[NOT YET SCHEDULED FOR ORAL ARGUMENT]

NO. 16-5117

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NAVAJO NATION,

Appellant,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,

Appellees.

BRIEF OF APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CASE NO. 14-CV-1909,
JUDGE TANYA S. CHUTKAN

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties:

The following parties appeared in the district court:

- Navajo Nation — Plaintiff/Appellant
- U.S. Department of the Interior — Defendant/Appellee
- Sally Jewell — Defendant/Appellee

Rulings Under Review:

Appellant Navajo Nation seeks review of the March 30, 2016 decision of the Honorable Tanya S. Chutkan denying its motion for summary judgment and granting Appellees' cross-motion for summary judgment.

Related Cases:

This case has not previously been before this Court or any other court other than the district court below. A related case brought by the Navajo Nation asserting the same claim for a subsequent year is currently before the district court, *Navajo Nation v. Department of the Interior, et al.*, No. 16-cv-00011. That action has been stayed by the district court pending a final resolution of this appeal, and any subsequent appeal.

Dated: September 20, 2016

Respectfully submitted,

/s/
Steven D. Gordon
Attorney for Appellant Navajo Nation

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JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 25 U.S.C. § 450m-1(a)[1] and 28 U.S.C. § 1331. On March 30, 2016, the district court issued a Memorandum Opinion and Order denying the Navajo Nation's motion for summary judgment and granting Appellees' cross-motion for summary judgment. The Navajo Nation filed a timely notice of appeal on April 29, 2016. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the district court erred in denying the Navajo Nation's motion for summary judgment, and granting the cross-motion for summary judgment filed by appellees Department of the Interior ("Department") and its Secretary, on the ground that the Navajo Nation is equitably estopped from pursuing its claims.

STATUTES AND REGULATIONS

Pursuant to Circuit Rule 28(a)(5), pertinent statutes and regulations are set forth in an addendum to this brief (hereinafter "Add.").

[1] On August 1, 2016, the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450 *et seq.*, was re-codified with no substantive changes as 25 U.S.C. § 5301 *et. seq.* Section 450m-1(a) was re-codified as § 5331(a). For simplicity, the Navajo Nation cites to the former codification in this brief in order to conform with the citations used in the district court and in the case law addressing the Act.

STATEMENT OF FACTS

A. Background

The Navajo Nation, a federally recognized Indian tribe, entered into a five-year contract in 2012 with the Department under the Indian Self-Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. §§ 450, 450a *et seq.*, to fund operations of the Navajo Nation's Judicial Branch. (App. 23.) "The ISDEAA permits Indian tribes to assume responsibility for federally funded programs or services that a federal agency would otherwise provide to the tribes' members." *Menominee Indian Tribe of Wisconsin v. U.S.*, 614 F.3d 519, 522 (D.C. Cir. 2010). "After the tribe and agency memorialize the transfer of authority in a 'self-determination contract,' they negotiate annual funding agreements, which become part of the contract." *Id.*

The term of the self-determination contract at issue here runs from January 1, 2012 through December 31, 2016. (App. 23.) The Navajo Nation and the Secretary of the Interior have negotiated successive Annual Funding Agreements ("AFAs"), which determine the amount of funds to be paid to the Navajo Nation for a given year during the contract term. (*See* App. 67.)

When the Navajo Nation submits a proposed AFA to the Department, "the Secretary shall, within ninety days after receipt of the proposal, approve the proposal and award the contract unless the Secretary provides written notification"

to the Nation that one of five statutory reasons for rejection applies. 25 U.S.C. § 450f(a)(2). "A proposal that is not declined within 90 days (or within any agreed extension []) is deemed approved." 25 C.F.R. § 900.18.

B. The Navajo Nation's Funding Proposal For 2014

On October 4, 2013, the Navajo Nation hand-delivered a proposed AFA for 2014 to Raymond Slim at the Navajo Regional Office of the Bureau of Indian Affairs ("BIA").[2] (App. 104.) Mr. Slim is an ISDEAA Specialist in the BIA's Self-Determination Office. Upon receiving the proposed AFA, Mr. Slim marked it for intra-office mail delivery to Jeannette Quintero, a BIA official responsible for making award and declination decisions for Navajo Nation contracts under the ISDEAA.

Due to a lapse in congressional appropriations that caused a partial government shutdown, the BIA was not fully staffed between October 1 and October 16, 2013. (*See* App. 167-68.) Ms. Quintero was furloughed during this shutdown, as were all of the other employees in the Navajo Regional Office other than Mr. Slim. (*Id.*) The proposed AFA was delivered to Ms. Quintero on October 17, 2013, when normal governmental operations resumed.

On October 21, 2013 – two business days after Ms. Quintero received the proposed AFA – the BIA sent a letter to the Navajo Nation acknowledging receipt

[2] A tribe "should submit" a proposed AFA "at least 90 days before the expiration date of the … existing annual funding agreement." 25 C.F.R. § 900.12.

of the proposal. (App. 95.) This letter stated that, due to the partial shutdown, the BIA considered the proposed AFA to have been received on October 17, 2013. (*Id.*) The letter also asserted that the BIA had until "90 days after October 17, 2013 to approve, decline, or award the proposal," and that this "90-day period will end on January 15, 2014." (*Id.*) The letter did not ask the Navajo Nation to provide any response, although it did include a boilerplate invitation for the Nation to contact Ms. Quintero or her colleague, Frances Price, if it had any questions. The Navajo Nation did not respond to this letter.

On November 7, 2013, the BIA sent another letter to the Navajo Nation regarding the proposed AFA. (App. 96.) This letter noted that the proposed AFA included a major increase in the requested budget, from about $1.3 million in 2013 to $17 million in 2014, and a corresponding expansion in the scope of work. (*Id.*) The letter recommended that the Navajo Nation submit a revised budget of $1.3 million and keep the current scope of work. (*Id.*) The letter requested that the Navajo Nation respond to these points by November 29, 2013, so that the BIA could complete its review of the proposed AFA. (*Id.*) The letter stated that the

BIA would "hold the approval" of the proposal "until requested documents are submitted."[3] (*Id.*) The Navajo Nation did not respond to this letter.

January 2, 2014 – the 90th day after October 4, 2013 – came and went without the BIA approving or declining the proposed AFA, or sending any further communications to the Navajo Nation.

On January 9, 2014, the BIA sent a letter to the Navajo Nation requesting a 45-day extension of the 90-day deadline – which, per the October 21 letter, the BIA had asserted would expire six days later, on January 15, 2014. (App. 98.) The BIA stated that it was requesting the extension so that the Navajo Nation could have additional time to respond to the issues raised in the BIA's November 7 letter (*i.e.* to revise its proposal). (*Id.*) The Navajo Nation did not respond to this letter.

On January 15, 2014, the BIA sent the Navajo Nation a letter partially declining the proposed AFA. (App. 99.) The BIA authorized approximately $1.3 million in 2014 funding, similar to the amount funded in 2013. (*Id.*) According to a declaration provided by Ms. Quintero, the reasoning behind BIA's partial declination did not change between its November 7 letter and its January 15 letter,

[3] The BIA must notify a tribe of any missing items in its proposal and request the tribe to furnish these items within 15 days. 25 C.F.R. § 900.15. But the BIA did not invoke this provision here; it did not identify any missing items in the Navajo Nation's proposal. Instead, the only documents the BIA requested were a revised budget and scope of work. As discussed below, the BIA had no authority to require such revisions. It could decline or partially decline the Nation's proposal, as it ultimately purported to do, but it had no authority to require a revised proposal.

i.e. the agency could have issued the partial declination any time after November 7, 2013.[4] (*Id.*)

On January 27, 2014, the Navajo Nation sent the BIA a letter asserting that the 90-day review deadline had expired on January 2, 2014 – *i.e.*, 90 days after it delivered the proposed AFA to the Regional Office on October 4, 2013. (App. 101.) The letter stated that the BIA's partial declination on January 15, 2014 was therefore untimely, and that the AFA proposed by the Navajo Nation was deemed approved as a matter of law as of January 2, 2014. (*Id.*)

On February 7, 2014, the BIA responded to the Navajo Nation. (App. 111.) The BIA asserted that its partial declination of the Nation's proposed AFA was timely issued on January 15, 2014. (*Id.*) The BIA reasoned that Mr. Slim's receipt of the Nation's proposal on October 4, 2013 did not constitute receipt by the Secretary for purposes of the 90-day deadline because, during the partial government shutdown, Mr. Slim was only authorized to perform work for contracts related to road construction. (*Id.*) The BIA contended that, during the partial shutdown, there was no BIA employee who was authorized to receive or work on the Nation's proposal and so the 90-day review period did not begin until October 17, 2013, when authorized employees returned to work. (*Id.*) But the BIA did not

[4] Ms. Quintero's assertion is a party admission upon which the Navajo Nation is entitled to rely, although other assertions in her declaration cannot be treated as undisputed facts because the Nation has not had the opportunity to depose her.

contend that the Navajo Nation's failure to respond to the letters of October 21 and November 7, 2013, estopped the Nation from asserting that the 90-day deadline expired on January 2, 2014.

The Navajo Nation then initiated this action seeking to enforce the proposed AFA and receive the additional funding for its judicial system. Its first claim seeks a declaration that its proposed 2014 AFA was deemed approved as a matter of law on January 2, 2014. The second claim seeks injunctive relief including an order compelling the Secretary to award and fund its proposed 2014 AFA. The third claim seeks damages for breach of the 2014 AFA in the amount of $15,762,985. After the Navajo Nation filed a motion for summary judgment, the Department and the Secretary filed an opposition and a cross-motion for summary judgment on April 3, 2015, in which they asserted, for the first time, that the Nation is equitably estopped from claiming that its proposed AFA was received by the Secretary on October 4, 2013. (Dkt. 18).

C. The District Court's Decision

The district court ruled that "the Nation should be equitably estopped from asserting the January 2, 2014 deadline because of its silence in response to BIA's October 21, 2013 and November 7, 2013 letters, which announced the agency's position that its deadline for acting on the Proposal was January 15, 2014." (App. 15.) The court reasoned that "[t]he Nation did not respond to either of [the BIA]

letters, despite the fact that (i) it purportedly believed that BIA was operating off of the wrong deadline; (ii) it knew that BIA was holding its decision on the Proposal, meaning that – unless it received the documentation it requested from the Nation – BIA would wait to act on the Proposal until the deadline off of which it was operating had arrived, and would therefore miss the earlier deadline that the Nation, unbeknownst to BIA, believed to be correct; and (iii) each of BIA's letters directed the Nation to contact the agency if it had any questions." (*Id.* at 16.)

According to the district court, "[t]hese facts establish the requisite duty to speak because they show that the Nation was well aware of the fact that BIA was relying on its silence in believing that both parties were on the same page as to the deadline being January 15, 2014." (*Id.* at 19.) The court reasoned that, "since the Nation kept its position as to the deadline a secret, its silence requires that it be estopped from asserting that deadline, as the record demonstrates that BIA reasonably read the Nation's silence as acquiescence to the date of receipt and deadline spelled out in the October 21 letter, and that it would have acted before January 2 passed if not for its reliance on the Nation's silence." (*Id.* at 20.)

The district court concluded that "the record demonstrates that the Nation acted in bad faith by maintaining its silence where common honesty and fair dealing demanded that it speak." (*Id.*). The court declared that it "will not sanction

the Nation's gamesmanship in taking advantage of a government shutdown by rewarding it with the windfall that it seeks." (*Id.* at 21).[5]

SUMMARY OF APPELLANT'S ARGUMENT

The district court erred in treating the Navajo Nation as a private party in applying the doctrine of equitable estoppel against it. Courts do not apply traditional rules of estoppel against governmental entities, including state, local and tribal governments. Where, as here, a governmental entity is exercising a governmental function (*i.e.* arranging funding for its judicial system) courts refuse to apply equitable estoppel or else restrict it to cases where the government has engaged in affirmative misconduct. The Navajo Nation did not engage in any affirmative misconduct here so there is no basis for estopping it.

Furthermore, the essential elements of equitable estoppel are missing in this case. The district court found that the Navajo Nation was estopped by its silence – its failure to respond to the two BIA letters – but the BIA never asked the Nation to

[5] There is no evidence that supports the court's assertion that the Navajo Nation attempted to take advantage of the federal government partial shutdown. The shutdown commenced on October 1, 2013. The Nation submitted its proposal three days later, on October 4, in conformance with the regulatory admonition that it "should" submit a proposal at least 90 days before the expiration of the existing AFA. Thus, the timing of the Nation's proposal and the partial shutdown were both dictated by the federal government. There is no evidence that the Nation altered its proposal in response to the partial shutdown. And there was no reason to anticipate that the shutdown – which ultimately lasted 16 days – would cripple the government's ability to comply with the 90-day deadline. (Indeed, it did not do so).

respond to its letter computing the 90-day deadline. In any event, the Nation had no legal duty to speak. Both the ISDEAA and the implementing regulations place the burden entirely on the BIA to respond timely to tribal budget proposals. If the BIA does not act on a tribal proposal within 90 days or obtain a written extension from the tribe, the proposal automatically becomes part of the contract. *See* 25 C.F.R. § 900.18. Moreover, Congress has mandated that the provisions at issue here must be construed liberally in the favor of Indian tribes.

In addition, the alleged misleading silence at issue here pertained to an issue of law – the Navajo Nation's position on when the 90-day deadline started to run – as opposed to an issue of fact. Silence on an issue of law cannot give rise to equitable estoppel. Nor can an estoppel be based on silence where the parties have equal knowledge of the facts. In this case, the BIA had full knowledge of the relevant facts and the applicable law relating to the 90-day deadline. The only thing the BIA lacked was knowledge of the Navajo Nation's legal position, which cannot form the basis for an estoppel.

For all of these reasons, the BIA could not reasonably rely on the Navajo Nation's failure to respond to the BIA's two letters as indicating assent to the BIA's position on applying the 90-day deadline. The district court erred in ruling otherwise.

Finally, the district court erred in concluding that the BIA actually did rely on the Navajo Nation's silence in delaying the issuance of its partial declination until January 15, 2014. The BIA did not assert that it had relied on the Nation's silence when, on February 7, 2014, it rejected the Nation's assertion that the 90-day deadline had expired on January 2, 2014. The BIA's equitable estoppel defense is a *post hoc* rationalization supported only by a litigation affidavit that the district court should not have considered.

ARGUMENT

This Court reviews *de novo* the district court's grant of summary judgment. *See Jankovic v. Int'l Crisis Grp.*, 822 F.3d 576, 584 (D.C. Cir. 2016). In this case, the district court erred because it misapprehended the governing law and mistakenly analyzed the relevant facts.

A. The Navajo Nation, As A Sovereign, Cannot Be Estopped On The Same Basis As A Private Party.

First, the district court erred by treating the Navajo Nation as "a non-governmental entity" and refusing to utilize "the heavier burden that applies when a private party is seeking to estop the government." (App. 15 n. 5.) The equitable doctrines of estoppel are applied to governments far more sparingly than to private actors. "[C]ourts generally have been reluctant to apply traditional rules of estoppel to a governmental entity." Mary R. Alexander, *Equitable Estoppel: Does Governmental Immunity Mean Never Having to Say You're Sorry?*, 56 St. John's

Law Review 114, 115 (1981) [hereafter "Alexander, *Equitable Estoppel*"]. This Court has opined that, unlike private parties, "application [of equitable estoppel] to the government must be rigid and sparing" and "[t]he case for estoppel against the government must be compelling." *ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1111 (D.C. Cir. 1988).

"The insulation of the government from the operation of normal estoppel principles had its origins in the doctrine of sovereign immunity." Alexander, *Equitable Estoppel*, 56 St. John's Law Review at 118; *see, e.g., U.S. v. Georgia-Pacific Co.*, 421 F.2d 92, 99 (9th Cir. 1970) (the "governmental immunity from estoppel is an off-shoot of sovereign immunity."). As sovereigns, it is well established that state and local governments cannot be estopped on the same basis as private parties. "[T]he reluctance of courts to estop the government and the rationale that supports governmental estoppel, apply equally to state and local governments." Deborah H. Eisen, *Schweiker v. Hansen: Equitable Estoppel Against the Government*, 67 Cornell L. Rev. 609 n. 2 (1982). "As with other governmental units generally, the application of estoppel doctrines against municipal corporations is not favored, is rarely applied, and is not available on the same terms as against a private individual." 28 Am.Jur.2d, *Estoppel and Waiver* § 140 (citations omitted).

Some courts hold that the doctrine of equitable estoppel is inapplicable against a state or a political subdivision when it is engaged in a governmental function. *See DRFP, LLC v. Republica Bolivariana de Venezuela*, 945 F. Supp. 2d 890, 910 (S.D. Ohio 2013). Other courts restrict the doctrine of equitable estoppel to cases where the state conduct at issue amounts to affirmative misconduct. *See, e.g., Shakopee Mdewakanton Sioux (Dakota) Cmty. v. Hatch*, No. CIV011737ADMAJB, 2002 WL 1364113, at *7 (D. Minn. June 20, 2002); *Knori v. State, ex rel. Dept. of Health, Office of Medicaid*, 109 P.3d 905, 909-11 (Wyo. 2005); *Prince v. Division of Family Services*, 886 S.W.2d 68, 73 (Mo. App. 1994).

Like state and local governments, the Navajo Nation is a sovereign, self-governing entity that possesses sovereign immunity. "Indian tribes are domestic dependent nations that exercise inherent sovereign authority." *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2030 (2014) (internal quotation marks and citations omitted). Although the tribes are subject to plenary control by Congress, "unless and 'until Congress acts, the tribes retain' their historic sovereign authority." *Id.* (citation omitted). "Among the core aspects of sovereignty that tribes possess … is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Id.* (citation omitted). "That immunity … is 'a necessary corollary to Indian sovereignty and self-governance.'" *Id.* (quoting *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*,

476 U.S. 877, 890 (1986)). "[T]ribal sovereign immunity is deemed to be coextensive with the sovereign immunity of the United States." *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1011 (10th Cir. 2007).

As sovereigns, Indian tribes are not subject to estoppel like private litigants. The Ninth Circuit, for example, recently affirmed that a tribe was immune from a state's claim based on a theory of promissory estoppel.[6] *Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 562-63 (9th Cir. 2016). And the Tenth Circuit ruled that a tribal enterprise could not be equitably estopped from asserting its sovereign immunity due to the misrepresentations of its managers. *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1295-96 (10th Cir. 2008).

The federal government has repeatedly recognized that "[t]he relationship between [Indian] Tribes and the United States is one of a government to a government." *About Native Americans*, (June 17, 2014) https://www.justice.gov/otj/about-native-americans; *see also* Exec. Order No. 13175, 65 FR 67249 (2000); Attorney General, Memorandum on Indian Sovereignty (June 1, 1995), available at https://www.justice.gov/ag/attorney-general-june-1-1995-memorandum-indian-sovereignty. The district court erred by ignoring the "sovereign to sovereign" nature of this relationship and treating the

[6] "Although promissory estoppel is distinct from equitable estoppel and applies in different circumstances, similar considerations apply when these doctrines are asserted against public bodies." *Matthews v. Chicago Transit Auth.*, 51 N.E.3d 753, 780 (Ill. 2016).

Navajo Nation as a non-governmental entity for purposes of applying the doctrine of equitable estoppel. As a sovereign government, the Nation could be estopped – if at all -- only if it had engaged in affirmative misconduct. Silence does not constitute affirmative misconduct. *See Morris Commc'ns, Inc. v. F.C.C.*, 566 F.3d 184, 192 (D.C. Cir. 2009).

B. The Essential Elements Of Equitable Estoppel Are Not Present.

Equitable estoppel "is properly invoked where the enforcement of the rights of one party would work an injustice upon the other party due to the latter's justifiable reliance upon the former's words or conduct." *Kosakow v. New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 725 (2d Cir. 2001). Because the equitable estoppel claim at issue here arises "under a federal statute, federal law principles of equitable estoppel are applicable," *Id.*

This Court has described the traditional elements of equitable estoppel as consisting of "'false representation, a purpose to invite action by the party to whom the representation was made, ignorance of the true facts by that party, and reliance,' as well as ... 'a showing of an injustice ... and lack of undue damage to the public interest.'" *ATC Petroleum,* , 860 F.2d at 1111 (citations omitted). Other courts have identified either four or five elements of equitable estoppel. The Ninth Circuit, for instance, listed four elements:

> To constitute estoppel (1) there must be false representation or wrongful misleading silence. (2) The error must originate in a

> statement of fact and not in an opinion or a statement of law. (3) The person claiming the benefits of estoppel must be ignorant of the true facts, and (4) be adversely affected by the acts or statements of the person against whom an estoppel is claimed.

Van Antwerp v. U.S., 92 F.2d 871, 875 (9th Cir. 1937) (internal quotations marks and citation omitted). More recently, the Tax Court listed five elements:

> The essential elements of estoppel are: (1) a false representation was made or a wrongful misleading silence maintained; (2) the error must be in a statement of fact and not in an opinion or a statement of law; (3) the person claiming the benefits of estoppel must be ignorant of the facts; (4) the person claiming the benefits must be adversely affected by the acts or statements of the person against whom estoppel is claimed; and (5) the person claiming the benefits must have reasonably relied on the acts or statements of the party against whom estoppel is claimed.

Gaughf Properties, L.P. v. C.I.R., 139 T.C. 219, 250-51 (2012).

Under either of these formulations, the essential elements of equitable estoppel are absent in this case.

1. There was no wrongful misleading silence

It is undisputed that there was no false representation in this case. The district court instead concluded that it was wrongful for the Navajo Nation not to respond to the BIA's October 21, 2013 and November 7, 2013 letters. The general rule is that "[m]ere silence or inaction does not raise an estoppel." *Carver v. Liberty Mut. Ins. Co.*, 277 F.2d 105. 108 (5th Cir. 1960) (Wisdom, J.). Rather, "[e]stoppel by silence arises only where a person is under a duty to another to speak." *Id.*; *see also Wiser v. Lawler*, 189 U.S. 260, 270 (1903) ("To constitute an

estoppel by silence there must be something more than an opportunity to speak. There must be an obligation.").

Thus, the federal courts have recognized equitable estoppel claims based on silence "where a party has a legal duty to speak," *Kosakow*, 274 F.3d at 725, but have rejected estoppel claims where there is no such duty. For example, the Second Circuit rejected a borrower's estoppel claim where the lender had no duty under the loan agreement to provide the borrower notice of events of default or of its intention to collect interest. *See Gaia House Mezz LLC v. State St. Bank & Trust Co.*, 720 F.3d 84, 90 (2d Cir. 2013). Likewise, the Tenth Circuit rejected a landlord's claim that a tenant was estopped from withholding rent based on a lease violation as to which the tenant had remained silent for months, because the tenant had no duty under the lease to notify the landlord of the violation. *Rockwell Acquisitions, Inc. v. Ross Dress For Less, Inc.*, 397 F. App'x 424, 429 (10th Cir. 2010).

In this case, neither the ISDEAA nor its implementing regulations impose any duty on the Navajo Nation to respond to the BIA's letters. To the contrary, the statute and the regulations place the burden entirely on the BIA to respond timely to tribal budget proposals. "The statute mandates that 'the Secretary shall, within ninety days after receipt of the proposal, approve the proposal and award the contract unless the Secretary provides written notification to the applicant' that the

proposal does not meet certain statutory criteria." *Yurok Tribe v. Dep't of the Interior*, 785 F.3d 1405, 1408 (Fed. Cir. 2015) (citing 25 U.S.C. § 450f(a)(2)). If the Secretary does not act on a tribal proposal within 90 days or obtain an extension, the proposal automatically becomes part of the approved contract. *See* 25 C.F.R. § 900.18. "In effect, if the Secretary does not timely respond to a[n ISDEAA] proposal, the proposal is deemed approved and the Secretary is directed to award a contract based on the terms of the proposal." *Yurok*, 785 F.3d at 1408.

The commentary to the final version of the regulations underscores the rigidity of the 90-day deadline:

> A comment inquired whether the 90-day period continues to run if the Indian tribe is notified that there are missing items, or whether the 90-day period starts only when there is a complete proposal. The regulation in § 900.15(b) requires the Secretary to notify the applicant of any missing items, and to request the applicant to furnish these items within 15 days. If the applicant fails to submit the missing items altogether, the Secretary must either approve or decline the proposal that was received within 90 days of receipt. Similarly, if the applicant submits the missing items within the 15-day deadline, the 90-day period continues to run from the time of receipt of the original proposal.

61 Fed. Reg. 32482, 32486 (June 24, 1996). The BIA can obtain an extension of the 90-day period only with the written consent of the tribe. 25 C.F.R. § 900.17. "If consent is not given, the 90-day deadline applies." *Id.*

Moreover, these statutory and regulatory provisions must be construed liberally in the favor of the Navajo Nation. Statutes enacted for the benefit of

Indian tribes, such as the ISDEAA, must be liberally construed in their favor. *See Chickasaw Nation v. United States*, 534 U.S. 84, 93–94 (2001); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). Congress mandated that "[e]ach provision of the [ISDEAA] and each provision of this [self-determination] Contract shall be liberally construed for the benefit of the Contractor . . . ." 25 U.S.C. § 450l(c); *see also* S. Rep. No. 103-374, at 11 (1994) (stating that the model self-determination contract "incorporates the longstanding canon of statutory interpretation that laws enacted for the benefit of Indians are to be liberally construed in their favor"); 25 C.F.R. § 900.3(a)(5). Likewise, the ISDEAA regulations provide that the "Secretary's commitment to Indian self-determination requires that these regulations be liberally construed for the benefit of Indian tribes" and that any ambiguities in the regulations "be construed in favor of the Indian tribe." 25 C.F.R. § 900.3(b)(11).

Furthermore, the two BIA letters at issue did not purport to create any duty to respond. The October 21 letter unilaterally announced an extension (or re-setting) of the 90-day deadline for responding to the Navajo Nation's proposed AFA. It did not seek any response from the Nation. It neither requested the consent of the Nation to an extension pursuant to 25 C.F.R. § 900.17, nor inquired about the Nation's position on the running of the deadline. And the November 7 letter did not address the 90-day deadline at all. Instead, it asked the Nation to

revise the proposed AFA and withdraw the request for an expanded budget and scope of work – something that the BIA had no authority to require.

In these circumstances, it is clear that (i) the Navajo Nation had no duty to respond to either of the BIA letters; (ii) the 90-day deadline could be altered only with written consent from the Nation; and (iii) the BIA could not reasonably rely on the Nation's silence in the face of these letters to conclude that the Nation had acquiesced in any adjustment to, or extension of, the 90-day deadline.

Accordingly, there is no basis – legal or factual -- for the district court's conclusion that "the Nation maintained its silence in bad faith, as common honesty and fair dealing compelled it to speak." (App. 19.) To the contrary, the court's ruling subverts the statutory and regulatory structure of the ISDEAA by imposing a novel "equitable" duty on the Nation to alert the BIA about the expiration of the 90-day deadline. It is firmly established that "rules of estoppel will not be permitted to thwart the purposes of statutes of the United States." *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 82 n. 6 (1982) (quoting *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942)).

2. The alleged misleading silence relates to an issue of law, not fact

The second essential element of equitable estoppel is also missing here because the alleged misleading silence relates to an issue of law, rather than an

issue of fact. How the 90-day deadline applied under the facts of this case was an issue of law. Both parties were fully aware of the relevant facts.

The district court concluded that the Navajo Nation, by its silence, deceived the BIA about "the Nation's position as to when the 90-day clock started running and what the deadline was." (App. 20.) This, however, is not an issue of fact; it is a legal position which cannot form the basis for equitable estoppel. Both parties are presumed to know the law and so, where the facts are known to both, there is no valid reason for one party to rely on the legal position of the other.

> Both the defendants and the insurance companies had the written contracts before them, and were presumed, as a matter of law, to know their legal effect and operation. What the complainant said in his testimony was a statement of opinion upon a question of law, where the facts were equally well known to both parties. Such statements of opinion do not operate as an estoppel.

Sturm v. Boker, 150 U.S. 312, 336 (1893). Accordingly, the Claims Court rejected an estoppel claim made by the United States in circumstances analogous to those presented here, ruling that "[t]here is no valid reason why [the Government] should have relied upon plaintiff's allegations as to the state law, as it is equally accessible to both parties." *Estate of German v. U.S.*, 7 Cl. Ct. 641, 646 (1985); *see also Gaughf Properties*, 139 T.C. at 251-52 (wrongful misleading silence pertaining to an issue of law, as opposed to an issue of fact, cannot give rise to equitable estoppel).

3. The BIA was not ignorant of the true facts

The district court acknowledged that "[o]ne cannot claim an estoppel based on silence where he or she had actual knowledge of the facts or the means of acquiring knowledge," or "where the parties have equal knowledge of the facts or the same means of ascertaining that knowledge." (App. 19) (quoting 31 C.J.S. *Estoppel and Waiver* § 124). Nonetheless, the court concluded that this requirement is satisfied here because the BIA lacked knowledge, and could not acquire knowledge, of the Navajo Nation's position as to when the 90-day clock started running because "the Nation kept its position to itself…." (*Id.* at 20.)

The district court's analysis is flawed because it mistakenly equates a legal position with a material fact. The Tenth Circuit drew this distinction in rejecting the equitable estoppel claim in *Rockwell Acquisitions*. As discussed above, the Tenth Circuit ruled that a tenant was not estopped from withholding rent based on a lease violation as to which the tenant had remained silent for months. Not only did the tenant have no duty to speak, but the court also found that the landlord was just as aware of the lease terms and relevant facts as was the tenant. 397 F. App'x at 429. The landlord argued that it was not aware of any lease violation because it did not believe the replacement tenants constituted a violation. "[I]n essence, [the landlord] argue[d] that if it were wrong about interpreting the lease, it did not have the requisite knowledge of the legal controversy." *Id.* The court rejected this

argument because estoppel turns on "real facts" and the landlord "not only had the ability to know but actually did know the facts that constitute this legal dispute." *Id.*

The Tenth Circuit's analysis is equally applicable here. The BIA had full knowledge of both the relevant facts and the applicable law relating to the 90-day deadline. The only thing the BIA lacked was knowledge of the Navajo Nation's legal position. But, as discussed in the previous section, a party cannot invoke the doctrine of equitable estoppel where another party did not disclose its legal position about how the (known) law applies to the (known) facts.

4. The BIA could not reasonably rely on the Navajo Nation's silence

For all of the foregoing reasons, the BIA could not reasonably rely on the Navajo Nation's failure to respond to the BIA's two letters as indicating assent to the BIA's position on applying the 90-day deadline. As a matter of fact, the BIA never asked the Nation to state a position on the deadline. And, as a matter of law, the Navajo Nation had no duty to speak. *See Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 566 (S.D.N.Y. 2013) (copyright infringement claim not estopped by plaintiff's failure to object to defendant's use of its content prior to filing suit because plaintiff had no duty to do so).

Furthermore, the BIA could not reasonably rely on the Navajo Nation's silence because the BIA knew all of the material facts and had the expertise

necessary to understand those facts. *See Gaia House*, 720 F.3d at 92 (citing *Grumman Allied Indus., Inc. v. Rohr Indus., Inc.*, 748 F.2d 729, 737 (2d Cir. 1984)); *see also Mull v. ARCO Durethene Plastics, Inc.*, 784 F.2d 284, 292 (7th Cir. 1986) (defendants not estopped from raising claim of untimely filing where plaintiff's knowledge of his situation made his reliance on defendants' alleged misleading actions an impossibility).

5. The BIA did not rely on the Navajo Nation's silence

Finally, there is no credible basis for concluding that the BIA did, in fact, rely on the Navajo Nation's silence in delaying the issuance of its partial declination until January 15, 2014. The district court's conclusion that the BIA relied on the Navajo Nation's silence was based upon the declaration of Ms. Quintero, which the Government created in support of its opposition to the Nation's motion for summary judgment and its own cross-motion for summary judgment. (App. 9.) But Ms. Quintero's declaration is a classic example of a "*post hoc* rationalization[] offered for the first time in litigation affidavits and arguments of counsel" which a court is "barred from considering" in reviewing agency action. *Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 11 n. 11 (D.C. Cir. 2006) (internal quotation marks and citation omitted).

It is fundamental that judicial review of agency action must be based solely on the grounds invoked by the agency. *See SEC v. Chenery Corp.*, 332 U.S. 194,

196 (1947). In this case, the BIA did not invoke the doctrine of equitable estoppel, either explicitly or implicitly, when it rejected the Navajo Nation's contention that the proposed AFA was deemed approved as of January 2, 2014, and instead concluded that its partial declination of the proposal on January 15, 2014 had been timely. The BIA's rationale was not that it had relied on the Navajo Nation's silence, but rather that, during the government shutdown, there was no BIA employee who was authorized to receive or work on the Nation's proposal and so the 90-day review period did not begin until October 17, 2013, when authorized employees returned to work.

The record shows that the BIA staked out its position on the 90-day deadline without regard to the views of the Navajo Nation. The BIA's October 21 letter announced that it considered the Nation's proposal to have been received on October 17, 2013, so that the 90-day period in which to approve or decline the proposal would end on January 15, 2014. The BIA did not request any response from the Navajo Nation on this issue. When the Nation later challenged the BIA's position and asserted that the deadline had expired on January 2, 2014, the BIA rejected the Nation's argument "on the merits," and did not assert that the Nation had misled it on this issue. These facts do not support a claim for equitable estoppel. They do not show, or even suggest, that the BIA acted in reliance on the Navajo Nation's failure to respond to the October 21 and November 7, 2013,

letters. The district court erred in reaching a contrary conclusion by going outside this record and considering Ms. Quintero's *post hoc* litigation affidavit.

Moreover, Ms. Quintero's declaration does not establish the detrimental reliance element of an equitable estoppel claim. She carefully stopped short of averring that the BIA had actually relied on the Navajo Nation's silence. Instead, she said:

> If the Navajo Nation had notified the BIA in response to any of the agency's prior letters and requests that it believed the 90-day statutory deadline began on October 4, 2013, the BIA could have issued its formal partial declination by January 2, 2014.

App. 169, Quintero Decl. ¶ 22 (emphasis added). Her assertion that the BIA "could have" issued its declination sooner had it known of the Navajo Nation's position does not suffice to establish that the BIA actually relied on the Nation's silence when it treated January 15, 2014 as the applicable deadline. *See Williamson v. Reinalt-Thomas Corp.*, No. 5:11–CV–03548–LHK, 2012 WL 1438812, at *8 (N.D. Cal. Apr. 25, 2012) ("That Plaintiff *could have* purchased his tires from a competitor or *could have* recycled the tires himself does not establish he *actually relied* on the alleged omission when deciding where to purchase his tires.") (emphasis in the original); *In re Olson*, 454 B.R. 466, 473 (Bankr. W.D. Mo. 2011) ("to merely assert what the Plaintiffs 'could have' done had they known about the Debtors' plans does not constitute reliance"); *Kiley v. First Nat. Bank of Maryland*, 649 A.2d 1145, 1154-55 (Md. App. 1994) (detrimental reliance for

estoppel not proven where plaintiff claimed only that he "could have taken his business elsewhere.").

In sum, the district court should not have considered Ms. Quintero's declaration at all. And the court further erred by concluding that the declaration established that the BIA had detrimentally relied on the Navajo Nation's silence in response to the October 21 and November 7 letters.

CONCLUSION

The district court erred in ruling that the Navajo Nation engaged in "gamesmanship" by invoking the 90-day deadline to obtain additional funding for its judicial system. Far from seeking an unjust "windfall," the Nation is lawfully pursuing its rights under the ISDEAA. The appropriate perspective is provided by another recent decision which succinctly rejected a comparable "windfall" argument made by the Government:

> When the Secretary fails to respond to an amendment proposal to a self-determination contract within the allotted 90 days, the proposal automatically becomes part of the parties' Contract. *See* 25 U.S.C. § 450f(a)(2), 25 C.F.R. § 900.18. While this system may seem imbalanced, Congress designed self-determination contracts to work in this manner for a specific remedial purpose, and the ISDEAA, its regulations, and the resulting contracts between Indian tribes and the United States must be read with that remedial intent in mind.

Seneca Nation of Indians v. U.S. Dep't of Health & Human Servs., 945 F. Supp. 2d 135, 152 (D.D.C. 2013) (emphasis added), *appeal dism.* 2013 WL 6818212 (D.C. Cir., Dec. 12, 2013).

The district court mistakenly imposed its view of the equities in a manner that subverts "the text of the [ISDEAA] statute and regulations to maintain the funding status quo." *Maniilaq Ass'n. v. Burwell*, --- F. Supp. 3d ----, 2016 WL 1118256 at *10 (D.D.C. 2016). The court erred in ruling that the Navajo Nation is equitably estopped from pursuing its claims for the additional funding at issue here. Accordingly, the district court's decision should be reversed and this matter should be remanded for a ruling on the merits of the Navajo Nation's claims.

Dated: September 16, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's Brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32(a). Excluding the Table of Contents, Table of Authorities, the Glossary, the Addendum of Pertinent Statutes and Regulations, and counsel's Certificates, this Brief contains 6,893 **words**, including footnotes. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because it has been prepared in a proportionally spaced typeface in **Microsoft Word 2003** using **Times New Roman, 14-point font**.

Dated: September 16, 2016

Respectfully submitted,

/s/ Steven D. Gordon
Steven D. Gordon

Attorney for Appellant Navajo Nation

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2016, copies of the foregoing Appellant's Brief were served by electronic means using the Court's CM/ECF system and by first-class U.S. Mail, postage prepaid upon the following:

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ADDENDUM OF PERTINENT STATUTES AND REGULATIONS

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 46. Indian Self-Determination and Education Assistance

25 U.S.C.A. § 5301
Formerly cited as 25 USCA § 450

§ 5301. Congressional statement of findings

Currentness

<Text may include reference to one or more sections within former chapters 14 and 19 of this title. See Disposition Table preceding 25 U.S.C.A. § 1.>

(a) Findings respecting historical and special legal relationship, and resultant responsibilities

The Congress, after careful review of the Federal government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that--

(1) the 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, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and

(2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.

(b) Further findings

The Congress further finds that--

(1) true self-determination in any society of people is dependent upon an educational process which will insure the development of qualified people to fulfill meaningful leadership roles;

(2) the Federal responsibility for and assistance to education of Indian children has not effected the desired level of educational achievement or created the diverse opportunities and personal satisfaction which education can and should provide; and

(3) parental and community control of the educational process is of crucial importance to the Indian people.

CREDIT(S)
(Pub.L. 93-638, § 2, Jan. 4, 1975, 88 Stat. 2203.)

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 46. Indian Self-Determination and Education Assistance
Subchapter I. Indian Self-Determination

25 U.S.C.A. § 5321
Formerly cited as 25 USCA § 450f

§ 5321. Self-determination contracts

Currentness

<Text may include reference to one or more sections within former chapters 14 and 19 of this title. See Disposition Table preceding 25 U.S.C.A. § 1.>

(a) Request by tribe; authorized programs

(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 to plan, conduct, and administer programs or portions thereof, including construction programs--

(A) provided for in the Act of April 16, 1934 (48 Stat. 596), as amended [25 U.S.C.A. § 452 et seq.];

(B) which the Secretary is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208) [25 U.S.C.A. § 13], and any Act subsequent thereto;

(C) provided by the Secretary of Health and Human Services under the Act of August 5, 1954 (68 Stat. 674), as amended [42 U.S.C.A. § 2001 et seq.];

(D) administered by the Secretary for the benefit of Indians for which appropriations are made to agencies other than the Department of Health and Human Services or the Department of the Interior; and

(E) for the benefit of Indians because of their status as Indians without regard to the agency or office of the Department of Health and Human Services or the Department of the Interior within which it is performed.

The programs, functions, services, or activities that are contracted under this paragraph shall include administrative functions of the Department of the Interior and the Department of Health and Human Services (whichever is applicable) that support the delivery of services to Indians, including those administrative activities supportive of, but not included as part of, the service delivery programs described in this paragraph that are otherwise contractable. The administrative functions referred to in the preceding sentence shall be contractable without regard to the organizational level within the Department that carries out such functions.

(2) If so authorized by an Indian tribe under paragraph (1) of this subsection, a tribal organization may submit a proposal for a self-determination contract, or a proposal to amend or renew a self-determination contract, to the Secretary for review. Subject to the provisions of paragraph (4), the Secretary shall, within ninety days after receipt of the proposal, approve the proposal and award the contract unless the Secretary provides written notification to the applicant that contains a specific finding that clearly demonstrates that, or that is supported by a controlling legal authority that--

(A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;

(B) adequate protection of trust resources is not assured;

(C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract;

(D) the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 450j-1(a) of this title; or

(E) the program, function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities covered under paragraph (1) because the proposal includes activities that cannot lawfully be carried out by the contractor.

Notwithstanding any other provision of law, the Secretary may extend or otherwise alter the 90-day period specified in the second sentence of this subsection, [1] if before the expiration of such period, the Secretary obtains the voluntary and express written consent of the tribe or tribal organization to extend or otherwise alter such period. The contractor shall include in the proposal of the contractor the standards under which the tribal organization will operate the contracted program, service, function, or activity, including in the area of construction, provisions regarding the use of licensed and qualified architects, applicable health and safety standards, adherence to applicable Federal, State, local, or tribal building codes and engineering standards. The standards referred to in the preceding sentence shall ensure structural integrity, accountability of funds, adequate competition for subcontracting under tribal or other applicable law, the commencement, performance, and completion of the contract, adherence to project plans and specifications (including any applicable Federal construction guidelines and manuals), the use of proper materials and workmanship, necessary inspection and testing, and changes, modifications, stop work, and termination of the work when warranted.

(3) Upon the request of a tribal organization that operates two or more mature self-determination contracts, those contracts may be consolidated into one single contract.

(4) The Secretary shall approve any severable portion of a contract proposal that does not support a declination finding described in paragraph (2). If the Secretary determines under such paragraph that a contract proposal--

(A) proposes in part to plan, conduct, or administer a program, function, service, or activity that is beyond the scope of programs covered under paragraph (1), or

(B) proposes a level of funding that is in excess of the applicable level determined under section 450j-1(a) of this title,

subject to any alteration in the scope of the proposal that the Secretary and the tribal organization agree to, the Secretary shall, as appropriate, approve such portion of the program, function, service, or activity as is authorized under paragraph (1) or approve a level of funding authorized under section 450j-1(a) of this title. If a tribal organization elects to carry out a severable portion of a contract proposal pursuant to this paragraph, subsection (b) of this section shall only apply to the portion of the contract that is declined by the Secretary pursuant to this subsection.

(b) Procedure upon refusal of request to contract

Whenever the Secretary declines to enter into a self-determination contract or contracts pursuant to subsection (a) of this section, the Secretary shall--

(1) state any objections in writing to the tribal organization,

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

(3) provide the tribal organization with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter and the opportunity for appeal on the objections raised, under such rules and regulations as the Secretary may promulgate, except that the tribe or tribal organization may, in lieu of filing such appeal, exercise the option to initiate an action in a Federal district court and proceed directly to such court pursuant to section 450m-1(a) of this title.

(c) Liability insurance; waiver of defense

(1) Beginning in 1990, the Secretary shall be responsible for obtaining or providing liability insurance or equivalent coverage, on the most cost-effective basis, for Indian tribes, tribal organizations, and tribal contractors carrying out contracts, grant agreements and cooperative agreements pursuant to this subchapter. In obtaining or providing such coverage, the Secretary shall take into consideration the extent to which liability under such contracts or agreements are covered by the Federal Tort Claims Act.

(2) In obtaining or providing such coverage, the Secretary shall, to the greatest extent practicable, give a preference to coverage underwritten by Indian-owned economic enterprises as defined in section 1452 of this title, except that, for the purposes of this subsection, such enterprises may include non-profit corporations.

(3)(A) Any policy of insurance obtained or provided by the Secretary pursuant to this subsection shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage or limits of the policy of insurance.

(B) No waiver of the sovereign immunity of an Indian tribe pursuant to this paragraph shall include a waiver to the extent of any potential liability for interest prior to judgment or for punitive damages or for any other limitation on liability imposed by the law of the State in which the alleged injury occurs.

(d) Tribal organizations and Indian contractors deemed part of Public Health Service

For purposes of section 233 of Title 42, with respect to claims by any person, initially filed on or after December 22, 1987, whether or not such person is an Indian or Alaska Native or is served on a fee basis or under other circumstances as permitted by Federal law or regulations for personal injury, including death, resulting from the performance prior to, including, or after December 22, 1987, of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations, or for purposes of section 2679, Title 28, with respect to claims by any such person, on or after November 29, 1990, for personal injury, including death, resulting from the operation of an emergency motor vehicle, an Indian tribe, a tribal organization or Indian contractor carrying out a contract, grant agreement, or cooperative agreement under sections 450f or 450h of this title [2] is deemed to be part of the Public Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and its employees (including those acting on behalf of the organization or contractor as provided in section 2671 of Title 28, and including an individual who provides health care services pursuant to a personal services contract with a tribal organization for the provision of services in any facility owned, operated, or constructed under the jurisdiction of the Indian Health Service) are deemed employees of the Service while acting within the scope of their employment in carrying out the contract or agreement: *Provided,* That such employees shall be deemed to be acting within the scope of their employment in carrying out such contract or agreement when they are required, by reason of such employment, to perform medical, surgical, dental or related functions at a facility other than the facility operated pursuant to such contract or agreement, but only if such employees are not compensated for the performance of such functions by a person or entity other than such Indian tribe, tribal organization or Indian contractor.

(e) Burden of proof at hearing or appeal declining contract; final agency action

(1) With respect to any hearing or appeal conducted pursuant to subsection (b)(3) of this section or any civil action conducted pursuant to section 450m-1(a) of this title, the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal (or portion thereof).

(2) Notwithstanding any other provision of law, a decision by an official of the Department of the Interior or the Department of Health and Human Services, as appropriate (referred to in this paragraph as the "Department") that constitutes final agency action and that relates to an appeal within the Department that is conducted under subsection (b)(3) of this section shall be made either--

(A) by an official of the Department who holds a position at a higher organizational level within the Department than the level of the departmental agency (such as the Indian Health Service or the Bureau of Indian Affairs) in which the decision that is the subject of the appeal was made; or

(B) by an administrative judge.

CREDIT(S)

(Pub.L. 93-638, Title I, § 102, formerly §§ 102 and 103(c), Jan. 4, 1975, 88 Stat. 2206; Pub.L. 100-202. § 101(g) [Title II], Dec. 22, 1987, 101 Stat. 1329-246; Pub.L. 100-472, Title II, § 201(a), (b)(1), Oct. 5, 1988, 102 Stat. 2288, 2289; Pub.L. 100-581, Title II, § 210, Nov. 1, 1988, 102 Stat. 2941; Pub.L. 101-644, Title II, § 203(b), Nov. 29, 1990, 104 Stat. 4666; Pub.L. 103-413, Title I, § 102(5) to (9), Oct. 25, 1994, 108 Stat. 4251 to 4253; Pub.L. 106-260, § 6, Aug. 18, 2000, 114 Stat. 732.)

Notes of Decisions (54)

Footnotes

1 So in original. Probably should be "paragraph".

2 So in original. Probably should be "this section and section 450h of this title".

25 U.S.C.A. § 5321, 25 USCA § 5321

Current through P.L. 114-219.

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 46. Indian Self-Determination and Education Assistance
Subchapter I. Indian Self-Determination

25 U.S.C.A. § 5329
Formerly cited as 25 USCA § 450 *l*

§ 5329. Contract or grant specifications

Currentness

<Text may include reference to one or more sections within former chapters 14 and 19 of this title. See Disposition Table preceding 25 U.S.C.A. § 1.>

(a)Terms

Each self-determination contract entered into under this subchapter shall--

(1) contain, or incorporate by reference, the provisions of the model agreement described in subsection (c) of this section (with modifications where indicated and the blanks appropriately filled in), and

(2) contain such other provisions as are agreed to by the parties.

(b)Payments; Federal records

Notwithstanding any other provision of law, the Secretary may make payments pursuant to section 1(b)(6) of such model agreement. As provided in section 1(b)(7) of the model agreement, the records of the tribal government or tribal organization specified in such section shall not be considered Federal records for purposes of chapter 5 of Title 5.

(c)Model agreement

The model agreement referred to in subsection (a)(1) of this section reads as follows:

"Section 1. Agreement between the Secretary and the _____ Tribal Government.

"(a) Authority and Purpose.--

"(1) Authority.--This agreement, denoted a Self-Determination Contract (referred to in this agreement as the 'Contract'), is entered into by the Secretary of the Interior or the Secretary of Health and Human Services (referred to in this agreement as the 'Secretary'), for and on behalf of the United States pursuant to title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) and by the authority of the _____ tribal

government or tribal organization (referred to in this agreement as the 'Contractor'). The provisions of title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) are incorporated in this agreement.

"(2) Purpose.--Each provision of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the following related functions, services, activities, and programs (or portions thereof), that are otherwise contractable under section 102(a) of such Act, including all related administrative functions, from the Federal Government to the Contractor: (List functions, services, activities, and programs).

"(b) Terms, Provisions, and Conditions.--

"(1) Term.--Pursuant to section 105(c)(1) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j(c)(1)), the term of this contract shall be _____ years. Pursuant to section 105(d)(1) of such Act (25 U.S.C. 450j(d)), upon the election by the Contractor, the period of this Contract shall be determined on the basis of a calendar year, unless the Secretary and the Contractor agree on a different period in the annual funding agreement incorporated by reference in subsection (f)(2).

"(2) Effective date.--This Contract shall become effective upon the date of the approval and execution by the Contractor and the Secretary, unless the Contractor and the Secretary agree on an effective date other than the date specified in this paragraph.

"(3) Program standard.--The Contractor agrees to administer the program, services, functions and activities (or portions thereof) listed in subsection (a)(2) of the Contract in conformity with the following standards: (list standards).

"(4) Funding amount.--Subject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement incorporated by reference in subsection (f)(2). Such amount shall not be less than the applicable amount determined pursuant to section 106(a) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j-1).

"(5) Limitation of costs.--The Contractor shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds awarded under this Contract. If, at any time, the Contractor has reason to believe that the total amount required for performance of this Contract or a specific activity conducted under this Contract would be greater than the amount of funds awarded under this Contract, the Contractor shall provide reasonable notice to the appropriate Secretary. If the appropriate Secretary does not take such action as may be necessary to increase the amount of funds awarded under this Contract, the Contractor may suspend performance of the Contract until such time as additional funds are awarded.

"(6) Payment.--

"(A) In general.--Payments to the Contractor under this Contract shall--

"(i) be made as expeditiously as practicable; and

"(ii) include financial arrangements to cover funding during periods covered by joint resolutions adopted by Congress making continuing appropriations, to the extent permitted by such resolutions.

"(B) Quarterly, semiannual, lump-sum, and other methods of payment.--

"(i) In general.--Pursuant to section 108(b) of the Indian Self-Determination and Education Assistance Act, and notwithstanding any other provision of law, for each fiscal year covered by this Contract, the Secretary shall make available to the Contractor the funds specified for the fiscal year under the annual funding agreement incorporated by reference pursuant to subsection (f)(2) by paying to the Contractor, on a quarterly basis, one-quarter of the total amount provided for in the annual funding agreement for that fiscal year, in a lump-sum payment or as semiannual payments, or any other method of payment authorized by law, in accordance with such method as may be requested by the Contractor and specified in the annual funding agreement.

"(ii) Method of quarterly payment.--If quarterly payments are specified in the annual funding agreement incorporated by reference pursuant to subsection (f)(2), each quarterly payment made pursuant to clause (i) shall be made on the first day of each quarter of the fiscal year, except that in any case in which the Contract year coincides with the Federal fiscal year, payment for the first quarter shall be made not later than the date that is 10 calendar days after the date on which the Office of Management and Budget apportions the appropriations for the fiscal year for the programs, services, functions, and activities subject to this Contract.

"(iii) Applicability.--Chapter 39 of title 31, United States Code, shall apply to the payment of funds due under this Contract and the annual funding agreement referred to in clause (i).

"(7) Records and monitoring.--

"(A) In general.--Except for previously provided copies of tribal records that the Secretary demonstrates are clearly required to be maintained as part of the recordkeeping system of the Department of the Interior or the Department of Health and Human Services (or both), records of the Contractor shall not be considered Federal records for purposes of chapter 5 of title 5, United States Code.

"(B) Recordkeeping system.--The Contractor shall maintain a recordkeeping system and, upon reasonable advance request, provide reasonable access to such records to the Secretary.

"(C) Responsibilities of Contractor.--The Contractor shall be responsible for managing the day-to-day operations conducted under this Contract and for monitoring activities conducted under this Contract to ensure compliance with the Contract and applicable Federal requirements. With respect to the monitoring activities of the Secretary, the routine monitoring visits shall be limited to not more than one performance monitoring visit for this Contract by the head of each operating division, departmental bureau, or departmental agency, or duly authorized representative of such head unless--

"(i) the Contractor agrees to one or more additional visits; or

"(ii) the appropriate official determines that there is reasonable cause to believe that grounds for reassumption of the Contract, suspension of Contract payments, or other serious Contract performance deficiency may exist.

No additional visit referred to in clause (ii) shall be made until such time as reasonable advance notice that includes a description of the nature of the problem that requires the additional visit has been given to the Contractor.

"(8) Property.--

"(A) In general.--As provided in section 105(f) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j(f)), at the request of the Contractor, the Secretary may make available, or transfer to the Contractor, all reasonably divisible real property, facilities, equipment, and personal property that the Secretary has used to

provide or administer the programs, services, functions, and activities covered by this Contract. A mutually agreed upon list specifying the property, facilities, and equipment so furnished shall also be prepared by the Secretary, with the concurrence of the Contractor, and periodically revised by the Secretary, with the concurrence of the Contractor.

"(B) Records.--The Contractor shall maintain a record of all property referred to in subparagraph (A) or other property acquired by the Contractor under section 105(f)(2)(A) of such Act for purposes of replacement.

"(C) Joint use agreements.--Upon the request of the Contractor, the Secretary and the Contractor shall enter into a separate joint use agreement to address the shared use by the parties of real or personal property that is not reasonably divisible.

"(D) Acquisition of property.--The Contractor is granted the authority to acquire such excess property as the Contractor may determine to be appropriate in the judgment of the Contractor to support the programs, services, functions, and activities operated pursuant to this Contract.

"(E) Confiscated or excess property.--The Secretary shall assist the Contractor in obtaining such confiscated or excess property as may become available to tribes, tribal organizations, or local governments.

"(F) Screener identification card.--A screener identification card (General Services Administration form numbered 2946) shall be issued to the Contractor not later than the effective date of this Contract. The designated official shall, upon request, assist the Contractor in securing the use of the card.

"(G) Capital equipment.--The Contractor shall determine the capital equipment, leases, rentals, property, or services the Contractor requires to perform the obligations of the Contractor under this subsection, and shall acquire and maintain records of such capital equipment, property rentals, leases, property, or services through applicable procurement procedures of the Contractor.

"(9) Availability of funds.--Notwithstanding any other provision of law, any funds provided under this Contract--

"(A) shall remain available until expended; and

"(B) with respect to such funds, no further--

"(i) approval by the Secretary, or

"(ii) justifying documentation from the Contractor, shall be required prior to the expenditure of such funds.

"(10) Transportation.--Beginning on the effective date of this Contract, the Secretary shall authorize the Contractor to obtain interagency motor pool vehicles and related services for performance of any activities carried out under this Contract.

"(11) Federal program guidelines, manuals, or policy directives.--Except as specifically provided in the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) the Contractor is not required to abide by program guidelines, manuals, or policy directives of the Secretary, unless otherwise agreed to by the Contractor and the Secretary, or otherwise required by law.

"(12) Disputes.--

"(A) Third-party mediation defined.--For the purposes of this Contract, the term 'third-party mediation' means a form of mediation whereby the Secretary and the Contractor nominate a third party who is not employed by or significantly involved with the Secretary of the Interior, the Secretary of Health and Human Services, or the Contractor, to serve as a third-party mediator to mediate disputes under this Contract.

"(B) Alternative procedures.--In addition to, or as an alternative to, remedies and procedures prescribed by section 110 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450m-1), the parties to this Contract may jointly--

"(i) submit disputes under this Contract to third-party mediation;

"(ii) submit the dispute to the adjudicatory body of the Contractor, including the tribal court of the Contractor;

"(iii) submit the dispute to mediation processes provided for under the laws, policies, or procedures of the Contractor; or

"(iv) use the administrative dispute resolution processes authorized in subchapter IV of chapter 5 of title 5, United States Code.

"(C) Effect of decisions.--The Secretary shall be bound by decisions made pursuant to the processes set forth in subparagraph (B), except that the Secretary shall not be bound by any decision that significantly conflicts with the interests of Indians or the United States.

"(13) Administrative procedures of Contractor.--Pursuant to the Indian Civil Rights Act of 1968 (25 U.S.C. 1301 et seq.), the laws, policies, and procedures of the Contractor shall provide for administrative due process (or the equivalent of administrative due process) with respect to programs, services, functions, and activities that are provided by the Contractor pursuant to this Contract.

"(14) Successor annual funding agreement.--

"(A) In general.--Negotiations for a successor annual funding agreement, provided for in subsection (f)(2), shall begin not later than 120 days prior to the conclusion of the preceding annual funding agreement. Except as provided in section 105(c)(2) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j(c)(2)) the funding for each such successor annual funding agreement shall only be reduced pursuant to section 106(b) of such Act (25 U.S.C. 450j-1(b)).

"(B) Information.--The Secretary shall prepare and supply relevant information, and promptly comply with any request by the Contractor for information that the Contractor reasonably needs to determine the amount of funds that may be available for a successor annual funding agreement, as provided for in subsection (f)(2) of this Contract.

"(15) Contract requirements; approval by Secretary.--

"(A) In general.--Except as provided in subparagraph (B), for the term of the Contract, section 2103 of the Revised Statutes (25 U.S.C. 81), section 16 of the Act of June 18, 1934 (48 Stat. 987, chapter 576; 25 U.S.C. 476), and the Act of July 3, 1952 (25 U.S.C. 82a), shall not apply to any contract entered into in connection with this Contract.

"(B) Requirements.--Each Contract entered into by the Contractor with a third party in connection with performing the obligations of the Contractor under this Contract shall--

"(i) be in writing;

"(ii) identify the interested parties, the authorities of such parties, and purposes of the Contract;

"(iii) state the work to be performed under the Contract; and

"(iv) state the process for making any claim, the payments to be made, and the terms of the Contract, which shall be fixed.

"(c) Obligation of the Contractor.--

"(1) Contract performance.--Except as provided in subsection (d)(2), the Contractor shall perform the programs, services, functions, and activities as provided in the annual funding agreement under subsection (f)(2) of this Contract.

"(2) Amount of funds.--The total amount of funds to be paid under this Contract pursuant to section 106(a) shall be determined in an annual funding agreement entered into between the Secretary and the Contractor, which shall be incorporated into this Contract.

"(3) Contracted programs.--Subject to the availability of appropriated funds, the Contractor shall administer the programs, services, functions, and activities identified in this Contract and funded through the annual funding agreement under subsection (f)(2).

"(4) Trust services for individual Indians.--

"(A) In general.--To the extent that the annual funding agreement provides funding for the delivery of trust services to individual Indians that have been provided by the Secretary, the Contractor shall maintain at least the same level of service as the Secretary provided for such individual Indians, subject to the availability of appropriated funds for such services.

"(B) Trust services to individual Indians.--For the purposes of this paragraph only, the term 'trust services for individual Indians' means only those services that pertain to land or financial management connected to individually held allotments.

"(5) Fair and uniform services.--The Contractor shall provide services under this Contract in a fair and uniform manner and shall provide access to an administrative or judicial body empowered to adjudicate or otherwise resolve complaints, claims, and grievances brought by program beneficiaries against the Contractor arising out of the performance of the Contract.

"(d) Obligation of the United States.--

"(1) Trust responsibility.--

"(A) In general.--The United States reaffirms the trust responsibility of the United States to the _____ Indian tribe(s) to protect and conserve the trust resources of the Indian tribe(s) and the trust resources of individual Indians.

"(B) Construction of Contract.--Nothing in this Contract may be construed to terminate, waive, modify, or reduce the trust responsibility of the United States to the tribe(s) or individual Indians. The Secretary shall act in good faith in upholding such trust responsibility.

"(2) Good faith.--To the extent that health programs are included in this Contract, and within available funds, the Secretary shall act in good faith in cooperating with the Contractor to achieve the goals set forth in the Indian Health Care Improvement Act (25 U.S.C. 1601 et seq.).

"(3) Programs retained.--As specified in the annual funding agreement, the United States hereby retains the programs, services, functions, and activities with respect to the tribe(s) that are not specifically assumed by the Contractor in the annual funding agreement under subsection (f)(2).

"(e) Other provisions.--

"(1) Designated officials.--Not later than the effective date of this Contract, the United States shall provide to the Contractor, and the Contractor shall provide to the United States, a written designation of a senior official to serve as a representative for notices, proposed amendments to the Contract, and other purposes for this Contract.

"(2) Contract modifications or amendment.--

"(A) In general.--Except as provided in subparagraph (B), no modification to this Contract shall take effect unless such modification is made in the form of a written amendment to the Contract, and the Contractor and the Secretary provide written consent for the modification.

"(B) Exception.--The addition of supplemental funds for programs, functions, and activities (or portions thereof) already included in the annual funding agreement under subsection (f)(2), and the reduction of funds pursuant to section 106(b)(2), shall not be subject to subparagraph (A).

"(3) Officials not to benefit.--No Member of Congress, or resident commissioner, shall be admitted to any share or part of any contract executed pursuant to this Contract, or to any benefit that may arise from such contract. This paragraph may not be construed to apply to any contract with a third party entered into under this Contract if such contract is made with a corporation for the general benefit of the corporation.

"(4) Covenant against contingent fees.--The parties warrant that no person or selling agency has been employed or retained to solicit or secure any contract executed pursuant to this Contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business.

"(f) Attachments.--

"(1) 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.

"(2) Annual funding agreement.--

"(A) In general.--The annual funding agreement under this Contract shall only contain--

"(i) terms that identify the programs, services, functions, and activities to be performed or administered, the general budget category assigned, the funds to be provided, and the time and method of payment; and

"(ii) such other provisions, including a brief description of the programs, services, functions, and activities to be performed (including those supported by financial resources other than those provided by the Secretary), to which the parties agree.

"(B) Incorporation by reference.--The annual funding agreement is hereby incorporated in its entirety in this Contract and attached to this Contract as attachment 2."

CREDIT(S)

(Pub.L. 93-638, Title I, § 108, as added Pub.L. 103-413, Title I, § 103, Oct. 25, 1994, 108 Stat. 4260; amended Pub.L. 106-568, Title VIII, § 812(a), Dec. 27, 2000, 114 Stat. 2917.)

Notes of Decisions (1)

25 U.S.C.A. § 5329, 25 USCA § 5329
Current through P.L. 114-219.

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 46. Indian Self-Determination and Education Assistance
Subchapter I. Indian Self-Determination

25 U.S.C.A. § 5331
Formerly cited as 25 USCA § 450m-1

§ 5331. Contract disputes and claims

Currentness

<Text may include reference to one or more sections within former chapters 14 and 19 of this title. See Disposition Table preceding 25 U.S.C.A. § 1.>

(a) Civil actions; concurrent jurisdiction; relief

The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this subchapter and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this subchapter. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this subchapter or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this subchapter or regulations promulgated hereunder (including immediate injunctive relief to reverse a declination finding under section 450f(a)(2) of this title or to compel the Secretary to award and fund an approved self-determination contract).

(b) Revision of contracts

The Secretary shall not revise or amend a self-determination contract with a tribal organization without the tribal organization's consent.

(c) Application of laws to administrative appeals

The Equal Access to Justice Act (Publc Law 96-481, Act of October 1, 1980; 92 Stat. 2325, as amended [1]), section 504 of Title 5, and section 2412 of Title 28, shall apply to administrative appeals pending on or filed after October 5, 1988, by tribal organizations regarding self-determination contracts.

(d) Application of chapter 71 of Title 41

Chapter 71 of Title 41 shall apply to self-determination contracts, except that all administrative appeals relating to such contracts shall be heard by the Interior Board of Contract Appeals established pursuant to section 8 of such Act (41 U.S.C. 607).

(e) Application of subsection (d)

Subsection (d) of this section shall apply to any case pending or commenced on or after March 17, 1986, before the Boards of Contract Appeals of the Department of the Interior or the Department of Health and Human Services except that in any such cases finally disposed of before October 5, 1988, the thirty-day period referred to in section 504(a)(2) of Title 5 shall be deemed to commence on October 5, 1988.

CREDIT(S)

(Pub.L. 93-638, Title I, § 110, as added Pub.L. 100-472, Title II, § 206(a), Oct. 5, 1988, 102 Stat. 2295; amended Pub.L. 100-581, Title II, § 212, Nov. 1, 1988, 102 Stat. 2941; Pub.L. 101-301, §§ 1(a)(2), 2(b), May 24, 1990, 104 Stat. 206, 207; Pub.L. 103-413, Title I, § 104(2), (3), Oct. 25, 1994, 108 Stat. 4268.)

Notes of Decisions (25)

Footnotes

1 So in original. Probably should be "Public Law 96-481, Act of October 21, 1980, 94 Stat. 2325, as amended".

25 U.S.C.A. § 5331, 25 USCA § 5331
Current through P.L. 114-219.

End of Document

Code of Federal Regulations
Title 25. Indians
Chapter V. Bureau of Indian Affairs, Department of the Interior, and Indian Health Service, Department of Health and Human Services (Refs & Annos)
Part 900. Contracts Under the Indian Self–Determination and Education Assistance Act (Refs & Annos)
Subpart A. General Provisions

25 C.F.R. § 900.3

§ 900.3 Policy statements.

Currentness

(a) Congressional policy.

(1) Congress has 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, planning, conduct and administration of educational as well as other Federal programs and services to Indian communities so as to render such programs and services more responsive to the needs and desires of those communities.

(2) Congress has declared its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

(3) Congress has declared that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.

(4) Congress has declared that the programs, functions, services, or activities that are contracted and funded under this Act shall include administrative functions of the Department of the Interior and the Department of Health and Human Services (whichever is applicable) that support the delivery of services to Indians, including those administrative activities supportive of, but not included as part of, the service delivery programs described in this paragraph that are otherwise contractible. The administrative functions referred to in the preceding sentence shall be contractible without regard to the organizational level within the Department that carries out such functions. Contracting of the administrative functions described herein shall not be construed to limit or reduce in any way the funding for any program, function, service, or activity serving any other tribe under the Act or any other law. The Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another Indian tribe or tribal organization under this Act.

(5) Congress has further declared that each provision of the Act and each provision of contracts entered into thereunder shall be liberally construed for the benefit of the tribes or tribal organizations to transfer the funding and the related functions, services, activities, and programs (or portions thereof), that are otherwise contractible under the Act, including all related administrative functions, from the Federal government to the contractor.

(6) Congress has declared that one of the primary goals of the 1994 amendments to the Act was to minimize the reporting requirements applicable to tribal contractors and to eliminate excessive and burdensome reporting requirements. Reporting requirements over and above the annual audit report are to be negotiated with disagreements subject to the declination procedures of section 102 of the Act.

(7) Congress has declared that there not be any threshold issues which would avoid the declination, contract review, approval, and appeal process.

(8) Congress has declared that all self-determination contract proposals must be supported by the resolution of an Indian tribe(s).

(9) Congress has declared that to the extent that programs, functions, services, and activities carried out by tribes and tribal organizations pursuant to contracts entered into under this Act reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings that have not otherwise been included in the amount of contract funds determined under section 106(a) of the Act, the Secretary shall make such savings available for the provision of additional services to program beneficiaries, either directly or through contractors, in a manner equitable to both direct and contracted programs.

(b) Secretarial policy.

(1) It is the policy of the Secretary to facilitate the efforts of Indian tribes and tribal organizations to plan, conduct and administer programs, functions, services and activities, or portions thereof, which the Departments are authorized to administer for the benefit of Indians because of their status as Indians. The Secretary shall make best efforts to remove any obstacles which might hinder Indian tribes and tribal organizations including obstacles that hinder tribal autonomy and flexibility in the administration of such programs.

(2) It is the policy of the Secretary to encourage Indian tribes and tribal organizations to become increasingly knowledgeable about the Departments' programs administered for the benefit of Indians by providing information on such programs, functions and activities and the opportunities Indian tribes have regarding them.

(3) It is the policy of the Secretary to provide a uniform and consistent set of rules for contracts under the Act. The rules contained herein are designed to facilitate and encourage Indian tribes to participate in the planning, conduct, and administration of those Federal programs serving Indian people. The Secretary shall afford Indian tribes and tribal organizations the flexibility, information, and discretion necessary to design contractible programs to meet the needs of their communities consistent with their diverse demographic, geographic, economic, cultural, health, social, religious and institutional needs.

(4) The Secretary recognizes that contracting under the Act is an exercise by Indian tribes of the government-to-government relationship between the United States and the Indian tribes. When an Indian tribe contracts, there is a transfer of the responsibility with the associated funding. The tribal contractor is accountable for managing the day-to-day operations of the contracted Federal programs, functions, services, and activities. The contracting tribe thereby accepts the responsibility and accountability to the beneficiaries under the contract with respect to use of the funds and the satisfactory performance of the programs, functions, services and activities funded under the contract. The Secretary will continue to discharge the trust responsibilities to protect and conserve the trust resources of Indian tribes and the trust resources of individual Indians.

(5) The Secretary recognizes that tribal decisions to contract or not to contract are equal expressions of self-determination.

(6) The Secretary shall maintain consultation with tribal governments and tribal organizations in the Secretary's budget process relating to programs, functions, services and activities subject to the Act. In addition, on an annual basis, the Secretary shall consult with, and solicit the participation of, Indian tribes and tribal organizations in the development of the budget for the Indian Health Service and the Bureau of Indian Affairs (including participation of Indian tribes and tribal organizations in formulating annual budget requests that the Secretary submits to the President for submission to Congress pursuant to section 1105 of title 31, United States Code).

(7) The Secretary is committed to implementing and fully supporting the policy of Indian self-determination by recognizing and supporting the many positive and successful efforts and directions of tribal governments and extending the applicability of this policy to all operational components within the Department. By fully extending Indian self-determination contracting to all operational components within the Department having programs or portions of programs for the benefit of Indians under section 102(a)(1) (A) through (D) and for the benefit of Indians because of their status as Indians under section 102(a)(1)(E), it is the Secretary's intent to support and assist Indian tribes in the development of strong and stable tribal governments capable of administering quality programs that meet the tribally determined needs and directions of their respective communities. It is also the policy of the Secretary to have all other operational components within the Department work cooperatively with tribal governments on a government-to-government basis so as to expedite the transition away from Federal domination of Indian programs and make the ideals of Indian self-government and self-determination a reality.

(8) It is the policy of the Secretary that the contractibility of programs under this Act should be encouraged. In this regard, Federal laws and regulations should be interpreted in a manner that will facilitate the inclusion of those programs or portions of those programs that are for the benefit of Indians under section 102(a)(1) (A) through (D) of the Act, and that are for the benefit of Indians because of their status of Indians under section 102(a)(1)(E) of the Act.

(9) It is the Secretary's policy that no later than upon receipt of a contract proposal under the Act (or written notice of an Indian tribe or tribal organization's intention to contract), the Secretary shall commence planning such administrative actions, including but not limited to transfers or reductions in force, transfers of property, and transfers of contractible functions, as may be necessary to ensure a timely transfer of responsibilities and funding to Indian tribes and tribal organizations.

(10) It is the policy of the Secretary to make available to Indian tribes and tribal organizations all administrative functions that may lawfully be contracted under the Act, employing methodologies consistent with the methodology employed with respect to such functions under titles III and IV of the Act.

(11) The Secretary's commitment to Indian self-determination requires that these regulations be liberally construed for the benefit of Indian tribes and tribal organizations to effectuate the strong Federal policy of self-determination and, further, that any ambiguities herein be construed in favor of the Indian tribe or tribal organization so as to facilitate and enable the transfer of services, programs, functions, and activities, or portions thereof, authorized by the Act.

SOURCE: 61 FR 32501, June 24, 1996, unless otherwise noted.

AUTHORITY: 25 U.S.C. 450f et seq.

Notes of Decisions (6)

Current through September 1, 2016; 81 FR 60458.

End of Document

Code of Federal Regulations
Title 25. Indians
Chapter V. Bureau of Indian Affairs, Department of the Interior, and Indian Health Service, Department of Health and Human Services (Refs & Annos)
Part 900. Contracts Under the Indian Self–Determination and Education Assistance Act (Refs & Annos)
Subpart C. Contract Proposal Contents

25 C.F.R. § 900.12

§ 900.12 Are the proposal contents requirements the same for renewal of a contract that is expiring and for securing an annual funding agreement after the first year of the funding agreement?

Currentness

No. In these situations, an Indian tribe or tribal organization should submit a renewal proposal (or notification of intent not to renew) or an annual funding agreement proposal at least 90 days before the expiration date of the contract or existing annual funding agreement. The proposal shall provide funding information in the same detail and format as the original proposal and may also identify any significant proposed changes.

SOURCE: 61 FR 32501, June 24, 1996, unless otherwise noted.

AUTHORITY: 25 U.S.C. 450f et seq.

Current through September 1, 2016; 81 FR 60458.

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Title 25. Indians
Chapter V. Bureau of Indian Affairs, Department of the Interior, and Indian Health Service, Department of Health and Human Services (Refs & Annos)
Part 900. Contracts Under the Indian Self–Determination and Education Assistance Act (Refs & Annos)
Subpart D. Review and Approval of Contract Proposals

25 C.F.R. § 900.15

§ 900.15 What shall the Secretary do upon receiving a proposal?

Currentness

Upon receipt of a proposal, the Secretary shall:

(a) Within two days notify the applicant in writing that the proposal has been received;

(b) Within 15 days notify the applicant in writing of any missing items required by § 900.8 and request that the items be submitted within 15 days of receipt of the notification; and

(c) Review the proposal to determine whether there are declination issues under section 102(a)(2) of the Act.

SOURCE: 61 FR 32501, June 24, 1996, unless otherwise noted.

AUTHORITY: 25 U.S.C. 450f et seq.

Notes of Decisions (3)

Current through September 1, 2016; 81 FR 60458.

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Title 25. Indians
Chapter V. Bureau of Indian Affairs, Department of the Interior, and Indian Health Service, Department of Health and Human Services (Refs & Annos)
Part 900. Contracts Under the Indian Self–Determination and Education Assistance Act (Refs & Annos)
Subpart D. Review and Approval of Contract Proposals

25 C.F.R. § 900.17

§ 900.17 Can the statutory 90–day period be extended?

Currentness

Yes, with written consent of the Indian tribe or tribal organization. If consent is not given, the 90–day deadline applies.

SOURCE: 61 FR 32501, June 24, 1996, unless otherwise noted.

AUTHORITY: 25 U.S.C. 450f et seq.

Current through September 1, 2016; 81 FR 60458.

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Part 900. Contracts Under the Indian Self–Determination and Education Assistance Act (Refs & Annos)
Subpart D. Review and Approval of Contract Proposals

25 C.F.R. § 900.18

§ 900.18 What happens if a proposal is not declined within 90 days after it is received by the Secretary?

Currentness

A proposal that is not declined within 90 days (or within any agreed extension under § 900.17) is deemed approved and the Secretary shall award the contract or any amendment or renewal within that 90–day period and add to the contract the full amount of funds pursuant to section 106(a) of the Act.

SOURCE: 61 FR 32501, June 24, 1996, unless otherwise noted.

AUTHORITY: 25 U.S.C. 450f et seq.

Notes of Decisions (2)

Current through September 1, 2016; 81 FR 60458.

End of Document