



DEPARTMENT OF THE INTERIOR HEARINGS DIVISION

Walker River Paiute Tribe v. Director, Phoenix Area Indian Health Service

Docket No. IBIA 14-051 (08/27/2014)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS

Departmental Hearings Division
351 South West Temple, Suite 6.300
Salt Lake City, Utah 84101
TELEPHONE: (801) 524-5344
FACSIMILE (801) 524-5539

August 27, 2014

ORDER

| | |
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| WALKER RIVER PAIUTE TRIBE, |) IBIA 14-051 |
| |) |
| Appellant |) Appeal of a December 27, 2013, |
| |) Decision partially declining the |
| v. |) Tribe's proposed scope of work for |
| |) its Indian Self Determination and |
| DIRECTOR, PHOENIX AREA INDIAN |) Education Assistance Act (ISDA). |
| HEALTH SERVICE, |) |
| |) Indian Self-Determination and |
| Appellee |) Education Assistance Act (ISDA) |
| |) 25 U.S.C. § 450j-1(a) |

RECOMMENDED SUMMARY DECISION

PROCEDURAL BACKGROUND

On February 12, 2014, the undersigned conducted a telephonic scheduling and status conference with respect to this docket in accordance with the provisions of 25 C.F.R. 900.161(b). In attendance, in addition to the undersigned, were the following: Carl W. Johnson, Chairman, Walker River Paiute Tribe, on behalf of the Appellant; Kim Richardson, Health Director, Walker River Paiute Tribe; Amber Torres, Vice-Chairman, Walker River Paiute Tribe; and, Michael Shachat, Esq., counsel for the Appellee, the Director, Phoenix Area Indian Health Service.

During that conference, each of the parties stated that they did not intend to pursue discovery, and each affirmed that they possessed all necessary documents in order to pursue this adjudication. In addition, both parties agreed with the undersigned that the instant docket lends itself to resolution by recourse to Summary Judgment, as there were no apparent material issues of fact in dispute between the parties, and the issues for adjudication are legal in content. Pursuant

thereto, a mutually agreeable summary judgment briefing schedule was entered in my February 12, 2014, Summary Judgment Scheduling Order.

Appellee's Motion For Summary Judgment was filed on April 14, 2014. Appellant's Response and Cross-Motion for Summary Judgment were scheduled to be filed on June 16, 2014; however because of the relocation of the Departmental Hearings Division to a new office location, that filing was made on June 23, 2014, through no fault of the Appellant. In turn, my Order of June 24, 2014, granted Appellant's Motion For Extension Of Time for purposes of filing the Response and Cross-Motion for Summary Judgment. By filing of June 23, 2014, Wes Williams, Jr., Esq. entered his appearance as counsel of record for the Tribe. Appellee's Reply was filed on July 18, 2014. At my request, on August 21, 2014, Mr. Williams was contacted by telephone by Ms. Patricia Bowman, Paralegal, Hearings Division, to inquire about the filing status of the Appellant's Sur-Reply Brief, which was due to be filed on August 18, 2014, pursuant to the terms of my Summary Judgment Scheduling Order of February 12, 2014. Mr. Williams advised Ms. Bowman that he does not intend to file a Sur-Reply Brief, and that advice was confirmed in writing by Mr. Williams by fax filing dated August 21, 2014.

Given that Mr. Williams has elected not to file a Sur-Reply Brief, this docket is ripe for decision. Without further attribution, this decision incorporates portions of the briefs of the parties in setting forth both the facts and the law. To the extent proposed findings or conclusions are consistent with those entered herein, they are accepted; to the extent that they are not so consistent or may be immaterial, they are rejected.

STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Summary Judgment is appropriate where there are no material issues of fact in dispute, and the issues for adjudication are legal in content. See e.g.: Larson v. Bureau of Land Management, 129 IBLA 250, 252 (1996). Relatedly, in resolving motions for summary judgment, factual inferences must be resolved in the light most favorable to the non-moving party. Ibid., at 252. A summary judgment motion will be decided on the basis of the pleadings, documentary evidence, affidavits, and other relevant evidence that would be admissible at a hearing conducted under the auspices of the Administrative Procedure Act ("APA"). Indeed, the applicable procedural regulations anticipate the potential for summary decision, as follows, "Within 15 days of the date of referral, the ALJ will hold a pre-hearing conference, by telephone or in person, to decide whether an evidentiary

hearing is necessary, or whether it is possible to decide the appeal based on the written record.” 25 C.F.R. 900.161(b). During our referenced telephonic scheduling conference, the parties and the undersigned were in mutual agreement that the instant docket could be adjudicated on the written record.

FACTUAL BACKGROUND

The Appellant is the Walker River Paiute Tribe (“Walker River”), and the Appellee is the Area Director, Phoenix Area Indian Health Service (“PAIHS”). This appeal implicates PAIHS’ refusal to approve Walker River’s proposal dated September 19, 2013, for funding to operate a Contract Health Services (“CHS”) program under the auspices of the Indian Self-Determination and Education Assistance Act (“ISDEAA”). PAIHS declined Walker River’s proposal by letter dated December 27, 2013, from Area Director, Dorothy Dupree. Walker River appealed that declination through a letter to the Indian Health Service (“IHS”) submitted by Tribal Chairman Carl Johnson dated January 2, 2014.

IHS is composed of a headquarters office in Rockville, Maryland, and twelve, regional area offices, including PAIHS, which serves Native Americans in Arizona, Nevada and Utah. In turn, PAIHS is divided into subordinate service areas known as Service Units, each of which is responsible for serving one or more Indian Tribes in respective geographic areas. Declaration of Thomas R. Tahsuda (“Tahsuda Declaration”), para. 6. The Schurz Service Unit (“SSU”) serves thirteen federally-recognized Indian Tribes in western Nevada, including Walker River. Tahsuda Declaration, para. 7.

In a letter dated October 22, 2013, the PAIHS Area Director notified the SSU tribes that the August 2013 SSU Allocation Tables had been adopted by PAIHS for the purposes of allocation of Service Unit tribal shares. Tahsuda Declaration, Attachment A. The Service Unit shares of programs, functions, services and activities (“PFSAs”) are provided by PAIHS to each SSU tribe and are based on resource distribution calculations made by PAIHS, after consultation with the SSU tribes. Tahsuda Declaration, para. 9.

Under Walker River’s current ISDEAA contract with IHS, the tribe provides ambulatory care, public health nursing, mental health services, dental services, and optometry services. IHS Exhibit 2, pp. 16-17. However, Walker River has not previously contracted for its share of the SSU CHS program. Tahsuda Declaration, para. 8. The SSU CHS program is operated by IHS and various tribal contractors for

health care services for eligible Indian beneficiaries provided by third-party providers at non-IHS and non-tribal facilities. Appellee's Motion For Summary Judgment, p. 8. Walker River's September 19, 2013, proposal to contract included several PFSA's that were not previously included in its current ISDEAA contract. Tahsuda Declaration, Attachment B.

Walker River proposed to take over its share of the CHS program through a so-called "buy back" mechanism with IHS, under which IHS would transfer relevant funding for the CHS program into the tribe's current ISDEAA contract, the tribe would utilize IHS personnel to operate the CHS program on the tribe's behalf, and, in turn, the tribe would reimburse IHS for the costs of those services. Tahsuda Declaration, Attachment B, p. 7. The CHS program would not, therefore, be operated directly by Walker River itself, but it would continue to be operated by IHS, through the auspices of the buyback agreement. Ibid.

In its proposal, Walker River set out \$1,934,555.00 as its tribal share of the SSU CHS program. Tahsuda Declaration, Attachment B, p. 9. Walker River derived this amount of the CHS categorical funding from a June 12, 2013, version of the SSU Allocation Tables, which had been developed by the so-called SSU Workgroup. Tahsuda Declaration, Attachment B, p. 20; Tahsuda Declaration, para. 16. As mentioned above, IHS instead relied upon the August 20, 2013, version of the SSU Allocation Tables to derive Walker River's Service Unit share of the SSU CHS program. Thereunder, according to IHS, Walker River's share was \$1,643,910.00 in CHS categorical funds, plus \$75,803.00 in CHS staffing funds, for a total of \$1,719,713.00. Tahsuda Declaration, Attachment A, p. 25; Tahsuda Declaration, para. 15.

In her declination letter of December 27, 2013, the Area Director noted that buy back agreements are discretionary with the IHS, because Congress authorized such buy backs, but did not mandate them. IHS Exhibit 3, pp. 2-3. And, herein lies the heart of the legal dispute between the parties, because Walker River argues that approval of the buyback proposal was mandatory under the purview of ISDEAA; whereas, IHS contends that the agency's approval of a buyback proposal is entirely discretionary as a matter of law. In particular, IHS declined the tribe's buyback proposal under the purview of Section 102(a)(2)(C); 25 U.S.C. 450f(a)(2)(C) on the ground that the proposed project could not be properly completed or maintained under the proposed contract. IHS also declined on the separate ground that the amount of the CHS funding request was in excess of the amount that the Secretary

would otherwise have spent to operate the program under the purview of Section 102(a)(2)(D); 25 U.S.C. 450f(a)(2)(D).

Separately, PAIHS approved a contract with the Reno-Sparks Indian Colony that consumed approximately 50% of the available funds from the Schurz Service Unit; whereas, Walker River argues that its proposal would have taken only about 35% of the funds available after deducting the Reno-Sparks contract. Appellant's Motion For Summary Judgment And Response, p. 2.

PAIHS argues that its declination decision must be reviewed under an abuse of discretion standard. Appellee's Motion For Summary Judgment, p. 11. Acknowledging that the act places the burden of proof on the agency to "... clearly demonstrate the validity of the grounds for declining the contract proposal ...," (ISDEAA Section 102e, 25 U.S.C. 450f(e)(1)), PAIHS further argues that "... this burden is inapplicable here, since there are no issues of material fact to adjudicate." Appellee's Motion For Summary Judgment, p. 11. Appellant counters by arguing that, "This directly applies to this matter despite PAIHS's protest that it should not have the burden of proof. PAIHS must establish by clear evidence that its reasons for declining Walker River's proposal were valid." Appellant's Motion For Summary Judgment And Response, p. 3. Indeed, the controlling procedural regulations provide that, "For those appeals, the Secretary has the burden of proof (as required by section 102(e)(1) of the Act) to establish by clearly demonstrating the validity of the grounds for declining the contract proposal." 25 C.F.R. 900.163. Either way, the Appellant addresses the abuse of discretion issue in its brief, as discussed below. Furthermore, in my opinion, PAIHS has clearly demonstrated the legal grounds for declining Walker River's proposal.

CONTENTIONS OF THE APPELLANT

Walker River contends that PAIHS abused its discretion in failing to approve the tribe's proposal. Appellant's Motion For Summary Judgment And Response, p. 3. Walker River argues that, "PAIHS engaged in a pattern of conduct that clearly demonstrates its failure to deal with Walker River in a lawful and reasonable manner. PAIHS took actions that cannot be justified no matter what technicalities PAIHS relies upon." *Ibid.* Walker River disputes the contention in Ms. Dupree's declination letter that Walker River had previously agreed not to contract for CHS funding. Walker River contends that it had to specifically request a declination letter so that it could formally appeal the declination decision. *Ibid.*

With respect to IHS's alleged bad faith during the parties' negotiations, Walker River states the following:

As further evidence of PAIHS's bad faith, during negotiations Mr. Tahsuda informed Walker River that sufficient funds were available for Walker River's CHS, and that Walker River would not be affected by IHS's approval of the Reno/Sparks Indian Colony's contract for its CHS funding. Walker River was wary of this assertion and could not see how this action by IHS would not have a huge effect on the remaining tribes in the SSU. That is exactly what occurred, as IHS changed its position to assert that sufficient funding was not available to provide CHS funds to Walker River. Mr. Tahsuda's statements during negotiations clearly were misleading and improperly sought to justify IHS's actions to deplete the available funds to an extent that directly harmed Walker River's ability to contract for CHS funding.

Appellant's Motion For Summary Judgment And Response, p. 4.

Walker River contends that no contracting or compacting should have been executed based on IHS's final tables, which Walker River contends were based on incorrect amounts, which were not supported by the historic amounts spent in the past. Ibid., p. 6. Walker River contends that Mr. Tahsuda originally informed the tribe that it would be able to obtain CHS funding for Walker River patients and that the tribe was entitled to what the Secretary would have spent. Walker River contends that IHS backed out on these statements and that its declination relies on incorrect data. Ibid.

Notwithstanding the agency's claimed discretion regarding buyback funding, Walker River argues that PAIHS remains obligated to treat all tribes equally with respect to the allocation of federal funds. Appellant's Motion For Summary Judgment And Response, p. 6. PAIHS based its declination, in part, upon the previously committed funding to the Reno-Sparks Indian Colonies with respect to its shares of the CHS program funding. As the declination letter itself states, after the assumption of CHS shares by the Reno-Sparks Indian Colony, only 50% of Schurz Service unit funding will remain to provide CHS services to all of the other tribes in the Schurz Service unit, including Walker River. Given this ensuing limitation of funding, PAIHS determined that approving Walker River's proposal would consume an additional 35% of the remaining Schurz CHS funds, which would "... severely strain the Schurz Service Unit's ability to provide services to the

small tribes that receive direct CHS services.” Declination letter, Agency Exhibit 3, p. 2.

Finally, with respect to which shares table should have been used, Walker River argues the following:

Finally PAIHS argues that it based its declination on the shares tables that PAIHS issued in August 2013, after Walker River had submitted its proposal on or about September 19, 2013. PAIHS never asked Walker River to adjust the requested amounts based on the new funding tables. But, instead PAIHS simply declined the proposal. This action was based on PAIHS’s false statement that Walker River agreed to leave CHS with IHS, but requested that IHS formally decline that portion of Walker River’s proposal. Prior to the declination letter, Walker River was never informed of the reason for the declination and was never told that the amount was incorrect. Instead PAIHS used the incorrect amount to help justify the declination. This shows PAIHS’s bad faith and supports Walker Rivers’ assertion that PAIHS actions were arbitrary, capricious and an abuse of discretion.

Appellant’s Motion For Summary Judgment And Response, pp. 7-8.

CONTENTIONS OF THE APPELLEE

Appellee’s basic legal argument is that, because IHS was not legally mandated to enter into a buyback agreement with Walker River, the tribe’s proposal to contract for its CHS program was properly declined. Appellee’s Motion For Summary Judgment, p. 13. IHS contends that it enjoyed the discretion to determine whether or not to enter into the proposed buyback arrangement. In effect, the proposal depended entirely on the Agency’s willingness to itself operate the program pursuant to a buyback agreement. Therefore, IHS argues that it properly declined Walker River’s proposal under the purview of ISDEAA Section 102(a)(2)(C), 25 U.S.C. 450f(a)(2)(C). Appellee’s Motion For Summary Judgment, pp. 14-15.

As stated in Appellee’s Reply, Walker River’s proposal did not implicate a take-over of the subject functions by the Tribe itself; rather:

... the Tribe elected not to operate a CHS program on its own,

but instead proposed to have IHS operate that program on its behalf through a 'buyback' arrangement. It was this buyback arrangement, and the impact it would have on SSU operations, that formed the basis of the Agency's declination decision, not the assumption of CHS shares in and of themselves.

Appellee's Reply, pp. 2-3.

In effect, IHS contends that, under the budgetary circumstances, it did not have the resources to operate the subject services on behalf of the Tribe under the auspices of the proposed buyback program. In particular, IHS argues that "... it was incumbent on the Agency to take into account such factors as the availability of Agency resources and the impact the buyback program would have on other tribes in the service unit." Appellee's Reply, p. 3.

IHS argues that Congressional authorization for buyback arrangements for Title I contracts was discretionary and not mandatory, as argued in context by the Tribe. Appellee's Reply, p. 3. In particular, IHS notes that the Consolidated Appropriations Act of 2014, Pub. L. 113-76, specifies that IHS is "authorized" to provide goods and services on a reimbursable basis, and the term "authorized" indicates that the Agency retains the discretion not to perform particular proposed activities when other funding considerations so dictate. Appellee's Reply, p. 3; citing: Creek Nation v. U.S., 318 U.S. 629, 639 (1943); Shopen v. Bone, 328 F.2d 655, 659 (8th Cir. 1964). Relatedly, with respect to the CHS contract proposal submitted by the Reno-Sparks Indian Colony, IHS points out that, "What the Tribe fails to acknowledge, however, is that Reno-Sparks proposed to directly operate its CHS program, and did not ask IHS to operate the program on its behalf through a buyback arrangement, as the Tribe chose to do. ... The Agency concluded that it wasn't in the best interests of the remaining tribes at the SSU for the Agency to agree to operate a CHS program on behalf of the Walker River Tribe while simultaneously attempting to operate a separate CHS program for the remaining SSU tribes." Appellee's Reply, pp. 4-5.

In addition, IHS argues that its declination was legally proper, because Walker River's proposal requested a level of funding in excess of the amount that the Secretary would have spent to operate the program. Ibid., p. 15. A tribal contractor's funding is based on the amount that the "... Secretary would have otherwise provided for the operation of the programs or portions thereof" 25 U.S.C. 450j-1(a)(1). Appellee argues, as follows:

When a tribe contracts with the Agency, it is contracting for its 'tribal share' of the total funding that supports the PFSA's to be transferred. This is the Secretarial amount awarded under 25 U.S.C. Section 450j-1(a)(1). Although IHS consults with tribes before determining these 'tribal shares' of the IHS program, the ultimate determination of the Secretarial amount rests with the agency, since it represents the amount of funds that the Agency, in its discretion, chooses to spend to operate the program in question.

Emphasis added; Appellee's Motion For Summary Judgment, p. 15.

After consulting with the various, constituent tribes, the Area Director selected the amounts set out in the August 2013 version of the SSU Allocation Tables as the applicable Section 106(a)(1) amounts available for contracting under the ISDEAA umbrella. Tahsuda Declaration, para. 14. Under the August 2013 Allocation Tables, the Section 106(a)(1) amount for Walker River's CHS program was \$1,719,713.00, which was determined by adding the amount of CHS Categorical funds available to Walker River, namely \$1,643,910.00, plus the tribe's share of CHS Staffing funds, namely \$75,803.00. Tahsuda Declaration, Attachment A, pp. 7, 25. Walker River did not utilize the August 2013 SSU Allocation Tables in preparing its CHS program funding request; rather, Walker River relied on the earlier SSU Workgroup Tables, which employed a different methodology for determining the respective tribal shares. Tahsuda Declaration, para. 16, & Attachment C, p. 20. As a result, Walker River requested a total of \$1,934,555.00 as its tribal share of the SSU CHS program, rather than the lesser amount of \$1,719,713.00. Tahsuda Declaration, para. 16, & Attachment C, p. 9.

IHS concludes the following:

Because the tribe proposed a level of CHS program funding that was in excess of the amount of funds that the IHS determined was what it would otherwise have spent to operate the Tribe's CHS program, the Agency properly declined this portion of the Tribe's proposal under ISDEAA Section 102(a)(2)(D), 25 U.S.C. Section 450f(a)(2)(D).

Appellee's Motion For Summary Judgment, pp. 16-17.

DISCUSSION

As IHS correctly argues in its brief, Title V of the ISDEAA includes an express buyback proviso (25 U.S.C. Section 458aaa-7(f)); whereas, Title I of the Act does not contain express authority for IHS to enter into buyback agreements with tribal contractors. Rather, with respect to Title I contracts, Congress has expressed buyback authority for IHS under the purview of IHS's annual appropriations acts, which express such buyback authority as discretionary in nature. For example, the 2014 appropriation language states that with "... respect to functions transferred by the Indian Health Service to tribes or tribal organizations, the Indian Health Service is authorized to provide goods and services to those entities on a reimbursable basis, including payments in advance with subsequent adjustment." Consolidated Appropriations Act of 2014, Pub. L. 113-76. In this context, the term "authorized" has been broadly construed to implicate agency discretion with respect to the disbursement and allocation of subject appropriated funds, as distinguished from mandated program funding. Creek Nation v. U.S., at 639; Shopen v. Bone, at 659; U.S. v. Maryland, 471 F. Supp. 1030, 1038 (D. Md. 1979). Consequently, IHS concluded that, "The Agency properly exercised its discretion when it declined to enter into a buyback arrangement to operate the Tribe's CHS program, which would have placed a strain on the Agency's ability to provide health care services to other tribes within the Schurz Service Unit ("SSU")." Appellee's Reply, p. 2.

IHS construes this discretionary authority, as follows:

Thus, PAIHS was not under a mandatory duty to accept Walker River's proposal to buy back its CHS services from the Agency. Because the viability of the CHS program the Tribe sought to contract depended entirely on the Agency's willingness to operate the program pursuant to a buyback arrangement, the Tribe's proposal was unworkable without the Agency's acquiescence, which the IHS was unwilling to provide. Therefore, the Agency properly declined the Tribe's proposal pursuant to ISDEAA Section 102(a)(2)(C), 25 U.S.C. Section 450f(a)(2)(C)

Appellee's Motion For Summary Judgment, pp. 14-15.

With respect to PFSA's, the Tribe's proposal is for its tribal share of total transferred PFSA funding, which is the Secretarial amount authorized under 25 U.S.C. Section 450j-1(a)(1). Although IHS engages in consultations with the member

tribes with respect to their potential, respective tribal shares, the final determination of the Secretarial amount with respect to PFSA is determined by IHS as a function of its administrative discretion. See e.g.: Lincoln v. Vigil, 508 U.S. at 194. That is, IHS's allocation of its lump-sum appropriations is committed to the agency's discretion as a matter of law. After receiving tribal input through consultation, the PAIHS Area Director employed her legal discretion and adopted the amounts ultimately set out in the August 2013 SSU Allocation Tables as the respective tribal Section 106(a)(1) amounts available for PFSA contracting. Tahsuda Declaration, para. 14. The section 106(a)(1) amount for Walker River's CHS program, as mentioned above, was \$1,719,713.00.

Because Walker River proposed a level of CHS program funding (\$1,934,555.00) that was in excess of the amount of funds that IHS determined was the appropriate Secretarial amount to operate the Tribe's CHS program, the Tribe's contract proposal did not use the amount identified by IHS as the proper section 106(a)(1) amount for its share of the CHS program. Because the Tribe proposed a level of CHS program funding that was in excess of the amount of funds that the IHS determined was what it would have spent to operate the Tribe's CHS program, PAIHS properly declined that portion of the tribe's proposal under Section 102(a)(2)(D), 25 U.S.C. Section 450f(a)(2)(D). Relatedly, IHS properly exercised its discretion in choosing to decline the Tribe's proposal to operate a CHS program through a buyback arrangement pursuant to Section 102(a)(2)(C), 25 U.S.C. 450f(a)(2)(C), because IHS determined that it lacked the budgetary resources and, therefore, the "... proposed project or function to be contracted cannot be properly completed or maintained by the proposed contract."

CONCLUSION

Based upon the foregoing legal and factual reasons, my Recommended Decision is the following: the Appellee's Motion For Summary Judgment is **GRANTED**, and the Appellant's Motion For Summary Judgment is **DENIED**. IHS's declination is **AFFIRMED**.

// original signed

James H. Heffernan
Administrative Law Judge

APPEALS PARAGRAPH

Within 30 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Secretary of Health and Human Services 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, Appellate Division, Cohen Building, Room G-644, MS-6127, 330 Independence Avenue, SW, Washington, D.C., 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.