



INTERIOR BOARD OF INDIAN APPEALS

Tohatchi Special Education and Training Center, Inc. v. Navajo Area Director,  
Bureau of Indian Affairs

25 IBIA 259 (04/07/1994)

Related Board case:  
26 IBIA 138



# United States Department of the Interior

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

TOHATCHI SPECIAL EDUCATION AND TRAINING CENTER, INC.

v.

NAVAJO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 93-51-A

Decided April 7, 1994

Appeal from a decision denying mature contract status to an Indian Self-Determination Act contract.

Vacated and remanded.

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

Under 25 U.S.C. § 450b(h) (1988), a "mature contract" is a self-determination contract that has been continuously operated by a tribal organization for 3 or more years, and for which there are no significant and material audit exceptions in the annual financial audit of the tribal organization.

APPEARANCES: Raymond Z. Ortiz, Esq., Santa Fe, New Mexico, for appellant; Thomas O'Hare, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Albuquerque, New Mexico, for the Area Director on the merits; George T. Skibine, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Assistant Secretary - Indian Affairs and the Area Director on jurisdiction.

## OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Tohatchi Special Education and Training Center, Inc., seeks review of a decision issued by the Navajo Area Contracting Officer, Bureau of Indian Affairs (Contracting Officer; BIA), on October 21, 1992, and concurred in by the Navajo Area Director (Area Director) on November 6, 1992. <sup>1/</sup> The decision denied mature contract status to an Indian Self-Determination Act (P.L. 93-638) contract. For the reasons discussed below,

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<sup>1/</sup> In light of the Area Director's concurrence in the decision, the Board deems him to be the final BIA decisionmaker and therefore identifies him as the appellee in this matter. Although the parties appear to object to this, the Board sees no point in requiring appellant to appeal the Contracting Officer's decision to the Area Director, as would be necessary if the Board were to disregard the Area Director's concurrence. See 43 CFR 4.331(a).

the Board vacates the Area Director's decision and remands this matter to him for further consideration.

### Procedural Background

This appeal has followed a long and winding road to reach this point. The BIA decision stated that it could be appealed to the Interior Board of Contract Appeals. Appellant appealed to that Board. On February 17, 1993, the Board of Contract Appeals dismissed the appeal for lack of jurisdiction and transferred it to this Board. Appeal of Tohatchi Special Education & Training Center, IBCA 3135. The appeal was docketed by this Board on March 9, 1993, following receipt of the administrative record. In the meantime, the Area Director sought reconsideration of the dismissal by the Board of Contract Appeals. On March 18, 1993, the Board of Contract Appeals reaffirmed its lack of jurisdiction.

Because the Area Director's request for reconsideration by the Board of Contract Appeals also raised questions as to whether this Board had jurisdiction over the matter, the Board suspended briefing on the merits and ordered the parties to submit briefs on this Board's jurisdiction. The Board also requested the Assistant Secretary - Indian Affairs to advise the Board of his position on the question. On June 25, 1993, following receipt of the requested briefs, the Board issued an order finding that it had jurisdiction over the appeal. The Board stated:

[A] determination must be made as to which of the following appeal procedures is applicable here: (1) 25 CFR Part 2, pursuant to 20 BIAM [BIA Manual] Supp. 1, section 2.2B(2); [2/] (2) 25 CFR 271.81-.82, under the theory that conversion to mature contract status is a contract revision or amendment subject to Part 271; or (3) 25 CFR Part 2, as a matter for which no other administrative appeal procedure is provided by statute or regulation.

Appellant challenges the BIA Manual provision on the grounds that it has not been published in accordance with the Administrative Procedure Act, 5 U.S.C. § 552. The Board's usual rule with respect to provisions which appear only in the BIA Manual, and not in published regulations, is that such provisions cannot be enforced against parties outside BIA but may be enforced against BIA. E.g., Robles v. Sacramento Area Director, 23 IBIA 276 (1993); Carter v. Billings Area Director, 20 IBIA 195 (1991). In Kaw Nation v. Anadarko Area Director, 24 IBIA 21 (1993), the Board found that the appellant was not required to follow an

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<sup>2/</sup> 20 BIAM Supp. 1 was issued on Sept. 25, 1990, to provide interim guidance for implementation of the 1988 amendments to P.L. 93-638, pending promulgation of regulations. Section 2.2B(2) provides: "Unlike declination and funding appeals, a denial of mature contract status is appealable under 25 CFR Part 2."

Proposed regulations for implementation of the 1988 amendments were published on Jan. 20, 1994. 59 FR 3166.

appeal procedure made applicable to its case only by the BIA Manual (in that case, the Part 271 procedure), but was entitled to waive that procedure and proceed under BIA's general appeal regulations in 25 CFR Part 2. Here, as in Kaw Nation, appellant objects to enforcement of the BIA Manual provision. In this case however, unlike Kaw Nation, the procedure called for by the Manual is the same as BIA's "default" procedure, *i.e.*, 25 CFR Part 2. Accordingly, even if the BIA Manual provision is not enforced against appellant here, this appeal may still fall under Part 2 if no other administrative appeal procedure applies. In light of appellant's objection to the Manual provision, the Board finds that the Manual provision, *per se*, may not be applied to this appeal.

The Board next considers whether the appeal procedure in 25 CFR Part 271 is applicable here. Conversion to mature contract status is arguably a contract revision or amendment within the meaning of Subpart E of Part 271, even though this particular kind of revision or amendment was not contemplated when the regulations were published. The Assistant Secretary and Area Director argue, however, that the appeal procedure in Part 271 was intended to apply only to contract declinations which are based upon the declination criteria in 25 U.S.C. § 450f(a)(2) [3/] or upon funding issues. They argue further that a decision to grant or deny mature contract status is not based upon either of these grounds.

Appellant does not discuss the Part 271 appeal procedure. Appellant continues to contend, however, that the proper administrative forum for its appeal is the Interior Board of Contract Appeals. This argument clearly implies that appellant does not believe the Part 271 appeal procedure is applicable here. Accordingly, the parties are apparently in agreement that this appeal is not subject to the Part 271 appeal procedures.

Upon review of Part 271, Subpart E, the Board is inclined to agree with the parties on this point. The Board concludes that this appeal is subject to the appeal procedure in 25 CFR

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3/ 25 U.S.C. § 450f(a)(2) (1988) provides:

"If \* \* \* authorized by an Indian tribe \* \* \*, a tribal organization may submit a proposal for a self-determination contract to the Secretary for review. The Secretary shall, within ninety days after receipt of the proposal, approve the proposal unless, within sixty days of receipt of the 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."

All further references to the United States Code are to the 1988 edition.

Part 2, as a matter for which no other administrative appeal procedure has been established. See 25 CFR 2.3. Accordingly, the Board has jurisdiction over this appeal. [Footnotes omitted.]

(Board's June 25, 1993, Order at 1-2). Upon issuance of this order, the Board reinstated the briefing schedule. Briefs on the merits were filed by appellant and the Area Director. The appeal became ripe for decision on November 15, 1993, when appellant's reply brief was received by the Board.

Three days earlier, however, on November 12, 1993, appellant filed a complaint in Federal district court concerning the matter at issue in this appeal. Tohatchi Special Education & Training Center, Inc. v. Babbitt, CIV 93-1333 JC (D.N.M.). The Board stayed proceedings in this appeal pending advice from the court that the Board might proceed.

On January 14, 1994, the district court stayed proceedings before it in order to allow the Board to proceed with this appeal. Upon receipt of notice of the court's order, the Board restored this case to its active docket.

#### Factual Background

On August 11, 1989, appellant entered into a P.L. 93-638 contract with BIA to provide special educational services for certain handicapped Indian students. Section 215 of the contract established the term of the contract as the period beginning April 1, 1989, and ending September 30, 1989. On July 20, 1990, the term was extended through September 30, 1990. See Contract Modification 8. Although, as far as the Board could find, no further modifications to section 215 were made, the contract has been implicitly extended through provision of funding for subsequent years.

At some point, problems arose with appellant's performance under the contract. On January 31, 1991, BIA issued a notice of intent to cancel the contract for cause. <sup>4/</sup> Evidently, the problems were still unresolved a year later, when Contract Modification 15 was executed. That modification, signed by the Contracting Officer on January 23, 1992, concerned contract funding for the period October 1, 1991, through January 31, 1992. It stated: "This modification is issued pending resolution of the outstanding REASSUMPTION notification" (Capitals in original).

By letter of January 27, 1992, appellant submitted a document entitled "Proposed Mature Contract Scope of Work." BIA returned the document to appellant because no supporting resolution from the Navajo Nation was included. Appellant then obtained resolutions from the Education Committee and the Intergovernmental Relations Committee of the Navajo Nation Council and resubmitted the proposal. On February 19, 1992, the Area Director informed the Nation that appellant's request would be reviewed within 30 days. However, on March 2, 1992, he again wrote to the Nation, stating:

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<sup>4/</sup> No copy of this notice is included in the record.

Tribal resolutions dated January 31, 1992 and February 3, 1992, authorized [appellant] to operate a mature P.L. 93-638 contract.

The resolutions will be held in abeyance until the Mark A. Cross audit of [appellant] is reviewed and issued by the Office of the Inspector General. We also need resolution of the "Notice of intent to cancel contract for cause" dated January 31, 1991.

The Bureau will continue to work cooperatively with the school to avoid an interruption in the Special Education services. Navajo Nation staff will be invited to attend any meetings scheduled with the school.

By letter of March 31, 1992, appellant requested that its existing contract be extended in order to avoid disrupting services pending resolution of its mature contract request. Funds to extend appellant's contract through FY 1992 were provided in Contract Modifications 17-20 and 22. Following appellant's similar request concerning FY 1993, funds for FY 1993 were provided in Contract Modification 23.

Appellant's March 31, 1992, letter also sought information about the status of its request for a mature contract. Several other letters of inquiry followed. BIA made no written response to these inquiries until October 21, 1992, when the decision on appeal was issued.

In the October 21, 1992, decision, the Area Director concluded that appellant's costs under its existing contract had become excessive and that its service population was declining, apparently because of laws requiring that handicapped students be placed in less restrictive environments. In the portion of the decision titled "Determination," the Area Director stated:

1. [Appellant's] REQUEST FOR A MATURE CONTRACT IS HEREBY DENIED. This contract will end when students become age 21. This activity/project funding is based on students turning age 21.
2. [Appellant] shall provide a contract through year 2000, or until such time as all clients reach age 21. If and when the population changes the term and funding will be adjusted accordingly.

The decision then discussed funding for the contract for the years FY 1993 through FY 2000.

#### Discussion and Conclusions

[1] The term "mature contract" was first used in the 1988 amendments to P.L. 93-638. As defined in the amendments, "mature contract" means

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.

25 U.S.C. § 450b(h). See also 25 U.S.C. § 450c(a)(2), concerning maintenance of records for mature contracts; section 450f(a)(3), concerning consolidation of mature contracts; and section 450j(c)(1)(B), concerning the terms of mature contracts. 5/

The Senate report on the 1988 amendments explains:

A definition of "mature contract" is included in order to simplify reporting requirements for contracts that have been successfully operated by tribes for three or more years. It is the intent of the [Select] Committee [on Indian Affairs] that self-determination contracts that have been successfully operated for three or more years, and for which there are no significant and material audit exceptions in the most recent annual audit report of the contractor, should, upon the request of an Indian tribe, be treated as "mature contracts" on the date of enactment of this title. The term "significant and material audit exceptions" means: unresolved audit exceptions involving amounts of questioned costs or reporting deficiencies; a qualified opinion on the part of the auditor resulting from serious departure from generally accepted accounting principles which call into question the financial results being reported; or clear findings of financial mismanagement or misappropriation of funds.

S. Rep. No. 274, 100th Cong., 1st Sess. 18 (1987). Accord S. Rep. 274 at 21: "The purpose of amending the law to include a definition of mature

5/ 25 U.S.C. § 450j(c) provides:

"(1) A self-determination contract shall be—

\* \* \* \* \*

"(B) for a definite or an indefinite term, as requested by the tribe (or, to the extent not limited by tribal resolution, by the tribal organization), in the case of a mature contract.

"The amounts of such contracts shall be subject to the availability of appropriations.

"(2) The amounts of such contracts may be renegotiated annually to reflect changed circumstances and factors, including, but not limited to, cost increases beyond the control of the tribal organization."

Although the 1988 amendments provided that all mature contracts would be for indefinite terms, subsection 450j(c)(1)(B) was amended in 1990 to provide that mature contracts could have either definite or indefinite terms.

contract is to decrease unnecessary contract compliance, reporting and monitoring requirements.”

The statutory language and the legislative history indicate that the designation of a contract as mature was intended to be a relatively simple and straightforward decision. As is clear from the definition in 25 U.S.C. § 450b(h), only two findings are required--(1) that the contract has been continuously operated by a tribal organization for 3 or more years and (2) that there are no significant and material audit exceptions in the annual financial audit of the tribal organization.

In his brief before the Board, the Area Director contends that the audit of appellant's contract showed serious problems with appellant's contract. 6/ The Area Director would have been justified in denying mature contract status to appellant's contract if the audit showed significant and material audit exceptions. However, the Area Director did not rely on the audit to reach his decision. Nor did he include a copy of the audit in the administrative record. The Board finds that the Area Director's decision is not supported by any evidence concerning “significant and material audit exceptions.”

The other factor to be considered is whether appellant's contract has been continuously operated for 3 or more years. Although appellant's present contract clearly has been operated for 3 or more years, appellant added a complicating factor when, rather than simply requesting conversion of its existing contract to mature contract status, it submitted an entire contract proposal, in the manner contemplated for the submission of proposals for new contracts. Appellant's approach made its request internally inconsistent--that is, appellant appeared to be seeking, at the same time, (1) either a new contract or a revision of its existing contract, 7/ and

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6/ The Area Director contends:

"Since the audit findings were so serious and had to be transmitted to law enforcement official[s, the Contracting Officer] could not use the contents or conclusions of the audit to deny the Appellant a mature contract. \* \* \* If the audit merely showed accounting improprieties instead of criminal conduct, the contracting officer could have used the audit to deny the Appellant a mature contract."

(Area Director's Brief at 10-11). The Board does not understand this statement. It seems likely that, if the audit revealed criminal activity, it would also have revealed financial mismanagement or misappropriation of funds. See S. Rep. 274 at 18, quoted supra. It is possible that the Area Director was attempting to argue that the audit was evidence in an ongoing criminal investigation and therefore could not be disclosed in this administrative proceeding.

7/ The proposal appears relatively complete, as if it were intended to be a proposal for a new contract. The Board is unfamiliar with BIA practice as to whether a proposal of this nature would normally be deemed a proposal for a new contract or a proposal for revision of an existing contract. The parties do not discuss the matter.

(2) mature contract status for its contract. The conflict between these goals is apparent when it is recognized that, to the extent appellant sought to change or replace its existing contract, it diminished the likelihood that the contract could be considered eligible for mature contract status. 8/

Appellant evidently considered its request to be subject to 25 U.S.C. § 450f(a)(2), although it did not make its understanding clear to BIA until it wrote to the Contracting Officer on July 20, 1992, nearly 6 months after it submitted its proposal. BIA, at least initially, interpreted appellant's submission as a request for mature contract status rather than a proposal under section 450f(a)(2). 9/ Appellant now contends that its proposal was subject to the deadlines in section 450f(a)(2). 10/ The Board finds that, in light of the confusing nature of appellant's initial submission, appellant was under an obligation to correct BIA's apparent misunderstanding of its request prior to the expiration of the time periods in 25 U.S.C. § 450f(a)(2). Having failed to do so, appellant is not now entitled to invoke those deadlines. 11/

Despite this holding, the Board finds that the Area Director's October 21, 1992, decision to deny mature contract status to appellant's contract is not supported by the record and must be vacated.

Upon remand of this matter, the best way for BIA to consider appellant's request is to divide it into its two components and to consider those components sequentially. BIA should first consider appellant's request as a proposal for a new or revised contract under 25 U.S.C.

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8/ This is not to say that any change in a contract would make it ineligible for mature contract status. It is at least arguable, however, that substantial changes would do so.

9/ See Area Director's Feb. 7, 1992, letter to appellant: "We are returning your package requesting mature contract status." See also Area Director's Feb. 19 and Mar. 2, 1992, letters. Appellant was put on notice by these letters that BIA did not construe appellant's submission as a proposal under 25 U.S.C. § 450f(a)(2).

10/ Appellant's argument here is inconsistent with its argument during the jurisdictional phase of this appeal. If appellant believed the Area Director's decision constituted an attempted declination of a contract proposal under 25 U.S.C. § 450f(a)(2), as it now appears to argue, it should have contended that jurisdiction over the matter fell under 25 CFR Part 271.81-.82, under which appeals from such actions are considered. Although offered the opportunity to make this argument (See Board's Mar. 22, 1993, order for Briefs on Jurisdiction), appellant did not do so.

11/ This does not excuse BIA's long delay in responding to appellant's requests for information on the status of its submission. Even though appellant's audit had been referred to the Inspector General and the matter may have been out of BIA's control, BIA should have provided at least some interim responses to appellant's inquiries.

§ 450f(a)(2) and grant or deny the proposal in accordance with that provision. 12/ Then, assuming it approves a new or revised contract, BIA should proceed to the consideration of appellant's request for mature contract status. It should compare the new or revised contract with appellant's former contract to determine whether they are enough alike that the new or revised contract may be deemed to have been in existence for the 3 years necessary for mature contract status. If it reaches an affirmative conclusion on this question, BIA must approve the request unless it finds that there are significant and material audit exceptions in the audit of appellant's operation.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's decision is vacated, and this matter is remanded to him for further proceedings. 13/

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//original signed  
Anita Vogt  
Administrative Judge

I concur:

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//original signed  
Kathryn A. Lynn  
Chief Administrative Judge

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12/ For purposes of this remand, the time periods in 25 U.S.C. § 450f(a)(2) will begin to run when the Area Director receives this decision.

13/ Appellant indicates that it intends to seek attorney fees. Appellant should submit its request in accordance with 43 CFR 4.610-4.619.