



INTERIOR BOARD OF INDIAN APPEALS

Kialegee Tribal Town v. Muskogee Area Director, Bureau of Indian Affairs

26 IBIA 235 (09/15/1994)



United States Department of the Interior

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

KIALEGEE TRIBAL TOWN, Appellant	:	Order Docketing, Dismissing, and Referring Appeal to Assistant Secretary - Indian Affairs
v.	:	
MUSKOGEE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	Docket No. IBIA 94-178-A September 15, 1994

On September 12, 1994, the Board of Indian Appeals received a notice of appeal from Kialegee Tribal Town, through Linda Levier, Tribal Administrator. Appellant seeks review of an August 9, 1994, decision issued by the Muskogee Area Director, Bureau of Indian Affairs (Area Director; BIA), which declined appellant's proposal for a P.L. 93-638 contract for three programs. The Area Director held that, under an October 1, 1990, opinion of the Associate Solicitor for Indian Affairs, the Executive Direction and Administrative Services programs were not contractible. He further held that appellant could not contract its portion of the Credit/Finance program of the Okmulgee Agency, BIA, because the Agency's entire Credit/Finance program was expected to be included in a Self-Governance compact with the Muscogee (Creek) Nation (Nation). 1/ The Area Director stated that his decision was appealable under 25 CFR Part 2.

The Area Director termed his decision a "declination." At the present time, declination decisions are appealable under the procedures in 25 CFR 271.81 and 271.82, rather than those in 25 CFR Part 2. See, e.g., section 2.6A of BIA's interim guidelines for implementation of the Indian Self-Determination Act Amendments of 1988, 20 BIAM Supp. 1 (Sept. 25, 1990): "Bureau line officials 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. * * * Appeals procedures in 25 CFR 271.81 and 25 CFR 271.82 are still in effect and shall be followed."

The Area Director's decision is not based on the declination criteria in section 102(a)(2) of P.L. 93-638, 25 U.S.C. § 450f(a)(2). 2/ For that reason, appellant contends, it is an invalid declination. It appears

1/ The decision indicates that, as of the date of the decision, the program had not yet been included in the Nation's compact.

2/ 25 U.S.C. § 450f(a)(2) provides:

"The Secretary shall, within ninety days after receipt of [a contract] proposal, approve the proposal unless, within sixty days of receipt of the

possible, however, that the Area Director's decision is, at least in part, not a declination under 25 U.S.C. § 450f(a)(2), but another kind of decision.

The Area Director's determinations concerning the Executive Direction and Administrative Services programs appear to be determinations concerning contractibility of those programs, rather than true declinations. ^{3/} Decisions concerning contractibility are not specifically included in the appeal provisions in 25 CFR Part 271. Arguably, therefore, they fall under 25 CFR Part 2 as matters for which no other appeal procedure is provided by statute or regulation. If they fall under 25 CFR Part 2, they are within the jurisdiction of this Board. ^{4/}

It is also possible, however, that the Area Director intended his decision, with respect to these two programs, to be a contract declination, as he stated. If it is a declination, an appeal must be taken under 25 CFR 271.81-82, as discussed above, and the Board lacks jurisdiction over it. See also, e.g., Redding Rancheria v. Acting Sacramento Area Director, 26 IBIA 11 (1994). In earlier P.L. 93-638 cases in which its jurisdiction was not clear, the Board called for briefing on jurisdiction. E.g., Tohatchi Special Education and Training Center; Kaw Nation v. Anadarko Area Director, 24 IBIA 21 (1993). However, such a procedure causes considerable delay in resolving the substantive issues on appeal. As discussed in the following paragraph, the Board has concluded that one determination made by

fn. 2 (continued)

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 project or function to be contracted for cannot be properly completed or maintained by the proposed contract."

^{3/} The matter of contractibility of programs is addressed in proposed regulations for implementation of the 1988 amendments to P.L. 93-638, 59 FR 3166, 3180 (Jan. 20, 1994). See proposed 25 CFR 900.106, 59 FR at 3180-82, and the discussion of this provision in the preamble, 59 FR at 3167-68.

With respect to appeals, the proposed regulations clearly distinguish decisions declining to contract from decisions relating to the contractibility of programs. However, both kinds of decisions are appealable under the proposed regulations and, in both cases, the appellants are entitled to a hearing. See proposed 25 CFR 900.803(a)(1) and (3), 25 CFR 900.803(f), 59 FR 3204, 3205.

^{4/} In an earlier appeal concerning a BIA decision on a different P.L. 93-638 issue, *i.e.*, mature contract status, the Assistant Secretary - Indian Affairs took the position that the decision was not subject to the Part 271 appeal procedure because that procedure "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" (footnote omitted). Tohatchi Special Education and Training Center v. Navajo Area Director, 25 IBIA 259, 261 (1994). The Board agreed with the Assistant Secretary in that case and concluded that it had jurisdiction over the appeal under 25 CFR Part 2.

the Area Director falls outside the Board's jurisdiction. Since at least that part of this appeal must be referred to the Assistant Secretary - Indian Affairs, the Board concludes that it should construe the Area Director's decision as a declination so that the entire appeal may be considered by a single forum.

The Area Director's determination pertaining to the Credit/Finance program concerns a conflict between appellant's proposed contract and a proposed addition to the Nation's Self-Governance compact. The decision resembles, to some extent, a declination based on funding issues, which would be appealable under 25 CFR 271.81-82. E.g., Redding Rancheria. In any event, Self-Governance compacts are executed at the level of the Assistant Secretary - Indian Affairs and would not, under any circumstances of which the Board is presently aware, come within the jurisdiction of this Board. ^{5/} Therefore, it does not appear that the Board has the jurisdiction necessary to resolve this conflict.

Although it is arguable that the Board should retain partial jurisdiction over this appeal, the resulting bifurcated procedure would be confusing and burdensome to all concerned. Accordingly, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Board docketed and dismisses this appeal and refers this case to the Assistant Secretary - Indian Affairs. ^{6/}

//original signed

Anita Vogt
Administrative Judge

//original signed

Kathryn A. Lynn
Chief Administrative Judge

^{5/} Actions and decisions of the Assistant Secretary - Indian Affairs are not appealable to this Board. See, e.g., 25 CFR 2.6(c); Central Council of Tlingit & Haida Indian Tribes v. Assistant Secretary -Indian Affairs, 24 IBIA 84 (1993) (dismissing an attempted appeal from an Assistant Secretary's decision concerning a funding agreement under a Self-Governance compact).

^{6/} By referring this appeal immediately, the Board hopes to enable the Assistant Secretary to consider the conflict between appellant's P.L. 93-638 contract proposal and the Nation's Self-Governance compact proposal before a final decision is made concerning the Nation's proposal.