



INTERIOR BOARD OF INDIAN APPEALS

Shoshone-Bannock Tribes of the Fort Hall Reservation v. Bureau of Indian Affairs,
Department of the Interior

61 IBIA 98 (07/15/2015)

Petition for Reconsideration Denied:

61 IBIA 226



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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SHOSHONE-BANNOCK TRIBES OF)	Order to Award Indian Self-
THE FORT HALL RESERVATION,)	Determination Act Contract
Appellant,)	Modification for Startup Costs
)	
v.)	
)	Docket No. IBIA 13-032
BUREAU OF INDIAN AFFAIRS,)	
DEPARTMENT OF THE INTERIOR,)	
Appellee.)	July 15, 2015

In this appeal by the Shoshone-Bannock Tribes of the Fort Hall Reservation (Tribe), the Board of Indian Appeals (Board) is asked to decide the consequences of the failure by the Bureau of Indian Affairs (BIA) to issue a written declination decision in response to a proposal from the Tribe for startup costs for an expanded Indian Self-Determination and Education Assistance Act (ISDA) contract that was awarded to the Tribe for road maintenance. BIA awarded funding for nearly all of the “pre-award”¹ startup costs incurred by the Tribe, but refused to award any of the one-time first-year startup costs proposed by the Tribe, and failed to issue a declination letter for the portion of the Tribe’s proposal that BIA refused to fund, despite the Tribe’s repeated requests for a written explanation.

ISDA provides that the Secretary of the Interior (Secretary) “shall” award an ISDA proposal from a tribe unless the Secretary, within 90 days of receipt of the proposal (with agreed-upon extensions allowed), issues a written declination decision making specific findings—factual or legal—for why one of the statutorily permissible grounds for declination exist. 25 U.S.C. § 450f(a)(2). If a severable portion of a tribe’s proposal does not support a declination finding, the Secretary shall award that portion, in which case the requirement to issue a written declination decision applies to the portion that is declined. *Id.* § 450f(a)(4).

BIA seeks to characterize the Tribe’s acceptance of pre-award costs, through a contract modification, as signaling that the Tribe had agreed to modify the scope of its startup costs proposal, i.e., as an agreement to effectively withdraw its entire request for

¹ In the context of startup costs, “pre-award” costs refers to costs incurred by a tribe before an ISDA contract is awarded.

post-award startup costs. Thus, BIA argues, no declination decision was required. We disagree. Neither the law nor the facts of this case support BIA's position. When the Secretary awards a severable portion of a contract proposal, as was the case here, the requirement to issue a written declination decision still applies to the portion that is declined. And the Tribe's acceptance of the pre-award funds could not reasonably be construed as agreeing to withdraw entirely the portion of its request for post-award startup costs. To the contrary, the record is clear that the Tribe objected to the partial award and repeatedly demanded a written explanation and decision.

BIA also argues that if we conclude that it erred by failing to issue a declination decision, we should remand the matter to provide it with an opportunity to do so, or even dismiss the appeal because, BIA now contends, the Tribe is not entitled to any of the post-award startup costs that it proposed. Neither ISDA nor the ISDA regulations afford BIA a second bite at the apple to explain why a Tribe's contract proposal should not or cannot be awarded, whether as a matter of fact or law, after the 90-day deadline has expired. The regulations are clear in stating the consequences if BIA chooses to disregard the deadline: the proposal is deemed approved and the contract shall be awarded. *See* 25 C.F.R. § 900.18.

Even assuming, in an appropriate case, the Board could excuse BIA from the statutory mandate to award an ISDA contract after failing to issue a timely declination decision, this is not that case. BIA's post-hoc attempt to argue that none of the Tribe's proposed startup costs were allowable is unconvincing. BIA's own policy—and apparent practice—indicates that there is no absolute line between allowable startup costs and those that may be characterized otherwise. And BIA's own negotiators, including its regional awarding official, agreed that the costs included in the Tribe's proposal qualified as startup costs and were reasonable.

Whether or not BIA, with a properly issued decision, might have been able to clearly demonstrate that declination of the proposal, in whole or in part, was justified, notwithstanding the recommendation of its regional officials, BIA chose not to issue a timely declination decision. In such cases, the regulations, by which BIA and the Board are bound, provide that the Tribe's proposal “is deemed approved and the Secretary shall award the contract or any amendment . . . and add to the contract the full amount of funds pursuant to [25 U.S.C. § 450j-1(a)].” *Id.*

Background

On May 3, 2012, BIA awarded the Tribe an ISDA contract to operate an extended Road Maintenance Program (RMP) serving the Fort Hall Reservation. Tribe's Supp. Statement on Jurisdiction, Jan. 9, 2013, Exhibit (Ex.) A, at 1 (RMP Contract). The “new

and expanded” contract included some of the functions performed under a prior road maintenance contract, but also expanded the contract to include the maintenance of an additional 19.38 miles of BIA-constructed roadway that had previously been under the control of Bingham County. Joint Statement Supporting Preaward and Start-up Costs, Apr. 5, 2012, at 1 (Joint Statement) (Administrative Record (AR) Document (Doc.) 4); RMP Contract at 2 (Tribe contracts to “[m]aintain BIA-constructed roads recently returned to Tribal jurisdiction by Bingham County”). BIA and Tribal negotiating teams agreed that the contract was a “clear expansion of the prior contract” and entered into negotiations for pre-award and startup costs pursuant to 25 U.S.C. § 450j-1(a)(5) and BIA’s Contract Support Cost Policy. Joint Statement at 1. The Annual Funding Agreement (AFA), through which program funding was added to the contract, indicates that several categories of funding were yet “to be determined,” including “Contract Support Cost Funding” and “One-time Startup Costs and Pre-award Costs.” Tribe’s Supp. Statement on Jurisdiction, Ex. B, at 2 (FY 2012 AFA).

Section 450j-1(a)(2) requires that the amount of funds provided pursuant to a self-determination contract include contract support costs, which compensate a tribe for “the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management,” but which do not include funding for activities that “normally are not carried on by the respective Secretary in his direct operation of the program,” or “are provided by the Secretary in support of the contracted program from resources other than those under contract.” 25 U.S.C. § 450j-1(a)(2).

In addition, § 450j-1(a)(5) requires that “during the initial year that a self-determination contract is in effect,” the contract support costs awarded must include startup costs to account for the “reasonable costs that have been incurred or will be incurred on a one-time basis pursuant to the contract necessary (A) to plan, prepare for, and assume operation of the program, function, service, or activity [(PFSA)] that is the subject of the contract; and (B) to ensure compliance with the terms of the contract and prudent management.” *Id.* § 450j-1(a)(5). Startup costs that have been incurred before the initial year that an ISDA contract is in effect are referred to more specifically as “pre-award costs,” and are awarded based on actual expenditures. *See id.* § 450j-1(a)(6); Tribe’s Supp. Statement on Jurisdiction, Ex. K, at 9-10 (BIA Contract Support Cost National Policy Memorandum, May 8, 2006 (CSC Policy)) (defining “Pre-award costs” as those “incurred prior to the initial year that a contract is in effect,” and provided only once “to plan, prepare for, and assume the operation” of the contracted activity).² Startup costs that are to be

² The Tribe contends that the CSC Policy is unlawful and should be given no deference because it has not been promulgated as a regulation and BIA lacks authority to create rules

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incurred after the contract is awarded are simply referred to as “startup costs.” As described in BIA’s CSC Policy, “startup costs” are provided to a tribe “once in the initial year of transfer,” and “are normally defined in a budget request, negotiated and added” to the “Secretarial amount”³ awarded pursuant to § 450j-1(a)(1). *Id.* Thus, startup costs, other than the pre-award costs, are one-time costs to be incurred during the first year of a contract.

On April 5, 2012, before the RMP Contract was awarded, the Tribal and BIA negotiating teams agreed to a proposed pre-award and startup cost budget. Joint Statement at 2. In a joint statement in support of the proposed budget, the negotiating teams explained that “[t]he specific items listed in the attached preaward and start-up budget are *not* intended to replace recurring program costs, rather they have been carefully selected to ensure – as a one-time cost only – that the Tribes will be able to integrate the newly acquired roads into the Tribes’ road maintenance program, in a safe and prudent manner.” *Id.* The statement continued that the costs “are designed to ensure compliance with the expanded terms of the contract and prudent management, exactly as specified in 25 U.S.C. 450j-1(a)(5).” *Id.* The statement concluded by stating that both the Tribal and BIA negotiating teams considered the proposed budget to be “fair and reasonable,” and requested that “full payment” be awarded to the Tribe “as soon as is reasonably possible.” *Id.*

After a few minor revisions, the pre-award and startup budget proposal was submitted to BIA’s Central Office in Washington, D.C. Memorandum from Brown to Parks, May 22, 2012 (May 22 Memorandum) (AR Doc. 1); Tribe’s Supp. Statement on Jurisdiction, Ex. D (unnumbered) (Proposed Startup Cost Budget, dated 3/16/2012, revised 5/10/2012). The proposal includes four categories, with separate amounts itemized for each: (1) “Pre-Award One-time Start-Up (personnel and legal)”; (2) “Post-Award One-time Start-Up (material and labor)”; (3) “One-time Start-Up (equipment)”; and (4) “Specific Start-Up Tasks.” May 22 Memorandum. The amount requested for pre-award costs was \$22,201, and the remaining three categories totaled \$624,349, for a grand total of \$646,550. *Id.*

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through policy documents. Opening Brief (Br.), Mar. 27, 2013, at 3 n.3. This case presents no issues that would require us to consider the Tribe’s objections.

³ The Secretarial amount refers to the funding to be used for operation of the PFSA. Startup funding may not be duplicative of the operational costs included in the Secretarial amount.

Both Tribal and BIA regional officials understood that BIA's Central Office had the responsibility for making a final decision on the proposal. *See* Tribe's Supp. Statement on Jurisdiction, Ex. E, at 5 (Contract Negotiation Chronology); *see also* Declaration of Nilah Devaney, BIA Northwest Region Awarding Official, Dec. 17, 2012, ¶ 8 ("I expected BIA's Central Office authorized staff to scrutinize the funding request and to determine whether the items in the funding request were appropriate pre-award and start-up costs . . . and to provide written documentation as to the final evaluation and decision of approval and disapproval of the funded amount.").

Approximately 6 weeks after the proposal was submitted, Timothy Brown, another BIA Northwest Regional Awarding Official, notified the Tribe by email that it "looks like" the Tribe was going to receive "\$22,201 (start-up) for the Road Maintenance Program." Tribe's Supp. Statement on Jurisdiction, Ex. E, Tab 35 (Email from Brown to Glaze, July 6, 2012, 1:43 PM). Brown sent a follow-up email stating that the "[t]otal amount of start-up for the . . . Tribe is \$21,322 (not \$22,201 . . .)," and stating, "[t]his is how it was calculated: \$646,550 was requested for start-up. Only approved personnel and legal (\$22,201). The balance amounts are program related costs. The \$22,201 was funded at approximately 96%." *Id.* (Email from Brown to Glaze, July 16, 2012, 9:19 AM). No further explanation was provided. The Tribe immediately objected, asserting that Brown's reasoning "is not supported by the ISDA," and suggesting that legal action might follow if the matter could not be resolved amicably. *Id.* (Email from Glaze to Brown, July 16, 2012, 12:33 PM).

On August 3, 2012, the Tribe's counsel wrote to Brown to inquire whether BIA's Central Office had agreed to increase the startup cost funding "to bring it more into line with the amount we all agreed was appropriate." *Id.* Tab 36 (Email from Glaze to Brown, Aug. 3, 2012, 7:53 AM). If not, the Tribe's counsel stated that he would follow-up with BIA's Central Office. Brown stated that the Tribe would need to follow-up with BIA's Central Office, and asked, "Do you want us to obligate what is available?" *Id.* (Email from Brown to Glaze, Aug. 3, 2012, 9:02 AM). The Tribe's counsel responded in the affirmative, but stated that he would advise the Tribe to document that it was accepting the amount under protest as a partial payment, and argued that the rationale provided by BIA's Central Office "makes no sense under the BIA's own contract support cost policy, not to mention the ISDA." *Id.* (Email from Glaze to Brown, Aug. 3, 2012, 3:29 PM).

On August 14, 2012, the Tribe's Chairman signed a contract modification, Modification No. 2, to add \$30,471 to the contract in contract support costs, including

\$21,322 in “Start Up Costs.”⁴ Tribe’s Supp. Statement on Jurisdiction, Ex. H. One week later, the Tribe’s Chairman executed the contract modification a second time, this time signing it with the notations, “under protest” and “need full amount.” Tribe’s Supp. Statement on Jurisdiction, Ex. I.

On August 15, 2012, an attorney in the Department of the Interior’s Solicitor’s Office contacted counsel for the Tribe to advise him that BIA’s Central Office had referred the matter to the Solicitor’s Office. *See* Tribe’s Supp. Statement on Jurisdiction, Ex. E, Tab 37 (Email from McCarthy to Glaze, Aug. 15, 2012, 7:50 AM). The Tribe’s counsel responded, stating that he had left a voicemail message for the Chief of BIA’s Division of Self-Determination, and enclosing for Solicitor’s Office counsel a copy of the pre-award and startup costs that the Tribal and regional BIA negotiators had agreed upon as appropriate and necessary one-time costs. *See id.* (Email from Glaze to McCarthy, Aug. 15, 2012, 1:32 PM).

On August 17, 2012, Solicitor’s Office counsel notified the Tribe that BIA planned to send “an explanation of what we awarded and what we decided not to award, from the recommendation made by [the Awarding Official].” *Id.* Tab 39 (Email from McCarthy to Glaze, Aug. 17, 2012, 10:15 AM). The Tribe’s counsel responded by enclosing a copy of a pre-award and startup cost budget from the Standing Rock Sioux Tribe for a road maintenance program, which, according to the Tribe’s counsel, contained similar cost items as those included in the Tribe’s proposal, and which apparently had been awarded nearly in full by BIA. *Id.* (Email from Glaze to McCarthy, Aug. 24, 2012, 2:03 PM).

Despite the Tribe’s repeated requests over the next few months for a status update or a written decision explaining BIA’s rejection of the startup cost proposal, *see id.* Tabs 40-45, no such response was forthcoming. At the end of October 2012, the Tribe’s counsel advised Tribal officials that he had been informed by the Solicitor’s Office counsel, by phone, that BIA would not change its initial funding decision and would not be sending any additional written explanation for the decision. *Id.* Tab 47 (Email from Glaze to Broncho, Oct. 26, 2012, 12:33 PM).

On November 21, 2012, the Tribe filed this appeal. Because of the unusual context in which the appeal was filed—the absence of a written decision by BIA—and some uncertainty about the nature of the Tribe’s claim, the Board solicited statements from the parties on whether the Board has jurisdiction to hear the appeal. On January 15, 2013, the Board made a preliminary finding that it has jurisdiction and ordered briefing on the merits.

⁴ The additional \$9,149 included in Modification No. 2 was for contract support costs other than startup costs.

The Tribe subsequently filed an opening brief, BIA submitted an answer, the Tribe filed a reply, and BIA submitted a motion to file a surreply and a proposed surreply. The Tribe objects to BIA's surreply.

Jurisdiction

Section 900.150 governs pre-award decisions that are appealable to the Board in an ISDA dispute. *See* 25 C.F.R. § 900.150. The regulation specifies 10 categories of appealable decisions. *Id.* As relevant to these proceedings, an Indian tribe may appeal: “[a] decision to decline to award a self-determination contract, or a portion thereof, under [25 U.S.C. § 450f]”; “[a] decision to decline a proposed amendment to a self-determination contract, or a portion thereof, under [25 U.S.C. § 450f]”; and “other appealable pre-award decisions by a Federal official as specified in [the] regulations.” 25 C.F.R. §§ 900.150(a), (c), and (i).

On January 15, 2013, the Board issued an Order Making Preliminary Jurisdictional Determination and Order for Administrative Record (Preliminary Jurisdictional Determination). The Board concluded that the Tribe's appeal involves a pre-award dispute, and does not arise from an awarded contract, and thus the appeal could be considered to fall under § 900.150(a), § 900.150(c), or § 900.150(i). Preliminary Jurisdictional Determination at 2. The Board rejected BIA's argument that the Board lacks jurisdiction because, BIA contended, the appeal “concerns an executed contract and an executed award for start-up funding,” and thus is a post-award dispute arising out of the contract. *Id.* The Board acknowledged that a “proposed amendment to a contract undoubtedly relates to an awarded contract,” and a decision to decline a proposed amendment “is ‘post-award’ in relation to the awarded contract,” but concluded that the decision on a proposed amendment is pre-award “in relation to the *proposed amendment*.” *Id.* at 3. Therefore, based on the record at that time, the Board made a preliminary finding of jurisdiction for the purpose of ordering briefing on the merits, but refrained from determining whether BIA's conduct ultimately constituted a declination decision within the meaning of § 900.150.

After reviewing the completed record and the parties' briefing on the merits, the Board affirms the Preliminary Jurisdictional Determination and finds that this appeal involves a pre-award dispute between the Tribe and BIA arising from BIA's decision to decline to award the portion of the Tribe's proposal for first-year startup costs. The fact that BIA agreed to award, and the Tribe agreed to accept, \$21,322 in pre-award costs, does not mean that the dispute over the remainder of the Tribe's startup cost proposal arises out of the contract modification. The dispute is not over the funding that was *awarded*, or over BIA's compliance with obligations arising under the contract modification. Instead, the dispute is over the portion of the proposal that was not awarded. With respect to the

portion that BIA refused to fund, i.e., the partial declination, the dispute is a pre-award dispute.

In addition, the absence of a written decision by BIA does not defeat the Board's jurisdiction. Although the ISDA regulations undoubtedly expect—and require—that BIA issue a declination decision in writing, *see* 25 C.F.R. § 900.29(a), it does not follow that BIA's inaction and failure to issue a written decision does not constitute an appealable “decision” under § 900.150. Under ISDA, not to decide is to decide because the statute plainly states BIA's obligations and the regulations make clear the consequences of BIA's failure to respond to an ISDA proposal from a tribe. *See* 25 C.F.R. § 900.18 (a proposal that is not timely declined is deemed approved).

Standard of Review

On appeal from a pre-award decision to decline all or part of a proposed amendment to a self-determination contract, the Secretary has the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal. 25 C.F.R. § 900.163; *see also Skokomish Indian Tribe v. Portland Area Director*, 31 IBIA 156, 160-61 (1997) (rejecting “clear and convincing” standard of proof for ISDA declination decisions); *California Trust Reform Consortium v. Director, Office of Trust Funds Management, Office of the Special Trustee for American Indians*, Docket No. IBIA 98-112-A (Departmental Hearings Division, Apr. 25, 2000), at 4 (“The legislative history of 25 U.S.C. § 450f(e)(1) and the preamble to the implementing regulation, 25 C.F.R. § 900.163, indicate that the ‘clearly demonstrates’ standard is an intermediate standard that is higher than a ‘preponderance of the evidence’ standard but lower than a ‘clear and convincing evidence’ standard.”).

Discussion

The facts of this case are undisputed. Briefly summarized, the Tribe proposed a pre-award and startup cost budget for the RMP, broken down into four categories. BIA awarded only one category—pre-award costs—and refused to award any of the startup costs from the remaining categories for the first year of the expanded contract, without providing a written explanation. The Tribe agreed to a contract modification that covered approximately 96% of the pre-award costs requested, but continued to press for a written response regarding the remainder of its proposal, which it contended were proper and reasonable costs.

The crux of the appeal comes down to two questions of law: (1) was BIA required to issue a written declination decision with regard to the proposed startup costs that were not awarded; and (2) if so, what is the consequence of BIA's failure to issue such a

decision? The Tribe argues that BIA's refusal to issue a written decision results in the automatic approval of the startup cost proposal, and requires BIA to fund the Tribe's requested startup budget in full. BIA, in turn, argues that a declination decision was not required after the Tribe signed the contract modification, and that even if it were, the proper resolution on appeal would be to remand the matter to BIA to issue a written decision in the first instance, or to dismiss the appeal because, BIA now contends, the requested startup costs are not allowable under ISDA. BIA's arguments are unconvincing.

I. BIA Was Required by Statute and Regulation to Issue a Written Declination Decision

ISDA requires that within 90 days of receipt of a contract proposal from a tribe, the Secretary "shall . . . approve the proposal and award the contract unless the Secretary provides written notification to the applicant that contains a specific finding that clearly demonstrates that, or that is supported by a controlling legal authority that," one of five statutory grounds for declination exist. 25 U.S.C. § 450f(a)(2). The statutory grounds for declination include:

(D) the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 450j-1(a) of this title; or

(E) the [PFSA] (or portion thereof) that is the subject of the proposal is beyond the scope of [PFSAs] covered under paragraph (1) [of § 450f(a)] because the proposal includes activities that cannot lawfully be carried out by the contractor.

Id. The Secretary may extend the 90-day approval period with written consent from the tribe. *Id.* However, the Secretary is required to approve "any severable portion of a contract proposal that does not support a declination finding," in which case the requirement to issue a written declination decision applies only to the portion that is declined. *Id.* § 450f(a)(4). But the requirement still applies. If the Secretary decides to decline any portion of a contract proposal, the Secretary must "state any objections in writing to the tribal organization," provide assistance to the tribe to overcome the stated objections, and provide the tribe with a hearing on the record, with full discovery⁵ and the opportunity to appeal. *Id.* § 450f(b).

The record shows that despite numerous requests for a written explanation of BIA's reasons for not funding any post-award startup costs—the bulk of the Tribe's startup cost

⁵ In the present case, the Tribe waived its right to a hearing before an administrative law judge.

proposal—BIA refused to issue a written declination decision. On appeal, BIA argues that because the Tribe accepted a modification to the contract to add the \$21,322 award for pre-award costs already incurred, “without protest,” the Tribe effectively signaled that it had agreed to alter the scope of its proposal by withdrawing the remainder of its request for startup costs. Department’s Answer Br., Apr. 26, 2013, at 7.⁶ The record does not support BIA’s argument. In accepting the addition of \$21,322 to the contract, which was unmistakably attributable to pre-award costs already incurred, the Tribe was under no obligation to qualify its acceptance of that award or risk waiving its right to pursuing the portion of its proposal for post-award startup costs. Thus, the fact that the Tribe’s Chairman signed the modification without any such qualification is not relevant in this case. The award for pre-award costs was for only one discrete category of costs included in the Tribe’s proposal, and thus was severable from the remaining three categories for which first-year startup costs were proposed.

The Tribe’s acceptance of the pre-award-costs contract modification could not reasonably be construed as an agreement by the Tribe to alter the scope of its proposal, as BIA contends, except with respect to the \$879 in pre-award costs not included in the modification.⁷ Department’s Surreply Br., June 11, 2013, at 2-3. To argue, as BIA does,

⁶ BIA also argues that “[a]t no time before the BIA awarded start-up funding [i.e., the pre-award costs] to the Tribe[] did the Tribe[] suggest to the BIA that their proposal for start-up and pre-award funding had been ‘declined,’ in whole or in part.” *Id.* That argument is both confusing and unconvincing, implying as it does that it was the Tribe’s responsibility to discern a declination in the absence of a written decision from BIA. In any event, the Tribe is not contending that BIA declined its proposal before the pre-award costs were added to the contract in August 2012. Nor has the Tribe contended that the 90-day time period for BIA to issue a written declination decision for the proposal for post-award startup costs had expired by that date.

There is some question about when the Tribe’s proposal should have been considered “received” by BIA, for purposes of triggering the 90-day deadline for a BIA response, but it appears that after the Tribe initially submitted a proposal to BIA in April 2012, it modified the budget spreadsheet on May 10, 2012, after which the proposal was transmitted to BIA’s Central Office by memorandum from BIA’s regional office dated May 22, 2012. According to the Tribe, even after Brown sent his initial email to the Tribe indicating that BIA’s Central Office had only approved \$21,322 for pre-award costs, BIA still had “plenty of time” to prepare a proper declination letter within the 90-day period. Opening Br. at 10.

⁷ We do agree with BIA that when the Tribe’s Chairman accepted, without qualification, the contract modification to add funding for pre-award costs, that action effectively acquiesced in a reduction of the award for pre-award costs. Those costs were a discrete category in the Tribe’s proposal, and when BIA proposed a contract modification for 96%

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that when the Tribe accepted \$21,322 in pre-award costs, one of four categories of startup costs proposed, the Tribe “agreed” to abandon the remainder of its proposal for three other categories of startup costs, totaling \$624,349, is unconvincing. The record clearly documents that the contract modification for pre-award costs was prepared after the Tribe had *objected* to the refusal by BIA’s Central Office to award its entire proposal, and had, quite understandably, agreed to have BIA obligate “what is available,” while making clear the Tribe continued to object to the decision not to award the other portions of its proposal. At no time did the parties discuss a modification of the proposal from the Tribe, so as to eliminate all post-award startup costs.⁸ In this context, BIA could not have reasonably concluded that the Tribe had amicably agreed to an alteration in the scope of the proposal that effectively withdrew its prior request for all post-award startup funding.

ISDA requires the Secretary to issue a written declination decision to explain its refusal to award *any severable portion* of a tribe’s proposal within the 90-day deadline. 25 U.S.C. §§ 450f(a)(2)-(4); 450f(b); *see also* 25 C.F.R. §§ 900.16; 900.29-30. And the ISDA regulations are unambiguous in protecting the Tribe’s right to appeal the declination of any severable part of a proposal, regardless of the Tribe’s acceptance of a partial award. 25 C.F.R. § 900.27 (a tribe does not lose its appeal rights to challenge the portion of the proposal that was declined if it elects to contract for a severable portion of the proposal). Because the post-award startup costs proposed by the Tribe were a severable portion of its proposal for startup costs, BIA had an obligation to issue a decision on the remaining portions of the proposal within 90 days from receipt.

II. ISDA Does Not Provide BIA Another Opportunity to Consider Declination of the Tribe’s Proposal

BIA argues that if the Board finds that BIA erred by failing to issue a declination decision, the Board should remand the matter to provide it with an opportunity to do so. In its answer brief, BIA identifies no authority in ISDA or the regulations that allows BIA

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of what the Tribe requested, and the Tribe accepted, that action reasonably could be construed as reaching final agreement between the parties on the pre-award costs. The Tribe’s objections, following BIA’s decision, focused on the remaining three categories of startup costs.

⁸ Notably, although BIA suggests that it relied on the Tribe’s acceptance of the modification for pre-award costs, without protest, to conclude that the Tribe had agreed to alter the scope of its proposal, the modification itself is not even included in the administrative record upon which BIA contends its Central Office relied in refusing to award the post-award startup cost portion of the Tribe’s proposal.

the discretion to issue a decision after the 90-day deadline passes without a declination decision having issued. In a surreply,⁹ however, BIA invokes the Federal district court decision in *Aleutian Pribilof Islands Ass'n, Inc. v. Kempthorne*, 537 F. Supp. 2d 1 (D.D.C. 2008), to support its argument that if a declination letter is required, the Board should remand the matter to BIA for further proceedings, i.e., to provide BIA with another opportunity to issue a declination letter. Department's Surreply Br. at 11-12. *Aleutian Pribilof* is both factually and legally distinguishable. In that case, BIA was willing to award the ISDA funding, but had concluded that it should go to another tribal entity. *Aleutian Pribilof*, 537 F. Supp. 2d at 2-3. In that context, and under the Administrative Procedure Act (APA), the court concluded that a remand was appropriate. *Id.* at 9-13. In the present case, the APA does not govern the proceedings before the Board. But BIA's regulations do, and they are binding on BIA and the Board. Those regulations plainly state the consequences when BIA fails to issue a declination letter within the prescribed time period. To allow BIA another chance would amount to an end-run around the ISDA regulations by allowing the agency an unauthorized second chance to comply with its obligations and avoid the consequences that the law compels.

III. Dismissal of the Appeal Based on Merits-Based Arguments That Were Not Timely Raised in a Declination Letter is Not Appropriate

BIA also argues, in the alternative, that the Board should dismiss the appeal because none of the post-award startup costs proposed by the Tribe were allowable. Even if BIA's arguments on the underlying merits of the Tribe's proposal were convincing, there is a substantial question whether it would be within our authority to consider those arguments at this late date, in the absence of a timely declination decision. After all, the written notification required of the Secretary, if a proposal is not awarded, must include "a specific finding that clearly demonstrates that, *or that is supported by a controlling legal authority*," that one or more of the five declination criteria are satisfied, 25 U.S.C. § 450f(a)(2) (emphasis added), and the declination criteria encompass both fact-based and legally-based grounds not to accept a proposal. If BIA believed that any components of the Tribe's startup cost

⁹ The Tribe's objection to BIA's motion for leave to file a surreply has considerable force. BIA sought to file a surreply based on "new arguments and new evidence" raised by the Tribe in its reply brief. But as the Tribe points out, that was only because BIA, for the first time in its answer brief, provided its purported justification for refusing to award any post-award startup costs to the Tribe, i.e., the very explanation (whether satisfactory or not) that the Tribe had repeatedly sought before bringing this appeal. BIA's surreply, albeit longer than its answer brief, adds no arguments that would convince us that we should or may relieve BIA of its obligations under the ISDA.

proposal were not allowable as a matter of fact or law, BIA presumably was required to explain that in a declination letter.

Regardless, in the present case, BIA's arguments that the costs included in the Tribe's proposal were not legally allowable are not convincing. First, BIA's own negotiating team, which included its regional awarding official, agreed that the startup costs proposed by the Tribe were reasonable and permissible. *See* Joint Statement at 2. Second, BIA's own contract support cost policy indicates that, at least for some expense items, no absolute line exists to determine what should be considered a first-year startup cost, and what should be treated as "program costs."¹⁰ For example, BIA suggests that certain equipment included in the Tribe's proposal is not allowable as a startup cost, Department's Answer Br. at 12, but BIA's CSC Policy includes the purchase of "equipment" as an example of a startup cost, if it is incurred on a one-time basis during the first year, *see* CSC Policy at 9.¹¹ Third, BIA contends that startup costs "do not include the costs of operating a program," Department's Answer Br. at 8, but that only begs the question, and presents no clear line, as a matter of fact or law, between costs of "operating" a program, function, service, or activity, and costs that are "necessary" to "prepare for, and assume operation of" a program, function, service, or activity, 25 U.S.C. § 450j-1(a)(5)(A). Some judgment and program expertise may be called for, and it may well be possible to delineate a reasonable line, but the place to do that is in a timely issued declination letter, not in a broad—and belated—assertion that the Tribe's proposed costs somehow do not meet the "statutory definition" of startup costs.¹² Department's Surreply Br. at 2. Fourth, BIA apparently does not dispute the Tribe's assertion that similar costs were awarded to the Standing Rock

¹⁰ All costs, presumably, must be program-*related* costs in some respect, and thus BIA's cursory explanation to the Tribe that the non-awarded costs were "program related costs" hardly constitutes a meaningful explanation. *See* Tribe's Supp. Statement on Jurisdiction, Ex. E, Tab 35 (Email from Brown to Glaze, July 16, 2012, 9:19 AM) (characterizing non-awarded portion of Tribe's proposal as "program related costs").

¹¹ The Tribe contends, and BIA does not dispute, that nothing in the administrative record supports a claim that the Tribe's startup cost items are duplicative of the Tribe's annual program budget, or that the Tribe's startup cost proposal would constitute double-dipping. *See* Appellant's Reply Br. at 10.

¹² BIA argues that certain functions included in the Tribe's proposal are inherently Federal, and thus can be performed only by BIA. Ironically, it appears that the focus of BIA's objection—right-of-way related work—is a startup task that the BIA regional staff asked the Tribe to add to its proposal. *See* Contract Negotiation Chronology at 5 (5/11/2012).

Sioux Tribe for its road maintenance program.¹³ BIA's response—that the award of such costs to another tribe does not make it permissible in this case—falls short of convincing us that awarding similar costs to the Tribe here must be precluded. Whether BIA previously awarded costs that it now suggests may have been “ineligible,” Department's Surreply Br. at 10, is not the same as demonstrating that the award of such costs was not permissible as a matter of law. Of course, there may be valid, program-specific reasons for concluding that certain costs are permissible in one context, but not in another. But when a tribe makes a proposal, and contends that BIA awarded the same types of costs to another tribe, it is incumbent upon BIA to clearly articulate its reasoning, in writing and on time, if it declines the proposal.

It may well be that ISDA's limitation that startup costs be “reasonable” and “necessary,” 25 U.S.C. § 450j-1(a)(5), could have provided BIA with a basis to decline, whether in full or in part, the Tribe's proposal for post-award startup costs. *See, e.g., id.* § 450f(a)(2)(D) (allowing declination if amount of funds proposed is “in excess of the applicable funding level”). However, once BIA allowed the 90 days to lapse, BIA lost its opportunity to make such a determination.¹⁴

IV. The Consequences of BIA's Failure to Comply With ISDA's Deadline for Issuing a Decision on the Tribe's Proposal

Under the ISDA regulations, if the Secretary fails or refuses to issue a written decision on a tribe's ISDA proposal, the proposal “is deemed approved” and the Secretary “shall award” the contract or amendment “and add to the contract the full amount of funds pursuant to [25 U.S.C. § 450j-1].” 25 C.F.R. § 900.18. And because it is the *proposal* that

¹³ The Tribe contends that BIA approved startup costs for the Standing Rock Sioux Tribe that included traffic signs, posts, and a “spreader” vehicle, which were also included as equipment and materials in the Tribe's proposal. Opening Br. at 11 n.8.

¹⁴ BIA argues that the underlying road maintenance contract is “new . . . only in a nominal sense,” because it replaces and expands—by adding road-miles—the Tribe's previous contract, and thus it does not constitute a “new” program. Department's Answer Br. at 1-2. But BIA's own contract support cost policy recognizes that an expanded contract may serve as a proper basis for new pre-award and new first-year startup costs associated with an expanded contract. *See* CSC Policy at 10. If BIA believed that, in context, the costs being proposed by the Tribe were unreasonable, or that all of the proposed “post-award startup costs” were, in substance, for the continuation of a program, function, service, or activity that the Tribe had already been providing through its existing contract, it was incumbent on BIA to provide a written declination letter setting forth its reasoning.

is “deemed approved,” the “full amount of funds,” as least in the present case, refers to the amount of funds in the proposal for post-award startup costs.

Conclusion

BIA failed to issue a timely declination decision in response to the portion of the Tribe’s startup cost proposal that it refused to award. Under the circumstances, the law provides that the Tribe’s proposal for post-award startup costs is “deemed approved” by BIA, and BIA “shall award” the full amount of \$624,349 included in the three categories of start-up costs in the Tribe’s proposal that did not include pre-award costs.

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 Board finds that BIA failed to clearly demonstrate the validity of the grounds for declining the startup cost proposal, and thus is obligated to award the contract modification to the Tribe for post-award startup costs. The Board remands the case to BIA for further proceedings consistent with this decision.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

//original signed
Thomas A. Blaser
Administrative Judge