



INTERIOR BOARD OF INDIAN APPEALS

The Puyallup Tribe of Indians v. Bureau of Indian Affairs

63 IBIA 10 (04/08/2016)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
801 NORTH QUINCY STREET  
SUITE 300  
ARLINGTON, VA 22203

THE PUYALLUP TRIBE OF	)	Order to Award Indian Self-
INDIANS,	)	Determination Act Contract
Appellant,	)	Modification for Start-up and
	)	Pre-award Costs
v.	)	
	)	Docket No. IBIA 15-002
BUREAU OF INDIAN AFFAIRS,	)	
Appellee.	)	April 8, 2016

The Puyallup Tribe of Indians (Tribe) appealed to the Board of Indian Appeals (Board) from the implied partial declination by the Bureau of Indian Affairs (BIA) of the Tribe’s new self-determination contract<sup>1</sup> for the Adult and Juvenile Corrections program. The Tribe contends that BIA “failed to award the full amount of agreed-upon pre-award and start-up funding,” totaling \$1,021,160 (\$615,945 in start-up costs and \$405,215 in pre-award costs). The Tribe also contends that BIA failed to issue a partial declination decision for these proposed costs, but that through a contract modification awarded to the Tribe for \$74,659 in start-up funding, BIA apparently declined, without explanation, to award the remaining amount submitted in its contract proposal.<sup>2</sup>

BIA contends that the Board lacks jurisdiction to consider this appeal because it is a post-award dispute that the regulations commit to the review of the Awarding Official and the Civilian Board of Contract Appeals. *See generally* 25 C.F.R. §§ 900.215-230. BIA also maintains that it was not required to issue a declination decision for the requested funding that was not awarded because its internal determination of the eligibility of proposed pre-award and start-up costs does not constitute the declination of a contract proposal within the meaning of the regulations. We disagree. This appeal arose from BIA’s decision to deny a significant portion of the Tribe’s requested start-up and pre-award funding, and is a pre-award dispute appealable to the Board pursuant to 25 C.F.R. § 900.150(a). As we

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<sup>1</sup> The contract was proposed under the Indian Self-Determination and Education Assistance Act (ISDA), Pub. L. No. 93-638, 25 U.S.C. § 450 *et seq.*

<sup>2</sup> The Tribe contends that the remaining amount totals \$946,501, which does not take into consideration \$200,000 of “one-time” funding awarded under the contract, discussed *infra*.

recently held in *Shoshone-Bannock Tribes of the Fort Hall Reservation v. BIA*, 61 IBIA 98 (2015), “[w]hen the Secretary awards a severable portion of a contract proposal . . . the requirement to issue a written declination decision still applies to the portion that is declined.” *Id.* at 99. The Tribe’s acceptance of the partial award of \$74,659 in start-up funding provided through a subsequent contract modification does not excuse BIA’s obligation to issue a declination decision for the remaining pre-award and start-up funds requested by the Tribe. Because BIA failed to meet this obligation within the requisite time period, the regulations require that the Tribe’s proposed pre-award and start-up costs be “deemed approved,” and that the requested funding be awarded in full.

### **Statutory and Regulatory Framework**

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 containing a specific finding—factual or legal—for why one of the statutorily permissible grounds for declination exists. 25 U.S.C. § 450f(a)(2). The statutory grounds for declination include:

- (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;
- (C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract;
- (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 program, function, service, or activity [(PFSA)] (or portion thereof) that is the subject of the proposal is beyond the scope of [PFSA] covered under paragraph (1) [of § 450f(a)] because the proposal includes activities that cannot lawfully be carried out by the contractor.

*Id.* § 450f(a)(2)(A)-(E).

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 discovery<sup>3</sup> and the opportunity to appeal. *Id.* § 450f(b). 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). 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. 25 C.F.R. § 900.27.

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 as part of the contract "shall include startup costs consisting of 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 [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). Start-up 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, following prior written notification of the Secretary of the nature and extent of the costs to be incurred, based on actual expenditures. *See id.* § 450j-1(a)(6); *see also* Opening Brief (Br.), Jan. 26, 2015, Exhibit (Ex.) A at 9-10 (BIA Contract Support Cost National Policy Memorandum, May 8, 2006) (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). Start-up costs that are to be incurred after the contract is awarded are simply referred to as "start-up costs." As described in BIA's policy memorandum, "start-up 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 operational funding awarded pursuant to § 450j-1(a)(1). Opening Br., Ex. A at 9.

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<sup>3</sup> In the present case, the Tribe waived its right to a hearing before an administrative law judge. *See* Notice of Appeal, Oct. 6, 2014, at 2.

## Background

In 2010, the Tribe received a Federal grant to construct a new correctional facility. Opening Br. at 5. The Tribe submitted a self-determination contract proposal in 2010 for the Corrections Program, *see* Letter from Tribe to Superintendent, June 25, 2010 (Administrative Record (AR) 34-37),<sup>4</sup> but withdrew it in August 2011 to wait until the facility was nearing completion, Opening Br. at 5. In its 2010 contract proposal, the Tribe notified BIA that it had “begun to incur pre-award costs” and specified the nature and purpose of the costs. Letter from Tribe to Superintendent at 2 (AR 35). As early as 2011, the Tribe met with BIA Office of Justice Services (OJS) staff concerning start-up and other costs associated with the proposed correctional facility contract, and in mid-April of 2012, the Tribe provided BIA with a proposed start-up budget and statement of pre-award costs and cost narrative. *See* Opening Br., Ex. C (Email from Tribe to Patricia Broken Leg-Brill, OJS, Apr. 16, 2012). Both the BIA Regional Awarding Official and OJS supported the Tribe’s proposed start-up budget request, which at that time came to \$582,336, consisting of \$283,516 in pre-award costs and \$298,820 of initial year start-up costs. *See* Opening Br., Ex. D (Memorandum (Memo) from Awarding Official to Parks, June 4, 2012); *id.*, Ex. E (undated memo from OJS to Devaney, BIA Regional Indian Self-Determination Specialist). The Office of Indian Services (OIS) processed the start-up budget provided by the Tribe with the fiscal year (FY) 2012 awards, and identified all but \$1,040 of the requested \$298,820 of start-up funding as “program cost related.” Opening Br., Ex. B at 1-2 (Letter from Tribe to BIA Director, Aug. 6, 2012). While the processing of the award for FY 2012 funding was apparently premature and the award was cancelled, *see id.*, the “denial” of the bulk of the requested start-up funding also spurred increased negotiations between the Tribe and BIA regarding the appropriate level of start-up and pre-award funding for the corrections program, *see* Opening Br. at 6.

In August 2013, the Tribe submitted revised start-up and pre-award budgets based on feedback from OIS officials. *Id.* at 6-7; *see also id.*, Ex. G (Start-up Budget for New Corrections Program, June 19, 2013). The Tribe met with BIA officials, including the Director and Deputy Directors for OIS and OJS in early August 2013, to discuss funding for its Tribal Justice Center and the Tribe’s draft start-up budget proposal, and in a letter to the BIA Director, stated that it agreed to work with the Deputy Director of Indian Services on “a line-item review of the budget” that same week. Opening Br., Ex. H at 1 (Letter

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<sup>4</sup> Citations to the administrative record are to the record as supplemented by BIA on December 3, 2014, which includes the Tribe’s October 6, 2014, Notice of Appeal and exhibits. The Tribe’s 2010 contract proposal was provided as Exhibit B to its Notice of Appeal. References to specific pages and page ranges in the administrative record refer to the pagination added to the record by BIA.

from Stephens to Director, Aug. 6, 2013). In its letter, the Tribe directly addressed the issue of pre-award and start-up cost funding and expressed its concern that BIA was changing what it considered to be reasonable start-up costs in a manner that was not compatible with BIA's past practices, BIA policy, or the governing regulations. *Id.* at 2-8. In a follow-up letter memorializing the August 7 meeting with BIA, the Tribe stated that “[e]veryone agreed that the items contained within the draft budget are reasonable start-up costs that should be funded” and that BIA agreed to coordinate discussions between OJS, OIS, and the Office of Facilities Management and Construction (OFMC) “to determine which program would fund which costs,” prior to a meeting scheduled for September 9, 2013. Opening Br., Ex. I at 2 (Letter from Stephens to BIA Director, Aug. 30, 2013). The Tribe states that during this time, BIA never indicated that any of the requested start-up funding line items were unallowable. Opening Br. at 7.

The final ISDA contract proposal was submitted to BIA on January 23, 2014. *Id.*, Ex. K (Adult and Juvenile Corrections Contract Proposal – January 2014). For FY 2014, the Tribe requested the 8-month pro rata equivalent of its proposed annual program funding and annual Contract Support Cost funding. *Id.*, Tab 3, Attachment 2 (Annual Funding Agreement). The Tribe also requested \$405,215 for pre-award costs from March 2010, and \$621,995 for start-up costs. *Id.* at 2. The contract proposal included detailed revised start-up and pre-award budgets. *Id.*, Tabs 6-7. At the request of BIA, the Tribe agreed to two extensions to the 90-day time limit for BIA to take action on the ISDA contract proposal, *see* Opening Br., Ex. L (Letter from Tribe to Cawston, June 12, 2014), and on June 30, 2014, the Awarding Official, Timothy Brown, notified Terrence Parks at OIS that the Northwest Regional Office had “reviewed the Puyallup Tribe’s requests for start-up and pre-award costs and we feel they are reasonable and we recommend that the total request of [\$]1,021,160.00 be approved,”<sup>5</sup> Letter from Brown to Parks, June 30, 2014 (AR 1).

BIA notified the Tribe of its decision to authorize approximately one-third of the requested amount of operational funding in a letter dated June 26, 2014. Letter from Melville to Tribe, June 26, 2014, at 1 (Partial Declination Letter) (AR 55). BIA explained that it did “not have the funds available to approve and award the entire [amount] in direct program operational funding you requested,” and therefore it “decline[d] to approve, in part, the . . . contract proposal” in accordance with 25 U.S.C. § 450f(a)(2)(C) and (D). *Id.* at 1-2 (AR 55-56). BIA further explained that the “partial declination” was due to various issues, including that the amount of funding requested by the Tribe “exceeds the newly established Secretary level of funding” available to carry out the activities to be contracted.

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<sup>5</sup> The 2012 total start-up request of \$582,336 was increased to a total of \$1,021,160 in the final contract proposal for start-up and pre-award costs.

*Id.* at 2 (AR 56). In the letter, BIA indicated that it was addressing the amount requested by the Tribe for “direct program operational funding (not including requested amounts for Contract Support Costs, Pre-Award, Start-up and Transition/Activation costs),” *id.*, and specified that the BIA Awarding Official could “proceed with the *award of . . . direct program funding,*” *id.* at 1 (AR 55) (emphasis added).

The ISDA contract was executed by the Tribe and BIA on July 23 and 24, 2014, respectively, and became effective on July 1, 2014. Award/Contract, July 1, 2014, at 1 (AR 31). In addition to the amount awarded for direct program operational funding, the contract award included \$200,000 for “one-time” funding, without explanation. *Id.* at 2 (AR 32). The Tribe requested an informal conference pursuant to 25 C.F.R. § 900.153 to dispute BIA’s decision, and following the August 20 conference, BIA upheld the partial declination in a written “recommended decision” issued on August 29, 2014. Letter from Jackson to Tribe, Aug. 29, 2014, at 1-2 (Recommended Decision) (AR 58-59); *see also* 25 C.F.R. § 900.153. Although the agenda provided for the informal conference included consideration of “pending” funding requests, including start-up and pre-award costs, the discussion of the Partial Declination Letter was a separate agenda item, which did not expressly reference start-up costs. *See* Agenda for Informal Conference (AR 60).

In the Recommended Decision, BIA acknowledged that the amount awarded for operational funding was less than one-third of the amount requested by the Tribe, but explained that the amount was determined on the basis of a “spreadsheet formula” applied to all tribes with new correctional facilities. Recommended Decision at 2 (AR 59). BIA also explained that the amount of the award was based on data self-reported by the tribes, and that BIA had added “another \$200,000 onetime funding *to help with* startup cost[s]” to the amount awarded to the Tribe for direct program operational funding. *Id.* at 1 (AR 58) (emphasis added). The Recommended Decision did not address the remaining funding requested by the Tribe for pre-award and start-up costs.

On August 27, 2014, BIA informed the Tribe that it was awarding additional funding as a modification to the contract. Letter from Acting Superintendent to Tribe, Aug. 27, 2014 (AR 62); *see also* Opening Br. at 9. The contract modification, which bears the date July 28, 2014, became effective on August 26, 2014. Contract Modification 0001, July 28, 2014, at 1 (AR 63). The modification awarded an additional \$43,651 in facilities and maintenance funding, and \$74,659 in start-up funding, without addressing the remaining start-up and pre-award funding requested by the Tribe. *Id.* at 2 (AR 64). The Tribe signed Contract Modification 0001 on September 10, 2014. *Id.* at 1 (AR 63).

On October 6, 2014, the Tribe appealed the de facto denial of the outstanding start-up and pre-award funding request to the Board. The Board issued a preliminary determination of jurisdiction on October 9, 2014. The Tribe filed an opening brief, BIA

answered, and the Tribe filed a reply. On September 8, 2015, the Tribe filed a request for expedited consideration of its appeal in light of the Board's *Shoshone-Bannock* decision, and the Board denied the request.

### 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.* The Board initially found that the instant appeal “may fall under § 900.150(a) (appeal from decision to decline a contract or portion thereof), or § 900.150(i) (appeal from any other appealable pre-award decision).” Order Making Preliminary Jurisdictional Determination, Oct. 9, 2014, at 2. In its answer on the merits, BIA devotes much of its brief to objecting that the Board lacks jurisdiction to consider the appeal. BIA argues that the Tribe's disagreement with the amount of start-up funds awarded under the contract and Contract Modification 0001 is a post-award dispute that must be appealed to the Awarding Official, rather than the Board, under §§ 900.215-.230. Answer Br., Feb. 25, 2015, at 1, 9-11. BIA appears to argue that the self-determination contract was “awarded” when the Tribe signed the contract in July 2014, and Contract Modification 0001 in September 2014, and that the Tribe's subsequent objection to the amount of start-up funding therefore constitutes a post-award dispute. *See id.* at 10-11.

We disagree. As relevant here, the Tribe identified specific amounts of funding required for direct program operations, initial year start-up costs, and pre-award costs in its contract proposal. *See* Opening Br., Ex. K (Annual Funding Agreement). BIA awarded part of the requested direct program operational funding, along with part of the requested start-up funding, and issued a partial declination. The Partial Declination Letter, however, only addressed the basis for BIA's declination of part of the *direct program operational funding*. *See* Partial Declination Letter at 1-2 (AR 55-56). BIA correctly advised the Tribe that it could appeal this partial declination to the Board, pursuant to 25 C.F.R. § 900.158, or request an informal conference pursuant to § 900.154. *Id.* at 2 (AR 56). The same rights of appeal apply to the partial declination of that part of the Tribe's contract proposal concerning start-up and pre-award costs. BIA's attempt on appeal to characterize the de facto partial declination of the Tribe's proposal for start-up and pre-award costs—without providing the Tribe with the timely formal written explanation required by § 900.29 for the declination—as a post-award decision over which the Board lacks jurisdiction, is unavailing.

Nor, as Appellee suggests, does the Tribe's agreement to sign the contract, and later Contract Modification 0001, deprive the Tribe of the right to appeal BIA's partial declination of its proposal. *See* Answer Br. at 9-10. In the *Shoshone-Bannock* ISDA appeal, the Board rejected a similar argument:

The fact that BIA agreed to award, and the Tribe agreed to accept, [a partial award of the requested start-up 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.

*Shoshone-Bannock*, 61 IBIA at 104-05. It is the partial declination of funding requested in its contract proposal, rather than the amount awarded, that the Tribe disputes in the instant appeal, and where a tribe challenges the decision to decline a contract proposal, in whole or in part, the appeal is properly considered a pre-award dispute within the jurisdiction of the Board. 25 C.F.R. § 900.150.

In the alternative, BIA argues that its “decision about which costs are eligible startup costs is different from a contract declination,” and that the Board lacks jurisdiction over this internal exercise of discretion. *See id.* at 11. However, a proposal to include start-up costs in a contract is treated no differently under ISDA, as a procedural matter, than any other contract proposal. Limitations on the Board's jurisdiction to review discretionary decisions are not relevant where, as here, the issue is a legal one: the consequences of BIA's failure to provide the written explanation for its de facto declination of that part of the Tribe's contract proposal. In *Shoshone-Bannock*, we held that “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,” including a tribe's proposal for pre-award and start-up costs. *See Shoshone-Bannock*, 61 IBIA at 108. The merits of whether BIA satisfied this obligation in the instant case, and the consequences of its failure to do so, are within the jurisdiction of the Board to decide on appeal.

BIA also mistakenly maintains that a declination decision could not be required for start-up awards because it “would have no utility,” as the latter's “purpose . . . is to allow BIA and a contractor to see where BIA can ‘provide assistance to the [tribe] to overcome the stated objections’ to a proposal,” and yet such assistance “cannot turn an ineligible cost into an eligible startup cost.” Answer Br. at 12 (quoting 25 U.S.C. § 450f(b)(2)). BIA apparently believes that the alleged futility of a declination decision in this context shows that the regulations did not intend to provide the Board with jurisdiction over appeals from actions on pre-award and start-up proposals, but this argument misses the point. The Board's jurisdiction is not dependent on whether BIA deems a declination letter appropriate in a given case; rather, the Board is authorized to review any decision that falls within the

categories listed in § 900.150(a)-(j), and as we previously explained, the partial declination of a pre-award or start-up proposal is an appealable decision under § 900.150(a).<sup>6</sup>

Thus, despite BIA's objections to the contrary, the Board has jurisdiction to consider this appeal pursuant to § 900.150(a). Having determined that the appeal is properly before the Board, we now turn to a review of the substance of the dispute.

### Standard of Review

On appeal from a pre-award decision to decline all or part of a proposed 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 Shoshone-Bannock*, 61 IBIA at 105; *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*, 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

Appellant argues that BIA failed to satisfy the statutory and regulatory requirement under ISDA to issue a written declination decision when it declined to fund part of the Tribe's contract proposal request for pre-award and start-up funding, and that the Tribe is therefore entitled to the full amount requested, pursuant to § 900.18 of the regulations. *See* Opening Br. at 11-13. Appellant contends that BIA cannot now prove, on appeal, that the partial declination was validly based on one of the statutorily permissible grounds because (1) BIA failed to explain the declination in a written decision within the requisite 90-day time period, as mandated by ISDA, and (2) the record itself does not support a finding that a valid ground for declination existed. *See id.* at 15-20. Appellant further argues that, even if it were possible to discern BIA's reasoning for denying the Tribe's start-up and pre-award request, the declination was arbitrary and capricious in that it broke from BIA's past

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<sup>6</sup> Under BIA's logic, because a proposal for funding in excess of the applicable funding level cannot be cured, i.e. to the extent above the cap, BIA need only award the applicable funding level without issuing a declination decision. By including § 450f(a)(2)(D) as a reason for declination, Congress clearly decided otherwise.

practice, was inconsistent with the law, and undermined the good faith negotiations conducted between BIA and tribal officials. *See id.* at 20-23.

The Board finds it unnecessary to consider the merits of BIA's reasoning because BIA violated its procedural obligation to issue a written declination decision, and as such, the Tribe is entitled, by law, to the full amount of proposed start-up and pre-award funding. ISDA requires that within 90 days of receipt of a contract proposal from a tribe, subject to agreed-upon extensions, the Secretary must approve and award the contract "unless the Secretary provides written notification to the applicant that contains a specific finding that" at least one of the five statutory grounds for declination exist. 25 U.S.C. § 450f(a)(2). If, as relevant to this appeal, the Secretary declines any portion of a tribe's proposed pre-award and start-up funding, the requirement to issue a written declination decision applies to the portion that is declined, and the Secretary must provide assistance to the tribe and fulfill additional obligations to safeguard the tribe's rights on appeal. *See id.* §§ 450f(a)(4), 450f(b); *Shoshone-Bannock*, 61 IBIA at 108.

It is undisputed that BIA did not issue a declination decision with respect to the portion of the requested start-up and pre-award funding that was denied. The partial declination issued by BIA concerning the Tribe's contract addressed only the funds awarded for operating the corrections program, and explicitly excluded consideration of the proposed pre-award and start-up funding. Partial Declination Letter at 1-2 (AR 55-56). The Recommended Decision, issued after the Tribe appealed the initial contract award decision by requesting an informal conference, noted that \$200,000 of the requested start-up funds had been awarded, but failed to address the basis for declining the remaining part of the requested start-up funding and the entirety of the Tribe's request for pre-award funding. *See* Recommended Decision at 1-2 (AR 58-59). The consequence of BIA's failure to issue a written decision on the Tribe's start-up and pre-award budget proposals is prescribed by the applicable regulation; that part of the contract proposal that was not timely declined by BIA is "deemed approved" and the full amount of funding requested in the contract proposal "shall" be awarded to the Tribe. 25 C.F.R. § 900.18; *see Shoshone-Bannock*, 61 IBIA at 111-12.

BIA argues that even if those parts of the Tribe's contract proposal are "deemed approved," BIA is not required to disburse the full amount of funding requested. Answer Br. at 12-13. Instead, BIA maintains that the Tribe is entitled only to the amount of funds requested for "eligible" cost items, and asserts that it has already awarded all of the funding for which the Tribe is eligible, leaving no additional funding to disburse pursuant to § 900.18. *See id.* at 13. Nothing in the statute or regulations suggests that Congress intended to allow such a loophole to the strict requirement that BIA take timely action on contract proposals. To the contrary, the statute reflects congressional intent to foreclose the possibility that BIA might be excused from taking timely action and then be allowed to

reject proposals at its leisure. *See* 25 U.S.C. § 450j-1(a)(5). BIA’s argument, if accepted, would create an unwritten exception in the statute, and the Board lacks authority to modify the clearly expressed will of Congress.

A more faithful interpretation, based on the clear language of the statute and regulations, and the one adopted by the Board in *Shoshone-Bannock*, is that noncompliance with the requirement to issue a declination decision results in the mandatory funding of the full amount of the contract proposal. And as Administrative Law Judge Hammett explained in *Susanville Indian Rancheria v. Director, California Area Office, IHS*, No. IBIA 97-89-A (Departmental Hearings Division, Dec. 14, 2001),<sup>7</sup> “[s]tating the rationale in the decision is not only a statutory and regulatory requirement, it is a necessary first step” to assist the Tribe to overcome the stated objections, to understand the detailed explanation of the decision to decline the proposal, and to provide the Tribe with the opportunity to decide whether to challenge the decision. *Susanville*, No. IBIA 97-89-A at 3. “Withholding part or all of the rationale accomplishes none of the goals of . . . ISDA.” *Id.*

### Conclusion

BIA violated its obligations under 25 U.S.C. § 450f(a)(2) and 25 C.F.R. § 900.29 when it partially declined the Tribe’s proposed start-up and pre-award budget without issuing a written declination decision. As a result of BIA’s violation, the regulations require that the Tribe’s contract proposal for start-up and pre-award costs be “deemed approved,” and the full amount of the proposed start-up and pre-award funding shall be awarded.

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 concludes that BIA failed to demonstrate the validity of the grounds for its partial declination of the Tribe’s start-up and pre-award cost proposal, and is required to award the remaining costs originally requested. The Board remands the matter to BIA for further proceedings consistent with this decision.

I concur:

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// original signed  
Robert E. Hall  
Administrative Judge

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//original signed  
Steven K. Linscheid  
Chief Administrative Judge

<sup>7</sup> Affirmed, Health and Human Services, Departmental Appeals Board, Docket No. A-02-30, Decision No. 1813 (Feb. 6, 2002).