

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Kern Valley Indian Community
Docket No. A-14-83
Decision No. 2599
October 17, 2014

DECISION

The Foundation for the Kern Valley Indian Community (Foundation), a non-profit organization, applied for funding from the Social and Economic Strategies (SEDS) program to assist the efforts of the Kern Valley Indian Community (KVIC) to obtain federal recognition as an Indian tribe. The Administration for Native Americans (ANA), which administers the SEDS program, rejected the application on the ground that the Foundation failed to meet the regulatory requirement that it “provide assurance that its duly elected or appointed board of directors is representative of the community to be served.” KVIC appealed ANA’s determination to the Board. For the reasons explained below, we uphold ANA’s determination.

Legal Background

The Native American Programs Act (NAPA), 42 U.S.C. § 2991 *et seq.*, “promote[s] the goal of economic and social self-sufficiency for American Indians, Native Hawaiians, other Native American Pacific Islanders (including American Samoan Natives), and Alaska Natives.” 42 U.S.C. § 2991a. NAPA authorizes ANA to provide grants of financial assistance to “public and nonprofit private agencies.” *Id.* § 2991b(a). Such agencies include governing bodies of Indian tribes on Federal and State reservations and public and non-profit private agencies serving Indian organizations in areas that are not Indian reservations. *Id.*

The implementing regulations provide in relevant part that 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, and national and regional incorporated non-profit Native American organizations with Native American community-specific objectives are eligible to apply for SEDS grants. 45 C.F.R. § 1336.33(a)(1)(i)-(vi). However, any applicant other than a tribe or an Alaska Native Village government “proposing a project benefitting Native Americans or Native Alaskans, or both, . . . must provide assurance that its duly elected or appointed board of directors is representative of the community to be served.” *Id.* § 1336.33(a).

Over the years, ANA has published several notices in the *Federal Register* regarding its grant award process that explained its interpretation of the community representation requirement in section 1336.33(a). A 2005 notice provided that ANA would “screen applications for completeness prior to the competitive panel review” to determine if the application contained four elements, including, “if the applicant is not a Tribe or Alaska Native Village government,” whether “the native non-profit organization submits a resolution and proof that a majority of the governing board of directors is representative of the community to be served.” 70 Fed. Reg. 6686, 6689 (Feb. 8, 2005). The notice further stated that “[a]n application that does not contain these elements will be considered incomplete and excluded from the competitive review process.” *Id.* A 2011 notice explained that “to better establish board support for a project and to demonstrate a stronger link between an organization’s board and the community to be served,” ANA was “revis[ing] the categories of representatives of the community to be served to include: (1) Members of Federally or State recognized Tribes; (2) persons eligible to be a participant or beneficiary to the project to be funded; (3) persons who are recognized by the eligible community to be served as having a cultural relationship with the community to be served; and (4) persons considered to be Native American as defined in Title 45, Part 1336, Section 10 of the Code of Federal Regulations (CFR), and Native American Pacific Islander as defined in the Native American Programs Act.” 76 Fed. Reg. 1437, 1439 (Jan. 10, 2011). The notice also stated that “[a]pplications that are submitted without this documentation . . . will not be considered for competition.” *Id.*; *see also* 78 Fed. Reg. 13,062, 13,065 (Feb. 26, 2013) (notice of public comment reiterating community representation requirement and categories), adopted as final policy in 78 Fed. Reg. 23,769 (Apr. 22, 2013).

Under 45 C.F.R. § 1336.35, the Board is authorized to hear appeals from applicants for grants under NAPA whose applications have been rejected on the grounds that the applicants or the activities they propose are ineligible for funding. If the Board determines that the applicant or activity is eligible for funding, such eligibility shall not be effective until ANA considers the next cycle of grant proposals. 45 C.F.R. § 1336.35(h).

Factual Background

In April 2014, the Foundation applied for Fiscal Year (FY) 2014 funding in response to SEDS Funding Opportunity Announcement HHS-2014-ACF-ANA-NA-0776. The part of the announcement related to eligibility listed several “Application Disqualification Factors,” including the following:

Assurance of Community Representation on Board of Directors

*This disqualification factor applies only to applicants that are **not** tribes or Native Alaska villages:*

Organizations applying for funding must show that a majority of board members are representative of the community to be served. Applicants must submit documentation that identifies each board member by name and indicates his/her affiliation or relationship to at least one of ANA's four categories of community representation, which include: (1) members of federally or state-recognized tribes; (2) persons eligible to be a participant in, or beneficiary of, the project to be funded; (3) persons who are recognized by the eligible community to be served as having a cultural relationship with that community; or (4) persons considered to be Native American as defined in 45 CFR § 1336.10 and Native American Pacific Islanders as defined in the Native American Programs Act. Applicants that do not include this documentation will be considered non-responsive, and the application will not be considered for competition.

ANA Ex. 1, at 11 (bold and italics in original). The requirement that certain applicants submit documentation regarding the representativeness of their board of directors was reiterated throughout the announcement. *See id.* at 15 ("Required Application Elements"); 24 ("Additional Eligibility Documentation"); 38-39 ("Review and Selection Process"); 47, 52 ("Application Checklist"). The announcement also provided that non-profit organizations applying for funding were required to submit proof of their non-profit status. *Id.* at 23-24. Acceptable proof included a certified copy of the organization's certificate of incorporation or a copy of a currently valid tax-exemption certificate from the Internal Revenue Service (IRS). *Id.* at 24.

The Foundation is listed as the applicant throughout its application materials. ANA Ex. 2, at 1; ANA Ex. 3, at 1, 6; KVIC Ex. 4. Those materials include a certified copy of the Foundation's Articles of Incorporation as a non-profit organization and a letter from the IRS confirming the Foundation's status as a non-profit. ANA Exs. 8, 10. The Articles of Incorporation do not contain any reference to how the Foundation will be governed. ANA Ex. 10.

By letter to the Foundation dated April 28, 2014, ANA rejected the application. The letter provided in relevant part:

Regrettably, this letter is to inform you that your application was not considered in the objective panel review competition for the following reason:

The Assurance of Community Representation on Board of Directors was not demonstrated[.] Organizations applying for funding must show that a majority of board members are representative of the community to be served. Documentation should identify each board member by names [sic] and include his/her affiliation or relationship to at least one of ANA's four categories of community representation. You may refer to Application Disqualification Factors in Section III.3 of the Funding Opportunity Announcement, for additional information on the Assurance of Community Representation on Board of Directors requirement.

KVIC Ex. 1.

KVIC appealed ANA's determination to the Board.¹

Analysis

1. The community representation requirement applied to the grant application.

As discussed above, under section 1336.33(a), any applicant for SEDS funding other than a tribe or an Alaska Native Village government must provide assurance that its board of directors is representative of the community to be served by its proposed project. KVIC argues that the community representation requirement did not apply here because KVIC meets the federal regulatory definition of an Indian Tribe. KVIC Br. at 2. However, KVIC also acknowledges that the SEDS application at issue here identified the Foundation, not KVIC, as the applicant for funding. KVIC R. Br. at 1-2. Thus, it is immaterial whether KVIC meets the federal regulatory definition of an Indian tribe and so would have been exempt from the community representation requirement had it been the grant applicant. As the Board recently explained in another decision involving the community representation requirement in section 1336.33(a), the "plain language" of the regulation "requires that the applicant's board of directors be representative of the community to be served." *Citadel Cmty. Dev. Corp.*, DAB No. 2596, at 5 (2014) (emphasis in original). Because the Foundation, a non-profit organization, was identified as the applicant on the application at issue here, the community representation requirement applied, and the application needed to demonstrate that the Foundation's board of directors was representative of the community to be served.

¹ ANA did not argue that KVIC could not properly appeal on behalf of the Foundation, the "applicant" for funding. See 45 C.F.R. § 1336.35.

KVIC also argues that the term “incorporated” is not defined in the regulations at 45 C.F.R. Part 1336, although an “incorporated non-federally recognized tribe” is eligible for funding. KVIC R. Br. at 4. KVIC admits, however, that it “chose to organize itself as a 501(c)(3) entity, rather than a corporation.” *Id.* Having created a non-profit foundation, KVIC has not shown that ANA could not treat that foundation as a non-profit business entity for which the board of directors must be shown to be representative of the community.

2. The application did not meet the community representation requirement.

The grant application failed to meet the community representation requirement. The Foundation is run by a board of trustees. *See* KVIC Ex. 8. In order to comply with the community representation requirement, the Foundation needed to submit documentation that identified each of its trustees by name and indicated each trustee’s relationship to at least one of ANA’s four categories of community representation. *See* ANA Ex. 1, at 11. No documentation submitted with the application identified the Foundation’s trustees by name, let alone identified how each trustee was representative of the community to be served.

KVIC contends that the application met the community representation requirement because the application demonstrated that the Foundation is the “same entity” as KVIC, with the same leadership, and that KVIC’s leadership is representative of the community to be served. KVIC R. Br. at 2-3. To the contrary, the application materials did not establish that the Foundation and KVIC are governed by the same individuals.

KVIC points out that letterhead for an election ordinance that was submitted with the application reads:

KERN VALLEY INDIAN COUNCIL
AND FOUNDATION FOR THE
KERN VALLEY INDIAN COMMUNITY

KVIC R. Br. at 3; *see* KVIC Ex. 6, at 1st p. (unnumbered). The fact that the Council and the Foundation are listed together on the letterhead for the ordinance is insufficient to establish that the Council governs the Foundation. While the ordinance discusses the Council’s powers and the manner in which the Council is elected, the ordinance does not say anything about the relationship between the Council and the Foundation. *See* KVIC Ex. 6. Similarly, KVIC’s constitution, which was also submitted with the application, outlines the Council’s powers, but does not indicate that Council members have the power to make decisions on behalf of the Foundation. *See* KVIC Ex. 5.

KVIC relies as well on the following statement from the resolution approving the project proposal for the SEDS grant (also submitted as part of the grant application):

The Kern Valley Indian Tribal Council and the board of trustees for the Foundation for Kern Valley Indian Community hereby exercises the authority delegated to *it* by the general membership to completely support of [sic] the Foundation for Kern Valley Indian Community’s “Kern Valley Indian Community Federal Recognition Project”

KVIC R. Br. at 3, quoting KVIC Ex. 8 (emphasis added by KVIC in briefing). The use of the word “it” could suggest that the Council is synonymous with the Foundation’s board of trustees, but an inference from a single sentence is inadequate proof of this fact. Nothing in the application clearly stated that the Council acted as the board of trustees for the Foundation as well as KVIC’s governing body. Indeed, even on appeal to the Board, where KVIC specifically alleged that the Council “is the Board of the Foundation” (KVIC Reply Br. at 2), KVIC produced no evidence of how the Foundation operates or any documentation that explicitly provided that the Council and the Foundation’s board of trustees are composed of the same individuals.

Because we reject KVIC’s argument that the grant application demonstrated that Council members are the Foundation’s board of trustees, we need not address KVIC’s contention that, read together, various documents submitted with the application established that Council members are representative of the community to be served. *See* KVIC Br. at 3-5. However, we note that the funding announcement appeared to require, if the community representation requirement applied to an applicant, that the applicant fulfill the requirement by devoting a separate section of its application to the requirement. Both the “Application Checklist” and the section regarding “Required Application Elements” in the announcement listed “Assurance of Community Representation on Board of Directors, if applicable” as a distinct application element. ANA Ex. 1, at 14-15, 47, 52. There was no separate assurance in the application here.

Thus, ANA did not err in concluding that the Foundation was ineligible for a FY 2014 SEDS grant because the application did not contain adequate documentation establishing that the Foundation’s board of trustees was representative of the community to be served.

3. KVIC had adequate notice of ANA’s determination.

KVIC argues that ANA’s letter rejecting the application did not comply with section 1336.34. KVIC Br. at 6. Under that regulation, a notice of ineligibility must include the legal and factual grounds for the finding of ineligibility, a copy of the applicable regulations, and a specific statement regarding how to appeal the decision to the Board. 45 C.F.R. § 1336.34(b). KVIC says that ANA’s letter did not contain the factual grounds

for ANA's determination, so it was difficult to determine the specific deficiencies of the application. KVIC also contends that the letter did not enclose a copy of the applicable regulations or explain how to appeal, so KVIC incurred additional legal fees to research the applicable regulations and how to comply with them.

The purpose of section 1336.34 is to ensure that an applicant has adequate notice of the basis for ANA's finding of ineligibility and of its appeal rights. As the Board observed in its letter to KVIC acknowledging the appeal, notwithstanding the lack of specificity in ANA's letter, it appears that KVIC was able to "address[] all salient issues in its appeal letter and exhibits," and in any event KVIC had the opportunity to supplement its arguments in its reply brief if ANA clarified or added to the grounds for the determination in ANA's response. 6/27/14 Ack. Letter at 3.

Moreover, although section 1336.35 authorizes the Board to hear appeals from applicants whose applications for grants under NAPA have been rejected on the grounds that the applicants or their proposed activities are ineligible for funding, the Board does not have the authority to order ANA to retroactively fund a rejected application, which is the remedy KVIC appears to seek. *See* KVIC Br. at 1 (identifying the amount in dispute as the \$821,758.10 in federal government funds requested by KVIC).² Even when the Board determines that an applicant or activity is eligible for funding, the Board's determination does not become effective until ANA considers the next cycle of grant proposals. 45 C.F.R. § 1336.35(h). Thus, even if the Board were to conclude that ANA improperly rejected the application for funding for FY 2014, the only relief the Board could order would be for ANA to consider the application for funding for FY 2015.

² Although KVIC asserts that the deficiencies in ANA's letter caused KVIC to incur additional attorney's fees, KVIC did not request reimbursement for those fees, perhaps recognizing that the Board has to authority to make such an award.

Conclusion

For the reasons stated above, we uphold ANA's determination.

_____/s/
Leslie A. Sussan

_____/s/
Constance B. Tobias

_____/s/
Judith A. Ballard
Presiding Board Member