Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Nizhoni Smiles, Inc.,	)	DATE: December 19, 1996
	)	
Appellant,	)	
	)	
- v. -	)	Docket No. C-96-029
	)	Decision No. CR450
The Indian Health Services.	)	
	)	
Appellee.	)	
	)	

RECOMMENDED DECISION

I recommend that the Departmental Appeals Board sustain the determination of the Indian Health Service (IHS) to decline the contract proposal of Nizhoni Smiles, Inc. (Appellant), which Appellant made to IHS on July 27, 1995 and resubmitted on October 2, 1995, pursuant to the provisions of the Indian Self-Determination Act (Act), 25 U.S.C. § 450, et seq. I base this recommended decision on my conclusion that, as of the date of the application for a contract, the program, functions, services, or activities which Appellant intended to conduct under the proposed contract could not be carried out lawfully by Appellant.

I. Background

On October 25, 1995, IHS declined Appellant's proposal for a contract. On November 1, 1995, Appellant filed an appeal from the declination. The case was assigned to me for a hearing and a recommended decision. I held a prehearing conference at which the parties advised me that they wished to defer a hearing in the case while they conducted and completed discovery. After discovery was completed, the parties advised me that they had agreed that the case could be heard and decided on written submissions, including briefs and exhibits.

The parties submitted briefs and reply briefs. Appellant submitted 23 exhibits in support of its arguments (Appellant Ex. 1 - 23). IHS objected to my receiving into evidence some

of Appellant's exhibits. Appellant responded to these objections. In responding to the objections, Appellant submitted an additional exhibit (Second Declaration of Julia Freeland). I am identifying this additional exhibit as Appellant Ex. 24.

I receive into evidence Appellant Ex. 1 - 24, notwithstanding the objections that IHS made to my receiving some of these exhibits into evidence. Although some of these exhibits are of questionable relevance, I do not find that admitting them into evidence would prejudice IHS.

I base my recommended decision in this case on the law, on the undisputed material facts, and on the parties' arguments.

II. Issues, recommended findings of fact and conclusions of law

In its original posture, this case had two issues. These were whether IHS could decline Appellant's contract proposal on the grounds that: (1) Appellant did not qualify as a "tribal organization" under the Act, because one of the members of Appellant's Board of Directors was an individual who was not an Indian; and (2) IHS could not contract with Appellant lawfully, because Appellant intended to charge patients who were eligible for contract services for some of the services that it proposed to provide.

The first of these issues is now moot. Appellant has agreed to remove the non-Indian member from its Board of Directors. Appellant Ex. 6 at 2; IHS Brief at 5. Therefore, the only issue which remains to be decided is the second of the two issues: whether IHS properly declined Appellant's contract proposal on the ground that IHS could not contract with Appellant lawfully.

I make the following recommended findings of fact and conclusions of law (Findings) to support my recommended decision that IHS properly declined to contract with Appellant. I discuss each of these Findings at Part III. of this recommended decision.

1. The Act requires the Secretary of the United States Department of Health and Human Services (the Secretary) and her delegate, IHS, to contract with Indian tribes or tribal organizations to provide services to eligible Indians which the Secretary and IHS would otherwise be required to provide directly to eligible Indians.

2. IHS may not contract lawfully for services to eligible Indians which it may not provide directly to Indians.

3. IHS may decline to enter into a contract with an Indian tribe or tribal organization where the services that are sought to be contracted for may not be provided lawfully.

4. From 1984 until 1996, IHS was prohibited from requiring eligible Indians to pay for services which IHS was authorized to provide to those Indians directly.

5. From 1984 until 1996, IHS was prohibited from entering into a contract with a tribe or tribal organization pursuant to which the tribe or tribal organization intended to charge a fee for the contracted services which it would be providing.

6. IHS may not be required to enter into a contract which is not lawful, on the ground that IHS may have entered into other, similar contracts.

7. The Act requires the Secretary and IHS to offer technical assistance to a tribe or tribal organization that applies to IHS for a contract pursuant to the Act, but which is unable to qualify for a contract.

8. IHS is not required to offer technical assistance to a tribe or tribal organization, beyond advising the tribe or tribal organization that the services that are sought to be contracted for cannot be provided lawfully, where IHS determines that the services that are sought to be contracted for cannot be provided lawfully.

9. On July 27, 1995, Appellant submitted to IHS a contract proposal to provide orthodontic and related services to eligible Indians, that IHS had provided directly.

10. Appellant's July 27, 1995 contract proposal would have required that an eligible Indian patient pay a portion of the cost of orthodontic services to be provided by Appellant to that patient. Appellant described this cost recoupment mechanism as a "shared responsibility model" for providing services.

11. On October 2, 1995, Appellant submitted a to IHS a revised contract proposal. In its revised proposal, Appellant stated that it would not charge patients for any services that are provided directly by IHS, and not by Appellant. However, the proposal continued to

contemplate a "shared responsibility model" for charging patients fees for services provided by Appellant.

12. Under Appellant's revised contract proposal, Appellant would charge patients some portion of the costs for orthodontic services that Appellant intended to provide.

13. Under Appellant's original contract proposal of July 27, 1995, and under Appellant's revised contract proposal of October 2, 1995, Appellant proposed to contract to provide orthodontic services that IHS had provided directly, and it proposed to charge eligible Indian patients fees for orthodontic services that IHS had provided to patients without charge.

14. IHS did not provide Appellant with the information or assistance that Appellant requested from IHS.

15. As of July 27, 1995 and October 2, 1995, IHS was prohibited by law from providing orthodontic services to eligible Indians and charging eligible Indians fees for those services.

16. IHS properly declined to enter into a contract with Appellant, because IHS could not lawfully provide orthodontic services to eligible Indians in the manner in which Appellant proposed to provide such services.

17. It is not relevant that IHS may have entered into contracts with other tribes or tribal organizations which arguably contain features that are similar to those in Appellant's proposals and which IHS found to be unlawful.

18. IHS is not required to provide technical assistance to Appellant, beyond advising Appellant that the contract could not be carried out lawfully.

III. Discussion

A. Governing law (Findings 1 - 8)

The Act requires the Secretaries of the Departments of Interior and Health and Human Services, upon the request of any Indian tribe, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer certain enumerated federal programs or portions of federal programs. Act, 25 U.S.C. § 450f(a)(1)(A) - (E). Essentially, the Act requires IHS to enter into a self-determination contract with an Indian tribe or tribal

organization to provide any service that IHS is authorized to provide directly to eligible Indians, and for which the tribe or tribal organization proposes to contract. Id.

The Act limits the circumstances under which IHS may decline to enter into a self-determination contract with a tribe or a tribal organization. One of the statutory grounds for declination — which is relied on by IHS in this case to justify its determination to decline Appellant's contract proposals — is where the program, function, service, or activity, or a portion thereof, that is the subject of a contract proposal, is beyond the scope of programs, functions, services, or activities which may be contracted for under the Act, because the proposed activities cannot be carried out lawfully by the contractor. Act, 25 U.S.C. § 450f(a)(2)(E).

The Act defines a "self-determination contract" to be a contract:

> between a tribal organization and the appropriate Secretary for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law . . . .

Act, 25 U.S.C. § 450b(j).

IHS relies on the phrase "pursuant to Federal law" in the Act's definition of a self-determination contract to assert that it may not contract with a tribe or a tribal organization to provide services that IHS is not authorized to provide directly. IHS argues that, if it is prohibited by law from providing directly a particular service to Indians, then it may not contract with a tribe or a tribal organization to provide that service. Therefore, IHS argues that it should decline a proposal to contract, pursuant to the authority contained in 25 U.S.C. § 450(f)(2)(E), where the proposal is for services that IHS is prohibited from providing directly.

Appellant argues that the Act's definition of a self-determination contract does not function as a substantive requirement that contractors comply with all laws governing IHS. According to Appellant, the phrase "pursuant to Federal law" means only that self-determination contracts will be limited to services provided under federal law, such as direct health care. Appellant's Brief at 12 - 14.

I am persuaded that IHS is correct in asserting that the Act prohibits it from contracting to provide services that it may not provide directly, including those services which IHS is

prohibited by law from providing directly. The definition of a self-determination contract contained at 25 U.S.C. § 450b(j) plainly limits the permissible scope of such a contract to those services which IHS may provide directly, pursuant to federal law. If IHS is prohibited by federal law from providing a service, then it may not contract for such service. The limitation applies not only to the type of service that may be contracted for (i.e., health care), but to the manner in which the service is provided. As I read the definition, IHS is prohibited from contracting to provide a service in a particular manner, if federal law prohibits IHS from providing the same service in the manner in which it is proposed to be contracted.

The definition of a self-determination contract is entirely consistent with the purpose of the Act. The Act is intended to require federal agencies to contract with Indian tribes to provide those services which the agencies have been providing directly. Act, 25 U.S.C. § 450f(a)(1)(A) - (E). The Act is not intended to allow federal agencies to contract to provide services which the agencies would not be permitted to provide under federal law. That is a reason why the Act permits IHS to decline a proposal to contract on the ground that the contract may not be carried out lawfully. Act, 25 U.S.C. § 450f(a)(2)(E).

Appellant argues that the definition of a self-determination contract contained in 25 U.S.C. § 450b(j) cannot mean, literally, that IHS shall enter into no contract to provide services which IHS is prohibited under federal law from providing directly, because Congress felt it necessary in other sections of the Act to emphasize that other provisions of federal law govern self-determination contracts. Appellant's Brief at 15 - 16. According to Appellant, it would have been unnecessary for Congress to have included these requirements in the Act, if it had intended the definition of a self-determination contract to be read literally. Id. As a specific example, Appellant cites the Act's requirement that the provisions of the Office of Federal Procurement Policy Act and associated regulations apply to a construction project that might be contracted for. Act, 25 U.S.C. § 450j(a)(3)(A).

I am not persuaded that the requirement that the Office of Federal Procurement Policy Act and associated regulations apply to a construction project suggests that Congress intended the definition of a self-determination contract to mean anything less than what it plainly says. Congress emphasized the statutory directives it intended be followed by inserting into the Act the specific requirement that the provisions of the Office of Federal Procurement Policy Act and associated regulations apply to a construction contract.

But the insertion of this specific requirement into the Act does not vitiate the general requirement that a contract be limited to those services which may be provided directly and lawfully by IHS.

From 1984 until 1996, the following statutory prohibition applied to IHS:

> The Indian Health Service shall neither bill nor charge those Indians who may have the economic means to pay unless and until such time as Congress has agreed upon a specific policy to do so and has directed the Indian Health Service to implement such a policy.

Act, 25 U.S.C. § 1681.[1] This section of the Act prohibits IHS from charging a fee to any Indian for services provided directly by IHS. I conclude that the section, when read with the statutory definition of a self-determination contract, operates to prohibit IHS from contracting with an Indian tribe or tribal organization where the tribe or tribal organization intends to charge a fee for the services that it will be providing pursuant to the proposed contract.

Appellant argues that 25 U.S.C. § 1681 was not intended by Congress to prohibit IHS from entering into contracts with Indian tribes or tribal organizations pursuant to which the tribes or tribal organizations might charge fees for the services they provide. Appellant's Brief at 12. According to Appellant, the purpose of the statute was to assure that IHS would not charge Indians who were not able to afford to pay for health care services fees for the health care services that IHS provided. Id.

I make no findings as to the underlying purpose of the statute. The language of the statute is plain and unambiguous. Given that, the unambiguous language of the statute must govern.

Appellant asserts that IHS would be applying the Act in an arbitrary and capricious way if it were to apply it to the facts of this case in such a way as to preclude Appellant

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[1] The parties have advised me that, in 1996, Congress repealed this section. I invited the parties to brief the issue of what impact, if any, the repeal might have on this case. Neither party submitted a brief. In light of that, I make no recommended findings of fact or conclusions of law concerning any possible impact that the repeal might have on the issues in this case.

from contracting to provide services for which Appellant intended to charge fees. Appellant's Brief at 19 - 22. That is so, according to Appellant, because, in other instances, IHS either has provided services to Indians directly for which it charges fees, or it has entered into contracts pursuant to which tribes or tribal organizations provide services for which they charge fees. Id.

I make no findings in this decision as to whether IHS is in fact providing services for which it charges fees, or has entered into contracts in which tribes or tribal organizations provide services for which they charge fees. It is unnecessary for me to address Appellant's assertions, because, even if they are true, they are not relevant.

As I find above, the law in effect until 1996 prohibits IHS from providing services directly for which it charges fees, and it prohibits IHS from entering into contracts where the contracting parties provide services for which they charge fees. If IHS is in fact providing services for which it charges fees, it may be doing so in violation of law. If it has contracted for such services, it may have contracted in violation of law. But, the fact that IHS arguably might have violated the law in other instances does not mean that the law is being applied incorrectly or improperly here. That IHS may be acting appropriately in this case, and may not have done so elsewhere, does not mean that in this case it is acting arbitrarily or capriciously. Nor do I find that IHS may be estopped from applying the law in this case on the ground that it may not have done so elsewhere. I am not persuaded that Congress intended that IHS be required to act in violation of law in one instance, simply because it may have done so in another instance.

The Act requires that IHS offer technical assistance to a tribe or a tribal organization to develop modifications to any proposal for a self-determination contract of which approval has been declined. Act, 25 U.S.C. § 450(d)(3). Appellant argues that this section requires IHS to offer a tribe or a tribal organization technical assistance to develop modifications to any proposal that is declined.

I do not find that the statutory requirement that IHS provide technical assistance means that IHS is required to assist a tribe or tribal organization to contract for something that cannot be contracted for lawfully. Technical assistance will not make a contract proposal acceptable if a central premise of the contract proposal is to do something that is not legally permissible. In that event, the only assistance that IHS can supply to a tribe or a tribal organization is to explain to the tribe or tribal organization why the law will not permit IHS to enter into the proposed contract.

B. The relevant facts (Findings 9 - 14)

The relevant facts are not disputed by the parties. I base my recommended Findings entirely on the exhibits that were submitted by Appellant.

Appellant is a non-profit corporation that is organized to provide orthodontic dentofacial orthopedic services to the people of the Navajo Nation. Appellant Ex. 6 at 2. On July 27, 1995, Appellant submitted a self-determination contract proposal to IHS. Appellant Ex. 2. Appellant submitted its proposal pursuant to the authority of a resolution adopted by the Health and Social Services Committee of the Navajo Nation Council. Id. at 2 - 3.

Appellant proposed to contract to provide orthodontic dentofacial orthopedic services which were being provided directly to members of the Navajo Nation by the Navajo Area Office of IHS. Appellant Ex. 2 at 6. These services included services traditionally thought of as orthodontic services (such as the use of braces to straighten teeth). Id. at 10. But, they included additional services, including providing treatment for skeletal imbalances or growth problems of the jaws, joint problems of the jaws, clefting disorders, or facial problems due to trauma. Id.

Appellant proposed that these services be provided to the people of the Navajo Nation, using a "shared responsibility model" mechanism for payment for the services. Appellant Ex. 2 at 15 - 16. The "shared responsibility model" would require patients to pay a portion of the cost of the services that Appellant would provide to them. Id. Essentially, Appellant intended to use IHS contract monies plus whatever fees it collected from patients, as a way of increasing the number of patients who could be treated pursuant to the contract. Appellant explained this approach as follows:

> The perspective of an IHS beneficiary using the shared responsibility model is a good news-bad news scenario. The good news is the Nizhoni model provides access to 1300 more patients over a two year cycle than the traditional program. The bad news is instead of being free, patients must pay what most beneficiaries feel is an affordable fee.

Id.

On October 2, 1995, Appellant submitted a revised proposal to IHS. Appellant Ex. 6. The revised proposal continued to rely on the "shared responsibility model" as a mechanism for obtaining revenues to defray the costs of providing services to patients. Id. at 2. Appellant averred, however, that it

would not charge patients for any services that are provided directly by IHS. Id.

It is unclear whether the revised proposal actually states a change in the way in which Appellant intended to obtain reimbursement for the services it provided. The July 27, 1995 proposal did not state, as did the October 2, 1995 revised proposal, that Appellant would not charge patients for services that are provided directly by IHS. On the other hand, that may have been an implicit fact in the July 27, 1995 proposal.

In any event, both the July 27, 1995 proposal and the October 2, 1995 proposal feature the "shared responsibility model" of cost recoupment as the mechanism by which Appellant intended to obtain reimbursement for the services it provided. Under both proposals, Appellant intended to use IHS contract monies as a partial payment for the total cost of the services it provided, with the balance to be obtained from third-party payments, or directly from patients. Under both proposals, Appellant intended to charge patients for services which IHS had provided directly and for which IHS had not charged individual patients. Appellant intended to serve a larger number of patients through its "shared responsibility model" of cost recoupment than it would have been able to serve had it relied only on IHS contract funds and whatever third-party payments it received. And, it intended to serve a larger number of patients than IHS would have been able to serve had IHS provided the services directly to those patients.

On October 25, 1995, IHS advised Appellant that it was declining Appellant's proposal. Appellant Ex. 7. In the declination letter to Appellant, IHS explained that it had determined that the prohibition against IHS charging patients for services in 25 U.S.C. § 1681 meant that contractors could not charge patients for services that IHS was authorized to provide directly. Id. at 2.

On November 1, 1995, Appellant requested that IHS provide it with technical assistance. Appellant Ex. 8. Appellant made specific requests for the following information or assistance:

> 1. IHS calculations on how many patients should be served under the proposed 93-638 contract at no cost to the patient.
>
> 2. Designing the orthodontic program to address the IHS concerns, for example, using as a model, the Alaska area tribal run orthodontic program that charges all IHS beneficiaries for service.

3. In lieu of the contract, explore Cooperative Agreement, section 9 of the Self Determination Act.

IHS acknowledged Appellant's request for technical assistance. Appellant Ex. 9. However, it does not appear that IHS ever specifically responded to the requests that Appellant made. I conclude that IHS did not give Petitioner the assistance that Petitioner requested.

C. Application of the law to the facts (Findings 15 - 18)

A central element of Appellant's proposal, in both the original and the revised version, was that part of the costs of providing orthodontic and related services would be charged to patients, in order to maximize the number of patients who would be able to avail themselves of those services. This may be an ingenious and laudable way to provide services to patients. However, the law forbade IHS from providing such services directly to patients in the manner contemplated by Petitioner. The provisions of the Act in effect in 1995 at 25 U.S.C. § 1681 expressly prohibited IHS from charging Indians for the services it provided.

IHS may not contract to provide a service that it may not provide directly. As I hold above, at Part III.A., this restriction is apparent, both in the definition of a self-determination contract, and in the Act's general explanation of what may be contracted for. Act, 25 U.S.C. §§ 450b(j), 450f(a)(1)(A) - (E). Therefore, IHS was prohibited from accepting Appellant's proposal, because Appellant was proposing to charge patients fees for services, something which IHS could not do as an element of any service it provided directly to patients. IHS properly declined Appellant's proposal on the ground that Appellant's proposal could not be lawfully carried out. Act, 25 U.S.C. § 450f(a)(2)(E).

Appellant asserts that, in fact, IHS has entered contracts with other entities in which fees are paid for services by the Indians who receive them. As I hold at Part III.A., it is not necessary for me to decide whether this assertion is correct, because it is not relevant. The fact that IHS might possibly be doing elsewhere that which it is prohibited from doing is not a basis for requiring IHS to accept Appellant's proposal.

Appellant argues that declination of its proposal is inconsistent with the specific authorization by Congress for tribal organizations to design programs which best meet the local needs of the Indian people and tribes who are served by a contract. Act, 25 U.S.C. § 450j(j); Appellant's Brief at

18. Appellant notes that the purpose of the Act is to give tribes greater flexibility over funds, resources, and programs. According to Appellant, this objective is precisely what it had in mind when it designed the "shared responsibility model" for recouping the costs of orthodontic services to the people of the Navajo Nation. Appellant argues that, in declining its proposal, IHS is thwarting Appellant's purpose and defeating the objectives of the Act.

I do not take issue with Appellant's assertion that its proposal might maximize the availability of orthodontic and related services to eligible Indians. Indeed, Appellant's proposal may represent a better approach to providing services than any alternative. But, nonetheless, up until 1996, the Act expressly prohibited IHS from providing or contracting for the services contemplated by Appellant.

I am not persuaded that IHS failed to fulfill its obligation to provide Appellant with technical assistance. The assistance that Appellant sought would not have made a contract possible, given that, as described above, the charging of fees for service is not permissible. The assistance sought by Appellant would not have affected the "shared responsibility model" of cost recoupment, which was a central element of Appellant's proposal. Given that, no amount of technical assistance would have enabled IHS to accept the proposal.

IV. Recommended conclusion

I recommend that the determination by IHS to decline Appellant's proposal to contract be sustained, on the ground that the proposal could not be carried out lawfully by Appellant.

/s/

Steven T. Kessel
Administrative Law Judge