

No. 12-326C
(Judge Charles F. Lettow)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

COUNCIL FOR TRIBAL EMPLOYMENT RIGHTS,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE QUESTION
OF WHETHER PLAINTIFF IS A THIRD-PARTY BENEFICIARY TO
CERTAIN CONTRACTS BETWEEN THE GOVERNMENT AND
THE SPIRIT LAKE SIOUX TRIBE

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Dated: April 16, 2013

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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COUNCIL FOR TRIBAL)	
EMPLOYMENT RIGHTS,)	
)	
Plaintiff,)	
)	CONTRACT CLAIM
v.)	NO. 12-326C
)	(Judge Lettow)
THE UNITED STATES)	
OF AMERICA,)	
)	
Defendant.)	
<hr/>)	

**MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE QUESTION
OF WHETHER PLAINTIFF IS A THIRD-PARTY BENEFICIARY TO
CERTAIN CONTRACTS BETWEEN THE GOVERNMENT AND
THE SPIRIT LAKE SIOUX TRIBE**

Pursuant to Rule 56 of the Rules of the United States Court of Federal Claims (“RCFC”), plaintiff, the Council for Tribal Employment Rights (“CTER”), respectfully requests that the Court grant partial summary judgment that plaintiff is a third-party beneficiary to the two contracts between the U.S. Department of Interior’s Office of Indian Energy and Economic Development (“IEED”) and the Spirit Lake Sioux Tribe (“Tribe”), as alleged in Counts II and V of its Complaint, on the grounds that there are no genuine issues of material fact and judgment should be entered in favor of the plaintiff as a matter of law. In support of this motion, the plaintiff relies upon the following brief, the allegations of the complaint, the discovery produced by the defendant, and the concurrently filed plaintiff’s proposed findings of uncontroverted facts (“PFUF”) and attached exhibits.¹

¹ While Rule 56 of the RCFC no longer requires parties filing motions for summary judgment to submit proposed findings of uncontroverted facts, Plaintiff has done so because it believes that doing so makes for a more orderly summary judgment process.

STATEMENT OF THE ISSUES

Whether plaintiff is a third-party beneficiary to two “pass-through” contracts between IEED and the Tribe under which IEED directed the Tribe to contract with CTER to provide job training programs on various Indian reservations, the Tribe’s only role was to administer the contracts with CTER, and IEED directed that the Tribe pass through to CTER the vast majority of the funds IEED provided to the Tribe under the contracts.²

STATEMENT OF FACTS

I. The NCCI Contract

In early 2009 Plaintiff, in a partnership with several labor unions, urged the United States Congress to include funding in the American Recovery and Reinvestment Act of 2009, Pub L. No. 111-5, 123 Stat. 115 (“ARRA”), for the Native Construction Careers Initiative (“NCCI”), an innovative approach to job training CTER had developed in a partnership with certain labor unions under which CTER provided unemployed Indians with hands-on construction trade training by combining the training with the renovation of a house or building on that reservation. The training focused on helping the trainees develop skills for jobs that were anticipated would become available at the time the training was completed. (PFUF ¶ 1.)

In early 2009 Plaintiff and several labor unions urged the United States Congress to include funding in the American Recovery and Reinvestment Act of 2009, Pub L. No. 111-5, 123 Stat. 115 (“ARRA”), for NCCI training. (PFUF ¶ 2.) In response, Congress included \$18 million in ARRA for Indian Workforce Development Programs. (PFUF ¶ 3.) Shortly after ARRA was signed into law, Robert Middleton, the then-director of IEED, emailed Daniel Press,

² As set out in its Response to Defendant’s Motion to Dismiss, Plaintiff does not believe that its claim that it is a third-party beneficiary to two contracts between IEED and the Tribe is necessarily in conflict with its claim that it is party to two three-party contracts among IEED, the Tribe, and itself. However, to the extent any such conflict exists, statements made in this Motion that may be considered inconsistent with its claim that it is a party to two three-party contracts are offered “in the alternative” to said claim.

counsel for Plaintiff, to inform him that IEED had been allocated \$4.3 million of the \$18 million and that IEED and CTER needed to schedule a teleconference as soon as possible. (PFUF ¶ 4.) After that teleconference was held, Mr. Middleton called Mr. Press and asked that CTER submit a proposal to IEED, in the range of \$1 million, to provide NCCI job training on reservations, with the funding to come out of \$4.3 million appropriations IEED received for job training in ARRA. (PFUF ¶ 5.) Mr. Middleton did not mention the Tribe or ask that CTER send a copy of said proposal to the Tribe. (PFUF ¶ 6.)

On February 25, 2009, CTER president Conrad Edwards sent to Mr. Middleton a proposal to provide NCCI training to nine specifically-named tribes at a cost \$110,000 per tribe for a total of \$990,000. (PFUF ¶ 7.) The proposal makes no mention of the Tribe. (*Id.*) In the weeks following February 25, 2009, IEED and CTER engaged in an extensive email exchange to finalize CTER's proposal. (PFUF ¶ 8.) The Tribe was not mentioned or involved. (*Id.*) IEED was directly involved in working with CTER to shape the proposal. For example, on February 27, 2009, Mr. Middleton sent a revised version of CTER's proposal to Mr. Edwards, with his cover email note stating: "Here is what I developed. I changed the number around so that everything wasn't \$110K." (PFUF ¶ 9.) The Tribe was not mentioned in or copied on the email. (*Id.*) On March 5, 2009, Mr. Middleton emailed Mr. Press to ask: "I need to know which projects we can actually start if I make money available within the next two weeks. Can we do any of them." (PFUF ¶ 10.) Mr. Press emailed back that five of them were ready to start. (*Id.*)

IEED repeatedly acknowledged that it was partnering with CTER on the NCCI project. For example, on February 27, 2009, Mr. Middleton, in an email, informed Mary Jane Miller in the Office of the Assistant Secretary for Indian Affairs in DOI that the NCCI project was "a partnership agreement with CTER and [the Laborer's International Union of North America

(“LIUNA”)] and will be out of my \$4M construction worker training.” (PFUF ¶ 11.) On March 3, Mr. Middleton again emailed Ms. Miller to provide his weekly ARRA report. The sole contents of his report read as follows: “Met with workforce development partners [CTER] and [LIUNA] to continue planning for the launch of projects once funds are available.” (PFUF ¶ 12.)

IEED acknowledged in numerous other documents that it worked directly with CTER on the NCCI proposal, without ever mentioning the Tribe. For example, in a document issued by IEED entitled “Weekly Highlights,” IEED announced: “This week our staff is reviewing proposals from the [CTER] organization requesting funds as follows. . . .” It goes on to list the nine projects contained in CTER’s proposal to IEED. The Weekly Highlights makes no mention of the Tribe. (PFUF ¶ 13.)

In a December 6, 2011 email in response to an internal request for information on the CTER projects, Stephanie West, an IEED program analyst, stated: “IEED received \$5.7 million for Workforce Training Programs from the [U.S. Department of the Interior (“DOI”)]. One of the identified programs was the [NCCI] (\$950,000). *Robert Middleton made the determination to fund CTER for the NCCI project.*” (emphasis added) (PFUF ¶ 14.) She made no mention of the Tribe.

At some point after the negotiations between CTER and IEED regarding the NCCI proposal were completed, IEED decided get the money needed for CTER to carry out its proposal to CTER by passing it through a tribe that had an existing Self-Determination Contract with IEED. The Indian Self-Determination and Education Assistance Act of 1975, 88 Stat. 2203 (codified at 25 U.S.C. § 450 *et seq.*), permits IEED to enter into sole-source contracts or contracts amendments with tribes. (PFUF ¶ 15.) When desiring to get funds to a non-tribal entity with which IEED did not have sole-source contracting authority, IEED had a long history

of amending an existing contract with a tribe to transfer funds to it, with directions in the contract to the tribe that it, in turn, subcontract with the non-tribal entity, effectively using the tribe as a pass-through. IEED also often assigned the tribe responsibility for serving as contract administrator of the subcontract and paid the tribe for carrying out these administrative tasks. (PFUF ¶ 41.) Because this contracting process could be completed very quickly, it was particularly useful in enabling IEED to distribute ARRA funds rapidly and thereby respond to the intense pressure to put ARRA funds to work as quickly as possible in order to create jobs.

At some point after IEED had accepted CTER's NCCI proposal but before August 5, 2009, IEED decided to use the Tribe as its pass-through tribe for the NCCI project. On August 5, 2009, IEED amended its Self-Determination Contract with the Tribe ("Amendment #2"). (PFUF ¶ 16.) The amendment provided the Tribe with ARRA funds and stated that the funds ". . . *must* be used in accordance with the following: (1) Solar Heat Panel Training and Installation Project (statement of work attached); (2) Native Construction Careers Initiative Project (statement of work attached)." (emphasis added) (PFUF ¶ 17.) (The "Solar Heat Panel Training and Installation Project," which apparently was a project to occur on the Spirit Lake Reservation, is not mentioned any other place in the document.) The Statement of Work ("SOW") that was attached, which is the only portion of Amendment #2 that provided any specificity on the Tribe's responsibilities under Amendment #2, was in the form of a proposed contract between CTER and the Tribe in which IEED dictated the tasks CTER was to carry out and the amount of money it would be paid for doing so. (PFUF ¶ 18.) Specifically, the SOW/proposed Tribe-CTER contract provided that CTER was to be responsible for providing the NCCI job training program to the same nine tribes listed in the above-referenced proposal CTER submitted to IEED on February 25, 2009. (PFUF ¶ 19.) The SOW gave the Tribe no responsibility for the provision of

any training. The Tribe's sole responsibility was to enter into and administer the contract with CTER. The SOW stated in part:

The [CTER] organization has nine (9) proposed projects called the [NCCI] to work with tribes nationwide to provide hands-on commercial construction training. The [Tribe] is well positioned to assist [CTER] to conduct these activities, to ensure contract compliance, issue quarterly payments, to collect quarterly data reports including program and financial from the [CTER] Organization and related tasks.

(PFUF ¶ 20.)

It is significant that even though Amendment #2 was an agreement between IEED and the Tribe, which CTER was not a party to, the SOW to that Amendment goes into great detail describing the activities CTER is required to carry out. (PFUF ¶ 21.) For example, Part II of the SOW, entitled "Council for Tribal Employment Rights (CTER) Responsibilities," begins with the following statement: "CTER *shall* perform those portions of the NCCI projects identified . . ." (emphasis added), which was followed with great detail about CTER's responsibilities in connection with the training of the nine tribes, describing numerous performance obligations assigned to CTER. (*Id.*)

The SOW also specifies that the role of the Tribe is to administer the NCCI project to ensure that the goals are being met, to transfer funds to CTER and to monitor the progress of the CTER activities. (PFUF ¶ 36.) It does not assign the Tribe any responsibility for the provision of job training. Rather, the Tribe's sole responsibilities are to serve as a contract administrator of a contract with CTER, to funnel the funds to CTER, and to monitor CTER's actions under the contract

IEED attached a budget to the SOW that provided as follows:

Description	Amount
Direct funds for CTERO NCCI Projects (see statement of work)	<i>\$950,000.00</i>
Administration of NCCI Project – Spirit Lake Tribe	\$57,000.00
Travel related to CTERO NCCI Projects – Spirit Lake Tribe (e.g. Quarterly Work Group Meetings and any of the on-site program Monitoring	\$ 12,000.00

(PFUF ¶ 22.)

Thus, not only did Amendment #2 “direct” the Tribe to contract with CTER, it provided that approximately 95% of the funding IEED was transferring to the Tribe under Amendment #2 was to go to CTER. This is further evidence that the primary purpose of Amendment #2 was to use the Tribe as an intermediary to provide funds to CTER so it could carry out the job training projects listed in its February 25, 2009 proposal to IEED.

Lynn Forcia, a Level I Awarding Official for IEED executed Amendment #2 on August 5, 2009 for IEED and Myra Pearson, the Tribal Chair, executed it for the Tribe on August 11, 2009. (PFUF ¶ 24.) The SOW was written in the manner described above because it was intended to be and in fact became the proposed contract between the Tribe and CTER. That is, IEED used Amendment #2 to dictate the exact language of the contract the Tribe was required by that Amendment to enter into with CTER. In fact, IEED made sure that occurred because it was the entity (rather than the Tribe) that changed the title of the SOW from “Statement of Work” to “Contract” (PFUF ¶ 23), and a third signature line for CTER. IEED, and then circulated the contract (“NCCI Contract”) for signature by the three parties. Evidence that IEED was choreographing the execution of NCCI Contract, even though it was a contract between the Tribe and CTER, is the fact that Ms. Forcia was the first to sign the NCCI Contract (on August 5, 2009) as “Awarding Official;” the Tribe executed it on August 11, 2009, and CTER on August 12, 2009. In addition, it was IEED rather than the Tribe that faxed the NCCI Contract to CTER

with instructions to sign it and send the original back to IEED (not back to the Tribe). (PFUF ¶ 25.)

II. The FHWA Contract

Sometime after Congress enacted ARRA but before September 2009, IEED submitted an undated proposal to the Federal Highway Administration Office of Civil Rights for \$1,500,000.

(PFUF ¶ 26.) The proposal requested that FHWA transfer \$1,500,000 to IEED for several purposes, including the following:

Council for Tribal Employment Rights; \$500,000 . . . To provide funding for the [NCCI] that will conduct on-site apprenticeship training programs to at least 6 tribes at the cost of \$50,000 per tribe this is $6 \times \$50,000 = \$300,000 + \$200,000$ for related expenses stated above.

(PFUF ¶ 27.)

The IEED proposal to FHWA lists CTER as one of its “Key Partners.” (PFUF ¶ 28.) The budget IEED attached to its proposal to FHWA reads as follows:

OJT/SS project Budget

The budget will include:

In-Kind Services	\$250,000.00
CTER	\$500,000

(PFUF ¶ 29.)

It then goes on to list other uses of the funds, such as the National Indian Ironworkers Project.

Nowhere in the proposal does IEED make any mention of the Tribe.

Prior to IEED submitting the proposal to FHWA, CTER was involved in the discussions between IEED and FHWA regarding the uses of the proposed funding. For example, on July 9, 2009, Mr. Edwards, the president of CTER, sent a communication to Teresa Banks, team manager in the FHWA Office of Civil Rights, stating: “Per our discussion I am forwarding the

list of transportation projects we would like to have considered for funding under the DOI/IEED, FHWA & CTER Cooperative Agreement.” (PFUF ¶ 31.) Mr. Edwards then listed the six tribes at which CTER intended to implement the training projects, (the same number subsequently set out in IEED’s proposal to FHWA). Nowhere is there any mention of the Tribe. On September 9, 2009, FHWA and IEED entered into an Interagency Agreement pursuant to which FHWA transferred \$1,500,000 to IEED for the projects listed in the IEED proposal to FHWA. (PFUF ¶ 32.)

IEED decided to again use the tribal pass-through approach to get the funds it received through the Interagency Agreement to CTER, but it apparently struggled to find a tribe to serve as the intermediary. For example, a document entitled “Summary of Weekly Conference call for FHWA and NCCI project December 1, 2009,” prepared by IEED, states:

Concerning the allocation of funds of the DOT/FHWA OJT/SS project to CTERO and Indian Ironworkers Training program for their immediate use. Jody Garrison [the IEED staff person responsible for the NCCI and FHWA projects] response was as soon as the IEED has a tribe in place to contract with to send the funds and maintain the responsibility for reporting and submission of information to this office. At this time we are in contact with the Sisseton-Wahpeton Sioux Tribe on the possibility of giving the contract for this project.

(PFUF ¶ 33.)

Thus, IEED specifically acknowledges that CTER is the intended beneficiary and that which tribe served as the contract intermediary was completely fungible. The quote above also shows that at the time IEED and CTER were negotiating the terms of the FHWA project, the Tribe was not even in the picture. Apparently it was brought in after IEED’s effort to use the Sisseton-Wahpeton Sioux Tribe as the intermediary fell through.

On June 11, 2010, IEED sent the Tribe a copy of Amendment #6 to the Spirit Lake Tribe’s Self-Determination Contract. (PFUF ¶ 34.) Amendment #6 was very similar to

Amendment #2 in that it provided that the Tribe “must” contract with CTER and had an SOW attached. Entitled “Spirit Lake Sioux Tribe, 477 Program Statement of Work for FHWA Project,” the SOW to Amendment #6, even though CTER was not a party to that Amendment, set out the job training activities CTER was obligated to carry out, activities that were identical to the ones IEED had listed for CTER in its proposal to FHWA. (PFUF ¶ 35.) As was the case for Amendment #2, the sole role that the Amendment #6 SOW assigned to the Tribe was to serve as contract administrator, distribute payments to CTER, and monitor its performance. (PFUF ¶ 36.) (The SOW also directed the Tribe to contract with the National Indian Ironworkers Project to provide certain other kinds of job training listed in IEED’s proposal to FHWA.)

The budget attached to the Amendment # 6 SOW provided:

The budget will include:

CTER	\$500,000.00
National Ironworkers	\$250,000.00
Spirit Lake Sioux Tribe OJT/SS Admin	<u>\$50,000.00</u>
TOTAL	\$800,000.00

(*Id.*)

Thus as was the case with the budget to Amendment #2, here the majority of the funding IEED was providing the Tribe was allocated to CTER and once again the budget acknowledges that the only role for the Tribe is to service as contract administrator.

After Ms. Forcia (for IEED) and Chairwoman Pearson (for the Tribe) executed Amendment #6 and the SOW (PFUF ¶ 39) (on June 11, 2010 and June 28, 2010 respectively), IEED converted the SOW into the contract between the Tribe and CTER by changing the title of the SOW from “Spirit Lake Sioux Tribe, 477 Program Statement of Work for FHWA Project” to “Council for Tribal Employment Rights (CTER) Statement of Work for FHWA Project,” and

added a third signature line for CTER. (PFUF ¶ 37.) This document became the FHWA Contract between the Tribe and CTER. The evidence that IEED was the entity that converted the SOW into the FHWA Contract with CTER is shown by the fact that Ms. Forcia of IEED signed both Amendment #6 and the FHWA Contract on June 11, 2010 (signing both as “Awarding Official”) and CTER executed the FHWA Contract on June 21, 2010, while the Tribe did not execute either until June 28, 2010. Further evidence that IEED was working directly with CTER on the FHWA Contract is shown by the fact that when several handwritten changes were made to the FHWA contract, those changes were initialed by Mr. Edwards and Ms. Forcia. Nobody from the Tribe initialed them. (PFUF ¶ 38.)

IEED has consistently acknowledged that the purpose of \$500,000 of the funds it received from FHWA was to fund CTER to implement the NCCI program on highway-related projects. For example, in an IEED weekly report for September 7-11, 2009, IEED stated:

Federal Highway Administration, Office of Civil Rights: IEED has been award \$1.5 M to provide job training and placement opportunities for American Indians and Alaskan Native in the highway construction trade. . . . \$500K will be used to support projects by [CTER]. . . .

(PFUF ¶ 40.)

In summary, the uncontroverted facts cited above demonstrate that IEED’s primary purpose in entering into Contract Amendments #2 and #6 with the Tribe was to use the Tribe as an intermediary to enable IEED to provide CTER with funding for job training programs that IEED had previously committed to CTER. Further, under neither Amendment did the Tribe have any discretion on which party it should contract with; that was dictated by IEED. IEED also used the Amendments to dictate the terms of the contracts the Tribe was to enter into with CTER. In both cases, CTER was sole entity responsible for providing training to Indian workers

– the purpose for which Congress appropriated the money. The Tribe’s sole responsibility was to administer the contracts with CTER.

The uncontroverted facts cited above also confirm that IEED used the Tribe as a fungible intermediary, in that IEED was prepared to use any willing tribe to serve in that capacity. For example, on the FHWA project, the facts show IEED was initially considering using the Sisseton-Wahpeton Tribe rather than the Spirit Lake Sioux Tribe as the intermediary. Regardless of which tribe was used, IEED used the tribe only to access the sole-source contracting authority IEED had when contracting with Tribes under the Self-Determination Act in order to expedite the transfer of funds IEED had committed to CTER in light of the pressure agencies were under to expend ARRA funding.

Finally, the uncontroverted facts set out above demonstrate that the primary goal of the Amendments was to fund CTER, not the Tribe. This is shown by the fact that if, for whatever reason, CTER had been unwilling to contract with the Tribe, the Tribe would have had nothing to do under Amendments # 2 and 6, since its only role under the SOWs was to administer the contract with CTER.

ARGUMENT

I. Standard of Review for Summary Judgment

Summary Judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *see also* RCFC 56(a) (“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”). A genuine dispute concerning a material fact exists when the evidence presented would permit a reasonable jury to find in favor of the non-movant.

Anderson, 477 U.S. at 248-49; *see also AEY, Inc. v. United States*, 99 Fed. Cl. 300, 303 (2011) (stating that a material facts exists if it affects the outcome of the lawsuit). A movant must support its assertion that no material fact in dispute exists by citing to particular materials in the record or by showing that the materials cited do not establish the absence or presence of a genuine dispute. RCFC 56(c).

As set out in the Fact Section above and in the attached Proposed Findings of Uncontroverted Facts, there are no genuine issues of material fact in dispute relating to the analysis of CTER's third-party beneficiary status. All of the facts Plaintiff relies on are supported by Defendant's own documents. Therefore, CTER hereby requests that this Court enter partial summary judgment in its favor, on the question of whether CTER is a third-party beneficiary to the NCCI and FHWA contracts at issue in this dispute.

A court's analysis of a third-party claim is a mixed issue of law and fact. *See Flexfab, L.L.C. v. United States*, 424 F.3d 1254, 1259 (Fed. Cir. 2005) ("The underlying question of whether Flexfab was a third-party beneficiary under the contract is a mixed question of law and fact."). When analyzing a third-party beneficiary claim, federal common law governs and "a contract with the United States is to be construed and the rights and duties of the parties determined by application of the same principles of law as if the contract were between private individuals." *JBG Enterprises, Inc. v. United States*, 63 Fed. Cl. 319, 331 (2004).

The Court of Federal Claims ("COFC") has adopted two related but somewhat different approaches to the question of whether a plaintiff is a third-party beneficiary. Under one approach, it looks to whether the contract at issue was intended to benefit the plaintiff directly. Under the second approach, the Court applies the principles set out in Section 302 of the Restatement (Second) of Contracts – whether recognition of a right of performance in the

beneficiary is appropriate to effectuate the intention of the promisee and promisor. As set out in the following two sections, Plaintiff in the present case qualifies as a third-party beneficiary under both approaches adopted by this Court.

II. CTER Is Entitled To Partial Summary Judgment Because the Uncontroverted Facts Indicate that IEED and the Tribe Intended to Benefit CTER Directly.

In the COFC, establishing third-party beneficiary status requires the plaintiff to demonstrate that the contract was intended to benefit him directly. *Glass v. United States*, 258 F.3d 1349, 1354 (Fed. Cir. 2001) (“[t]o prove third party beneficiary status, a party must demonstrate that the contract not only reflects the express or implied intention to benefit the party, but that it reflects an intention to benefit the party directly.”); *see also Schuerman v. United States*, 30 Fed. Cl. 420, 433 (1994) (“The proper test for determining third party beneficiary status is whether the contract reflects the express or implied intention of the parties to benefit the third party . . .”); *Roedler v. Dep’t of Energy*, 255 F.3d 1347, 1352 (Fed. Cir. 2001) (explaining that the benefit to the third party must be direct). “Third party beneficiary status is an ‘exceptional privilege’ and, to avail oneself of this exceptional privilege, a party must ‘at least show that [the contract] was intended for his *direct* benefit.’” *Glass v. United States*, 258 F.3d at 1354 (emphasis added) (citing *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220, 230 (1912)). A party “must demonstrate that the contract not only reflects the express or implied intention to benefit the party, but that it reflects an intention to benefit the party directly.” *Glass v. United States*, 258 F.3d at 1354.

The facts in the present case demonstrate that not only was the intent of the two contracts, Amendments #2 and #6 to the Workforce Development contract between IEED and the Tribe, benefit CTER directly but that their primary purpose was to benefit CTER. As set out above, for both the NCCI and the FHWA projects, IEED made commitments to provide CTER with

funding to carry out job training programs before the Tribe was even involved. IEED contracted with the Tribe only because IEED's ability to enter into sole-source contracts with tribes provided an expedited contracting mechanism to get the committed funding to CTER.

To briefly summarize the facts set out above, in the case of the NCCI project, Mr. Middleton asked CTER to submit a proposal and then negotiated the terms of that proposal with CTER without any involvement of the Tribe. IEED also announced in one of its newsletters that it was negotiating such an agreement with CTER without any mention of the Tribe. In the case of the FHWA project, IEED submitted a proposal to FHWA in which it specifically stated it would use \$500,000 of the funding it was seeking from FHWA to fund CTER to implement a highway-related job training project. IEED also acknowledged that it sought out a tribe to serve as the intermediary only after it had committed to fund CTER from the dollars it received from FHWA and that the Spirit Lake Sioux Tribe was not even the first tribe IEED approached to be the intermediary.

Further, the only role for the Tribe under the contract amendments was to provide funding to CTER through a contract and to administer CTER's use of those funds. One way to demonstrate that the primary purpose of the contract amendments was to benefit CTER is to look at what would have happened if CTER had declined to contract with the Tribe. If that had occurred, the Tribe would have had nothing to do under the contract amendments, since its sole role under them was to service CTER.

In *Schuerman*, the court found that plaintiffs were third-party beneficiaries to a government contract intended to provide assistance to farmers because it reflected an intention to benefit the third party. There, the Government entered into contracts with certain financial lending institutions to guarantee loans to individual farmers who required lines of credit to

function in their business. After an exhaustive review of third-party beneficiary cases, the threshold question for the court to resolve was “whether the contract reflect[ed] the express or implied intention of the parties to benefit the *third party*. . . .” *Schuerman*, 30 Fed. Cl. at 433. Applying that test, the court held that plaintiffs qualified as intended third-party beneficiaries because the reason the Government entered into a contract with lending institutions to guarantee loans to the farmers was to enable the farmers to obtain such loans. It further reasoned that the loan agreements contained “various conditions to which the borrower and lender had to agree and satisfy before the [Government] would issue [the final acceptance and promise to guarantee the loan].” *Id.*

The situation in the present case is on all fours with that in *Schuerman*. The primary purpose, if not the sole purpose of the contract amendments between IEED and the Tribe was to direct the Tribe to contract with CTER and to set out the terms of the Tribe-CTER contract. In *Schuerman*, if the farmers did not enter into loan agreements with the financial institutions, the guarantees between the Government and those institutions would have been meaningless because there would have been nothing for the institutions to do under their agreements with the Government. Similarly, in the present case, if CTER had declined to contract with the Tribe, the Tribe-IEED contract amendments would have been meaningless since there would not have been anything for the Tribe to do under those contract amendments.

In *Schuerman*, the court also gave great weight to the fact that the guarantee contracts specifically identified the plaintiffs in that case as the borrower of the guaranteed funds, noting that “failure of the contract to identify the beneficiary may suggest that the beneficiary is only incidental.” *Id.* (emphasis in the original) (citing E. Allen Farnsworth, *Farnsworth on Contracts* § 10.3 (1990).) That court also noted that the guarantee contracts “included various conditions to

which both the borrower and lender had to agree and satisfy before the FmHA would issue the Contract of Guarantee.” *Schuerman*, 30 Fed. Cl. at 433.

Similarly, in the present case, both the contract amendments and the SOWs attached to them specifically identified CTER as the party to provide the training required by the contract amendments and to receive the vast majority of the funds being transferred to the Tribe. Further, Section C.2 of both the NCCI and FHWA contract amendments reference the Statements of Work (SOWs) attached to the contract amendments. The SOWs specifically direct the Tribe to contract with CTER and directs the specific terms the Tribe was required to include in its contracts with CTER. In fact, as indicated, the SOWs, with nothing more than a change of their heading, became the contracts between the Tribe and CTER. The fact that the government not only used the contract amendments at issue to direct the Tribe to contract with CTER but included in the contract amendments the exact terms of the contracts the Tribe was to enter into with CTER is consistent with the above-quoted language from *Schuerman* and provides additional strong evidence that the purpose of the contract amendments were to benefit CTER directly.

Finally, *Flexfab* stands for the proposition that the government’s intent to benefit a third party must be acknowledged by the contracting officer authorized to bind the government. Here, the authorized government procurement official, Ms. Forcia, had full knowledge of the intent to benefit CTER directly. CTER is mentioned throughout the contract amendments and is explicitly named as a party that shall perform certain responsibilities and shall be paid funds for its services. Ms. Forcia helped to negotiate the contracts and she executed both the contract amendments and the Tribe-CTER contracts as “Awarding Official.” At the time she executed the contract amendments, Ms. Forcia had a warrant to execute them. (PFUF ¶ 42.)

In summary, the uncontroverted evidence demonstrates that the parties intended to benefit CTER, that the intention to benefit was direct, and that the authorized government contract officer had knowledge of the intention to benefit CTER.

III. The Uncontroverted Facts Also Indicate that CTER is Entitled To Partial Summary Judgment Under the “Reasonable Reliance” Test Contained in Section 302 of the Restatement (Second) of Contracts.

In 1997, the U.S. Federal Circuit adopted the Restatement (Second) of Contracts approach to analyzing a third-party beneficiary claim. *See Montana v. United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997). In relevant part, the Restatement (Second) of Contracts provides:

- (1) Unless otherwise agreed between the promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and . . .
 - (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

- (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

Restatement (Second) of Contracts § 302 (1981).

The Federal Circuit has also explained that “one way to ascertain such intent is to ask whether the beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him.” *Montana*, 124 F.3d at 1273; *Flexfab, LLC v. United States*, 62 Fed. Cl. 139, 147 (2004); *see also Dewakuku v. Martinez*, 271 F.3d 1031, 1041 (Fed. Cir. 2001).

CTER can demonstrate that it is an intended third-party beneficiary with enforceable rights when analyzed under each essential prong of Section 302 of the Restatements including the “reasonable reliance” test found in comment *d* of Section 302 because: (1) IEED and the Tribe did not deny rights to third-party beneficiaries; (2) CTER has a right to performance to effectuate the intent of IEED and the Tribe; (3) the circumstances indicate that IEED and the

Tribe intended to give CTER the benefit of the promised performance; and (4) CTER cannot be an incidental beneficiary.

A. IEED and the Tribe Did Not Deny Rights to Third-Party Beneficiaries.

The first requirement under the Restatement (Second) of Contracts approach requires CTER to establish that, in the contract, the promisor (IEED) and promisee (the Tribe) did not agree to deny third-party rights under the contract or set forth another analysis for how this Court should evaluate intended third-party beneficiary claims. Although uncommon, a promisor and promisee may affirm or deny rights to third parties under the contract. This was a principal reason why the plaintiff in *Maniere v. United States*, 31 Fed. Cl. 410 (1994), failed to establish third party beneficiary rights. There, the contract at issue denied third-party rights by express contractual language stating “all . . . conditions and provisions are for the sole benefit of the parties hereto and for the benefit of no other person.” *Id.* at 419. Further, the contract stated that “[n]othing expressed or referred to in th[e] [a]greement is intended . . . to give any person other than the parties hereto any legal or equitable right, remedy, or claim. . . .” *Id.*

Here, in contrast, neither of the contracts at issue in this dispute contains anything similar to the language found in *Maniere*, nor do the contracts imply any limitation on the rights vested in third parties. The failure to include limiting language waives the parties’ right to expressly deny any legal or equitable right, remedy or claim to an intended third-party beneficiary. The first step, therefore, of overcoming the “[u]nless otherwise agreed . . .” hurdle has been satisfied.

B. CTER Has a Right To Performance To Effectuate the Intentions of IEED and the Tribe under the Contract.

The next requirement under the Restatement (Second) of Contracts approach requires CTER to establish that the facts make it appropriate for this Court to recognize a right to

performance in CTER “to effectuate the intent of the parties.” This Court has analyzed this prong in terms of whether, absent the third party’s performance, the contract could be performed.

The *Norwest Bank Arizona, N.A. v. United States*, 37 Fed. Cl. 605 (1997), case is particularly instructive here. There, the government contracted with a company to install modular buildings, who in turn subcontracted to construct and deliver the modular buildings contemplated in the contract. Soon after the performance began, the subcontractor became concerned about the primary contract promisee’s solvency and demanded that payments under the contract be assigned to its bank, instead of the prime contractor’s bank. The subcontractor refused to continue performance by delivering modular buildings unless this assignment of payment took place. The primary contract promisee and the government, as a result, agreed to modify the contract so that the government would disburse contract funds to the subcontractor’s bank directly. The Court explained that the prime contract could not be accomplished until the payments were assigned. In other words, “the parties sought to effectuate their intention[s].” *Id.* at 609 (internal quotations omitted). This same analysis was endorsed in *Nelson Construction Co. v. United States*, 79 Fed. Cl. 81, 97 (2007) (citing *Norwest Bank*, 37 Fed. Cl. At 609 (“the prime contractor and the government shared the intention that the buildings be installed for the benefit of the [U.S.] Navy . . . [but] to effectuate their intentions, the parties allowed the subcontractor’s bank to receive payment under the prime contract.”)). Thus, the subcontractor was entitled to performance by way of payment on the assigned funds in order to effectuate the intentions of the party.

Similarly, here, CTER’s performance was essential to the completion of the contract. Both the NCCI Contract and the FHWA Contract were written to provide an administrative structure for IEED to disburse funds to CTER through an amendment to a 477 Tribal contract so

that CTER could provide job training programs on various reservations. IEED's contracts with the Tribe directed that the Tribe "shall contract" with CTER and described in great detail the activities that CTER would carry out under its contract with the Tribe. Absent involvement by CTER, no training could have taken place under the IEED-Tribal contracts because the Tribe's only performance obligations were to contract with CTER to conduct the training described in the contracts and to administer the contract by assisting CTER with reporting and other administrative tasks. CTER thus had a right to performance from the Tribe in the form of administrative assistance and disbursement of IEED funds so that CTER could "effectuate the intentions of the parties" by conducting the contracted-for training services on the selected Native American Reservations. It is therefore appropriate for this Court to recognize a right to performance in CTER to effectuate the intention of the parties of the NCCI and FHWA Contracts, respectively.

C. The Circumstances Indicate that CTER "Reasonably Relied" on IEED and that IEED and the Tribe Intended To Give CTER the Benefit of the Promised Performance.

The final analysis under the Restatement (Second) of Contracts approach requires CTER to prove that the circumstances indicate that the Tribe intended to give CTER the benefit of the promised performance. *Restatement (Second) of Contracts* § 302(1)(b). Courts often describe this prong as the "intent to benefit" category. *See* 9 Corbin on Contracts § 44.4 at 57 (2007). Under this prong, the "benefit" is receipt of ARRA Funds, and IEED's "promised performance" is the disbursement of ARRA funds to conduct training programs.

The Federal Circuit has used the "reasonable reliance" beneficiary test described in comment *d* of *Restatement (Second) of Contracts* § 302³ to analyze whether the parties intended

³ *Restatement (Second) of Contracts* § 302, comment *d* reads in part as follows:

to benefit the third party. *See, e.g., Montana v. United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997) (“One way to ascertain such intent is to ask whether the beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him.”); *see also Flexfab, LLC v. United States*, 62 Fed. Cl. 139, 147 (2004).

In the present case, CTER reasonably relied on the IEED-Tribal contracts to provide funding to it. IEED expressed its intent to fund CTER for the two training programs and CTER and IEED negotiated the terms of the training CTER was to provide even before the Tribe came into the picture. The Tribe was brought as a contracting party with IEED as a mechanism for getting the funding from IEED to CTER as quickly as possible, that is, to effectuate the intent of IEED and CTER. Thus, CTER had a right to rely on the IEED-Tribal contracts as promises to get to it the funding it had negotiated with IEED.

In addition to the “reasonable reliance” analysis, the facts here demonstrate two other reasons why the circumstances surrounding the contract indicate that IEED and the Tribe intended to benefit CTER with ARRA funds disbursed by IEED. First, the plain language of the NCCI and the FHWA SOWs, by directing the Tribe to contract with CTER, makes it clear that CTER is entitled to receive such funds. (PFUF ¶¶ 18, 35.) (“Spirit Lake Tribe shall transfer [ARRA] funds to CTER . . .”) Second, the Budget document attached to the NCCI SOW provides that CTER is to receive \$950,000 of the funds IEED is transferring to the Tribe under Amendment #2, while the Budget document attached to the FHWA SOW provides that CTER is

Either a promise to pay the promisee’s debt to a beneficiary or a gift promise involves a manifestation of intention by the promisee and promisor sufficient, in a contractual setting, to make reliance by the beneficiary both reasonable and probable. . . . In such cases, if the beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him, he is an intended beneficiary.

to receive \$500,000 of the funds that IEED is transferring to the Tribe under Amendment #6.
(PFUF ¶¶ 22, 36.)

D. CTER Cannot Be an Incidental Beneficiary.

An incidental beneficiary is “a person who is neither the promisee of a contract nor the party to whom performance is to be rendered [but who] will derive a benefit from [the contract’s] performance.” *Sallee v. United States*, 41 Fed. Cl. 509, 515 n.7 (1998). CTER cannot be considered an incidental beneficiary because it is the “party to whom performance is to be rendered.” Specifically, the contract’s plain language requires the Tribe to disburse contract funds to CTER to perform the services described in the contract.

For these reasons, CTER is entitled to judgment as a matter of law that it is a third party beneficiary under the contracts at issue.

CONCLUSION

For all of the foregoing reasons, the plaintiff respectfully requests that the Court grant its motion for partial summary judgment on whether CTER is an intended third party beneficiary under the NCCI and FHWA contracts because IEED and Spirit Lake intended to benefit CTER directly, and did not disavows any rights of third parties.

Respectfully Submitted,



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