DEPARTMENT OF THE INTERIOR HEARINGS DIVISION

Trenton Indian Service Area v. Billings Area Director, Indian Health Service

Docket No. IBIA 07-106-A (09/20/2007)

United States Department of the Interior

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September 20, 2007

TRENTON INDIAN SERVICE AREA,	)	IBIA 07-106-A
	)	
Appellant	)	Appeal from March 9, 2007, decision
	)	issued by the Billings Area Director
v.	)	declining proposed contract for health
	)	care services.
BILLINGS AREA DIRECTOR, INDIAN	)	
HEALTH SERVICE,	)	Indian Self-Determination Act (ISDA)
	)	25 U.S.C. §§ 450-450n
Appellee	)	

RECOMMENDED DECISION

APPELLEE'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT DENIED
APPELLANT'S MOTION FOR SUMMARY JUDGMENT GRANTED
APPEAL DISMISSED
HEARING CANCELLED

Appearances: Karla Hauck, Esq. Trenton, North Dakota, for the Trenton Indian Service Area
Gary Fahlstedt, Esq., Denver, Colorado, for the Director, Billings Area, Indian Health Service

Before: Administrative Law Judge Robert G. Holt

I. Introduction

This matter is before me on cross motions for dismissal or for summary judgment. Appellant, Trenton Indian Service Area, is a tribal organization serving the members of the Turtle Mountain Band of Chippewa Indians living in six counties on either side of the border between Montana and North Dakota. Appellee, Billings

Area Director, Indian Health Service, provides health services to Indians in Montana.

Trenton has a current Indian Self-Determination and Education Assistance Act ("ISDA") contract administered by the Aberdeen Area of the IHS lasting through Fiscal Year (FY) 2008. The Aberdeen Area Office provides services to Indians on the North Dakota side of the border with Montana. The contract requires Trenton to provide medical services in both North Dakota and Montana. The associated Annual Funding Agreement provides funds though FY 2007.

Trenton has applied to the Billings Area for an additional contract covering Indians living in Montana. The IHS has argued that Trenton did not make a proper proposal, but that if it did, then the Billings Area must decline the proposal because Trenton already has a contract with the Aberdeen Area to provide the same services to the same population.

In light of the ISDA purpose to facilitate the transfer of services from the IHS to tribal organizations and the requirement to interpret its provisions in favor of Indian tribes, I have liberally interpreted Trenton's proposal as a request for the Billings Area to provide the funds that it may be spending on Turtle Mountain tribal members living in Montana. Under this interpretation, I cannot grant the motion of the Billings Area to dismiss or for summary judgment because an issue of fact exists about whether the Billings Area has retained funds to provide services for members of the Turtle Mountain Band in Montana.

The Billings Area claims that it provided funds to Trenton when Trenton first entered the contract with the Aberdeen Area. But Trenton has provided evidence that the Billings Area may still retain some funds to provide a category of medical services known as Contract Health Services. The evidence shows that the Billings Area may still provide these medical services, and perhaps others, for members of the Turtle Mountain Band through its Fort Peck Service Unit in Poplar, Montana. Because of this fact dispute, and for additional reasons discussed below, I cannot grant the IHS 's motions.

On the other hand, Trenton's motion asks for a unique remedy. Instead of asking for a contract award, it asks for the procedural remedy of an order requiring

the IHS "to withdraw the declination and provide technical assistance." Appellant Mot. for Summ. J. 23. Trenton argues that it is entitled to this remedy because the IHS has not followed proper ISDA procedure and has not provided adequate technical assistance. I can grant Trenton's request because the Billings Area did not provided Trenton with sufficient technical assistance to present an adequate contract proposal. Granting Trenton's remedy requires voiding both Trenton's pending request and the IHS 's declination, effectively sending the parties back to negotiations.

The following materials will first describe the requirements of the ISDA and its implementing regulations, next provide background for the relationship between the IHS and Trenton, and conclude by analyzing the parties' motions.

II. The Indian Self-Determination and Education Assistance Act

The ISDA provides a mechanism for Indian tribes to assume responsibility for services provided by federal governmental agencies. If a tribal organization desires to provide services to tribal members, it may submit a contract proposal to the IHS. The IHS then has 90 days to decline the proposal, but only on five possible grounds. If not declined, the ISDA deems the proposal accepted:

> [T]he Secretary shall, within ninety days after receipt of the proposal, 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--
>
> (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 (or portion thereof) that is the subject of the proposal is beyond the scope of programs,

> functions, services, or activities covered under paragraph (1) because the proposal includes activities that cannot lawfully be carried out by the contractor.

25 U. S. C. § 450f(a)(2) (2000); *See also*, 25 C. F. R. §§ 900.16 - 900.18, 900.22, 900.24.

The statute defines the amount of funds the IHS must provide a tribal organization to perform the contract. It is the amount the IHS would otherwise provide for the relevant services:

> The amount of funds provided under the terms of self-determination contracts entered into pursuant to this Act shall *not be less than the appropriate Secretary would have otherwise provided for the operation of the programs* or portions thereof for the period covered by the contract, ...

25 U.S.C. § 450j-1(a)(1) (2000) (emphasis added).

Thus, the ISDA allows for the transfer of responsibility for existing services, together with existing funds, from the federal government to a tribal organization. But, it does not provide a mechanism to increase the funding amount from what Congress has provided. In other words, the ISDA does not provide a remedy for situations where services may be underfunded or even unfunded. No matter how strongly a tribal organization may assert an urgent need for funding, the IHS can only transfer the funds that Congress has appropriated to provide the services that are transferred.

When the IHS declines to accept a contract proposal, the statute imposes additional duties upon the IHS to assist the tribal organization in overcoming the objections:

> Whenever the Secretary declines to enter into a self-determination contract or contracts pursuant to subsection (a) of this section, the Secretary shall--
> (1) state any objections in writing to the tribal organization,

(2) provide assistance to the tribal organization to overcome the stated objections,

25 U.S.C. § 450f(b) (2000).

The implementing regulations also provide additional requirements. For example, the IHS must provide technical assistance, not only when it declines a proposal, but also when a tribal organization prepares an initial proposal:

> What technical assistance is available to assist in preparing an initial contract proposal?
>
> The Secretary shall, upon request of an Indian tribe or tribal organization and subject to the availability of appropriations, provide technical assistance on a non-reimbursable basis to such Indian tribe or tribal organization to develop a new contract proposal or to provide for the assumption by the Indian tribe or tribal organization of any program, service, function, or activity (or portion thereof) that is contractible under the Act. The Secretary may also make a grant to an Indian tribe or tribal organization for the purpose of obtaining technical assistance, as provided in section 103 of the Act. An Indian tribe or tribal organization may also request reimbursement for pre-award costs for obtaining technical assistance under sections 106(a)(2) and (5) of the Act.

25 C.F.R. § 900.7.

> Is technical assistance available to an Indian tribe or tribal organization to avoid declination of a proposal?
>
> Yes. In accordance with section 103(d) of the Act, upon receiving a proposal, the Secretary shall provide any necessary requested technical assistance to an Indian tribe or tribal organization, and shall share all relevant information with the Indian tribe or tribal organization, in order to avoid declination of the proposal.

25 C.F.R. § 900.28.

> When the Secretary declines all or a portion of a proposal, is the Secretary required to provide an Indian tribe or tribal organization with technical assistance?
>
> Yes. The Secretary shall provide additional technical assistance to overcome the stated objections, in accordance with section 102(b) of the Act, and shall provide any necessary requested technical assistance to develop any modifications to overcome the Secretary's stated objections.

25 C.F.R. § 900.30.

All these statutes and regulations are subject to important interpretive requirements which favor the contractibility of programs and the liberal interpretation of statutes and regulations to facilitate inclusion, rather than exclusion, of programs in contracts with tribes:

> . . .
>
> (8) It is the policy of the Secretary that the contractibility of programs under this Act should be encouraged. In this regard, Federal laws and regulations should be interpreted in a manner that will facilitate the inclusion of those programs or portions of those programs that are for the benefit of Indians under section 102(a)(1) (A) through (D) of the Act, and that are for the benefit of Indians because of their status of Indians under section 102(a)(1)(E) of the Act.
>
> . . .
>
> (11) The Secretary's commitment to Indian self-determination requires that these regulations be liberally construed for the benefit of Indian tribes and tribal organizations to effectuate the strong Federal policy of self-determination and, further, that any ambiguities herein be construed in favor of the Indian tribe or tribal organization so as to facilitate and enable the transfer of services, programs, functions, and activities, or portions thereof, authorized by the Act.

25 C.F.R. § 900.3(b).

Having reviewed these relevant statutes and regulations, the following materials will next describe the background for the current dispute.

III. Background

The Turtle Mountain Band of Chippewa Indians is a federally recognized Indian tribe with a small reservation located in north-central North Dakota, near the Canadian border. The original reservation proved too small to accommodate land allotments for all tribal members, so Congress authorized allotments from public domain land in six counties along either side of the Montana-North Dakota border. The Turtle Mountain Band eventually created the Trenton Indian Service Area as a tribal organization to serve the tribal members located in these six Montana and North Dakota counties. This area is some 250 miles west of the Turtle Mountain Reservation.

The area served by Trenton straddles two IHS administrative areas. The Billings Area serves Montana and the Aberdeen Area serves North Dakota. Trenton has contracted with the IHS since 1980 to provide health related services for Turtle Mountain members located in the six Montana and North Dakota counties. The existing Self-Determination Agreement expires at the end of FY 2008. Resp't Mot. to Dismiss Ex. 1 at 4-10. The associated Annual Funding Agreement provides funding through FY 2007. *Id*. at 1-3. The Aberdeen Area administers both the Self-Determination Agreement and the Annual Funding Agreement.

Trenton first expressed interest in obtaining a contract from the Billings Area in an October 2006 letter enclosing a resolution of the Trenton Board of Directors. Resp't Mot. to Dismiss Ex. 2. After some discussions between the Billings Area and Trenton, Trenton submitted a second resolution. Resp't Mot. to Dismiss Ex. 3. The Billings Area responded with a letter stating its belief that Trenton's request should properly be made to the Aberdeen Area as a request for contract modification. Resp't Mot. to Dismiss Ex. 4. Trenton then submitted a third resolution. Resp't Mot. to Dismiss Ex. 5. The Billings Area responded with a letter stating that it did not regard Trenton's submissions as a "legally cognizable contract proposal under" the ISDA, but, in case it might be regarded as a proposal, they declined it. Resp't Mot. to Dismiss Ex. 6 at 2. When the subsequent informal conference failed, Trenton appealed. Resp't Mot. to Dismiss Exs. 7-9.

With this background in mind, the next section will discuss the resolution of Trenton's appeal in the context of the pending motions.

IV. Discussion

A. The IHS Motions

1. Motion to Dismiss

The IHS advances three grounds for dismissing Trenton's appeal: (1) Trenton does not propose to contract for any new programs, functions, services, or activities; (2) Trenton has not submitted a proper authorizing resolution from the Turtle Mountain Band; and (3) Trenton presents a post-award dispute that is not subject to appeal. None of these grounds justify dismissal of Trenton's appeal.

First, the IHS argues that Trenton cannot propose a new contract because it has a current contract and funding agreement which cover all possible programs, functions, services, activities. Therefore, the IHS cannot contract twice with Trenton to provide the same thing. It correctly points out that the existing contract is quite broad and specifically includes the three Montana counties within the responsibility of the Billings Area. Resp't Mot. to Dismiss Ex. 1. Further, Trenton's submissions are imprecise enough to be interpreted as the IHS has done.

Nevertheless, the response by Trenton to the pending motions demonstrates that it did not intend to contract twice for the same services. Mem. in Opp'n to Appellee's Mot. 28-29. Rather, its submissions may be interpreted as an intent to contract for any services that the Billings Area may still be providing to tribal members in Montana. As an example, Trenton points to evidence that the Billings Area may still provide Contract Health Services to tribal members through the Fort Peck Service Unit at Poplar, Montana, which is within the Billings Area. *See Id.* at 17 and Exs. X, Y, Z. According to Trenton, it is entitled to contract for those services and receive the funds that the Billings Area may be spending on them:

> [I]f Fort Peck Service Unit agreed to provide [Contract Health Services] to Chippewa living in the Montana counties of the Trenton Service Area, then [Trenton] is entitled to contract for those funds that the Fort Peck Service Unit was, and is utilizing to provide [Contract Health Services] to those Chippewa.

Id. at 19.

Based on Trenton's responses, I conclude that Trenton's submission to the Billings Area should be interpreted as a proposal to contract for any services the Billings Area may still provide to Turtle Mountain members in Montana, including any Contract Health Services provided by the Fort Peck Service Unit.

The current Self-Determination Agreement does not prevent this interpretation. The contract language describes a comprehensive group of functions, services, activities, and programs (*e.g.*, Hospitals & Clinics, Dental, Mental Health, Alcoholism, Contract Health Service, Public Health Nursing, Community Health Representative), but the language does not say that the IHS has transferred all of the stated functions, services, activities, and programs to Trenton. Resp't Mot. to Dismiss Ex. 1 at 9-10. Thus, the contract language leaves open the possibility that the IHS may have retained some.

Neither does the Annual Funding Agreement prevent this interpretation. The IHS argues that because Trenton accepted the current Annual Funding Agreement for FY 2007, it cannot contract for more funds to perform the contract. The argument may prevent additional funds for FY 2007, but it would not apply for a period in which Trenton had not yet received funds (*i.e.,* FY 2008). Therefore, Trenton's submission may be further interpreted as a proposal for FY 2008, a period not covered by an existing annual funding agreement.

Even if Trenton's proposal were interpreted to cover a period also covered by an existing funding agreement (*i.e.*, FY 2007), Trenton could still present a valid proposal. If the IHS had withheld funds (for example to provide Contract Health Services at the Fort Peck Service Unit), Trenton may propose to receive these funds as the funds the IHS would "otherwise provide for the operation of the programs or portions thereof for the period covered by the contract, ..." *See* 25 U.S.C. § 450j-1(a)(1) (2000).

Further, the contract itself and the ISDA statute support interpretations that include, rather than exclude, the transfer of services and funding in ISDA contracts. For example, section (a)(2) of the current Self-Determination Agreement provides:

> Each provision of the [ISDA] and each provision of this Contract shall be liberally construed for the benefit of the Contractor [*i.e.*, Trenton] to transfer the funding and the following related functions, services, activities, and programs . . . from the Federal Government to the Contractor.

Resp't Mot. to Dismiss Ex. 1 at 9. *See also* 25 C.F.R. § 900.3(b)(8) ("Federal laws and regulations should be interpreted in a manner that will facilitate the inclusion of those programs or portions of those programs that are for the benefit of Indians"); *i.d.*, § 990.3(b)(11)("any ambiguities herein [should] be construed in favor of the Indian tribe or tribal organization so as to facilitate and enable the transfer of services, programs, functions, and activities, or portions thereof . . . ."). Thus, I conclude that the existing contract should be interpreted to leave room for an additional contract to cover services the Billings Area may still retain.

Once Trenton's submission is interpreted as a proposal to contract, beginning in FY 2008, for any services the Billings Area may still provide to Turtle Mountain members in Montana, the IHS argument that Trenton has not proposed to contract for any new programs, functions, services, or activities carries no weight.

Second, the IHS argues that Trenton has not provided an authorizing resolution from the Turtle Mountain Band as required by the ISDA. Because Trenton is not a tribe itself, but rather, is a tribal organization created by a federally recognized tribe, the IHS asserts that the Turtle Mountain Band must provide an authorizing resolution in order for Trenton to propose another contract to the IHS. Because Trenton failed to present such a resolution, the IHS argues it must reject any proposal Trenton presented.

I first note that the IHS did not identify a missing authorizing resolution as a deficiency in its declination letter to Trenton (Resp't Mot. to Dismiss Ex. 6 at 1) or in its response to Trenton's notice of appeal. Agency Resp. to Notice of Appeal. Further, the IHS specifically excluded a tribal resolution from the information it required from Trenton in its letter of January 30, 2007. Agency Opp'n to Appellant's

Mot. for Summ. J. Ex. 8 at 1 (The IHS letter excepted the item required by 25 C.F.R. § 900.8(d) (*i.e.*, an authorizing resolution the from tribe). If the IHS had pointed out this deficiency, Trenton might have been able to cure it.

More importantly, the IHS overlooks an exception to the general requirement for a tribal resolution. 25 C.F.R § 900.8(d) provides that a resolution is not required where a tribal organization proposes to serve tribal members not located on the tribe's reservation:

> What must an initial contract proposal contain?
>
> An initial contract proposal must contain the following information:
>
> . . .
>
> (d) A copy of the authorizing resolution from the Indian tribe(s) to be served.
>
> (1) If an Indian tribe or tribal organization proposes to serve a specified geographic area, it must provide authorizing resolution(s) from all Indian tribes located within the specific area it proposes to serve. *However, no resolution is required from an Indian tribe located outside the area proposed to be served whose members reside within the proposed service area*.
>
> (2) If a currently effective authorizing resolution covering the scope of an initial contract proposal has already been provided to the agency receiving the proposal, a reference to that resolution.

25 C.F.R § 900.8(d) (emphasis added).

Trenton satisfies the conditions for an exception under subsection (d)(1) to the above regulation. It serves tribal members residing outside the Turtle Mountain Reservation. The Turtle Mountain Band is located some 250 miles east of Trenton's service area in north-central North Dakota, but the members Trenton serves reside across the state on the western border of North Dakota and the eastern border of Montana.

Further, under subsection (d)(2), a tribal organization need not submit a new resolution with each proposal. Trenton must have submitted any required resolution for the initial contract it entered with the Aberdeen Area and it need not provided it again.

Therefore, I conclude that the lack of a current authorizing resolution from the Turtle Mountain Band does not justify dismissal.

Third, the IHS argues that Trenton's submission concerns a post-award dispute that is not subject to appeal. This ground for dismissal must also fail because, as discussed above, Trenton's submission may be interpreted as a proposal to contract, beginning in FY 2008, for any services the Billings Area may still provide to Turtle Mountain members in Montana. This interpretation makes Trenton's submission a contract proposal and not a post-award dispute.

Because none of the grounds asserted by the IHS justify a dismissal of Trenton's appeal, I must deny its motion to dismiss.

2. Motion for Summary Judgment

Alternatively, the IHS argues that if the appeal cannot be dismissed, then summary judgment should be granted in its favor because no material factual issues are in dispute. It primarily argues that the doctrines of waiver and estoppel preclude Trenton from obtaining additional funds or changing the terms of its existing contract.

But, as discussed above, Trenton's submission should not be considered a proposal to change its existing contract but rather should be interpreted as a proposal to enter an additional contract for any services the Billings Area may still be providing to Turtle Mountain members in Montana. With this interpretation, the existing contract cannot provide a basis for waiver or estoppel. The waiver and estoppel arguments become even weaker if Trenton's proposal is interpreted to include the period beginning with FY 2008, for which no annual funding agreement existed.

I have also considered whether summary judgment could be granted because the Billings Area does not, in fact, provide services to any Turtle Mountain members

in Montana and thus has no funds or services to transfer to Trenton. If this fact was undisputed, the IHS might still be entitled to judgment in its favor. In this circumstance, Trenton would not be entitled to an additional contract, despite its proposal as interpreted above. But a factual dispute exists over whether the Billings Area does or does not provide services to Turtle Mountain members in Montana.

The Billings Area has presented evidence that it has contributed funding to Trenton from the time that the Aberdeen Area first entered contracts with Trenton in the 1980s. Agency Opp'n to Appellant's Mot. for Summ. J. 2-7 and Exs. 1-7. According to the IHS, this funding has now reached over $400,000 through subsequent appropriations increases. Agency Resp. to Notice of Appeal 11. This evidence establishes that the Billings Area has provided *some* funding but, it does not establish that the Billings Area has provided *all* the funds that it would otherwise spend on Turtle Mountain members in Montana.

On the other hand, Trenton has presented evidence that the Billings Area may still be providing Contract Health Services to tribal members through the Fort Peck Service Unit at Poplar, Montana. *See* Mem. in Opp'n to Appellee's Mot. 17 and Exs. X, Y, Z. The exhibits describe how tribal members access Contract Health Services through the Fort Peck Service Unit. One can imply from these exhibits that the Billings Area still provides funds through its Fort Peck Service Unit for Turtle Mountain members and thus may not have supplied Trenton with all the funds Trenton may be entitled to receive under the ISDA. This factual dispute over whether the Billings Area still retains funds to provide services to Turtle Mountain members in Montana prevents summary judgment in favor of the IHS.

Having considered the IHS 's two motions and concluded that they do not warrant dismissal or judgment in favor of the IHS, Trenton's motion for summary judgment will next be considered.

B. Trenton's Motion for Summary Judgment

1. The Grounds

Trenton argues that it is entitled to summary judgment on procedural grounds. It claims that (1) the IHS failed to follow the regulatory procedure for

considering proposed contracts, and (2) the IHS failed to provide Trenton with the technical assistance necessary to present a valid proposal.

First, Trenton argues the IHS failed to satisfy the procedural requirement of 25 C.F.R. § 900.15(a) to provide written notice of receipt of Trenton's proposal within two days. The IHS argues that it did not initially regard Trenton's October 2006 submission as a contract proposal. But, when the IHS did eventually treat the submission as a proposal on January 18, 2007, it still did not provide a written receipt as required by the regulation.

Trenton also argues that the IHS failed to satisfy the requirement of 25 C.F.R. § 900.15(b) to provide written notice of any missing items (required by 25 C.F.R. § 900.8) within fifteen days after receipt of Trenton's proposal. The IHS argues that it did provide the required written notice once it concluded that Trenton intended its October 2006 submission to be a contract proposal. But the IHS response did little more than recite the regulation (25 C.F.R. § 900.8) and failed to tailor the list of missing items to the fact that Trenton already had an existing contract (*i.e.*, the regulation at 25 C.F.R. § 900.8 contains the requirements for initial contracts). Agency Opp'n to Appellant's Mot. for Summ. J. Ex. 8.

Finally, Trenton argues that the IHS failed to satisfy the requirement of 25 C.F.R. § 900.29(a) to provide copies of materials relied upon in making the declination decision within 20 days after the decision. The IHS argues that Trenton already possessed copies of relevant documents and, in any event, that Trenton received additional copies at the informal conference on April 26, 2007. But even considering these assertions, the IHS, at a minimum, should have identified within 20 days those documents as the ones it relied upon in making the declination decision. The IHS failed to do this.

Therefore, I conclude that the IHS did not comply with the procedural regulations described above.

Second, Trenton contends that the IHS failed to satisfy the requirement of 25 C. F. R. §§ 900.7 and 900.28 to provide adequate technical assistance to Trenton in making a contract proposal. The IHS argues that no amount of technical assistance could have overcome the conclusion that Trenton could not contract for the same programs twice. Agency Opp'n to Appellant's Mot. for Summ. J. 7-8; Agency Resp.

to Notice of Appeal 14-16 (citing *California Rural Indian Health Board v. Indian Health Service*, Dept. App. Bd. Dec. No. CR273 (Dept. of Health and Hum. Servs. 1993)). But as discussed above, Trenton's submission should not be interpreted as a proposal to contract twice for the same thing. Rather, it should be interpreted as a proposal to contract for whatever the Billings Area may still retain.

Further, the IHS declination lists a number of technical deficiencies in Trenton's submission:

> The resolution provides some, but not all, of the required items of information. For example, the resolution does not provide a description of the specific programs, functions, services, or activities that you propose to perform under a new contract; does not provide a copy of your most recent indirect cost rate agreement; does not describe minimum staff qualifications; does not identify the amount of funds requested by program, function, service, or activity; requests start-up costs but without specifying an amount; requests pre-award costs but without specifying an amount; does not provide a breakdown of direct contract support costs by major budget category; and does not propose either a starting date or a contract term.

Resp't Mot. to Dismiss Ex. 6 at 1.

The fact that IHS claims that these deficiencies remain demonstrates that it has not provided adequate technical assistance to correct them. If the IHS had provided adequate technical assistance, all that should remain would be for the IHS to accept the proposal or to decline it on one of the statutory grounds identified in the ISDA. *See* 25 U. S. C. § 450f(a)(2)(A)-(E) (2000).

Nothing in the ISDA requires the IHS to assist a tribal organization in preparing a proposal which the IHS must accept. Even with adequate technical assistance, a tribal organization may still submit a proposal which the agency may decline on the statutory grounds. For example, if Trenton had expressly submitted a contract proposal, beginning in FY 2008, for any services the Billings Area still provided to Turtle Mountain members in Montana, the IHS could still decline it if the Billings Area was not providing such services or if Trenton, under its contract

with the Aberdeen Area, was already receiving the funds the Billings Area would otherwise provide for the services.

At a minimum, the IHS must provide enough assistance for Trenton to structure a submission that the IHS can treat as a proposal. The assistance must also be enough for Trenton to overcome any IHS objections that Trenton failed to provide the information required by regulations such as 25 C.F.R. § 900.8 (What must an initial contract proposal contain?). Because the IHS did not achieve this result for Trenton's proposal, I conclude that the IHS did not provide Trenton with the technical assistance required by the regulations.

2. Remedy

The regulatory violations described above are technical and mostly involve the procedural rights afforded Trenton under the ISDA. The IHS correctly points out that nothing in the ISDA, or its regulations, provides a remedy for violation of such rights. The substantive remedy of a contract award applies only where an agency has not proven its declination was justified on one of the specified grounds. 25 U. S. C. § 450f(a)(2)(A)-(E) (2000); *See also*, 25 C. F. R. §§ 900.16 - 900.18, 900.22, 900.24.

But Trenton has not asked for a contract award. Rather, it has asked for an order requiring the IHS to withdraw its declination and provide technical assistance. Appellant Mot. for Summ. J. 23; Mem. in Opp'n to Appellee's Mot. 30; Appellant Reply to Agency Opp'n 1. This is a reasonable procedural remedy for the violation of the procedural regulations described above.

Nevertheless, I cannot enter the precise order Trenton requests because I do not have supervisory authority over the IHS (*i.e.*, I cannot order the IHS to provide technical assistance). But I can provide relief that accomplishes the same result by interpreting Trenton's request for relief as including an implied withdrawal of any pending contract proposal. This interpretation permits the IHS and Trenton to start over and gives the IHS another opportunity to provide adequate technical assistance.

C. Recommendation for Mediation

Having considered and decided the pending motions, I offer the following observation for whatever assistance it may be to the parties. The voluminous filings on these motions demonstrate that the parties and their counsel are not fully communicating their concerns. Trenton's submissions seem very broad and may ask for results (*i.e.*, funds for unfunded or underfunded programs) beyond what the ISDA can provide, while the IHS submissions seem very narrow and technical. The circumstances suggest that a mediation process may be useful before the parties again begin the formal process of making contract proposals and considering declinations. I therefore encourage the parties (including both the Billings Area and the Aberdeen Area of IHS) to engage in some form of mediation.

Because this office will no longer have jurisdiction after this appeal is dismissed, the Office of Hearings and Appeals cannot provide a mediator. Nevertheless, I encourage the parties to seek one elsewhere, perhaps within other offices of the Department of the Interior (*i.e.*, Office of Collaborative Action and Dispute Resolution) or the Department of Health and Human Services.

V. Conclusion

Having considered the motions, the supporting and opposing memoranda, the other papers on file, and for good cause, it is ordered that:

1. The motion of appellee, the Billings Area Director, Indian Health Service, for dismissal is denied.

2. The alternative motion of appellee, the Billings Area Director, Indian Health Service, for summary judgment is denied.

3. The motion of appellant, Trenton Indian Service Area, for summary judgment is granted.

4. The pending contract proposal and the declination that are the subject of this appeal are declared void.

5. The appeal by the Trenton Indian Service Area of the declination made by the Billings Area Director, Indian Health Service, dated March 9, 2007, is dismissed, without prejudice to right of the Trenton Indian Service Area to make another contract proposal or the right of the Billings Area Director, Indian Health Service to decline a new contract proposal, if warranted.

6. The Prehearing Conference scheduled for October 30, 2007, and the hearing scheduled for November 6, 2007, are cancelled.

Appeal Information

Within 30 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Secretary under 25 CFR 900.165(b). An appeal to the Secretary under 25 CFR 900.165(b) shall be filed at the following address:

Department of Health and Human Services
Departmental Appeals Board
MS 6127, Appellate Division
Cohen Building, Room G-644
330 Independence Ave. S.W.
Washington, DC, 20201

You shall serve copies of your notice of appeal on the official whose decision is being appealed. You shall certify to the Secretary that you have served this copy. If neither party files an objection to the recommended decision within 30 days, the recommended decision will become final.

// original signed
Robert G. Holt
Administrative Law Judge