2014-5003

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

COUNCIL FOR TRIBAL EMPLOYMENT RIGHTS,

Plaintiff-Appellant,
v.

UNITED STATES,

Defendant-Appellee,

Appeal from the United States Court of Federal Claims in 12-CV-326,
Judge Charles F. Lettow.

BRIEF OF DEFENDANT-APPELLEE, UNITED STATES

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STATEMENT OF RELATED CASES

Pursuant to Fed. Cir. R. 47.5, defendant-appellee's counsel states that this is plaintiff-appellant's first appeal concerning this matter. We are unaware of any other appeal in or from the same proceeding to have been previously before this or any other appellate court under the same or similar title. We are unaware of any other cases pending in this or any other court that will directly affect or be directly affected by the Court's decision in this pending appeal.

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Appeal from the United States Court of Federal Claims in 12-CV-326,
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STATEMENT OF THE ISSUES[1]

(1) Whether the parties to the agreements at issue were required to obtain tribal resolutions from the tribes to be benefitted prior to the execution of the agreements where 25 U.S.C. § 450b(*l*) requires that in any case where a self-determination agreement will provide services benefitting more than one Indian tribe, tribal resolutions from each of the benefitted tribes authorizing the agreement must be obtained prior to the agreement's execution.

[1] In accordance with Federal Rules of Appellate Procedure 28(b), defendant-appellee United States provides separate statements of the issues, case, facts and standard of review.

(2) Whether the two agreements at issue are *void ab initio* when an agreement issued in violation of statute is *void ab initio* where the violation constituted a substantial deviation from the law, and nonenforcement is consistent with the law's underlying public policy, and the failure to obtain tribal resolutions from the tribes to be benefitted under the two agreements at issue contravened the central tenants of the Indian Self-Determination And Education Assistance Act of 1975 (ISDA), Pub. L. 93-638, codified at 25 U.S.C. §§ 450, *et seq*., and nonenforcement is consistent with ISDA's public policy.

(3) Whether the trial court correctly concluded that no contract existed between the Government and CTER when a party alleging a contract with the United States must demonstrate that the Government official with whom the party dealt possessed actual authority to bind the United States in contract, and the Government official with whom the Council For Tribal Employment Rights (CTER) dealt did not possess the authority to bind the United States in contract with CTER.

STATEMENT OF THE CASE

I. Nature Of The Case

This case involves a breach of contract action brought in the U.S. Court of Federal Claims by plaintiff-appellant, CTER, seeking monetary damages related to two alleged contracts between itself and the U.S. Department of Interior (DOI)

acting through the Office of Indian Energy and Economic Development (IEED). The alleged contracts relate to two grant programs involving IEED, the Spirit Lake Tribe (SLT) and CTER to afford vocational job training services to fourteen Indian tribes and one Alaska Native Village. The funding for the two programs was made available to IEED through the American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. 111-5, 123 Stat. § 115. The ARRA funds were distributed by IEED to SLT under the authority of ISDA and the Indian Employment, Training and Related Services Demonstration Act of 1992, Pub. L. 102-477, codified at 25 U.S.C. §§ 3401, *et seq*.

Under the grant program agreements, SLT was to distribute the program funds to CTER, the subcontractor, with CTER providing the training to the Indian tribes and Alaska Native Village. SLT was to monitor CTER's performance and ensure all reporting requirements were satisfied.

II. Course Of Proceedings And Disposition Below

In February and March of 2012, CTER submitted two certified claims pursuant to the Contracts Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101, *et seq*., to IEED seeking breach of contract damages under two alleged three-party contracts between IEED, SLT and CTER. IEED did not respond to CTER's claims and on May 23, 2012, CTER filed a complaint at the CFC. In it, CTER sought

damages based upon two express contracts between itself and IEED, or, in the alternative, as a third-party beneficiary to two agreements between IEED and SLT.

Prior to the Government answering CTER's complaint, the trial court opened the proceeding to full discovery. On December 11, 2012, the Government filed combined motions to dismiss and summary judgment, contending that the trial court was without jurisdiction to entertain CTER's complaint because there was no contract between IEED and CTER, and that CTER was not a third-party beneficiary to the agreements between IEED and SLT. On April 16, 2013, CTER filed a motion for partial summary judgment upon its third-party beneficiary claims. The trial court held a hearing on the parties' motions on June 4, 2013.

On August 27, 2013, the trial court granted the Government's motion to dismiss. *See Council For Tribal Employment Rights v. United States*, 112 Fed. Cl. 231 (2013).[2] In doing so, the trial court concluded that no express contracts existed between IEED and CTER because the Government official with whom CTER dealt did not possess actual authority to bind the United States in contract with CTER. Op. at 11-14. The trial court further held that CTER could not be a third-party beneficiary to two agreements between IEED and SLT because the agreements were *void ab initio*. *Id*. at 15-18. The trial court concluded that the parties did not

[2] Citations to the trial court's decision will reference the version of the opinion attached to appellant's principal brief.

satisfy a statutory prerequisite to the formation of the two agreements, and that the violations were plain and substantial. Op. at 15-18.

The trial court entered judgment upon CTER's complaint on August 30, 2013. This appeal followed.

STATEMENT OF FACTS

I. Statutory And Legal Framework

A. ISDA

Congress passed ISDA based in-part upon its finding that "[t]he prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government . . . ." 25 U.S.C. § 450(a)(1). Congress acknowledged that "the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons." 25 U.S.C. § 450(a)(2). Through ISDA, Congress recognized "the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of . . . Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities." 25 U.S.C. § 450a(a). *See also Demontiney v. United States ex rel Dept. of Interior, Bureau of Indian*

Affairs, 255 F.3d 801, 806 (9th Cir. 2001) ("Congress enacted [ISDA] to encourage Indian self-determination and tribal control over administration of federal programs for the benefit of Indians . . . .").

Congress conferred upon the Secretary of the Interior the authority to "enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof" for the benefit of Indians. 25 U.S.C. § 450f(a)(1). The statute states:

> That in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant.

25 U.S.C. § 450b(*l*).

The manner in which a tribe expresses its approval to allow an organization to perform services on its behalf is through a "tribal resolution." 25 U.S.C. § 450*l*(c) (see model agreement paragraph (f)(1)). In passing amendments to ISDA in 1988, the Senate Committee on Indian Affairs explained that the purpose of requiring an organization to obtain a tribal resolution from the tribes to be benefitted under a self-determination agreement prior to the "letting or making" of the agreement was to maintain tribal control over the contracting process:

> The Committee does wish to clarify its understanding, however, of the intent of the requirement to obtain tribal resolutions.
>
> Clearly, the law envisions maintaining tribal government control of the contracting process. These amendments strengthen the requirement for a tribal resolution in Section 102(a) as amended. Sections 102 and 103 in the original Act contain provisions for "community support for the contract" which the Secretary has correctly interpreted to mean a tribal resolution.

S. Rep. No. 100-274 at *19-20.

ISDA sets forth a model agreement, commonly referred to as a "self-determination contract" or "638-contract," to be followed by the Secretary of the Interior in the formation of an ISDA agreement with a tribal organization. 25 U.S.C. § 450*l*(c). The law mandates that "[e]ach self-determination contract entered into under this subchapter shall . . . contain, or incorporate by reference, the provisions of the model agreement . . . ." 25 U.S.C. § 450*l*(a); *Thompson v. Cherokee Nation of Oklahoma*, 334 F.3d 1075, 1082 (Fed. Cir. 2003) ("The ISDA requires that every self-determination contract incorporate the terms of a model agreement, which is provided by 25 U.S.C. § 450*l*(c)."). The model agreement requires that the resolutions from the tribes to be benefitted under the agreement be attached to the contract:

> **Approval of Contract**.-- Unless previously furnished to the Secretary, the resolution of the _____ Indian tribe(s) authorizing the contracting of the programs, services, functions, and activities identified in this Contract is attached to this Contract as attachment 1.

25 U.S.C. § 450*l*(c) (model agreement paragraph (f)(1)) (emphasis original); *see also* 25 C.F.R. § 900.8(d).

B. Pub. L. 102-477

Subsequent to the enactment of ISDA, Congress passed Pub. L. 102-477. Congress' stated purpose in passing Pub. L. 102-477 was "to demonstrate how Indian tribal governments can integrate the employment, training and related services they provide in order to improve the effectiveness of those services, reduce joblessness in Indian communities and serve tribally-determined goals consistent with the policy of self-determination." 25 U.S.C. § 3401. The law mandates that the Secretary of the Interior:

> [S]hall, upon receipt of a plan acceptable to the Secretary . . . submitted by an Indian tribal government, authorize the tribal government to coordinate, in accordance with such plan, its federally funded employment, training, and related services programs in a manner that integrates the program services involved into a single, coordinated, comprehensive program and reduces administrative costs by consolidating administrative functions.

25 U.S.C. § 3403. The law defines "Indian tribe" in accordance with the definition ISDA provides for that term. 25 U.S.C. § 3402. ISDA defines "Indian tribe" to mean "any Indian tribe, band, nation, or other organized group or community,

including any Alaska Native village or regional or village corporation . . . , which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 450b(e).

The plans authorized under Pub. L. 102-477 are commonly referred to as "477 plans." JA703.[3] The types of training and related services that may be included within a tribe's 477 plan include:

> [A]ny program under which an Indian tribe is eligible for receipt of funds under a statutory or administrative formula for the purposes of assisting Indian youth and adults to succeed in the workforce, encouraging self-sufficiency, familiarizing Indian Youth and adults with the world of work, facilitating the creation of job opportunities and any services related to these activities.

25 U.S.C. § 3404. The law states that the "lead agency for a demonstration program under this chapter shall be the Bureau of Indian Affairs, Department of the Interior" (BIA). 25 U.S.C. § 3410(a).

Through a 477 plan, Indian tribes combine Federal grant funds related to employment and training activities into a single plan with a single budget and a single reporting system. *See* Office of Management and Budget (OMB), Compliance Supplement, Circular No. A-133 (June 2012), 2012 WL 6764077 ("Tribes participating in the '477' program . . . are required to submit a single financial report covering all Federal formula programs that are part of their 477

[3] "JA __" refers to the Joint Appendix.

plan to [BIA]."); JA703. IEED serves as the lead office within DOI for the 477 program. JA703. No separate funding or contracting authority is associated with a 477 plan. *Id*. The funds distributed through a tribe's 477 plan are those which a tribe would otherwise receive under the authority of the individual programs it chooses to consolidate into its 477 plan. 25 U.S.C. § 3408(a) ("The plan submitted by a tribal government may involve the expenditure of funds . . . if such expenditures are . . . consistent with the purposes specifically applicable to Indian programs in the statute under which the funds are authorized."); *see also* JA703. All 477 program funds are distributed by IEED to participating Indian tribes through ISDA self-determination agreements. JA703.

II. The 638-Contract At Issue

A. Spirit Lake Tribe's 477 Plan And 638-Contract To Distribute Funds Provided Through ARRA

In December 2008, IEED approved a 477 plan submitted by SLT, a Federally recognized Indian tribe whose reservation is located in east-central North Dakota. JA706-07. To distribute the plan funds to SLT, IEED issued the tribe 638-contract No. GTK00T109. *Id*.

On February 17, 2009, Congress enacted ARRA. In Title VII of ARRA, Congress allocated $40 million to BIA for the "Operation of Indian Programs" related to "workforce training programs and the housing improvement program." In Title XII, Congress allocated $550 million to the Federal Highway

Administration "for investments in transportation at Indian reservations and Federal lands."

On June 1, 2009, IEED, issued 638-contract No. GTK00T109AR to SLT. JA9. The stated purpose of the agreement was to "provide Indian Employment, Training, and Related Services in accordance with the terms, provisions and conditions of this contract and funding agreement; and provisions of the [ARRA]" (the ARRA 638-contract). JA11. The ARRA 638-contract stated that the programs provided by SLT under the agreement would be administered as part of SLT's 477 plan. JA12, 26. SLT's ARRA 638-contract contained the ISDA prescribed model agreement for 638-contracts, JA10, and identifies the "Recipient" and "Contractor" to be "[SLT], a federally-recognized Indian Tribe or Tribal Organization, as defined at 25 U.S.C. 450b." JA43.

SLT's ARRA 638-contract required that "in any case where a contract is let or grant made to an organization to perform services benefitting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant." JA25. The agreement defined tribal resolution" to mean "the formal manner in which the tribal organization expresses its legislative will in accordance with its organic documents. In the absence of such organic document, a written expression adopted pursuant to tribal practices will be acceptable." *Id*. The agreement contemplated that SLT would enter into

subcontracts to carry out the agreement's purpose, JA27, and that the parties could issue future amendments to the agreement. JA36.

B. Amendments 2 And 6 To SLT's ARRA 638-Contract

1. Amendment 2

On August 5, 2009, IEED issued an amendment to SLT's ARRA 638-contract (Amendment 2). JA51. The purpose of Amendment 2 was to allocate ARRA grant funds to support (1) a Solar Heat Panel Training and Installation Project; and (2) the Native Construction Careers Initiative Project (NCCI). JA62. Amendment 2 identified the parties to the agreement as being IEED and SLT, JA51, and defined "Contractor, Recipient, Tribe (ARRA related)" to mean "[SLT], a federally-recognized Indian Tribe or Tribal Organization, as defined at 25 U.S.C. 450b." JA56. Amendment 2 anticipated that SLT would enter into subcontracts to execute the two grant programs. JA57. The amendment contained the same tribal resolution requirement and definition that were stated in SLT's ARRA 638-contract. JA58.

The NCCI training program statement of work (SOW), JA82, referenced in Amendment 2's SOW, JA62, involved CTER providing "hands-on commercial construction training" to Indian tribes. JA82. The NCCI SOW stated that "[SLT] proposes to enter into a contract with CTER to conduct [NCCI training]." *Id*. The NCCI training program agreement identified eight Indian tribes and one Alaska

Native Village to which CTER would afford the NCCI training. *Id*. The amount of ARRA grant funds to be afforded the NCCI training program was $1,019,000. JA93. Amendment 2 was signed by representatives of IEED and SLT. JA78. The performance period for Amendment 2 was from June 1, 2009, through September 30, 2010. JA51. The NCCI training program SOW was signed by representatives of IEED, SLT and CTER. JA92.

Neither SLT, CTER nor IEED obtained tribal resolutions from all eight tribes and Alaska Native Village to whom CTER was to provide NCCI training under Amendment 2 prior to the execution of that agreement.

2. Amendment 6

a. Interagency Agreement

On September 16, 2009, IEED and the Federal Highway Administration (FHWA) entered into an interagency agreement, JA94, to allow IEED to secure a portion of FHWA's ARRA grant funds "for On-the-Job training and Supportive Services (OJT/SS) to increase job opportunities for federally recognized tribes and disadvantaged American Indians in the Federal-aid highway construction industry." JA98. Through the agreement, FHWA provided IEED with $1.5 million to support the training program. JA94. Of that amount, the agreement stated that $500,000 would be allocated for CTER's NCCI training "that will be conducting on-site apprenticeship training programs to at least 6 tribes at the cost

of $50,000 per tribe this is 6 x $50,000 = $300,000 + $200,000 for related expenses stated above." JA111. In the "Budget and Financial Requirements" section, the agreement stated that the "activities cited in this proposal strengthen and expand the goals and objectives of the 477 program and [IEED]. The activities address the weakness of the 477 program which are a lack of economic development and jobs on Indian reservations." JA110.

b. Amendment 6

On June 11, 2010, IEED issued a sixth amendment to SLT's ARRA 638-contract (Amendment 6). JA118. The purpose of Amendment 6 was to allocate ARRA grant funds through SLT's ARRA 638-contract to support "Department of Transportation-Federal Highway Administration's approved training projects . . . ." JA129. Amendment 6 stated that the parties to the agreement were IEED and SLT, JA118, and defined "Contractor, Recipient, Tribe (ARRA related)" to mean "[SLT], a federally-recognized Indian Tribe or Tribal Organization, as defined at 25 U.S.C. 450b." JA123. Amendment 6 anticipated that SLT would enter into subcontracts to execute the purpose of the amendment. JA124. The amendment contained the same tribal resolution requirement and definition included in SLT's ARRA 638-contract. JA125.

The FHWA training program SOW, JA155, referenced in Amendment 6's SOW, JA129, stated that "SLT proposes to enter into a contract with CTER and

the National Indian Ironworkers [(NII)] Training Program to administer the [FHWA/IEED] Training Initiative." JA156. The FHWA training program agreement stated that the "purpose of this [SOW] is a modification to the current ARRA contract between [SLT], [CTER] and adding the [NII] training center that is an ARRA project under an interagency agreement that is between [FHWA] and The Department of the Interior/Indian Affairs." JA155. The FHWA training program SOW explained that CTER would provide training "to develop Indian preference certification programs for road construction activity." *Id*. CTER was to provide this training to six as yet to be identified Indian tribes. JA156. The amount of ARRA grant funds to be afforded for the FHWA training program performed by CTER stated in Amendment 6 was $500,000. JA155.

Amendment 6 was signed by representatives of IEED and SLT. JA145. The performance period for Amendment 6 was from June 1, 2009, through September 30, 2010. JA118. The FHWA training program agreement was signed by representatives of IEED, JA153, SLT, *id*., and CTER. JA161. The FHWA training program SOW would terminate on September 30, 2010. JA159.

Neither SLT, CTER nor IEED obtained tribal resolutions from the six tribes to whom CTER was to provide NCCI training under Amendment 2.

C. The Scope Of The IEED Awarding Official's Authority

Amendments 2 and 6, as well as the associated agreements between SLT and CTER, were signed by the IEED's Chief of the Division of Workforce Development, Lynn Forcia. JA51, 92, 118, 161. In that position, Ms. Forcia was responsible for managing tribes' 477 plans. JA. At the time she signed the agreements at issue, Ms. Forcia was a "Level I Awarding Official." JA704. The BIA's "Indian Self-Determination Awarding Official Certification System (AOCS) Handbook" defines "Awarding Official" to mean an agency representative with the authority to issue self-determination contracts and grants under ISDA. JA700.

In certifying Ms. Forcia as an Awarding Official, BIA placed restrictions upon the scope of her authority. JA704. Specifically, in the letter to IEED accompanying Ms. Forcia's warrant certificate, BIA stated that "we have conditionally approved Ms. Forcia as a Level I Awarding Official to award only Pub. L. 102-477 grants." JA694. Accordingly, Ms. Forcia's delegation of authority certificate states that she is "delegated the authority to award only P.L. 102-477 grants, and is hereby certified as an Awarding Official – Level I." JA705.

BIA delegates to awarding officials a level of authority that is commensurate with their duties, and typically this is accomplished through certain established authority levels. JA704. Ms. Forcia did not require general ISDA contracting authority because the 477 demonstration project that she was responsible for did

not encompass these areas. *Id.* However, the BIA certification policy predated the 477 program and the limits that BIA required to be placed upon Ms. Forcia's awarding certificate could not be accomplished within the AOCS's traditionally established authority levels. *Id.* Therefore, BIA specifically limited her authority to "only Pub. L. 102-477 grants," whereby the Indian tribe's 477 plan funding would be distributed through an ISDA 638-contract. *Id.*

The limitation placed upon Ms. Forcia's authority meant that she could only enter into self-determination agreements with an Indian tribe, and agreements that are specifically related to implementing the tribe's 477 plan. *Id.* Specifically, 25 U.S.C. § 3403 requires the Secretary of the Interior to authorize a 477 plan submitted by an "Indian tribal government." For purposes of the 477 program, "Indian tribe" is defined as "any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation . . . , which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 3402; 25 U.S.C. § 450b(e).

SUMMARY OF ARGUMENT

The trial court correctly held that Amendments 2 and 6 were issued in violation of Subsection 450b(*l*). The plain, unambiguous language of the statute – "in *any* case" – required that the authorizing tribal resolutions from the tribes to be

afforded the training under the amendments be obtained prior to the execution of the agreements. This clear requirement goes to the heart of the public policy underlying ISDA: promoting Indian self-determination, and effectuating tribal control over the contracting process and the organizations which enter their communities to provide Federally-funded services.

The trial court also correctly held that the violations of Subsection 450b(*l*) rendered Amendments 2 and 6 *void ab initio*. The statutory deviations were substantial because they contravened ISDA's central tenants of promoting Indian self-determination and tribal control. Moreover, the violations at issue were not mere procedural defects in the issuance of the amendments. Subsection 450b(*l*) conferred upon the tribes the substantive right of prior approval. Failure to adhere to the tribal resolution requirement in this case prevented the tribes from exercising that right. Nor did the violations at issue involve the contravention by the Government of an obscure, internal contracting procedure the existence of which only the agency could reasonably have been aware. Rather, it was incumbent upon all of the parties to Amendments 2 and 6 to ensure compliance with Subsection 450b(*l*).

Finally, the trial court correctly held that no contract could exist between IEED and CTER because the Government official with whom CTER dealt did not possess the authority to bind the United States in contract. The limitation on the

official's authority is expressly stated on her delegation of authority certificate and is based upon a statute. There is no requirement that agencies publish in the Federal Register express limitations included on contracting officers' warrant certificates in order for those limitations to be given effect. Even so, before the trial court, the Government affirmatively demonstrated the limitation of authority by submitting the affidavit from the BIA official that issued the delegation of authority certificate.

For these reasons, as will be more fully stated below, the Court should affirm the trial court's decision.

ARGUMENT

I. Standard Of Review

This Court reviews *de novo* the trial court's decision to dismiss a complaint. *Kam-Almaz v. United States*, 682 F.3d 1364, 1368 (Fed. Cir. 2012). The Court also reviews *de novo* the trial court's grant of summary judgment. *DIRECTV Group, Inc. v. United States*, 670 F.3d 1370, 1374 (Fed. Cir. 2012). The Court reviews without deference the trial court's interpretation of statutes. *Id*. at 1375.

II. The Trial Court Correctly Held That Amendments 2 And 6 Were *Void Ab Initio* Because They Violated Subsection 450b(*l*)

ISDA mandates that:

> [I]n *any case* where a contract is let or grant made to an organization to perform services benefitting more than one Indian tribe, the approval of *each* such Indian tribe shall be a *prerequisite* to the letting or making of such contract or grant.

25 U.S.C. § 450b(*l*) (emphasis added). Interpreting this clear language, the trial court concluded that "[t]he language . . . provides a plain directive: a contract under ISDA cannot be let or made to an organization to perform services benefiting more than one Indian tribe without the prior approval of each Indian tribe that is to benefit." Op. at 15.

It is not disputed that Amendments 2 and 6 to SLT's ARRA 638-contract called for an organization – SLT through CTER – to perform services benefiting more than one tribe. JA82, 156. Nor is it disputed that the required tribal resolutions from each of the Indian tribes to benefit under Amendments 2 and 6 were not obtained prior to the "letting or making" of those agreements. Applying ISDA's plain language to the undisputed facts of this case, the trial court correctly ruled that the two amendments were not validly issued because they did not satisfy a clear, statutorily required prerequisite to contract formation. Op. at 15-17.

The trial court then held that the infirmity in the issuance of Amendments 2 and 6 rendered those agreements *void ab initio*, Op. at 17-18, because the failure to obtain the required tribal resolutions constituted a "substantial" violation of ISDA:

> This requirement furthers the general purpose of ISDA, *i.e.*, to ensure tribes have effective and meaningful participation in programs and services designed to benefit them. Thus, failure to comply with Subsection 450b(*l*) before executing Amendments 2 and 6 contravened a central tenet of the statute.

Op. at 18. The trial court further concluded that the "departure from the plain directive of ISDA was obvious insofar as the need for prior tribal resolutions was concerned," rendering the two amendments "plainly" violative of ISDA and therefore *void ab initio*. *Id*.

On appeal, CTER argues that the trial court's decision was erroneous because: (1) Subsection 450b(*l*) was ambiguous as it applied to the facts of this case, and the trial court therefore should have deferred to an alleged agency policy not requiring tribal resolutions for 638-contracts instituting programs on a national basis; (2) ARRA displaced ISDA's tribal resolution requirement; (3) Amendment 6 is not subject to the tribal resolution requirement because the agreement did not name the tribes to be benefitted; and (4) the departure from ISDA's tribal resolutions requirement did not render the two amendments *void ab initio* because the violations were not substantial or otherwise obvious to CTER.

For the following reasons, CTER's arguments are without merit, and the Court should affirm the trial court's decision.

A. The Trial Court Correctly Held That ISDA Required The Parties To Obtain Tribal Resolutions From Each Of The Tribes To Be Afforded Training Under Amendments 2 And 6 Prior To The Agreements' Executions

1. The Plain Language Of Subsection 450b(*l*) Required That Tribal Resolutions Be Obtained Prior To The Executions Of Amendments 2 And 6

CTER argues that Subsection 450b(*l*)'s tribal resolution requirement was ambiguous regarding whether the requirement applied to 638-contracts implementing ISDA programs on a national basis, and the trial court therefore erroneously failed to consider an alleged agency policy not requiring tribal resolutions for national programs. App.'s Br. at 19-23. CTER's argument contravenes the plain language of the statute, which is confirmed by the clear purpose of the tribal resolution requirement within ISDA.

"Statutory interpretation begins with the language of the statute." *Norfolk Dredging Co., Inc. v. United States*, 375 F.3d 1106, 1110 (Fed. Cir. 2004) (citing *Williams v. Taylor*, 529 U.S. 420, 431 (2000)). "A court derives the plain meaning of the statute from its text and structure." *Id*. (citing *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001)). "If the language is clear and fits the case, the plain meaning of the statute generally will be regarded as conclusive." *Id*. (citing *Sullivan v. Stroop*, 496 U.S. 478, 482 (1990)). The Supreme Court has "'stated time and again

that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.'" *Id*. (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)).

CTER's argument that Subsection 450b(*l*) is ambiguous is devoid of any analysis of the statute's actual language but, rather, jumps right into a discussion of ISDA's legislative history and alleged agency policies. The statute, however, clearly states that the tribal resolution requirement applies "in *any* case." CTER provides no explanation for why the phrase "in any case" is ambiguous, allowing for an interpretation excluding 638-contracts calling for an organization to provide services to tribes located across the country. The word "any" is clear, and affords no interpretive space for such an exception.

A consideration of the tribal resolution's important purpose in carrying out ISDA's intent confirms that the requirement is applicable to "any" 638-contract in which an organization is to provide services to more than one Indian tribe. Specifically, ISDA was enacted upon Congress's recognition that "the Indian people will never surrender their desire to *control their relationships . . . with non-Indian governments, organizations, and persons.*" 25 U.S.C. § 450(a)(2) (emphasis added); *see also* 25 U.S.C. § 450(b)(3) ("parental and community *control* of the educational process is of crucial importance to the Indian people" (emphasis added); *Demontiney v. United States ex rel Dept. of Interior, Bureau of*

Indian Affairs, 255 F.3d 801, 806 (9th Cir. 2001) ("Congress enacted [ISDA] to encourage Indian self-determination and tribal *control* over administration of federal programs for the benefit of Indians . . . " (emphasis added).).

The tribal resolution requirement is the statutorily prescribed prophylactic tool that effectuates ISDA's core principal that Indian tribes maintain control over which outside organizations may enter their communities to perform services for its members. As the Senate Committee on Indian Affairs explained:

> Clearly, *the law envisions maintaining tribal government control of the contracting process*. These amendments *strengthen the requirement* for a tribal resolution in Section 102(a) as amended. Sections 102 and 103 in the original Act contain provisions for "*community support for the contract*" which the Secretary has correctly interpreted to mean *a tribal resolution*.

S. Rep. No. 100-274 at *19-20 (emphasis added).

The critical function that the tribal resolution requirement plays in ensuring Indian tribes maintain control over their relationships with outside organizations in no way changes based on whether a 638-contract calls for an organization to provide services to tribes located within a particular region or across the nation. In either case, it remains that an outside organization will be entering the Indian tribe's community to provide a Federally-funded service to its members. It is ISDA's clear purpose to afford the tribe control over its relationship with any

outside organization, *see* 25 U.S.C. § 450(a)(2), and the tribal resolution requirement in Subsection 450b(*l*) is the device that ensures such control.

2. The Legislative History Upon Which CTER Relies Supports The Trial Court's Conclusion That Tribal Resolutions Were Required In This Case

In its brief, CTER cites legislative history to argue that the tribal resolution requirement was limited to only those situations in which one tribe assumed control over a pre-existing BIA program through a 638-contract and would proceed to provide services to other tribes. App. Br. at 21-22. CTER, however, fails to cite any language in ISDA itself that would suggest that the "in any case" language of Subsection 450b(*l*) was limited in the manner appellant contends. Nor does the legislative history upon which CTER relies support a reading that the "in any case" language was narrowly limited to certain types of 638-contracts.

CTER relies upon the following statement from the House Committee on Interior and Insular Affairs:

> [W]here a contract could involve programs or activities serving several tribes (*such as* in the case of western Washington, Nevada, the New Mexico Pueblos, and other places where [BIA] serves more than one tribe) . . . .

App.'s Br. at 21 (citing H. Rep. No. 93-1600, at *7786 (emphasis added)). Nothing in this passage supports CTER's contention that Congress intended that the tribal resolution requirement only apply where "two tribes shared a particular

. . . program . . . and one of those tribe [sic] proposed to take that program over under the ISDA . . . ." *Id*. The committee report simply provides an example of a contract in which some service would be provided to more than one tribe. The phrase "such as" clearly indicated that it was one example of a 638-contract in which more than one tribe would be benefitted under the agreement.

Furthermore, when read in its full context, the committee report language reinforces the importance of the tribal resolution's role as the statutorily prescribed protective tool ensuring tribes maintain control over the contracting process. Specifically, the beginning of the legislative history passage upon which CTER relies states:

> We are aware of the concerns of some Indian leaders . . . that contracts under sections 102 and 103 could be entered into with Indian organizations *not approved by* the tribal government or governments whose members would be served under the contract.

H. Rep. No. 93-1600, at *7786 (emphasis added). This portion of ISDA's legislative history is addressing the issue of tribes maintaining control over their relationships with outside organizations – *i.e*., "Indian organizations not approved by the tribal government." This concern over control applies equally to 638-contracts affording services to tribes located in one region or nationally.

In this case, the tribes to receive the vocational training under Amendments 2 and 6 possess the same desire to maintain control over their relationships with

outside organizations – such as SLT and CTER – regardless of the fact that the tribes were located in different parts of the nation.

3. IEED Has Not "Interpreted" Subsection 450b(*l*) To Not Apply To 638-Contracts Instituting Programs To Tribes Located Across The Nation

CTER argues that it has been BIA's and IEED's longstanding policy to not require that tribal resolutions be obtained where the 638-contract will provide services to tribes located throughout the nation and, therefore, the trial court should have afforded deference to that alleged interpretation of Subsection 450b(*l*) pursuant to *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). CTER is not correct.

This Court has explained that, under *Chevron*, "'[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as [an] agency, must give effect to the unambiguously expressed intent of Congress.'" *DIRECTV Group, Inc.*, 670 F.3d at 1381 (Fed. Cir. 2012) (quoting *Chevron*, 467 U.S. at 842-43). If the statute is silent or ambiguous with respect to the specific issue, however, then a reviewing court should give deference to the agency's interpretation if it is not in conflict with the statute's plain language. *Id*.

As explained above, Congress unambiguously expressed its intent in ISDA that Indian tribes would maintain control over the contracting process and their relationships with outside organizations. 25 U.S.C. § 450(a), (b). Subsection

450b(*l*)'s requirement that tribal resolutions be obtained "in *any* case" that an organization will provide services that benefit more than one tribe is the statutory tool by which Congress's intent is effectuated. The language "in *any* case" is clear and unambiguous on its face, and affords no basis for an exclusion of 638-contracts affording services to tribes located across the nation. Accordingly, the interpretive inquiry ends there, and *Chevron* deference is not applicable in this case. The trial court therefore correctly concluded that "[b]ecause Subsection 450b(*l*) is unambiguous, any contrary interpretation by the agency would not be entitled to the deference which [CTER] urges." Op. at 17.

CTER's characterization of BIA's and IEED's past practices as demonstrating an agency policy that Subsection 450b(*l*) does not apply to 638-contracts affording services to tribes across the nation is nevertheless incorrect. There is no promulgated regulation, policy directive, or other formal, written guideline of which we are aware, in which BIA or IEED interprets, upon deliberation, that ISDA's tribal resolution requirement does not apply to 638-contracts providing services to tribes located across the nation.

BIA's ISDA-implementing regulations enforce Subsection 450b(*l*)'s requirement that tribal resolutions be acquired "in any case." Specifically, 25 C.F.R. § 900.8, titled "what must an initial contract proposal contain?" requires that a proposed 638-contract include "[a] copy of the authorizing resolution from

the Indian tribe(s) to be served" under the contract. 25 C.F.R. § 900.8(d). There is nothing in this regulation that carves out an exception to the tribal resolution requirement for 638-contracts affording services to tribes located across the nation.

Subparagraph (d)(1) of the regulation does include the conditional clause:

> 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.

The use of the conjunctive "if" at the beginning of the clause signals that the regulation is proceeding to further describe how the tribal resolution requirement applies in a specific instance.

In support of its argument that BIA and IEED have a "longstanding policy" interpreting Subsection 450b(*l*) to not apply to 638-contracts providing services to tribes located across the nation, CTER points to two 638-contracts issued by BIA without first obtaining the required tribal resolutions. App. Br. at 22-23. The Government acknowledges that there have been instances in which the tribal resolution requirement was apparently not adhered to by BIA or IEED. However, as explained above, there is no regulation, policy directive, or other written guidance of which we are aware, that, after deliberation, the agencies concluded that Subsection 450b(*l*) did not apply to certain types of 638-contracts. Rather, the

one BIA regulation addressing the issue enforces the tribal resolution requirement for all 638-contracts. *See* 25 C.F.R. § 900.8(d).

Furthermore, as the trial court noted, prior to the tribal resolution issue arising within the context of this litigation, an IEED official stated that tribal resolutions would be required for all national and regional training programs. *See* Op. at 17 n.16; JA498. Finally, the clearest indication that neither BIA nor IEED had instituted a policy that the tribal resolution requirement would not apply to the agreements at issue in this case is that Amendments 2 and 6 contained Subsection 450b(*l*)'s requirement *within their terms*. Specifically, both amendments stated plainly that:

> [I]n any case where a contract is let or a grant made to an organization to perform services benefitting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant.

JA58, 125.

4. ARRA Does Not Displace Subsection 450b(*l*)

CTER argues that ARRA displaced ISDA's tribal resolution requirement because "the training programs were being funded under ARRA," and "[a] key element of ARRA . . . was to use the recipient of the funds as a pass-through entity that could transfer such funds to another entity that actually provided the services under the program." App.'s Br. at 24. CTER's argument is without merit.

While Amendments 2 and 6 identify ISDA, Pub. L. 102-477, and ARRA as issuing authorities, JA51, 118, CTER identifies no provision within ARRA that displaces the contracting requirements of other laws under which the appropriated funds would be committed by an agency. Here, while ARRA provided funds to IEED for Indian workforce training, ARRA afforded no independent contracting authority to the agency and IEED therefore could only distribute those funds under the authority of Pub. L. 102-477 and ISDA. There is nothing in ARRA that would allow IEED to enter into agreements with Indian tribes for the expenditure of ARRA funds without following the established requirements of the existing contracting statutes to which the agency must adhere.

Citing an OMB ARRA-implementing regulation defining "sub-recipient," CTER argues that SLT was merely a "pass-through entity" through which the ARRA funds could be distributed to CTER. App.'s Br. at 24 (citing 2 C.F.R. § 176.30). Characterizing SLT as a mere "pass through entity" is fundamentally inapposite to ISDA's goal of promoting Indian self-determination by affording tribes control over the contracting process. *See* 25 U.S.C. § 450(a). In any event, the vehicles by which those funds were distributed was SLT's 477 plan and 638-contract. There is nothing in ARRA that displaces the contracting requirements of those two statutes. Nor is there any language in the OMB regulation upon which CTER relies that would effectuate such a displacement. Even if there were such

language, it is axiomatic that a regulation cannot super-cede a statutory requirement. *Caldern v. J.S. Alberici Const. Co., Inc*., 153 F.3d 1381, 1383 n.1 (Fed. Cir. 1998) ("Statutes trump conflicting regulations").

5. Subsection 450b(*l*) Applies To Amendment 6

CTER argues that ISDA's tribal resolution requirement did not apply to Amendment 6 because the six tribes to be afforded vocational job training under the agreement had yet to be identified. App.'s Br. at 26-28. CTER contends that because the tribes had not been identified, "the trial court interpreted section 450b(*l*) in a manner that would be impossible to carry out and thus produce an absurd result." *Id*. at 28. CTER's argument is without merit, as it is clear that the tribal resolution requirement applied to Amendment 6.

Rejecting CTER's argument below, the trial court concluded that:

> A contract that contemplates the provision of benefits to multiple tribes cannot avoid compliance with the plain language of ISDA simply by being indefinite as to the identity of the tribes to be benefited. Nor can a call for future resolutions as stated in the contract displace a statutory directive that requires resolutions as a "prerequisite" to a contract or grant.

Op. at 16 n.13. The trial court's application of Subsection 450b(*l*) to Amendment 6 is correct.

First, Subsection 450b(*l*) applies "in any case where a contract is let or grant made to an organization to perform services benefitting more than one Indian tribe

. . . ." It is not disputed that under Amendment 6 CTER would "perform services benefitting more than one Indian tribe." *See* JA156 ("[t]he contract will involve six Tribal projects identified by CTER . . . ."). Accordingly, Amendment 6 clearly falls within the class of 638-contracts that Congress intended ISDA's tribal resolution to apply.

CTER argues that the tribal resolution requirement should not apply because the six Indian tribes had yet to be identified. This reasoning is specious. The SOW to Amendment 6, JA155-61, called for CTER to identify the six Indian tribes *and* provide the training to the tribes. JA156. Thus, once performance of the job training began, the condition would exist where an organization is performing services benefitting more than one tribe under a 638-contract without having obtained the required tribal resolutions prior to the "letting or making" of that agreement. That condition violates the clear language of Subsection 450b(*l*).

Furthermore, as the trial court correctly observed, "nor can a call for future resolutions as stated in the contract displace a statutory directive that requires resolutions of tribes as a 'prerequisite' to the contract or grant." Op. at 16 n.13. The trial court's reasoning is valid. The manner in which the parties to an agreement chose to craft that agreement cannot create a *fait accompli* displacing a statutory requirement that clearly applies to the agreement. CTER contends that the "trial court failed to explain how it would have been possible to identify the

tribes prior to executing Amendment #6 . . . ." App.'s Br. at 27. The parties chose to craft Amendment 6 in a manner that ensured noncompliance with Subsection 450b(*l*). That the parties chose to proceed in this manner cannot afford a basis to displace ISDA's clearly applicable "prerequisite" that tribal resolutions be obtained from the six tribes to be benefitted under the amendment prior to the "letting or making" of the agreement.

B. The Trial Court Correctly Held That The Parties' Failure To Obtain The Tribal Resolutions Prior To The Execution Of Amendments 2 And 6 Rendered Those Agreements *Void Ab Initio*

Upon concluding that Amendments 2 and 6 did not comply with Subsection 450b(*l*), the trial court considered whether the noncompliance rendered the amendments *void ab initio*. Op. at 17-18. In concluding that they did, the trial court emphasized that the violations were substantial in that they contravened a core principal of ISDA: Indian self-determination. Op. at 18. The trial court observed that the requirement:

> [F]urthers the general purpose of ISDA, *i.e.*, to ensure Indian tribes have effective and meaningful participation in programs and services designed to benefit them. Thus, the failure to comply with Subsection 450b(*l*) before executing Amendments 2 and 6 contravened a central tenet of the statute.

Op. at 18. In its brief, CTER asserts that the trial court's conclusion was erroneous because the statutory violations were not substantial or otherwise obvious to CTER. App.'s Br. at 28-35. CTER's arguments are without merit.

1. The Statutory Violations Were Substantial, And Nonenforcement Is Consistent With The Public Policy Embodied In ISDA

This Court has explained that "[i]nvalidation of the contract is not a necessary consequence when a statute or regulation has been contravened, but must be considered in light of the statutory or regulatory purpose, with recognition of the strong policy of supporting the integrity of contracts made by and with the United States." *American Tel. & Tel. Co. v. United States*, 177 F.3d 1368, 1374 (Fed. Cir. 1999). "[W]hen a statute 'does not specifically provide for the invalidation of contracts which are made in violation of [its provisions]' the court shall inquire 'whether the sanction of nonenforcement is consistent with and essential to effectuating the public policy embodied in [the statute].' *Id*. (quoting *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 563 (1961)). "Thus the policy underlying the enactment must be considered in determining the remedy for its violation, when the statute itself does not announce the sanction of contract invalidity." *Id*.

The statutory violations at issue here were substantial because they contravened the "central tenant" of ISDA – *i.e.*, promoting self-determination among the Indian tribes and ensuring tribal control over their relationships with outside organizations. *See, e.g.*, 25 U.S.C. § 450(a)(2) ("the Indian people will never surrender their desire to control their relationships . . . with non-Indian

governments, organizations, and persons."). Congress established the tribal resolutions requirement in Subsection 450b(*l*) as the prophylactic tool enforcing that "central tenant." Nonenformcement is therefore consistent with the public policy embodied by ISDA, because it effectuates Congress's intent that Indian tribes maintain control over who may enter their communities to provide services to their members. *See* S. Rep. No. 100-274 at *19 ("These amendments *strengthen* the requirement for a tribal resolution" (emphasis added).).

Furthermore, while the statute does not specifically provide for invalidation as the consequence of violations of Subsection 450b(*l*), Congress clearly stated that there can be no contract in the first instance without the benefitted tribes' prior consent: "the approval of each such Indian tribe shall be a *prerequisite* to the letting or making of such contract or grant" (emphasis added). The failure to obtain the tribes' prior consent of the two amendments is more than a mere procedural defect. In *Cabazon Band of Mission Indians v. City of Indio, Cal*., 694 F.2d 634 (9th Cir. 1982), the United States Court of Appeals for the Ninth Circuit held *void ab initio* a state municipality's annexation of a portion of an Indian tribe's land because the municipality did not obtain the Federal government's or tribe's prior consent to the annexation as was required by state statute. *Id*. at 635-36. The Court explained that:

> [F]ederal consent is a condition precedent to the city's annexation proceedings. [The city's] failure to obtain that consent constitutes *more than a mere procedural defect*. By failing to comply with [state law], [the city] *denied the Cabazon Band a substantive right*-the right to prevent annexation by withholding its consent.

Id. at 638 (emphasis added). Here, Subsection 450b(*l*) conferred upon the tribes the substantive right of prior consent of Amendments 2 and 6. The failure to adhere to the tribal resolution requirement was more than a mere procedural defect in the formation of the amendments.

CTER argues that the statutory violations were not substantial because "the violations did not result in any negative effects on the self-determination rights of the tribes to be served" where the tribal resolutions were, or would have been, obtained before CTER began performance. App.'s Br. at 32. CTER reasons that the violations were not "egregious" because they did not "cause[] any harm" to the affected tribes. *Id*. CTER is not correct.

CTER's contention that the trial court was required to consider whether the violations of Subsection 450b(*l*) resulted in any actual, tangible harm to a protected interest in order to hold the amendments *void ab initio* is wrong. CTER relies upon the Court of Claims decision in *Trilon Educ. Corp. v. United States*, 578 F.2d 1356 (Ct. Cl. 1978), in which the Court stated that a contract should not be held *void ab initio* where the violation of the statute was "not egregious." *Id*. at 1360.

The "egregious" standard, however, was in relation to whether there was a clear and substantial deviation from the statute. The Court explained:

> Procurement officers must find their way through a maze of statutes and regulations, which bidders know little about. It would be unfair for them to suffer for *every deviation*. Therefore, when the *deviation is not egregious*, the court has preferred to allow the contractor to recover on the ground that the contracts were not *palpably illegal* to the bidder's eyes.

Id. (emphasis added). The "egregious" standard instructs a reviewing court to determine whether the violation at issue was a significant departure from the statute and "palpably illegal." As explained above, the trial court correctly concluded that there were such violations. There was no requirement that the trial court consider whether the violations of Subsection 450b(*l*) rendered an actual, tangible harm upon any of the affected tribes.

Even so, it is clear that the affected tribes did suffer a tangible harm by the violations of Subsection 450b(*l*) in this case. In ISDA, Congress granted the tribes the substantive right of prior consent. In addition to the "prerequisite" requirement of Subsection 450b(*l*), the model contract requires that the parties obtain the benefitted tribes' prior approval of the contemplated agreement. *See* 25 U.S.C. § 450*l*(c) (see model agreement paragraph (f)(1)); *see also* 25 C.F.R. § 900.8(d). The violations of Subsection 450b(*l*) deprived the tribes of their statutorily

conferred right of prior consent over Amendments 2 and 6, and the tribes were therefore actually harmed. *See Cabazon Band of Mission Indians*, 694 F.2d at 638.

2. The Statutory Violations Were "Plain"

CTER asserts that the statutory violations do not render the amendments *void ab initio* because the violations "were not obvious to the contractor." App.'s Br. at 30-31. In making its argument, CTER proffers a standard whereby the trial court must consider whether a party was subjectively aware of the statutory violation. App.'s Br. at 30 ("being 'familiar with the statute' is not the same thing as being 'unmistakably' aware that the contract amendments were in violation of section 450b(*l*) . . . ."). CTER is not correct.

As we explained in section II.A.1 above, Subsection 450b(*l*) is unambiguous and plainly applied to Amendments 2 and 6. While there have been past instances in which BIA or IEED did not require compliance with the tribal resolution requirement, there is no regulation, policy directive, or other formal written guidance of which we are aware, where the agencies concluded, upon deliberation, that Subsection 450b(*l*) would not apply to agreements like those at issue. BIA's ISDA implementing regulations specifically enforce the tribal resolution requirement, *see* 25 C.F.R. § 900.8(d), and, indeed, the amendments themselves incorporated the tribal resolution requirement within their express terms. JA58, 125.

CTER's suggestion that the Court must consider whether appellant was itself aware of the violation is incorrect. Specifically, in *Fluor Enterprises, Inc. v. United States*, 64 Fed. Cl. 461 (2005), the Court of Federal Claims (CFC) held *void ab initio* a contract for architectural services that did not contain a statutorily required fee-limitation provision. *Id*. at 493. In doing so, the CFC concluded that the statutory violation was "plain" despite the contractor's mistaken belief that the fee-limitation provision did not apply to the contract:

> The record is clear that [the contractor] was aware of the fee limitation in § 254(b), *but was under the mistaken belief that the section did not apply* given the broad spectrum of services called for by the contract. *Whatever the basis for this misconstruction of the law*, [the contractor] bore the risk that the contracting officer's failure to comply with the statute might undermine his authority to enter into a contract of the type here and that the contract might be later deemed unenforceable.
>
> Ultimately, the court concludes that this is the type of case *in which the illegality of contract is "plain"* and "so substantial" as to nullify that portion of [the contractor's] contract dealing with A & E services.

Id. (emphasis added).

Here, it is clear that the parties were aware of the necessity, at some point, to obtain tribal resolutions from the tribes to receive the services under the amendments as the requirement is stated in both amendments' SOW's. JA87, 156. Furthermore, a dispute over the timing of when CTER was required to obtain the tribal resolutions provides a basis for CTER's breach allegations. JA206-07. That

CTER may have been subjectively mistaken concerning the requirement to have the tribal resolutions in place prior to the execution of the agreements, however, does not render the trial court's conclusion that the statutory violation was "plain," erroneous.

3. The Statutory Violations At Issue Did Not Involve Government Noncompliance With Internal Review And Reporting Procedures

This Court observed in *AT&T* that "[p]recedent does not favor the invalidation, based on governmental noncompliance with internal review and reporting procedures, of a contract that has been fully performed by either contracting party." 177 F.3d at 1376. That is not this case. The statutory violations at issue here were not "based on government noncompliance with internal review and reporting procedures," of which the other parties could not have been aware.

Under ISDA, it is the Indian tribe that requests the formation of a 638-contract between itself and the cognizable agency. *See* 25 U.S.C. § 450f(a)(1) ("The Secretary is directed, *upon the request of any Indian* tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization" (emphasis added).). The model contract expressly requires that the tribes' approval of the agreement be included with the 638-contract. 25 U.S.C. § 450*l*(c) (see model agreement paragraph (f)(1)). BIA's ISDA-implementing

regulations also enforce the requirement that the parties include tribal resolutions with the agreement. 25 C.F.R. § 900.8(d). Indeed, the regulation contemplates that the tribe will produce the tribal resolutions, as the regulation is titled "[w]hat must an initial contract *proposal* contain?" (emphasis added).

Accordingly, this is not a case where the Government has violated an obscure, internal procurement oversight regulation the existence of which only the agency's contracting officer could have reasonably been aware. Rather, adherence to Subsection 450b(*l*)'s requirement to obtain the tribes' prior consent was a responsibility the statute placed upon the parties.[4]

III. The Trial Court Correctly Concluded That The IEED Awarding Official Did Not Possess The Authority To Bind The United States In Contract With CTER

The IEED awarding official's delegation of authority certificate expressly states that Ms. Forcia "[i]s delegated the authority to award only P.L. 102-477

[4] CTER argues that the trial court's conclusion that Amendments 2 and 6 were *void ab initio* was erroneous because it left CTER with "no other avenue of relief." App.'s Br. at 33-35. Nothing in the authority addressing when an agreement may be held *void ab initio* states that a court can only nullify a contract if doing so does not foreclose the claimant's ability to proceed under other theories of recovery. CTER also argues that holding the agreements *void ab initio* would be improper because it would allow IEED to "avoid having to defend its efforts to undermine CTER's ability to perform on its subcontracts." App.'s Br. at 34. This assertion assumes that IEED has breached the alleged underlying agreements. CTER's factual allegations supporting its claims for breach of contract were not before the trial court and are not germane to any issue to be decided on appeal.

grants . . . ." JA705. Based upon this express limitation on her authority, the trial court concluded that:

> Ms. Forcia possessed the authority to enter into Amendments 2 and 6 with [SLT], a federally recognized Indian tribe. She could not, however, also contract with [CTER], which is not an Indian tribe and, for the purposes of this case, is also not a qualifying tribal organization . . . . Accordingly, [CTER] cannot prevail on its claims that Amendments 2 and 6 were express, three-party contracts between [SLT], the government, and [CTER], because Ms. Forcia did not have the authority to bind the government to agreements that included [CTER] as a party.

Op. at 14. In its brief, CTER does not contest whether Ms. Forcia possessed the actual authority to bind the United States in contract with CTER. Rather, CTER asserts that the limitation is unenforceable because it was a secret, internal agency instruction. App.'s Br. at 35-39. CTER's argument is not correct.

A. Ms. Forcia Could Not Contract With CTER Because Her Authority Was Limited To Issuing Agreements With Tribes; The Government Produced Evidence Demonstrating This Limitation

"[T]he law requires that a Government agent who purports to enter into or ratify a contractual agreement that is to bind the United States have actual authority to do so." *Monarch Assur. P.L.C. v. United States*, 244 F.3d 1356, 1360 (Fed. Cir. 2001). Furthermore, "any party entering into an agreement with the Government accepts the risk of correctly ascertaining the authority of the agents who purport to act for the Government." *Id*. "Whatever the form in which the Government

functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority . . . . And this is so even though . . . the agent himself may have been unaware of the limitations upon his authority." *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947).

Here, BIA limited Ms. Forcia's authority to only issuing agreements under Pub. L. 102-477. JA694, 705. That law affords IEED the authority to enter into agreements with Indian tribes to implement proposed 477-plans. *See* 25 U.S.C. § 3403 ("The Secretary of the Interior . . . shall, upon the receipt of a plan acceptable to the Secretary of the Interior submitted by an *Indian tribal government*, authorize *the tribal government* to coordinate" (emphasis added).); JA704. This limitation – based upon a statute – appears expressly on the face of Ms. Forcia's delegation of authority certificate. JA705. A review of that certificate therefore advises that Ms. Forcia could only issue agreements authorized under Pub. L. 102-477. A review of that statute advises that Ms. Forcia could only

enter into agreements with Indian tribes. CTER is not an Indian tribe and, therefore, Ms. Forcia did not possess the actual authority enter into agreements with appellant.[5]

Although the limitation on Ms. Forcia's authority is expressly stated on her delegation of authority certificate, the Government produced evidence demonstrating Ms. Forcia's lack of authority. Specifically, the Government presented to the trial court an affidavit pursuant to 28 U.S.C. § 1746 from the BIA official that issued Ms. Forcia's certificate and placed the limitation upon her authority. JA703-04. In it, the official explained the reason for the limitation on Ms. Forcia's authority:

> Lynn Forcia served IEED as the Chief of the Division of Workforce Development and, in that capacity, was directly involved with the 477 demonstration project . . . . BIA policy states that awarding officials are only to be delegated authority commensurate with their duties . . . . Ms. Forcia did not need general contracting authority or general self-determination agreement authority because the 477 demonstration project does not encompass these areas.

JA704. The official further explained the scope of Ms. Forcia's authority at the time her certificate was issued:

[5] Because the limitation on Ms. Forcia's authority was expressly stated on her delegation of authority certificate, and the limitation was based upon a statute, we respectfully disagree with the trial court's conclusion that information on the scope of her authority was not readily available to the agency and public in accordance with 48 C.F.R. § 1.602-1(a). *See* Op. at 14 n.10.

> [L]imiting Ms. Forcia's authority meant that she could only award funds within the 477 demonstration project . . . . Another important limitation is that Ms. Forcia could only make awards to Tribes to carry out an approved 477 plan.

Id.

The trial court stated that the interplay between ISDA and Pub. L. 102-477 could engender confusion regarding the limitation on Ms. Forcia's authority. Op. at 12-14. Relying upon this Court's decision in *LDG Timbers Enters., Inc. v. Glickman*, 114 F.3d 1140 (Fed. Cir. 1997), the trial court held that it was therefore incumbent upon the Government to produce evidenced demonstrating Ms. Forcia's lack of authority. The Government did not rely upon allegations by its attorney in a litigation context, but, rather, produced evidence demonstrating that Ms. Forcia did not possess the actual authority to bind the United States in contract with CTER. The trial court therefore correctly concluded that there could be no "three-party contracts" between IEED, SLT and CTER due to this lack of authority. Op. at 14.

B. The Limitation On Ms. Forcia's Authority Is Expressly Stated On The Face Of Her Delegation Of Authority Certificate; IEED Was Not Required To Publish The Limitation In The Federal Register In Order For It To Be Operative

CTER does not contend that Ms. Forcia possessed the actual authority to contract with appellant. Rather, CTER argues that the limitation placed upon Ms.

Forcia's authority cannot be enforced because information on the scope of her authority was not readily accessible. App.'s Br. at 35-39. In support of its argument, CTER relies upon two Armed Services Board of Contract Appeals decisions holding that internal agency procedural guidelines not published in the Federal Register cannot afford a basis to invalidate contracts based upon lack of authority. *Id*. at 37-38 (citing *Appeal of A-1 Garbage Disposal & Trash Serv.*, ASBCA No. 30623, 89-1 BCA ¶ 21,323 (A.S.B.C.A. Oct. 31, 1988) and *Appeal of Kurz & Root Co., Inc.*, ASBCA No. 17146, 74-1 BCA ¶ 10,543 (A.S.B.C.A. Mar. 18, 1974)). CTER's argument is not correct.

1. Where The Limitation On A Government Official's Authority Is Not Based Upon Statute Or Regulation, The Court Requires The Government To Affirmatively Demonstrate The Limitation

The board in *A-1Garbage* held that a limitation on the contracting officer's authority was not enforceable against a third party because the limitation – an internal agency operating procedure establishing which officer must approve the expenditure of certain program funds – was not published in the Federal Register and therefore constituted "undisclosed or secret instructions to the agents." Likewise in *Kurz*, the board held that the contracting officer's failure to follow internal procurement directives in agreeing to a settlement with a contractor did not prevent the settlement from being operative because the directives were not published in the Federal Register. On this basis the board in both *A-1 Garbage* and

Kurz distinguished the cases from the Supreme Court's decision in *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947), in which the Government official acted in contravention of an agency regulation. *Id*. at 385.

In *LDG Timber*, however, this Court stated that where a limitation on a Government official's authority is not contained in a statute or regulation, then the burden shifts to the Government to produce evidence establishing the lack of authority:

> When the actions of the contracting officer are within the authority that pertains to the subject matter of the contract, and *no statute or regulation limits that authority, as in Federal Crop Insurance*, the agency bears the burden of coming forward with evidence of lack of authority for the actions of the contracting officer. This burden is not met simply by attorney allegation in a litigation context.

114 F.3d at 1143 (emphasis added). The Court allows the Government to enforce a limitation on a contracting officer's authority that was not published in the Federal Register, so long as the Government affirmatively demonstrates the lack of authority and does not rely solely upon "attorney allegation in a litigation context."

As explained above, the Government did not rely upon "attorney allegation." Rather, the Government produced the affidavit of the BIA official that issued Ms. Forcia's delegation of authority certificate, in which the official explained the purpose and effect of the express limitation contained within the certificate.

JA703-04. The trial court therefore correctly concluded that there could be no contract between IEED and CTER based upon lack of authority.

2. The Limitation On Ms. Forcia's Authority Is Not The Result Of An Internal Agency Operating Procedure Not Being Followed, But Is Based Upon An Express Limitation Placed Upon Her Delegation Of Authority Certificate

The limitation on Ms. Forcia's authority is not based upon an undisclosed, internal agency operating procedure, as were the cases in *A-1 Garbage* and *Kurz*. Rather, the limitation is expressly stated on her delegation of authority certificate, and is based upon a statute. JA705. Placing the limits of a contracting officer's authority on the face of the official's warrant is the standard practice of Federal agencies. *See, e.g.*, *Harbert/Lummus Agrifuels Projects v. United States*, 142 F.3d 1429, 1432 (Fed. Cir. 1998) (delegation of authority certificate prohibiting oral contract modifications); *Renda Marine, Inc. v. United States*, 66 Fed. Cl. 639, 645 (2005) (contracting officer's warrant limited to contracts not exceeding $100,000); *Appeals of Steward/Tampke J.V.*, ASBCA Nos. 49172, 48929, 96-2 BCA ¶ 28320 (Apr. 30, 1996) ("[the contracting officer] held a Level IV warrant limited to contract types 1 and 8"). CTER has identified no case in which a court or board has refused to give effect to a limitation of authority expressly stated on a contracting officer's delegation of authority certificate.

There are thousands of contracting officers operating across the Government. A requirement that agencies must publish each officer's limitation of

authority in the Federal Register in order for the limitation to be operative would place an enormous administrative burden upon the agencies.

C. CTER May Not Recover In *Quantum Meruit*

Finally, the trial court correctly held that CTER could not recover in *quantum meruit* because it cannot establish the elements of an implied-in-fact contract with the Government. Op. at 23. This is so because, as explained above, the Government official with whom CTER dealt did not possess the actual authority to bind the United States in contract with appellant. In its brief, CTER acknowledges that the issue of the scope of Ms. Forcia's authority is dispositive to its *quantum meruit* claim. App.'s Br. at 39-40.

CONCLUSION

For these reasons, we respectfully request that the Court affirm the trial court's decision.

Respectfully submitted,

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January 24, 2014

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 24th day of January, 2014, a copy of the foregoing "BRIEF OF DEFENDANT-APPELLEE, UNITED STATES" was filed electronically.

☒ This filing was served electronically to all parties by operation of the Court's electronic filing system.

/s/Joseph E. Ashman

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1. This brief complies with the type-volume limitation of Fed. R. App. Proc. 32(a)(7)(B). The brief contains 11,403 words, excluding the parts of the brief exempted by Fed. R. App. Proc. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. Proc. 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14-point font.

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January 24, 2014