Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: Pacific Islander Council of Leaders
Docket No. A-07-48
Decision No. 2091

DATE: June 11, 2007

DECISION

The Pacific Islander Council of Leaders (PICL, Appellant) appealed the December 4, 2006 decision of the Administration for Native Americans (ANA, Respondent) determining that a project proposed by PICL was ineligible for funding under the Fiscal Year 2006 social and economic development strategies (SEDS) competition. For the reasons explained below, we conclude that the PICL project proposal was ineligible under the applicable requirements. We therefore affirm ANA's decision.

Background

ANA funds various projects under the Native Americans Program Act (NAPA), 42 U.S.C. § 2991 et seq., including the SEDS program. Eligible applicants compete for funding based on announcements of available funding for specific categories of projects.

On January 25, 2006, ANA issued initial announcement number HHS-2006-ACF-ANA-NA-0003 soliciting proposals for "community-based, locally designed projects," with particular interest in those "designed to grow Native American economies, strengthen Native American families, and decrease the high rate of social challenges caused by the lack of community-based business, social, and economic infrastructure." ANA Ex. 1, at 2. The announcement listed, in relevant part, the following types of applicants that would be eligible to propose projects: federally recognized Indian Tribes; consortia of Indian Tribes; incorporated non-Federally recognized Tribes; incorporated non-profit multi-purpose community-based Indian organizations; urban Indian Centers; national or regional incorporated non-profit Native American organizations with Native American community-specific objectives; and public and non-profit agencies serving Native Hawaiians and Native People from Guam, American Samoa, or

the Northern Mariana Islands.[1] Id. at 10-11.

The announcement also identified specific purposes for which no funding could be granted, including the following:

> Projects in which a grantee would provide Training and/or Technical Assistance (T/TA) to other Tribes or Native American organizations that are otherwise eligible to apply for ANA funding. However, ANA will fund T/TA requested by a grantee for its own use or for its members' use (as in the case of a consortium), when T/TA is necessary to carry out project objectives.

Id. at 21.

PICL submitted a proposal dated April 1, 2006 in response to the announcement. ANA Ex. 2. The proposed project was entitled "Urban N.H.O.P.I. [Native Hawaiian and Other Pacific Islanders][2] Social Empowerment Project." Id. at cover page. PICL identified itself in the box for "type of applicant" as a not-for-profit organization. Id. at i. The project set a two-part goal. The first part involved increasing self-awareness and advocacy among NHOPI people. The second part involving building "through training and technical assistance, the capability of 3 urban NHOPI community-based organizations (CBOs) to design, administer and sustain social development programs that advance the self-sufficiency of NHOPI people who reside in urban areas." Id. at xiii. Project objectives were summarized for three years, and each year includes an objective related to T/TA for each of the three CBOs. Id. The last objective is creation of "5-year Strategic Action Plans for self-sufficiency by 3 NHOPI CBOs." Id. PICL estimated that its project would benefit NHOPI populations in three selected areas, i.e. Southern California, San Francisco Bay and Salt Lake City, Utah. Id. The project would provide "[d]irect services" to "at least 300 NHOPI community members and 30 staff and board members of" the CBOs. Id. In its program narrative, PICL explained that the intent is to establish an Urban NHOPI Planning and Resource Development Center to draw "on traditional and other methods of leadership

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[1] We omit a number of other listed types relating to Native Alaskans and tribal colleges that are clearly not relevant.

[2] PICL emphasized in its proposal that the United States census in 2000 recognized NHOPI for the first time as a racial category and collected data on that grouping, instead of combining the data with Asians. ANA Ex. 2, at 1, 3-5.

development to build the organizational infrastructure and capabilities of" the three CBOs, one in each of the targeted regional areas. Id. at 1.

In ANA's December 4, 2006 letter, Quanah Crossland Stamps, ANA Commissioner, responded to concerns expressed by PICL over the decision not to fund its project proposal. The letter explained the reason for denial of funding as follows:

> . . . ANA found that the project is built exclusively around PICL's relationship with three participating [CBOs]. The nature of PICL's relationship woven throughout five of six project objectives for each of the three years is one of . . . [T/TA] provider.

ANA pointed to the restriction on T/TA in the announcement quoted above and also to 45 C.F.R. § 1336.33(b)(1), which provides that projects "in which a grantee would provide . . . (T/TA) to other tribes or Native American organizations ('third party T/TA')" are ineligible for funding under NAPA. The regulation also provides that "purchase of T/TA by a grantee for its own use or for its members' use (as in the case of a consortium), where T/TA is necessary to carry out program objectives," is acceptable. Id.

In its January 15, 2007 notice of appeal[3], PICL asserts that it is eligible for funding under the exception for T/TA "requested by a grantee for its own use or for its members' use." Notice of Appeal at 1.[4] PICL also quoted extensively from reviewers' comments on its proposal to illustrate that (1) the merits of the project were very highly rated and (2) neither the reviewers on this competition nor those who reviewed a very similar proposal PICL submitted the preceding year (and not even the technical assistance consultant PICL employed in between) notified PICL

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[3] In a follow-up letter dated December 19, 2006, ANA acknowledged a letter sent to it by PICL dated December 15, 2006 and instructed PICL that its 30-day time period for appeal would begin on December 19, 2007 instead of when PICL received the December 4, 2006 ANA letter.

[4] Although PICL asked that its 2006 proposal be funded, the relief available from the Board under the applicable regulations when an applicant and proposal are found to be eligible is limited. 42 C.F.R. § 1336.35(h). The eligibility determination will not result in retroactive funding and will not be effective "until the next cycle of grant proposals are considered by" ANA. Id.

that the proposal was ineligible for funding for the reasons now given by ANA. Id. at 2-7.

Issues

The primary issue in this case is whether PICL's project proposal was ineligible for funding under the grant announcement because its objectives included T/TA of a kind for which funding was restricted. PICL contends that the T/TA activities contemplated by the proposal fit within the exception allowing funding for T/TA "requested by a grantee for its own use or for its members' use (as in the case of a consortium)." PICL argues that the T/TA here was intended for its members (i.e., asserting that the three CBOs were members of PICL), or was intended to benefit a consortium consisting of PICL and the three CBOs, or was intended for individual NHOPI people rather than for Native American organizations. PICL also argues that the CBOs were not all independently eligible for ANA funding and hence were not among the organizations targeted for the funding restriction (which, according to PICL, was meant to preclude a grantee from providing T/TA to organizations which could seek T/TA independently from ANA). In addition, PICL takes the position that ANA should be estopped from asserting that PICL's proposal is ineligible because PICL detrimentally relied on ANA's failure to disclose the true reason for the rejection of its 2005 proposal in resubmitting a "very similar" proposal in 2006. PICL Reply Br. at 3.[5]

[5] An additional issue is that the exception to the funding restriction on T/TA in the ANA announcement permits the use of grant money only for the grantee and/or its members to obtain T/TA to further project objectives, not for a grantee with the direct objective of the grantee providing T/TA itself to its members. This distinction is even clearer in the regulation which distinguishes the ineligible provision of T/TA by a grantee to other organizations from the potentially eligible purchase of T/TA by the grantee for its own needs in carrying out the grant objectives. 45 C.F.R. § 1336.33(b)(1). PICL did not have a full opportunity to address this point, however, since ANA articulated it clearly only in its supplemental brief. Therefore, we do not rely on it alone for purposes of our decision, but rather have considered above the various arguments offered by PICL to explain why it should be seen as providing T/TA to the permissible kinds of organizations. As explained above, PICL failed to establish that the CBOs were PICL members, consortium members, or otherwise permissible targets of T/TA under the ANA announcement. It is

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Analysis

1. PICL's proposal was ineligible for funding.

A careful review of the grant announcement and PICL's project proposal leads inexorably to the conclusion that the proposal sought funding for restricted purposes. A major goal of the project, apparent throughout the PICL application, was for PICL to provide technical assistance to the three named CBOs to improve their structure and function in order that they might better serve and advocate for the NHOPI populations in their respective geographic areas. PICL does not deny that its proposal sought funding for T/TA, but proffers three alternative (and mutually inconsistent) theories for how its proposal might fit into the exception allowing funding for certain T/TA activities. We discuss, and reject, each theory in turn below on the ground that PICL failed to show on the record that any of the three actually applied. We then explain why we conclude that the issue of whether the CBOs were independently eligible for ANA funding is irrelevant.

A. The three CBOs were not shown to be members of PICL.

PICL argues that its proposed T/TA activities should be eligible for funding because the T/TA would be provided by PICL under the exception for grantee T/TA "for its members' use." See Notice of Appeal at 1; PICL Reply Br. at 6-8; see also ANA Ex. 1, at 21. ANA denies that PICL made an adequate showing that the CBOs were in fact "members" of PICL. ANA Br. at 3-6.

Nowhere in its application does PICL describe the CBOs as "members" or "member organizations" of PICL. Directors of at least two of the CBOs are listed as members of the PICL Board of Directors. ANA Ex. 1, at ix. PICL has not shown, however, that cross-membership of certain individual directors from the CBOs on the PICL Board of Directors is equivalent to organizational membership of the CBOs in PICL itself. ANA denies that cross-membership of individual directors can suffice to convert independent organizations into members of a single larger organization for these purposes. ANA Resp. Br. at 5. ANA also points out that the letters submitted by the CBOs never characterize their involvement with PICL as organizational

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[5](...continued)
evident, however, that the project might well be ineligible for funding based on its intention to have the grantee (PICL) provide T/TA as a major grant objective in itself.

membership. Id. at 5-6, and record citations therein.

PICL also emphasizes that its motto is to be a "collaborative effort towards policy and advocacy for Pacific Islanders in America," and points to the effectiveness of its planned collaboration with the three CBOs to reach NHOPI peoples in areas where PICL does not have offices. PICL Br. at 7. While collaboration may be a reasonable, or even laudable, strategy, "collaborating with other NHOPI organizations already in existence" does not establish that those existing organizations are members of PICL. Cf. id.

We conclude that PICL has not shown that the CBOs are PICL members.

B. PICL is not acting as an eligible consortium.

In its reply brief, PICL also suggests that PICL and the three CBOs collectively constitute a "consortium" for purposes of the exception for a grantee to provide T/TA "for its own use or for its members' use (as in the case of a consortium)." PICL Reply Br. at 6-8.

PICL concedes that consortium applicants were required by the ANA announcement to identify "the consortium membership" but argues that the three CBOs were clearly identified in the proposal. PICL Reply Br. at 8, citing ANA Ex. 1, at 33. This argument overlooks the absence of any identification of the applicant entity as a consortium or of any of the CBOs as forming part of the consortium membership. PICL also completely fails to address the further requirement, in the same paragraph of the announcement, that a consortium application must include "a copy of the consortia legal agreement or memorandum of understanding to support the proposed project." ANA Ex. 1, at 33. PICL does not point to any such agreement or memorandum of understanding in its application.

Furthermore, PICL bases its claim to be a "consortium" on an inapplicable definition of "consortium" from an online dictionary. PICL Reply Br. at 6-7. Merriam-Webster's Online Dictionary defines the term as "an agreement, combination, or groups (as of companies) formed to undertake an enterprise beyond the resources of any one member." Id., quoting from http://www.m-w.com/dictionary/consortium. The relevant issue here is not whether the groups working with PICL on its project could meet a dictionary definition of consortium but whether they formed a consortium eligible for funding under the grant announcement and the regulations. Not all consortia are eligible

for funding under the regulations governing NAPA program eligibility, but rather only "consortia of Indian tribes" and certain village consortia are listed as eligible applicants. 45 C.F.R. § 1336.33(a)(1)(ii) and (vii). The grant announcement specifically defined "consortium" in a manner consistent with the regulations as follows:

> *Consortium-Tribal/Village:* A group of Tribes or Villages that join together either for long-term purposes or for the purpose of an ANA project.

ANA Ex. 1, at 5 (italics in original). Neither PICL nor any of the 3 CBOs claims to be a tribe or a village. On the contrary, PICL identifies itself as a not-for-profit organization and the CBOs as urban community-based groups. ANA Ex. 2, at i and xiii. If PICL had applied as a consortia of groups other than tribes or villages, it would have been categorically ineligible apart from any question of funding restrictions on provision of T/TA.

PICL also acknowledges that the ANA announcement required "documentation (a resolution adopted pursuant to the organization's established procedures and signed by an authorized representative) from all consortium members" in support of the project application. PICL Reply Br. at 8; AHA Ex. 1, at 33. PICL does not point to any such documentation from any of the CBOs, but only to the PICL National Executive Board list (which, as noted, includes individuals who are leaders of these CBOs as well as other Executive Board members). PICL Ex. F. PICL asserts that the documentation requirement "seems merely advisory because it is in parenthesis." PICL Reply Br. at 8. PICL offers no basis, and we find none, for the idea that a parenthetical in a grant announcements lacks authority or is merely advisory. In context, the parenthetical quoted appears to specify the nature of the documentation required. Clearly, in any case, no documentation, in the specific required form or in any reasonable alternative form, was provided from the CBOs to suggest that they joined as consortium members in seeking funding of a consortium project.

We conclude that PICL has not shown that it applied as an eligible consortium.

> C. PICL proposed to provide T/TA to other Native American organizations, not merely to individual NHOPI people.

PICL also argues that, in seeking the goal of making "NHOPI members aware of their status," it was pragmatically using the

existing CBOs to reach NHOPI members, but that its project "does not aim to provide [T/TA] to these organizations per se, but rather proposes to provide such assistance to NHOPI members directly." PICL Reply Br. at 9. On the one hand, PICL insists that the T/TA to be provided under its project would be "intended for NHOPI community members, and not for the CBOs." Id. On the other hand, PICL asserts that it "does propose" to provide T/TA "to CBO staff members and volunteers," in order to "increase the project's sphere of influence." Id.

PICL's project proposal does include some activities that might be described as training individual NHOPI community members. For example, PICL planned to hold nine workshops for community members (in conjunction with the various CBOs) to increase awareness of the new NHOPI category and to promote advocacy efforts based on the resulting data. ANA Ex. 2, at xii/2.[6] Such individual participation in project activities does not constitute T/TA to tribes or other Native American organizations.

The proposal, however, also includes many specific plans and objectives expressly targeting the organizational and developmental needs of the CBOs. For example, Objective 5 in Year 1 plans for the following benefits:

> 1. A total of at least 30 staff and board members at the three (3) NHOPI CBOs will participate in [T/TA], specific to their organizational needs.
> 2. Enhanced organizational infrastructure within the three (3) participating NHOPI CBOs.
> 3. Increased knowledge and skills among the staff and community volunteers of the three (3) participating NHOPI CBOs with regard to identifying and navigating programs, services and resources.

Id. at xii/5. The proposal specifies that the project's staff will be providing training and developing materials to help reorganize and improve governance at the CBOs, including creating and monitoring individual Organization Development Plans. Id., passim; see also id. at 1 (one overall goal is to build, through T/TA, capability of 3 CBOs "to design, administer and sustain social development programs that advance the self-sufficiency" of urban NHOPI people). Given the numerous similar references

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[6] The multi-page Objective Work Plan section of the proposal is identified by the single number xii. Where relevant, we have identified the specific (unnumbered) page within the plan by adding the number in the form xii/#.

throughout the project proposal to objectives and activities focused on serving the T/TA needs of the CBOs, we find it clear that T/TA to the organizations[7] per se was planned as part of the project.

ANA did not allege that all of the planned project activities were impermissible but only that some of the funding was sought for impermissible purposes.[8] See, e.g., ANA Supplemental Br. at 10-11. ANA alleged that PICL's project proposed activities for which funding is restricted, and that therefore the proposal was ineligible to receive funds. ANA Br. at 3. While the project included some training and workshops directed at NHOPI individuals, the project also included substantial objectives and activities specifically directed at T/TA to the CBOs themselves related to their organizational needs.

We conclude that PICL has not shown that its proposed project was limited to eligible activities and hence eligible for funding.

D. ANA was not required to show that the CBOs were independently eligible for ANA funding to apply the T/TA funding restriction.

PICL further suggests that ANA has some obligation to show that the three CBOs are eligible for ANA funding on their own account in order to apply the restriction on funding T/TA delivery to them as part of PICL's proposal. PICL Reply Br. at 6. Thus, PICL argues that, even if the Board finds that the proposed activities include providing T/TA to the CBOs (as opposed to directly to NHOPI peoples), "such activities would not make the project ineligible for funding unless there was some evidence that [the three CBOs] . . . could qualify for funding on their

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[7] No T/TA was planned to any tribes since all of the T/TA recipients were non-profit community organizations.

[8] ANA did not assert that all activities and objectives proposed by PICL were ineligible for funding. For example, training workshops for NHOPI individuals were arguably eligible for SEDS funding. ANA has sufficient discretion, however, to decline to fund a project proposal if some of the purposes are ineligible even if others may be eligible. For the same reason, PICL's argument that the merits of the project received high ratings from reviewers cannot change the fact that the project included objectives and activities that were ineligible for SEDS funding. Cf. PICL Supplemental Reply Br. at 1.

own."[9] Id. PICL bases this theory on its reading of the ANA announcement prohibiting funding grantees to provide T/TA "to other Tribes or Native American organizations that are otherwise **eligible to apply for ANA funding**." See ANA Ex. 1, at 21 (emphasis added), discussed in PICL Reply Br. at 6.

The question that thus arises is whether the clause "that are otherwise eligible to apply for ANA funding" should be treated as limiting the set of "Tribes and Native American organizations" to those "otherwise eligible" or merely as further describing one aspect of "Tribes and Native American organizations." Grammatically, "that" traditionally introduces a defining clause and its use here might therefore suggest that PICL's reading is at least plausible. See, e.g., Fowler's Modern English Usage (2d Ed. 1965) at 626. The fine distinctions between "which" and "that" have lost much of their clarity in usage. Id. at 625-630. When we consider the regulatory language applicable to the SEDS program and the context of the announcement provision, however, it becomes clear that the clause cannot reasonably be read to mean that funding will be provided for a project for T/TA so long as some of the T/TA will be provided to organizations that are ineligible to apply for ANA funding.

The express language of the regulation restricts funding for any "projects in which a grantee would provide [T/TA] to other tribes or Native American organizations," without any limitation to those tribes or organization that demonstrate independent eligibility. 45 C.F.R. §1336.33(b)(1). The regulation thus makes clear that no SEDS funding will be awarded for T/TA to any third-party tribe or Native American organization, regardless of eligibility status. Furthermore, ANA's funding authority derives from statute, in this case NAPA, which authorizes spending –

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[9] One of the CBOs, Taulama for Tongans, does not represent Native American Pacific Islanders, as Tonga is an independent nation outside that definition. 42 U.S.C. §2992c(6). Rather than justifying a grant to provide T/TA to Taulama for Tongans and the other CBOs, this fact raises further questions about the extent to which the proposal would benefit an ineligible group, especially if the CBOs were considered members or consortium participants of the grantee. PICL recognized this problem and offered an explanation of its inclusion of Taulama for Tongans based on its location in San Francisco facilitating PICL's service to NHOPI members who also reside in that area. PICL Reply Br. at 6, n.1. We need not resolve these questions now since the proposal is clearly ineligible for the reasons discussed in the text.

> to provide financial assistance, on a single year or multiyear basis, to public and nonprofit private agencies, including but not limited to, governing bodies of Indian tribes on Federal and State reservations, Alaska Native villages and regional corporations established by the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1601 et seq.], and such public and nonprofit private agencies serving Native Hawaiians, and Indian and Alaska Native organizations in urban or rural areas that are not Indian reservations or Alaska Native villages, for projects pertaining to the purposes of this subchapter. The Commissioner is authorized to provide financial assistance to public and nonprofit private agencies serving other Native American Pacific Islanders (including American Samoan Natives) for projects pertaining to the purposes of this Act.

42 U.S.C. §2991b(a). ANA points out that its funding authority is thus limited to American Indians, Native Hawaiians, other Native American Pacific Islanders, and Alaska Natives. ANA Supplemental Br. at 8-9, citing 42 U.S.C. §2991a. To spend funds on T/TA for ineligible organizations would violate NAPA, and the requirement that funds be spent for the purposes for which they were appropriated. 31 U.S.C. §3101(a).

The announcement cannot properly be read to expand funding beyond regulatory or statutory limits. The clause quoted from the announcement may be grammatically clumsy, but clearly is meant simply to reference the general rationale for the restriction on T/TA funding, i.e., ANA's determination that it had proven inefficient to fund one grantee to provide T/TA to others, instead of simply providing funding to the group in need of T/TA to buy what is needed. 60 Fed. Reg. 19,994, 19,995 (Apr. 21, 1995)("Third party T/TA is not an eligible activity because ANA believes it is inefficient to fund organizations which would otherwise be able to apply directly to ANA for TA funding . . . ."). The rationale thus explains why even organizations eligible for ANA funding are required to submit their own proposals to purchase T/TA, but can hardly be read to mean that otherwise ineligible organizations can nevertheless receive ANA-funded T/TA by the expedient of seeking to obtain it through an eligible organization's SEDS grant.

We conclude that the possible ineligibility of one or more of the CBOs for independent ANA funding cannot convert the provision of T/TA by PICL to those CBOs into an eligible activity.

E. Equitable estoppel is not available to PICL in these circumstances.

Finally, PICL argues that ANA should be estopped from claiming that PICL is ineligible for ANA funding. PICL Reply Br. at 1.[10] The Board has repeatedly acknowledged the prevailing view in the federal courts that equitable estoppel does not lie against the federal government, if indeed it is available at all, absent at least a showing of affirmative misconduct. See, e.g., South Carolina Department of Social Services, DAB No. 1998 (2005); Northstar Youth Services, Inc., DAB No. 1884 (2003), and cases cited therein (including Office of Personnel Management v. Richmond, 496 U.S. 414 (1990) and Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51 (1984)). PICL alleges nothing that could remotely be characterized as affirmative misconduct.[11]

According to PICL, when ANA rejected PICL's 2005 project proposal, ANA explained only that it could not fund all eligible applications, without mentioning any claim that PICL's application was ineligible. PICL Reply Br. at 2. ANA then advised PICL to seek T/TA on improving its proposal from one of four designated

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[10] To begin with, PICL misstates the problem here. ANA has not asserted that PICL is ineligible for ANA funding. ANA has rather found that this particular project proposal by PICL is ineligible. As we conclude in the text, equitable estoppel is simply not available to PICL under these circumstances so we need not refine the scope of the estoppel sought.

[11] In its reply to ANA's supplemental brief, PICL admits that estoppel "may only be applied against a government agency when the government agency has engaged in 'affirmative misconduct.'" PICL Supplemental Reply at 3. PICL then cites two federal Court of Appeals decisions which PICL describes as examples of situations in which such affirmative misconduct has been found. Id. In fact, in both cases, the courts actually found no affirmative misconduct and rejected the estoppel claims. Mendrala v. Crown Mortgage Co., 955 F.2d 1132, 1141-42 (7th Cir. 1992)("There was no such affirmative misconduct on the part of the [Federal Home Loan Mortgage Corporation] in the present case."); Lurch v. United States, 719 F.2d 333, 341 (10th Cir. 1983)("In the instant case we find no showing of "affirmative misconduct" by the Government and particularly no showing of the basic second element of estoppel.").

providers, which PICL alleges it did.[12] Id.; see ANA Ex. 3. PICL asserts that it modified its proposal for 2006 in accordance with the T/TA recommendations "while maintaining all of the proposal's essential characteristics," only to receive a similar rejection from ANA with the same brief statement about ANA's inability to fund all eligible applications.

PICL claims that this sequence of events amounted to misrepresentation because ANA's denials "implied that PICL's projects were, indeed, eligible for funding, but that ANA simply did not have the resources to fund all eligible applicants." PICL Reply Br. at 3. Nothing PICL has shown indicates that the statement that ANA lacked resources to fund all eligible projects was false. At best, PICL reads into the statement the interpretation that, but for the resource limitations, its proposal would otherwise have been eligible and funded. Even if that reading is reasonable, the statement is subject to other reasonable interpretations, such as that lack of resources even for eligible projects was one of the reasons for the denial. Even if the statement could be construed as a misstatement of the reason for the denial (as opposed to simply ambiguous as we have said), we would not consider this sufficient to establish any affirmative misconduct.

Moreover, PICL has not established all of the elements of estoppel, so that we would not grant estoppel here even were we to conclude that estoppel could lie against a government party. Traditionally, the following elements must be met:

> (1) the party against whom estoppel is sought must have misrepresented the facts;
> (2) the party asserting estoppel must have reasonably relied on those facts; and
> (3) the reliance must have resulted in some harm or detriment to the party asserting estoppel.

South Carolina Department of Social Services, DAB No. 1998, at 39, n.34 (2005).

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[12] ANA counters that PICL did not seek T/TA on its project proposal until a mere three weeks before the 2006 applications were due, implying that with more time, the T/TA firm might have been able to provide better advice. ANA Supplemental Br. at 5. We need not determine the extent of T/TA accessed by PICL before submitting its 2006 proposal application, given that we conclude for the reasons in the text that PICL cannot estop ANA even accepting PICL's assertions as to the events.

ANA agrees that it failed to explain to PICL immediately that its project could not be funded, even were sufficient resources available, because it proposed ineligible objectives and activities. ANA Supplemental Br. at 4. ANA also expresses regret that PICL spent resources preparing an application which was also ineligible for the same reasons. Id. The regrettable lack of clarity does not, in our view, constitute misrepresentation, nor does any misplaced effort amount to cognizable harm, i.e., harm which is subject to remedy in this proceeding. It is not clear, in any case, how the absence of an express statement that PICL's proposal was ineligible could suffice for PICL to rely on as affirming that it was eligible when the announcement and the regulations clearly indicate that T/TA to other organizations would not be funded.

At most, PICL might have been able to develop and submit a different proposal in 2006 had it understood the ineligibility of the one it submitted. Although PICL repeatedly asks that the Board find its 2006 proposal eligible for funding, PICL Reply Br. at 10, as we have noted the only relief available on appeal is prospective. There is no suggestion in the statute or regulations that the Board may order future funding of an otherwise ineligible proposal as equitable relief for prior year actions by ANA, and such a suggestion would clearly run afoul of both the program statute and appropriations law. 42 U.S.C. §2991b(a); 31 U.S.C. §3101(a).

This decision provides PICL with clear guidance as to why its proposals in 2005 and 2006 were ineligible for funding, and PICL may use that guidance and seek additional T/TA and assistance from ANA to develop a future proposal that is eligible. It may not, however, force the government to fund an ineligible project.

Conclusion

For the reasons stated above, we conclude that PICL's FY 2006 proposal applying for SEDS funding was ineligible.

/s/
Judith A. Ballard

/s/
Sheila Ann Hegy

/s/
Leslie A. Sussan
Presiding Board Member