



INTERIOR BOARD OF INDIAN APPEALS

Menominee Tribal Enterprises v. Minneapolis Area Director, Bureau of Indian Affairs

29 IBIA 100 (02/23/1996)



United States Department of the Interior

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

MENOMINEE TRIBAL ENTERPRISES, Appellant	:	Order Dismissing Appeal in Part;
	:	Vacating Area Director's Decision
	:	in Part; and Remanding Case to the
	:	Area Director
v.	:	
	:	
MINNEAPOLIS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	Docket No. IBIA 95-94-A
	:	
	:	February 23, 1996

This is an appeal from a March 1, 1995, letter of the Minneapolis Area Director, Bureau of Indian Affairs (Area Director; BIA), and attached decision of the Minneapolis Area Contracting Officer, concerning the mature contract status of certain P.L. 93-638 contracts and the designation of a Contracting Officer's Representative (COR). 1/ For the reasons discussed below, the Board dismisses this appeal in part, vacates the Area Director's decision in part, and remands this matter to the Area Director for issuance of a new decision.

The "mature contract" issue concerns three contracts--for Forest Management, Forest Development, and Roads Maintenance--which had been held by the Menominee Indian Tribe of Wisconsin (Tribe) as mature contracts. During the time it held these contracts, the Tribe had subcontracted work under them to Menominee Tribal Enterprises (MTE), which is the principal business arm of the Tribe.

On May 5, 1994, the Menominee Tribal Legislature (MTL) adopted a resolution "recogniz[ing] MTE's authority under the Constitution and MTE Management Plan, to contract directly with [BIA] without receiving prior approval from the [MTL]" (Resolution No. 94-16). On December 29, 1994, the MTL adopted a resolution "grant[ing] authority to MTE to contract directly with [BIA] for Roads Maintenance Services" (Resolution 94-72).

Under authority of these resolutions, MTE sought to take over the contracts as they had been held by the Tribe, including their mature contract status. In her March 1, 1995, decision, the Area Director held that MTE "did not continuously operate these contracts as a tribal organization for three or more years with no significant or material audit exceptions" and that MTE "does not meet the lawful requirements to be deemed a 'Mature Contractor' for the * * * contracts" (Area Director's Decision at 3).

1/ By letter of Apr. 5, 1995, the Area Director confirmed that she intended her Mar. 1, 1995, letter to be a decision adopting the findings and conclusions made in the Contracting Officer's decision. Accordingly, the Board deems the Contracting Officer's decision to have been issued by the Area Director.

The Area Director's decision also affirmed the designation of the Acting Area Forester as the COR for the Forest Management and Forest Development contracts.

MTE appeals both parts of the Area Director's decision. With respect to the mature contract issue, MTE contends that it has performed all administrative and operational activities under the three contracts for many years, albeit for the most part as a subcontractor,^{2/} and therefore meets the requirement in 25 U.S.C. § 450b(h) (1994) ^{3/} for continuous operation of a contract by a tribal organization for three or more years. Further, MTE continues, "the controlling statute does not require a direct contractual relationship between [BIA] and a tribal organization in order to obtain mature contract status" (MTE's Opening Brief at 8). MTE also contends that "there is no evidence that MTE has had significant and material audit exceptions in any annual financial report concerning the Contracts" (Id. at 11).

25 U.S.C. § 450b(h) defines "mature contract" as

a self-determination contract that has been continuously operated by a tribal organization for three or more years, and for which there are no significant and material audit exceptions in the annual financial audit of the tribal organization: Provided, That upon the request of a tribal organization or the tribal organization's Indian tribe for purposes of section 450f(a) of this title, [a] contract of the tribal organization which meets this definition shall be considered to be a mature contract.

In her answer brief, the Area Director argues that MTE does not qualify as a mature contractor under this definition. She contends that MTE did not become a tribal organization until 1994 when the MTL authorized it to contract directly with BIA. Therefore, she reasons, the contracts were not operated by a tribal organization for three or more years.

The term "tribal organization" is defined in 25 U.S.C. § 450b(l) as

the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: Provided, That in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant.

^{2/} It appears that MTE contracted directly with BIA for one or two years in the mid-1980's pursuant to a MTL resolution adopted in 1985.

^{3/} All further references to the United States Code are to the 1994 edition.

MTE is an entity recognized in the Menominee constitution and sanctioned by the Tribe's governing body. Further, the Constitution provides for election of MTE's Board of Directors by the eligible voters of the Tribe. Art. XII, sec. 2(f). Thus, MTE clearly meets the statutory definition of "tribal organization."

The Area Director appears to base her contention upon the definition of "tribal organization" in 25 CFR 271.2(r). That definition restates the statutory definition in virtually identical language but adds another proviso: "Provided, That a request for a contract must be made by the tribe that will receive services under the contract." The added proviso reflects the statutory provision requiring that requests for contracts be made by tribes. See 25 U.S.C. § 450f(a): "The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization." See also 25 CFR 271.18(a): "Before the Bureau can enter into a contract with a tribal organization, it must be requested to do so by the tribe to be served under the contract."

If the Board understands her argument correctly, the Area Director is contending that, in light of the proviso in 25 CFR 271.2(r), an entity does not become a tribal organization until a tribe requests that BIA contract with that entity. The Board must reject any such contention. The evident intent of the proviso is to alert the reader to the requirement stated elsewhere concerning the eligibility of a tribal organization to contract, not to constrict the statutory definition of "tribal organization." In any event, had it been the intent of the regulation drafters to alter the statutory definition so drastically, the validity of the regulation would be questionable.

The Board finds that, contrary to the Area Director's contention, MTE's status as a tribal organization did not depend upon the 1994 action by the MTL. Rather, that status has existed as long as MTE has met the statutory definition.

It appears likely that MTE has operated the three contracts at issue for three or more years. The pivotal question, then, is whether MTE is precluded from enjoying mature contractor status because it did not have a direct contractual relationship with BIA during the years in which it operated the contracts.

As MTE contends, the statutory definition does not explicitly require a direct contractual relationship. To the extent that the definition may be ambiguous in this regard, it should be interpreted to the benefit of a tribal organization, particularly given the policy underlying the Indian Self-Determination Act. See 25 U.S.C. § 450a. The Board concludes that it is reasonable to interpret the definition of "mature contract" to encompass a situation where the present contractor is a tribal organization which has operated the contract in its entirety, or virtually so, for three or more years, even though it has done so in the role of a subcontractor.

Therefore, the Board finds that the Area Director erred to the extent she based her decision upon the fact that MTE did not have a direct contractual relationship with BIA during the period in which it operated the contracts. The Board further finds that the Area Director erred to the extent she based her decision upon a conclusion that MTE was not a tribal organization prior to enactment of the MTL resolutions in 1994.

Accordingly, the Board vacates the Area Director's decision insofar as it held that MM does not qualify for mature contractor status. The Area Director shall issue a new decision, which shall recognize MTE as a tribal organization and which shall not require MTE to have been in a direct contractual relationship with BIA during the time it operated the contracts. The Area Director shall find MTE entitled to mature contractor status unless she finds that MTE did not operate the contracts continuously for three or more years or that MTE fails to meet the audit requirements for mature contract status.

The second issue in this appeal concerns the designation of the Acting Area Forester as the COR for the Forest Management and Forest Development contracts. MTE contends that the designation is an abuse of discretion because the Area Contracting Officer did not consult with the Tribe or MTE before making the designation and because he failed to give reasons for his choice.

Recognizing that the Tribe and/or MTE may have preferred the designation of a different individual as COR, the Board concludes that the designation of a COR was a matter of internal BIA contract administration and within the discretion of BIA. The Board further concludes that, under 43 CFR 4.330(b)(2), it lacks jurisdiction to review that decision.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal is dismissed for lack of jurisdiction insofar as it seeks review of the designation of a COR. The remainder of the decision is vacated in accordance with the discussion above, and this matter is remanded to the Area Director for issuance of a new decision.

//original signed
Anita Vogt
Administrative Judge

//original signed
Kathryn A. Lynn
Chief Administrative Judge