This amount was evidently later restored. See Area Director's Jan. 14, 1993, letter to appellant's Chairperson.

Appellant states that it does not challenge the first-quarter reductions (Appellant's Reply Brief at 2).

The Area Director responded to appellant's October 19, 1992, letter on December 11, 1992, stating:

The original funding and the new appropriation without residual amounts were determined based on the assumption that all five (5) tribes would be contracting. However, since [appellant] is the only tribe proposing to contract all programs at this time, these amounts are no longer valid and funding has been revised for the distribution accordingly. Based on the present circumstances, it is the decision of this office that the revised amounts are appropriate and to concur with the division of the funding as determined by the Pawnee Agency.

* * * * *

Pending resolution of this funding issue, I recommend that negotiation of the contracts continue based on the revised amounts of 10/2/92.

The Area Director's decision informed appellant that it could appeal the decision to the Board.

Appellant's notice of appeal was received by the Board on January 8, 1993. The appeal was docketed on February 25, 1993, at which time the Board granted appellant's request for expedited consideration. Both appellant and the Area Director filed briefs.

Jurisdiction

After appellant filed its notice of appeal with the Board, the Director, Office of Tribal Services, in BIA's Central Office, wrote to appellant, stating that appellant should have filed its appeal under 25 CFR Part 271, rather than with the Board. ^{8/} The Board construed the Director's letter as a challenge to Board jurisdiction and requested briefs on the issue from appellant, the Area Director, and the Director, Office of Tribal Services. Briefs were filed by appellant, the Area Director, and Departmental Counsel George T. Skibine, Esq., on behalf of the Area Director. All argued that the Board has jurisdiction over this appeal. Appellant contended that the appeal procedures in Part 271 were not applicable because those procedures applied to contract declinations and appellant's contract proposals had not been declined. Further, appellant argued, BIA's funding decision had been made independently of its decision on appellant's contract proposals. After reviewing the responses, the Board retained jurisdiction over the appeal and issued a notice of docketing.

^{8/} As a procedural matter, the Director should have filed her objections directly with the Board. Cf. Raymond v. Acting Aberdeen Area Director, 19 IBIA 41 (1990). The Director's letter placed an unfair burden on appellant, which had followed the appeal instructions given in the Area Director's decision.

The Board recognizes that, 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. With respect to funding issues, 25 CFR 271.22(c) and 271.23(d) set out procedures to be followed when the issue arises during review of a contract proposal. The regulations delineate a series of steps to be taken and then provide, in 25 CFR 271.23(d)(2)(ii), that an Area Director's decision "that the proposed contract cannot be entered into because of unresolved funding problems" is appealable under the procedures in Part 271.

In this case, as appellant notes, its contract proposals were not declined. The appeal procedures in Part 271, at least on their face, do not appear to apply where there is no declination. Appeals from decisions of BIA officials are appealable under 25 CFR Part 2, and thus to this Board, unless a statute or regulation provides another appeal procedure. 25 CFR 2.3; cf. Tohono O'odham Nation v. Phoenix Area Director, 15 IBIA 147, 155-56, 94 I.D. 120, 124 (1987).

In 1990, however, BIA issued interim guidelines to implement the Indian Self-Determination Act Amendments of 1988, P.L. 100-472, 102 Stat. 2285, pending promulgation of new regulations. These guidelines appear in the BIA Manual at 20 BIAM Supplement 1. Subsection 2.2D(3) provides:

When a tribe or tribal organization disagrees with the calculation made by the Bureau to determine the amount of funds available for a contract and the issue cannot be resolved, the responsible Area Director or Education line officer must follow the procedures in 25 CFR 271.23(d) of the current regulations, except insofar as it is inconsistent with Section 2.1H(2) and (3) of this supplement.

(a) The tribe or tribal organization shall be afforded the right to appeal the calculation as provided under Section 2.6A of this supplement.

(b) The tribe or tribal organization may, however, by mutual agreement, be awarded a contract at a lower amount while waiting for resolution of its appeal, subject to appropriate adjustments in the proposed scope of work and proposed budget. In such case, the contract award shall reflect the lower amount and reduced scope of work.

Section 2.6A provides:

Hearings on the Record. Bureau line officers shall ensure that tribes and tribal organizations are provided, at their request, with a hearing on the record whenever a decision is made to decline to enter into a contract or whenever a decision is made to rescind and reassume a contract. "Hearing on the record" is a reference to the formal hearing procedures set forth in the

Administrative Procedures Act (APA), 5 U.S.C. 554 - 559. Appeals procedures in 25 CFR 271.81 and 25 CFR 271.82 are still in effect and shall be followed.

These provisions indicate that BIA intended to make funding disagreements appealable under Part 271 even in cases, such as this one, where no declination is involved. See, e.g., subsection 2.2D(3) (a), which makes BIA's calculation appealable under that part.

[1] The Board concludes that this matter is within the scope of decisions which the BIAM provision states are appealable under Part 271. However, because neither 25 CFR Part 271 nor P.L. 93-638 itself require that the Part 271 appeal process be followed in appeals of this nature, the Board further concludes that appellant was entitled to waive the BIAM provision and proceed under 25 CFR Part 2. ^{9/} Given appellant's forceful argument in favor of Board jurisdiction over this appeal, the Board finds that appellant has effectively waived the BIAM provision in this case and that the Board therefore has jurisdiction to decide the appeal.

Discussion and Conclusions

Appellant argues that its share of Agency funds should not have been charged with any portion of the amount necessary for the Agency's operation of contractible programs for the non-contracting tribes. Its rightful share of these funds, appellant contends, is the amount shown on the chart attached to the Area Director's 1991 decision, augmented by appellant's proportionate share of the Agency's increase in appropriations. Appellant further contends that "[i]t is not necessary for the Superintendent to take part of a contracting tribe's share to carry out BIA's responsibilities to the non-contracting tribes. This action amounts to penalizing a tribe which chooses to avail itself of self-determination under PL. 93-638 as amended" (Appellant's Statement of Reasons at 3).

25 U.S.C. § 450j-1 provides:

(a) (1) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this Act shall

^{9/} In an appeal presently pending before this Board and previously pending before the Interior Board of Contract Appeals, an argument has been made that a separate appeal provision in BIA's Interim Guidelines cannot be enforced because, inter alia, the guidelines have not been published in accordance with the Administrative Procedure Act, 5 U.S.C. § 552. Tohatchi Special Education and Training Center, Inc. v. Navajo Area Director, Docket No. IBIA 93-51-A; Appeal of Tohatchi Special Education and Training Center, Inc., IBCA 3135, dismissed by the Board of Contract Appeals for lack of jurisdiction, Feb. 17, 1993; lack of jurisdiction affirmed, Mar. 18, 1993.

The Board has held in other contexts that provisions appearing only in the BIA Manual cannot be enforced against parties outside BIA but may be enforced against BIA. E.g., Robles v. Sacramento Area Director, 23 IBIA 276 (1993); Carter v. Billings Area Director, 20 IBIA 195 (1991).

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.

* * * * *

(b) The amount of funds required by subsection (a) of this section---

(1) shall not be reduced to make funding available for contract monitoring or administration by the Secretary;

(2) shall not be reduced by the Secretary in subsequent years except pursuant to---

(A) a reduction in appropriations 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;

(3) shall not be reduced by the Secretary to pay for Federal functions, including but not limited to, Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring;

* * * * *

Notwithstanding any other provision in this Act, the provision of funds under this Act is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this Act.

Appellant's argument is evidently based upon subsection 450j-1(a)(1). The Area Director, on the other hand, relies upon the last paragraph of subsection 450j-1(b)(3) to urge affirmance of his decision.

Appellant views the Area Director's December 16, 1991, decision as having definitively established the floor amount of its funding for contracting purposes. The text of the Area Director's decision in fact

contained no specific dollar amounts but only a formula for division of appropriated funds. As noted above, however, the chart attached to the decision shows the amounts that each tribe would receive under the formula, based upon the then-estimated FY 1993 appropriations. The chart shows no residual amount for Agency operation of contractible programs. The Board construes this chart as a part of the Area Director's decision and thus agrees with appellant's argument to the extent that, had all five tribes contracted, and assuming there were no reductions in appropriations, the allocations shown on the chart would be binding on BIA.

It is true, as appellant's argument suggests, that neither the 1991 decision nor the attached chart explicitly stated that the allocations shown on the chart would apply only in the event that all five tribes contracted. Nevertheless, it was evident to the Board when it decided Ponca Tribe that the 1991 decision was premised upon the assumption that all tribes would contract. It was further evident that the tribes understood the context in which the decision was issued. Accordingly, to the extent appellant may now be contending that the allocations shown on the chart are binding upon BIA, despite the failure of the premise upon which the decision was based, the Board cannot agree.

The record copy of the 1991 decision includes, on the same attached page containing the chart discussed above, a second chart entitled "Agency Residual Staffing and Funding Requirement Assuming One or More Tribes Do Not Contract Program Services." 10/ This chart shows residual amounts on a program-by-program basis. However, neither the chart nor the decision explains how BIA intended to implement this requirement if it became necessary to do so--that is, whether BIA intended to deduct the amount from the shares of both contracting and non-contracting tribes, as it ultimately did, or only from the shares of non-contracting tribes. 11/ The Board concludes that this issue, the central issue in the present appeal, was neither addressed nor decided in the 1991 decision.

[2] Were it not for 25 U.S.C. § 450j-1 (b) (3), the Board might conclude that 25 U.S.C. § 450j-1 (a) (1) compelled the adoption of appellant's position in this appeal. Appellant's share of program funds, to which it

10/ It is not clear whether this second chart was included with the 1991 decision when it was sent to the tribes. As noted, it is attached to the record copy of the 1991 decision. It is also mentioned in the Superintendent's Oct. 27, 1992, letter as having been a part of the 1991 decision. However, it is missing from the copy of the 1991 decision and attachments submitted by appellant during this appeal. Appellant alleges that the tribes were never advised of residual funding requirements, either during pre-decision discussions or at the time the decision was issued.

11/ What BIA actually did, according to the Superintendent's Oct. 27, 1992, letter, was to deduct the residual funding from the entire Agency appropriation, on a program-by-program basis, before dividing the funds among the five tribes. The effect of this procedure, of course, was to reduce the shares of all the tribes.

is entitled under this subsection, would presumably include its proportionate share of the salaries of BIA program staff. However, subsection 450j-1 (b) (3) provides that "[n]otwithstanding any other provision in this Act, * * * the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this Act." The Area Director contends that, if appellant's argument is adopted, funding for the other tribes would be reduced. The language of subsection 450j-1 (b) (3) indicates that the Secretary is vested with some degree of discretion to balance the funding requirements of tribes which share a common appropriation.

The division of program funds, in cases where some tribes contract and others do not, is undoubtedly difficult in the best of circumstances. 12/ It is apparent that circumstances will vary greatly from one contracting situation to another. One would assume, for instance, that BIA's residual funding needs would be greater where only one of five tribes contracts than where four out of five contract. Yet, there are undoubtedly certain minimum staffing levels that must be maintained as long as there are any noncontracting tribes. Another variable, apparent from the record in this appeal, is the relation, on a program-by-program basis, between program budget and the residual funding requirement for that program. 13/ Undoubtedly, there are other variables of which the Board is unaware. It seems

12/ The matter of "program division" is addressed in December 1992 draft regulations implementing the 1988 and subsequent P.L. 93-638 amendments. While these draft regulations are clearly not binding here, they illustrate some of the difficulties inherent in this situation.

Draft section 900.107 provides in part:

"(d) For purposes of determining whether or not to decline [a contract proposal], the Secretary shall consider the effect the proposed contract will have on the level, scope and quality of services not only for those tribes and individuals to be served under the contract proposal but also those tribes and individuals who are served by the current program but who would not be served under the contract proposal. A proposal to divide a program for purposes of contracting may result in losing certain economies of scale realized in the prior administration of the program. This may result in a reduction in the level, scope or quality of services previously provided due to contracting. Such reduction is not in itself a reason for declining a contract proposal unless such reduction reaches the declination criteria * * *.

"(e) In the event the determinations made pursuant to this section do not lead the Secretary to decline the contract proposal, but result in the delivery of diminished services or resources to the contracting tribes, to other tribes, or to both sets of tribes, the Secretary may confer with all the affected tribes for the purpose of rearranging priorities to better meet the needs of all the affected tribes."

13/ For instance, the total Agency budget for tribal courts for FY 1993 is \$53,500. The residual funding requirement for that program is \$33,484, leaving only \$20,016 to be divided among the five tribes (assuming the Area Director's methodology is employed). On the other hand, the Agency

evident that no hard and fast rules can be laid down to resolve the issue raised here. ^{14/} Rather, BIA must have leeway to balance the factors present in each situation in order to arrive at the best solution for that particular situation. The Board agrees with the Area Director's argument that BIA's decision in this case is based on the exercise of discretion.

[3] Given BIA's discretion in this matter, the Board's authority here is limited. In reviewing discretionary decisions of BIA officials, the Board does not substitute its judgment for that of BIA but, rather, seeks to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion. *See, e.g., Ponca Tribe, supra*, 22 IBIA at 203. Even in the case of discretionary decisions, however, the Board requires that the BIA decisionmaker explain the reason for his/her decision. *E.g., Quileute Tribe v. Portland Area Director*, 23 IBIA 20 (1992). *See Bowen v. American Hospital Association*, 476 U.S. 610, 626-27 (1986) (“[A]n agency’s explanation of the basis for its decision must include ‘a rational connection between the facts found and the choice made’”; an agency has a responsibility “to explain the rationale and factual basis for its decision, even though we [the Court] show respect for the agency’s judgment in both.”)

In this case, there is no explanation, in the Superintendent's letter, the Area Director's decision, or the administrative record, for BIA's decision to attribute a share of the residual funding to appellant's share of Agency funds, rather than only to the shares of the non-contracting tribes. ^{15/} Accordingly, the Area Director's decision must be vacated and

fn. 13 (continued)

budget for law enforcement is \$613,200 and the residual funding requirement is \$39,540, leaving a total of \$573,660 to be divided. Clearly, the effect of a residual funding reduction on the law enforcement budget is minor when compared to its effect on the tribal courts budget. These differences suggest at least the possibility that, for purposes of the issue in this appeal, a program-by-program analysis might be useful.

^{14/} For instance, although a "rule" adopting appellant's argument, *i.e.*, that residual funding be taken only from the budget shares of non-contracting tribes, might appear reasonable in cases where only one of several tribes contracts, it would become less and less workable as more tribes contracted, leaving fewer to share the residual costs, at least until the point is reached where Agency staff is no longer required.

Further, BIA must be mindful of subsection 450j-1 (b) (2). Under this subsection, it appears that BIA would be precluded from reducing appellant's contract funds in future years in order to redistribute the residual funding if and when a problem arises when other tribes contract. If BIA cannot correct a problem in the future, it must seek to avoid creating the problem in the first instance.

^{15/} In *Ponca Tribe*, the Board noted a similar lack of explanation but found that, under the particular circumstances of that case, the Area Director's decision should be affirmed. 22 IBIA at 203-04.

this matter remanded to him for issuance of a new decision. Whether he reaches the same conclusion or a different one, he shall explain the reasons for his decision.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. 4.1, the Area Director's December 11, 1992, decision is vacated, and this matter is remanded to him for issuance of a new decision.

//original signed

Anita Vogt
Administrative Judge

I concur:

//original signed

Kathryn A. Lynn
Chief Administrative Judge