UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR FAILURE TO STATE A CLAIM
UPON WHICH RELIEF MAY BE GRANTED: February 4, 2014

CBCA 3519-ISDA

YUROK TRIBE,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Raymond Calamaro, Douglas Wheeler, and Audrey Moog of Hogan Lovells US LLP, Washington, DC, counsel for Appellant.

Rebekah Krispinsky, Office of the Solicitor, Department of the Interior, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **SOMERS**, and **VERGILIO**.

DANIELS, Board Judge.

The Yurok Tribe (Tribe), whose lands are in Northern California, claims that it is entitled to payment under a justice services contract between it and the Department of the Interior's Bureau of Indian Affairs (BIA). BIA moves the Board to dismiss the case for lack of jurisdiction on the ground that no such contract exists. BIA is correct; a contract between the parties never came into being. Following the guidance of the Court of Appeals for the Federal Circuit, however, we conclude that the non-existence of a contract causes us not to dismiss the case for lack of jurisdiction, but rather, to find that a necessary prerequisite for

the claim is absent. Consequently, we dismiss the case for failure to state a claim upon which relief may be granted.

Background

On October 12, 2011, the Tribe wrote a letter to the director of the BIA's Office of Self Governance, stating:

> The Yurok Tribe (Tribe) is submitting this letter of interest for program inclusion and funding under title I of the Indian Self Determination and Education Assistance Act [(ISDA)] Public Law 93-638, 25 U.S.C. 450 et seq. The purpose of this letter is to request the authorization to compact law enforcement and related services for both the Yurok Department of Public Safety (YDPS) and the Yurok Tribal Court (YTC) because of the critical state of emergency for the Tribe regarding the public health, safety and tribal justice on and near the Yurok Indian reservation (YIR).

In this letter, the Tribe made the following funding requests: for the YDPS, $5,534,270 annually ($2,948,914 for personnel and $2,585,356 for operations) and $2,000,000 for infrastructure; and for the YTC, $1,509,251 annually ($1,048,869 for personnel and $460,382 for operations) and $7,634,456 for infrastructure.

BIA responded on October 28, 2011. The agency's assistant deputy director noted that the Tribe had said that its request was being made under Title I of the ISDA, but requested a compact, which is possible under Title IV of that Act, but not Title I. Consequently, BIA said, "We would like to clarify whether the Tribe is seeking a self-determination contract under Title I . . . or, inclusion of programs and funding in a self-governance annual funding agreement under Title IV." The letter informed the Tribe that if it desired the latter, it had directed its request to the correct office, but that if it desired the former, it should contact the Office of Justice Services.

On November 3, 2011, a delegation from the Tribe met with various BIA officials. The Tribe says that it orally clarified at the meeting that it wanted a Title I contract, but BIA maintains that no clarification was made. BIA also says that it told the Tribe at the meeting that the Office of Justice Services had no funding available to meet the Tribe's needs. These statements were made in an exchange of letters between the parties in February 2012. In these letters, the Tribe asserted that because BIA had not formally responded to the Tribe's October 2011 letter, the requested contract had been deemed approved, but BIA insisted that no contract existed because the letter "did not meet the requirements of an initial contract proposal under the self-determination regulations at 25 C.F.R. § 900.8." The parties agree

that the Tribe did not send BIA a letter regarding its intentions immediately following the November 2011 meeting, and that BIA did not expressly decline the Tribe's proposal at that time.

By letter dated March 14, 2013,[1] the Tribe made a claim for the funds noted in its October 2011 letter. The claim is premised on the theory that "the Bureau's failure to respond [to the letter] within the 90 day period has rendered the Tribe's Title I [Office of Justice Services] request a valid enforceable contract."

On July 25, 2013, the director of the Office of Justice Services responded "that the demand for full performance of a Title I contract is premature because the Tribe has not submitted a complete proposal for a Title I self-determination contract." Furthermore, "even after the Tribe's Title I self-determination contract proposal is complete, the proposal cannot be approved until new funding is available for the contract. We regret that the absence of available funding remains an insuperable barrier to contracting."

As to the last point, the director's letter asserts that a Title I self-determination contract transfers programs, functions, services, and/or activities – and corresponding funding – from the Government to a tribe, and because BIA had not been performing any of the programs, functions, services, and/or activities noted in the Tribe's October 2011 request, "there are no . . . responsibilities to transfer." The letter continues:

> The ISDA does not . . . require the BIA to create and fund new federal programs for a tribe. Nor does the ISDA require the Secretary [of the Interior] to enter into a contract that cannot be funded. Because the amount of funds proposed under the contract necessarily is in excess of the secretarial amount ($0) to be provided under 25 U.S.C. § 450j-1(a)(1), the BIA must hereby decline the contract.

The Tribe filed a notice of appeal on August 30, 2013. The appeal is said to be from a deemed denial of the claim.

Discussion

Did a contract arise between the Tribe and BIA? Each party believes that an analysis of these facts demonstrates that its position is correct.

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[1] The letter is actually dated March 14, 2012, but the parties agree that it was written in 2013. BIA states that it received the letter on March 26, 2013.

The Tribe sees the situation in this way: It sent a letter to BIA requesting a self-determination contract under Title I of the ISDA. Under BIA's regulations, the agency was required to notify the Tribe of any missing items in the proposal within fifteen days of receiving the letter. 25 CFR 900.15 (2011). BIA did not provide such notification within the time permitted, thus confirming that the proposal did not contain any missing items. BIA did inquire as to whether the Tribe was seeking a contract under Title I, and the Tribe confirmed that it was. Also under BIA's regulations, "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 [which is part of Title I]." *Id.* 900.18. BIA did not decline the proposal within ninety days of receiving it, and the ninety-day period was not extended. Therefore, the proposal was deemed approved and the Secretary of the Interior was required by law to award the contract sought, including the full amount of funds requested. The contract came into being by operation of law. The Tribe finds support for its position in *Seneca Nation of Indians v. United States*, 945 F. Supp. 2d 135 (D.D.C. 2013).

BIA's view is quite different: The Tribe's initial "letter of interest" was not a proposal to enter into a contract. The letter was confusing in that it requested a compact (which is available under Title IV of the ISDA) but said that the request was made under Title I. The Tribe never clarified whether it desired a Title I contract or a Title IV compact. Nor did the Tribe ever direct a communication to the office which BIA told the Tribe was the proper recipient of a request for a Title I contract. To the extent that the letter might be considered a request for a Title I contract, it was clearly missing much of the information which is required for such a request by 25 CFR 900.8. Further, no Title I contract could have been awarded because such contracts are for the purpose of transferring to a tribe programs, functions, services, or activities which are being performed by BIA for members of that tribe, and BIA had not been providing any of the programs, functions, services, or activities which the Yurok Tribe wishes to establish. BIA finds support for its position in *Los Coyotes Band of Cahuilla & Cupeño Indians v. Jewell*, 729 F.3d 1025 (9th Cir. 2013).

In our judgment, BIA's position is correct. The Tribe's October 2011 letter is not clear in intent and lacks many of the details plainly required for a contract proposal by 25 U.S.C. § 450f(a)(2) and 25 CFR 900.8. BIA was not required to notify the Tribe of items which are mandated by that regulation because the regulation pertains to proposals for contracts under Title I, and it was not clear from the letter that the Tribe was making such a proposal. Whatever communications transpired orally at the November 2011 meeting between the parties, it is uncontested that the Tribe never clarified to BIA in writing that it desired such a contract. Thus, the fact that BIA did not specifically decline to award a

contract within ninety days from the date the agency received the October 2011 letter did not, as a matter of law, create a contract.

Even if the analysis of the foregoing paragraph were not correct, the Title I contract the Tribe now says it requested could not have come into being for the last reason cited by BIA. These contracts transfer from BIA to an Indian tribe programs, functions, services, or activities which the agency had been performing for the tribe, as well as funds necessary for performance. 25 U.S.C. §§ 450f(a)(1)(B), 450j-1(a). Regulations implementing these statutes explain that these contracts are "to *transfer* the funding and the related functions, services, activities, and programs" and to "permit an orderly *transition from the Federal domination of programs*" to "assur[e] maximum Indian participation in the direction, planning, conduct and administration of . . . *Federal programs and services*." 25 CFR 900.3(a)(1), (2), (5) (emphasis added). The regulations further explain that these contracts allow tribes to assume "programs, functions, services and activities . . . *which the Department [of the Interior is] authorized to administer* for the benefit of Indians" and that "[w]hen an Indian tribe contracts, there is a *transfer* of the responsibility with the associated funding." *Id.* 900.3(b)(1), (4) (emphasis added). A contract could not be awarded for the programs, functions, services, or activities noted in the Tribe's October 2011 letter, because BIA was not at that time performing any of those programs, functions, services, or activities for the benefit of tribal members.[2] No transfer of responsibilities or funds could take place.

The situation we encounter in this case is virtually identical to the one that the Ninth Circuit faced in *Los Coyotes*. That court concluded:

> The ISDA allows the Tribe to take control of existing programs and obtain the funds that the [BIA] would otherwise have spent on those programs. Where there is no existing BIA program, there is nothing that the BIA would have spent on the program, and therefore nothing to transfer to the Tribe.

729 F.3d at 1028. The decision cited by the Yurok Tribe, *Seneca Nation*, addressed a different situation: a tribe held a Title I contract and requested additional funding for it. Even there, the court understood that "self-determination contracts essentially allow Indian tribes to step into the shoes of certain United States government agencies in providing certain services to their members." 945 F. Supp. 2d 135, 143. Here, there were no shoes – nothing for the Tribe to step into.

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[2] The Tribe points out that BIA was providing some money to the Tribe for public safety and the tribal court. The provision of money is not, however, the provision of a program, function, service, or activity.

The Court of Appeals for the Federal Circuit has instructed that where a plaintiff alleges the existence of a contract between it and the Federal Government, the Board has jurisdiction to consider the case. *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1353 (Fed. Cir. 2011). A successful claim against the Government requires, however, compliance with all statutory elements of the claim, so failure of proof of an element of the cause of action means the plaintiff is not entitled to the relief it seeks. *Id.* at 1354 (citing *Spruill v. Merit Systems Protection Board*, 978 F.2d 679, 687 (Fed. Cir. 1992)). A party may not initiate a case at the Board under the Contract Disputes Act unless it is a contractor – "a party to a Federal Government contract other than the Federal Government." 41 U.S.C. §§ 7101(7), 7104(a) (Supp. IV 2011). The Yurok Tribe was not a contractor to BIA. Consequently, it has failed to prove an element of the cause of action. We must therefore dismiss the case for failure to state a claim upon which relief may be granted.

Decision

The case is **DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED**.

STEPHEN M. DANIELS
Board Judge

We concur:

JERI KAYLENE SOMERS
Board Judge

JOSEPH A. VERGILIO
Board Judge